

THE PAST, PRESENT, AND FUTURE OF UNITED STATES-CHINA MUTUAL LEGAL ASSISTANCE

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The Mutual Legal Assistance Agreement (MLAA) between the United States and China, effective since the late 1990s, reflects the development of cooperative law enforcement between the two countries. Study of transnational law enforcement between the United States and China and use of the MLAA has been limited because of the few notable cases and a lack of transparency. This Note will attempt to fill some of the gaps in the academic literature.

The MLAA, which is unique among mutual legal assistance mechanisms the United States has with other states, arose out of a rocky history of trying to meld two countries' values and interests. In practice, both prosecution and defense attorneys have noted the MLAA's limitations. Its provisions lack the accountability of other international agreements, and both the United States and China have taken steps towards unilateral investigation and prosecution of transnational crimes where American and Chinese interests diverge. While both countries have paid lip service to continuing the MLAA, there is no external enforcement, oversight, or incentive to increase cooperation. If the MLAA remains in its current form indefinitely, it is not likely to facilitate a stronger joint law enforcement relationship. Formalizing the MLAA as a treaty could demonstrate a deeper commitment to cooperation, but the current state of relations between the United States and China makes this step politically unfeasible.

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INTRODUCTION

In October 2000, three middle managers of the state-run Bank of China arrived in Las Vegas, where they spent over two million dollars gambling at the Rio and the Bellagio.¹ The money wasn't theirs. Xu Chaofan, Xu Guojun, and Yu Zhendong² had stolen millions of dollars from their employer through an extended scheme of foreign exchange speculation and unrecorded or false loans, laundering the money through Hong Kong, Canada, and the United States.³ The managers' escape plan? They and their spouses would evade Chinese authorities by arranging sham marriages with naturalized United States citizens, securing green cards and the protection of the United

¹ See *United States v. Chao Fan Xu*, 706 F.3d 965, 982 (9th Cir. 2013) ("Specifically, Defendants traveled to Las Vegas on or about October 4, 2000, and gambled at the Rio and Bellagio casinos using two million dollars drawn from the Hua Chao Commercial Bank in Hong Kong.").

² Xu, Xu, and Yu are the surnames of these individuals. Where appropriate, this Note will follow Chinese naming customs, placing the surnames first.

³ See *Chao Fan Xu*, 706 F.3d at 972 (describing the "three types of fraud" that the three managers allegedly committed, including the alleged loss of \$147 million). The scheme lasted from approximately 1991 to 2004. *Id.* at 989 ("The RICO conspiracy was alleged to have begun in 1991 . . . and to have ended with the arrests of Chaofan and Kuang in 2004."). The indictment in the case charged losses of \$485 million, but by the time the defendants appealed, the figure had dwindled to barely more than \$20 million. *Compare* Second Superseding Indictment ¶ 13a, *United States v. Xu Chaofan*, No. 2:02-CR-0674-PMP(LRL), 2006 WL 6295557 (D. Nev. Jan. 31, 2006) ("Through this scheme, members of the Enterprise and their associates obtained at least \$485 million from the Bank through numerous wire transfers of funds, use of facsimile transmissions, telegrams, checks, and cash."), *with* Transcript of Oral Argument, *United States v. Chao Xu*, No. 15-10016, 2016 WL 5940231 (9th Cir. Sept. 13, 2016) (recording defense attorney's statement that "the government actually reduced its argument on loss by \$462 million").

States,⁴ which did not, and still does not, have an extradition treaty with China.⁵

What the United States did have was a newly-signed Mutual Legal Assistance Agreement (MLAA) with the People's Republic of China, an agreement intended to help law enforcement in each country procure evidence from the other and ensure that both countries could protect their sovereign interests.⁶ The United States had such interests here: Though the three managers had defrauded a state-run Chinese bank in China, their scheme depended on funneling the money into the United States and exploiting the U.S. immigration system. But the United States couldn't investigate and prosecute the crimes alone. After U.S. authorities arrested Yu Zhendong in Los Angeles in December 2002, he pled guilty and agreed to cooperate with the FBI and return to China on the condition that he not be subject to torture or execution.⁷ A Chinese court sentenced Yu to twelve years in prison,⁸ and the United States needed the Chinese government's cooperation to secure his testimony from within Chinese prison. This and other videotaped depositions became part of the "lengthy pretrial motions and discovery" that lasted from early 2005 to 2008.⁹

The U.S. prosecution was complex and involved attorneys from several federal offices as well as assistance from the Chinese Ministries of Justice and Public Security, the Hong Kong Department of Justice, and the Hong Kong Police Force, which assisted substantially in helping U.S. prosecutors obtain evidence and witness trial and deposition testimony.¹⁰ The Bank of China sought restitution from

⁴ See *United States v. Chao Fan Xu*, No. 2:02-CR-00674-PMP-LRL, 2008 WL 1315632, at *1 (D. Nev. Apr. 10, 2008) (describing the defendants' plan to "flee the People's Republic of China . . . and immigrate to the United States by entering into sham marriages with naturalized U.S. citizens"), *aff'd*, 706 F.3d 965 (9th Cir. 2013).

⁵ See 18 U.S.C. § 3181 (2019) (listing the United States' bilateral extradition treaties).

⁶ See Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Mutual Legal Assistance in Criminal Matters, China-U.S., June 19, 2000, T.I.A.S. No. 13,102 [hereinafter U.S.-P.R.C. MLAA].

⁷ See David Lague, *China Seeks Extradition Pacts in Spite of Death Penalty*, N.Y. TIMES (May 28, 2007), <https://www.nytimes.com/2007/05/28/world/asia/28cnd-china.html>.

⁸ *Corrupt Banker Sentenced 12 Years in Prison*, CHINA DAILY (Apr. 1, 2006), http://www.chinadaily.com.cn/bizchina/2006-04/01/content_557749.htm.

⁹ *Chao Fan Xu*, 706 F.3d at 973.

¹⁰ See Press Release, U.S. Dep't of Justice Office of Pub. Affairs, Former Bank of China Managers and Their Wives Sentenced for Stealing More Than \$485 Million, Laundering Money Through Las Vegas Casinos (May 6, 2009), <https://www.justice.gov/opa/pr/former-bank-china-managers-and-their-wives-sentenced-stealing-more-485-million-laundering> (listing the involvement of the DOJ Criminal Division's Organized Crime and Racketeering Section, two U.S. Attorneys' Offices, and the DOJ Office of International Affairs (OIA)).

whomever it could, wherever it could, including from co-conspirators in Hong Kong¹¹ and from the defendants through a civil suit in British Columbia, Canada.¹² The district court in the U.S. case ordered restitution twice, though the Ninth Circuit remanded for further elaboration both times.¹³

The Bank of China case marked the first real test of the new effort at cooperative law enforcement between the United States and China.¹⁴ However, this case and others following it illustrate the limitations of the MLAA. Study of cross-border law enforcement and the MLAA over the past ten years has been limited because of few notable cases and a lack of transparency, partly because of the confidentiality required by the MLAA.¹⁵ This Note provides the most comprehensive analysis of MLAA use thus far. Previous articles mentioning the MLAA have provided overviews of its provisions when analyzing other topics, such as human rights or extradition.¹⁶

¹¹ See *Trio Must Repay Part of \$4b BOC Fraud Loot*, SOUTH CHINA MORNING POST (July 19, 2005), <https://www.scmp.com/article/508905/trio-must-repay-part-4b-boc-fraud-loot>.

¹² See *DLA Piper Successfully Represents the Bank of China in \$670 Million Litigation*, DLA PIPER: NEWSROOM (Apr. 17, 2015), <https://www.dlapiper.com/en/canada/news/2015/04/dla-piper-represents-bank-of-china>.

¹³ See *United States v. Chao Fan Xu*, 673 F. App'x 616, 619–20 (9th Cir. 2016) (“We remand for clarification regarding the legal basis of the restitution order.”); *Chao Fan Xu*, 706 F.3d at 994 (remanding for resentencing).

¹⁴ See *A Personal History of U.S.-China Law Enforcement Cooperation*, COLUM. L. SCH. (Oct. 12, 2015), http://www.law.columbia.edu/media_inquiries/news_events/2015/october2015/cheng-2015 (“The Bank of China trial marked a turning point in U.S.-China law-enforcement relations . . .”).

¹⁵ See U.S.-P.R.C. MLAA, *supra* note 6, art. 7(2) (providing that one country can require the other to maintain confidentiality over requests or produced information and evidence). *But see id.* art. 7(4) (observing that “[n]othing in this Agreement shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution or fundamental principles of law” of the requesting nation). Court opinions and public trial records involving evidence obtained from abroad often do not mention how prosecutors obtained such evidence unless the defendant attempts a challenge, making it difficult to study the use of agreements and treaties. See David Aronofsky & Jie Qin, *U.S. International Narcotics Extradition Cases: Legal Trends and Developments with Implications for U.S.-China Drug Enforcement Activities*, 19 MICH. ST. J. INT'L L. 279, 295 (2011) (“Although to date, there are no reported U.S. court decisions utilizing the Agreement, it is quite probably only a matter of time before these cases emerge.”). For an advocacy group’s perspective on the lack of transparency in mutual legal assistance generally, see *MLAT: A Four-Letter Word in Need of Reform*, ACCESS NOW (Jan. 9, 2014, 5:20 PM), <https://www.accessnow.org/mlat-a-four-letter-word-in-need-of-reform>.

¹⁶ See generally Margaret K. Lewis, *Mutual Legal Assistance and Extradition: Human Rights Implications*, in 2 CHINA RTS. F. LEGAL REFORM & ACCOUNTABILITY 83 (Stacy Mosher ed., 2007) (analyzing the human rights concerns for cooperation with China generally); Aronofsky & Qin, *supra* note 15 (analyzing extradition cases); Anna MacCormack, Note, *The United States, China, and Extradition: Ready for the Next Step?*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 445 (2009) (analyzing extradition policy).

This Note seeks to deepen the analysis of the MLAA and provide a more current picture of cooperation efforts.

The MLAA, which is both like and unlike cooperation agreements the United States has with other states, arose out of a rocky history of trying to meld two countries' values and interests. In practice, while the MLAA has been useful for some investigations, it has also caused frustration for all parties involved: the Chinese and U.S. governments, as well as criminal defendants caught between them. This Note analyzes the historical and current contexts of the MLAA and concludes that, because of the MLAA's lack of external enforcement, oversight, and incentives to increase cooperation, the MLAA does not live up to its stated goals of increasing law enforcement cooperation and will not if it continues to exist in its current form indefinitely.

This Note will proceed in two parts. Part I will provide an updated profile of the MLAA's formation, historical use, and present function, finding that the MLAA is most useful as a framework for cooperation where Chinese and U.S. interests align—such as in cases where prosecution furthers both countries' law enforcement priorities—but that the MLAA does not sufficiently encourage further cooperation. Part II will assess and explain three key deficiencies of the MLAA: its unique status in U.S. mutual legal assistance as a non-binding agreement rather than a treaty, procedural inefficiencies and the ease with which both countries can deny assistance, and its silence on extradition. While both countries have paid lip service to continuing the MLAA, there is no external enforcement, oversight, or incentive to increase cooperation. If the MLAA remains in its current form indefinitely, it is not likely to facilitate a stronger joint law enforcement relationship. Formalizing the MLAA as a treaty could demonstrate a deeper commitment to cooperation, but the current state of relations between the United States and China makes this step politically infeasible.

I

A PRACTICAL HISTORY OF THE FORMATION AND USE OF THE MLAA

“The history of U.S.-China cooperation is short”¹⁷ and volatile. The first treaty between the United States and China dates back to

¹⁷ *A Personal History of U.S.-China Law Enforcement Cooperation*, *supra* note 14 (quoting a presentation by attorney Ronald Cheng at Columbia Law School's Center for Chinese Legal Studies).

Chinese imperial rule in 1845¹⁸ and reflects a negotiated intention for peace, friendship, and reciprocity between the two countries. Despite these lofty goals, mutual respect did not follow, as evidenced by developments such as the Chinese Exclusion Act and the United States' operation of an extraterritorial district court in China.¹⁹ The days of the U.S. Court in China may be over, but the trend of asserting an intent to cooperate and falling short of delivering on that promise continues today. This is not without justification; U.S. politicians are wary of cooperating with a country that they perceive as having an abusive criminal justice system.²⁰ This Part will first summarize the law enforcement relationship between the United States and China, including the events leading to the MLAA's negotiation and its subsequent use. The MLAA has the most potential for use where U.S. and Chinese interests align, but developments since 2010 show that these interests are increasingly divergent as both countries are taking steps towards unilateral prosecution of transnational crimes. These events show that the MLAA is insufficient to encourage further cooperation.

A. *The Goldfish Case, Early MLATs, and Letters Rogatory: Setting the Stage*

The first joint investigation and prosecution between the United States and China occurred in the late 1980s and early 1990s, at the same time when the United States began negotiating Mutual Legal

¹⁸ Chae Chan Ping v. United States, 130 U.S. 581, 590 (1889).

¹⁹ See *id.* at 606–07 (justifying the exclusion of Chinese laborers from the United States, despite the absence of a war with China, by alleging that the United States government could fairly deem Chinese émigrés “a source of danger to the United States” (quoting a communication from Secretary of State Edward Everett to A. Dudley Mann, a special agent for the Department of State in Europe in December 1852)); Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 L. & CONTEMP. PROBS. 217, 237 (2008) (observing that Western imperialists never colonized China as a whole but that “the West’s extraterritorial legal presence in China was ultimately authorized in a series of bilateral ‘Treaties of Trade, Peace and Amity’ to which China had given its formal consent—even if only at gunpoint”); Dong Wang, *The Discourse of Unequal Treaties in Modern China*, 76 PAC. AFF. 399, 402–03 (2003) (describing the impact of late 19th and early 20th century Unequal Treaties on modern Chinese nationalism); *U.S. Court for China, 1906–1943*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/us-court-china-1906-1943> (summarizing the history of the U.S. Court for China).

²⁰ See CONG.-EXEC. COMM’N ON CHINA, 115th CONG., ANNUAL REP. 29–32 (Comm. Print 2018), <https://www.cecc.gov/sites/chinacommission.house.gov/files/Annual%20Report%202018.pdf> (describing congressional findings on Chinese criminal rights abuses in China and recommending that the United States take steps to encourage criminal justice reform within China).

Assistance Treaties (MLATs) with other countries.²¹ The influential “Goldfish Case” involved a large-scale drug-smuggling operation in which the defendants allegedly transported heroin sewn inside the bellies of goldfish from China into the United States.²² The trial in U.S. district court ended in a mistrial when a key Chinese witness, Wang Xong Xiao, upended the proceedings by recanting his prior statements, claiming that police had coerced him into a false confession.²³ Wang sought political asylum in the United States on the grounds that his “failure to comply with his captors demands would lead to a death sentence when he got back to China.”²⁴ Shortly thereafter, presiding Judge William Orrick criticized the Chinese government for failing to turn over material related to the witness’s questioning and opined that the case “should be proof positive that we can’t meld the legal system of the Peoples Republic of China with the system of the United States.”²⁵

At the same time as the Goldfish Case investigation in the mid-1980s, the United States was negotiating some of its earliest MLATs with the Bahamas, Belgium, Canada, the Cayman Islands, Mexico, and Thailand.²⁶ There were already agreements in place with Italy, the Netherlands, Switzerland, and Turkey.²⁷ Law enforcement agreement

²¹ *United States v. Lun*, 944 F.2d 642, 643 (9th Cir. 1991) (“This heroin importation and possession trial was the first time the People’s Republic of China and the United States joined to investigate and prosecute a criminal offense.”).

²² See *Asylum Bid Snags Smuggling Trial*, L.A. TIMES (Feb. 11, 1990), http://articles.latimes.com/1990-02-11/news/mn-1071_1_san-francisco.

²³ See *Xiao v. Barr*, 979 F.2d 151, 152 (9th Cir. 1992) (“The *Leung* trial ended disastrously for the government, however, when the court declared a mistrial in response to Wang’s revelations that Chinese authorities had tortured and coerced him into confessing and testifying falsely.”).

²⁴ *Lun*, 944 F.2d at 643–44 (describing Wang Xong Xiao’s trial testimony, which lasted “several days” before Wang suddenly claimed “that his Chinese captors had coerced and tortured him to confess falsely” and that “he was ordered by his captors to testify falsely at trial according to a ‘script’ created by the Chinese officials”). Years later, citing numerous due process violations by American immigration authorities and the threat that deportation would pose to Wang’s safety, the Ninth Circuit finally enjoined Wang’s deportation, allowing him to remain in the United States. See *Wang v. Reno*, 81 F.3d 808, 810–11 (9th Cir. 1996).

²⁵ Pamela A. MacLean, *Mistrial in Chinese Heroin Smuggling Trial*, UPI (Feb. 14, 1990), <https://www.upi.com/Archives/1990/02/14/Mistrial-in-Chinese-heroin-smuggling-trial/2892634971600>.

²⁶ See Bruce Zagaris, *Dollar Diplomacy: International Enforcement of Money Movement and Related Matters—A United States Perspective*, 22 GEO. WASH. J. INT’L L. & ECON. 465, 496 (1989) [hereinafter Zagaris, *Dollar Diplomacy*] (describing the then-recent ratification of six new MLATs and the United States’ interest in pursuing MLATs “[d]ue to the dramatic increase in narcotics trafficking and other international crimes” at the time); Bruce Zagaris, *Senate Foreign Relations Gives Favorable Response to 6 MLATs*, 4 INT’L ENFORCEMENT L. REP. 131 (1988) (discussing the first Senate MLAT hearings).

²⁷ Zagaris, *Dollar Diplomacy*, *supra* note 26, at 496.

discussions with China would not begin until the next decade.²⁸ An MLAT is a bilateral agreement between two countries that authorizes law enforcement in each country to request assistance directly from the other country's law enforcement in procuring evidence and testimony located within the other's jurisdiction.²⁹ The MLAA is still legally distinct from an MLAT, but the two forms share many facial similarities and are nearly indistinguishable in practical use, to the point where one court even mistakenly called the MLAA a treaty.³⁰ Today, the U.S. State Department, coordinating with the Department of Justice, negotiates and ratifies MLATs "to facilitate cooperation in criminal matters" and allow law enforcement of participating countries to exchange "evidence and information in criminal and related matters."³¹ The United States has MLATs with over fifty other countries, including the Bahamas, Canada, Russia, South Korea, and Switzerland, as well as with Hong Kong, with which the United States cooperates outside of relations with China due to Hong Kong's distinct legal system.³² MLAT procedure is generally opaque,³³ and MLATs largely do not create rights for criminal defendants,³⁴ nor do

²⁸ See *infra* note 51 and accompanying text (describing the discussions between Presidents Bill Clinton and Jiang Zemin in 1997 that began the formal law-enforcement relationship between the United States and China).

²⁹ See Mark A. Rush & Jared A. Kephart, *Lifting the Veil on the MLAT Process: A Guide to Understanding and Responding to MLA Requests*, K&L GATES (Jan. 20, 2017), <http://www.klgates.com/lifting-the-veil-on-the-mlat-process-a-guide-to-understanding-and-responding-to-mla-requests-01-20-2017>.

³⁰ See, e.g., *United States v. Chitron Elecs. Co.*, 668 F. Supp. 2d 298, 306–07 (D. Mass. 2009) (referring to the MLAA as a "treaty" and treating it as such).

³¹ U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS & LAW ENF'T AFFAIRS, 2 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 20 (2012) [hereinafter INT'L NARCOTICS & LAW ENF'T AFFAIRS REPORT].

³² See *id.*; see also *United States' Reply to Defendant* at 4 n.2, *United States v. Xu Chaofan*, No. CR-S-02-0674-PMP(LRL) (D. Nev. May 27, 2008) ("Cooperation on this matter was distinct and separate in terms of gathering evidence from China and gathering evidence from Hong Kong.").

³³ See, e.g., *Dongkuk Int'l, Inc. v. U.S. Dep't of Justice*, 204 F. Supp. 3d 18, 28 (D.D.C. 2016) (finding that requests by the Korean government pursuant to the U.S.-Korea MLAT were protected from disclosure under a FOIA exemption because "the information withheld falls within the statute's coverage" and "is the very type of 'request' document that the United States must use its 'best efforts' to keep confidential" (quoting Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters, U.S.-S. Kor. art. 5, Nov. 23, 1993, S. TREATY DOC. No. 104-1 (1995))).

³⁴ See Daniel Huff, *Witness for the Defense: The Compulsory Process Clause as a Limit on Extraterritorial Criminal Jurisdiction*, 15 TEX. REV. L. & POL. 129, 161 (2010) ("Most MLATs explicitly provide that they do 'not give rise to a right on the part of any private person to obtain . . . any evidence.'" (quoting Robert Neale Lyman, Note, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 VA. J. INT'L L. 261, 288 (2006))). Challenges to improperly-gathered evidence are also limited, as courts can construe improperly-gathered evidence as outside the MLAT entirely. See, e.g., *United States v. Rommy*, 506 F.3d 108, 129 (2d Cir. 2007) (finding that a defendant

they create legal entitlement to notice of MLAT requests. For example, in the Bank of China case, the defendants challenged MLAT-procured evidence from Hong Kong based in part on the argument that the government had not adequately demonstrated that the documents were obtained and authenticated properly by failing to furnish copies of the requests.³⁵ Three early MLATs provided defense counsel with access to MLAT procedure for their own evidence-gathering: those between the United States and Switzerland, Turkey, and the Netherlands.³⁶

The early MLATs came about as supplements, and in many law enforcement cases, as replacements for the existing letters rogatory process.³⁷ Through letters rogatory, courts in one country can, on behalf of the litigants, submit, receive, and return requests for information and evidence held in another country. This may be done either indirectly through diplomatic channels such as the U.S. State Department, or a court may submit its request directly to the responsive tribunal, officer, or agency.³⁸ Because letters rogatory are based on principles of international comity rather than treaties, they lack official enforcement mechanisms and are considered more informal than MLAT requests.³⁹ Despite the other difficulties that befell evidence gathering in the Goldfish Case and the Chinese government's

could not challenge the United States' use of a confidential informant in the Netherlands after the MLAT request was denied because "[b]y its express terms, however, the treaty has no application to evidence obtained outside the MLAT process").

³⁵ See Defendant Guo Jun Xu's Response to United States' Motion in Limine to Admit Rule 15 Depositions at 4, *United States v. Guo Jun Xu*, No. CR-S-02-674-PMP(LRL), 2005 WL 6305003 (D. Nev. Dec. 12, 2005) (alleging that MLAT procedure was not followed when "the defendant was not provided with the 'request' made by the Government"). The district court, noting that the government failed to provide several exhibits supposedly authenticating the evidence, declined to rule on this issue at the motion in limine stage. See *United States v. Xu Chaofan*, No. 2:02-CR-00674-PMP-LRL, 2006 WL 8425631, at *3 (D. Nev. Apr. 3, 2006) (finding that the exhibits allegedly demonstrating proper MLAT certification of the Hong Kong documents were "not included with the Deposition testimony or attached to Exhibit 1C" and thus declining to rule on admissibility).

³⁶ See T. MARKUS FUNK, FED. JUDICIAL CTR., *MUTUAL LEGAL ASSISTANCE TREATIES AND LETTERS ROGATORY: A GUIDE FOR JUDGES* 12 n.47 (2014), <https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf>.

³⁷ See *id.* at 5 (observing circa 2014 that "MLATs are the principal vehicle through which law enforcement officials make transnational requests for assistance relating to evidence gathering and other law enforcement activities"); *id.* at 17 (describing letters rogatory as "used primarily by non-government litigants who do not have access to the MLAT process").

³⁸ See 28 U.S.C. § 1781 (2012) (authorizing by statute the transmission and reception of letters rogatory to and from the United States). Rule 28(b) of the Federal Rules of Civil Procedure further describes the request process in civil cases. See FED. R. CIV. P. 28(b).

³⁹ See FUNK, *supra* note 36, at 17 ("In most cases, foreign courts honor requests issued pursuant to letters rogatory. However, international judicial assistance is discretionary, based upon principles of comity rather than treaty . . .").

lack of full cooperation, letters rogatory facilitated depositions of witnesses in Shanghai, including some witnesses in official custody.⁴⁰ Often, however, letters rogatory are not so effective; they are notoriously slow, costly, and involve “a number of bureaucratic steps, including courts in both countries, foreign ministries, justice ministries, and in some cases, embassies,” as well as private lawyers employed to assist the U.S. government in other countries.⁴¹ A letters rogatory requires approval from a U.S. district court, transmission via diplomatic channels by the State Department’s Bureau of Consular Affairs, and judicial approval abroad, a process that “could take up to a year.”⁴² Letters rogatory are, however, generally available to all parties in both civil and criminal cases.⁴³ While available to the government in the investigative stage of a criminal proceeding, letters rogatory often become available to the defense only after the beginning of criminal litigation, and foreign governments are even less likely to execute letters rogatory requests from private parties than from United States officials.⁴⁴ In 2010, a district court noted that letters rogatory sent to China “[had] not been particularly successful in the past”—they could take even longer than a year, the recipient could fail to reply at all, or Chinese authorities might “after considerable time has elapsed . . . request clarification from the American

⁴⁰ See *Xiao v. Reno*, 837 F. Supp. 1506, 1532 (N.D. Cal. 1993) (“On May 2, 1989, Swenson wrote Keith at the American Embassy in Beijing, informing him of this Court’s Order authorizing the defendants’ counsel to seek to obtain, at a minimum, through Letters Rogatory, depositions of certain witnesses in Shanghai.” (quotations omitted)), *aff’d sub nom. Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996).

⁴¹ Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT’L L. & POL’Y 339, 352 (1990). Zagaris was optimistic that MLATs would improve transnational evidence gathering, though he wrote relatively early in their use; by spring of 1990, only four MLATs had been ratified, with six pending. See *id.*

⁴² Susan E. Brune & Erin C. Dougherty, *Representing Individuals in International Investigations*, CHAMPION, Sept.–Oct. 2016, at 42.

⁴³ See FUNK, *supra* note 36, at 17 (indicating that the Federal Rules of Civil Procedure allow for letters rogatory and that a district court may bypass the State Department in issuing letters rogatory); Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 680 n.304 (2016) (“In the absence of an MLAT, a litigant may call upon a judge in the United States to issue a letters rogatory, which seeks assistance with respect to evidence-gathering from a foreign judge. Letters rogatory are often thought to work at a much slower pace than MLATs.”).

⁴⁴ See Brune & Dougherty, *supra* note 42, at 42 (observing that defense counsel typically cannot submit letters rogatory “until litigation commences” and that, “as a practical matter, there is less international cooperation than there may be when the U.S. government is making the request” on behalf of defense counsel, as counsel “cannot be certain that the foreign government will execute the request”).

court with no indication that the request will eventually be executed.”⁴⁵

Though MLATs generally streamline the transnational evidence-gathering process for law enforcement by identifying appropriate authorities for requests without the additional steps of submission through judicial and diplomatic channels, MLATs suffer from some of the same issues as letters rogatory, especially delay.⁴⁶ Sources of delay can include “the required level of legal formality and the availability of resources, such as staff and funding.”⁴⁷ Nevertheless, MLATs remain a useful and increasingly common tool in transnational investigations and prosecutions.⁴⁸ Though prosecutors are often frustrated by the MLAT process, it remains an evidentiary tool that they can use and defense counsel cannot.⁴⁹ The MLAA likewise purports to apply only to the parties: the governments that negotiated it.⁵⁰

B. U.S. Requests for Assistance in Operation Spring and the Bank of China Case

The difficulties of the Goldfish Case had a profound impact on law enforcement cooperation efforts between the United States and China, but both countries took small steps in the following years. After the Summit in Washington between then-presidents Bill Clinton and Jiang Zemin on October 29, 1997, the Chinese and American delegations “agreed to begin negotiation of an agreement on mutual legal assistance in criminal matters at an early date”⁵¹ This agreement first led to the 1998 establishment of a Joint Liaison Group on

⁴⁵ *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 248 (S.D.N.Y. 2010) (describing difficulties district courts have faced in sending letters rogatory to China and noting that it was “not unusual” for the process to be unfruitful).

⁴⁶ See *FUNK*, *supra* note 36, at 14 (observing that once cases have reached the litigation stage, “[o]btaining evidence through the use of formal MLATs between nations can be time-consuming and may result in government requests for additional time”).

⁴⁷ *Id.*

⁴⁸ See *Rush & Kephart*, *supra* note 29 (finding that budget estimates reveal that requests into and out of the United States have increased since 2000, with both incoming and outgoing requests numbering in the thousands). The rise of data storage has also led to increasing requests from U.S.-based tech companies. See Kent Walker, *An International Framework for Digital Evidence*, GOOGLE: THE KEYWORD (Apr. 20, 2017), <https://blog.google/outreach-initiatives/public-policy/international-framework-digital-evidence> (commenting on Gmail’s receipt of “over 31,000 [cross-border requests for data] in the second half of 2016 coming from outside of the United States”).

⁴⁹ See *Lyman*, *supra* note 34, at 286 (“The plain imbalance in evidence-gathering power is a threat to the integrity of an adversarial justice system and is fundamentally unfair.”).

⁵⁰ See U.S.-P.R.C. MLAA, *supra* note 6, art. 1.

⁵¹ Press Statement, James P. Rubin, U.S. Dep’t of State Office of the Spokesman, Joint Press Statement: U.S.-China Law Enforcement Joint Liaison Group (May 13, 1998), <https://1997-2001.state.gov/briefings/statements/1998/ps980513c.html>.

Law Enforcement Cooperation (JLG).⁵² The JLG has met numerous times since then⁵³ and has become a “wide-ranging forum” for shared global law enforcement concerns.⁵⁴ After additional negotiations, the two countries finally entered into a nonexclusive⁵⁵ agreement on June 19, 2000, for the purpose of improving “the effectiveness of cooperation between the two countries in respect of mutual legal assistance in criminal matters on the basis of mutual respect for sovereignty, equality, and mutual benefit”⁵⁶—the MLLA.

However, despite these steps, “cooperation [was] stagna[nt] until Operation Spring”⁵⁷—a 2005 case involving counterfeit DVDs that the United States government identified as the “first joint United States-China intellectual property criminal investigation.”⁵⁸ By April 2005, the Supreme People’s Court in China had already convicted and sentenced American citizen Randolph Hobson Guthrie III.⁵⁹ The United States secured Guthrie’s return by October, when prosecutors charged him with criminal intellectual property and importation offenses, as well as money laundering.⁶⁰ After Guthrie’s conviction, officials predicted that the case would “serve as a roadmap for future intellectual property investigations.”⁶¹

⁵² *Id.*

⁵³ See *China-US Joint Liaison Group on Law Enforcement Cooperation (JLG) Holds the 14th Plenary Session*, MINISTRY OF FOREIGN AFFAIRS, THE PEOPLE’S REPUBLIC OF CHINA (Nov. 23, 2016), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/bmdyzs_664814/xwlb_664816/t1418659.shtml (discussing the fourteenth plenary session of the JLG).

⁵⁴ Press Release, U.S. Dep’t of State, Office of the Spokesperson, U.S.-China Joint Liaison Grp. on Law Enf’t Cooperation (Dec. 19, 2012), <https://2009-2017.state.gov/r/pa/prs/ps/2012/12/202280.htm>.

⁵⁵ See U.S.-P.R.C. MLLA, *supra* note 6, art. 21.

⁵⁶ *Id.* at 1.

⁵⁷ *A Personal History of U.S.-China Law Enforcement Cooperation*, *supra* note 14 (internal quotations omitted).

⁵⁸ Press Release, Dep’t of Justice, Defendant Faces 18-Count Indictment in First Joint Criminal Intellectual Property Investigation by United States and China (Oct. 25, 2005), https://www.justice.gov/archive/opa/pr/2005/October/05_crm_564.html.

⁵⁹ *Id.* There is some speculation that the Chinese government sought out an American to test IP enforcement reforms after international pressure. See Mark Cohen, *On Avoiding “Rounding Up the Usual Suspects” in the Patent Law Amendments . . .*, CHINA IPR (Jan. 23, 2019), <https://chinaipr.com/2019/01/23/on-avoiding-rounding-up-the-usual-suspects-in-the-patent-law-amendments> (using Guthrie’s prosecution as an example of how “foreigners are often the test cases for ‘improved’ enforcement mechanisms in IP”).

⁶⁰ Press Release, Dep’t of Justice, *supra* note 58.

⁶¹ *Id.* Since his conviction, Guthrie has attempted to sue the United States and other parties several times pro se, alleging wrongful prosecution and other abuse. Courts have universally dismissed his complaints as frivolous. See, e.g., Guthrie v. U.S. Gov’t, 618 F. App’x 612, 617 (11th Cir. 2015) (summarizing Guthrie’s “fantastical” allegations, including, among other claims, that the government induced his neighbors to play loud music at night, ordered a person to have a car accident with him, and poisoned his pet parrot); Guthrie v. U.S. Gov’t, No. 12-22193-CIV, 2014 WL 12600155, at *2 (S.D. Fla. Sept. 2, 2014)

Guthrie's conviction in Operation Spring "set the stage" for the Bank of China case, in which American and Chinese law enforcement continued to cooperate.⁶² The MLAA helped the United States obtain documents, such as evidence of millions of dollars in false loans and marriage records,⁶³ but it saw the most use in scheduling witness depositions. After the defendants' arrests and indictments (and, in Yu's case, deportation), pretrial motions and discovery lasted about three years, "including two rounds of videotaped depositions of witnesses who either lived in or were incarcerated in China."⁶⁴ Under the MLAA, "parties that are in custody may travel to the PRC, and be transferred to the custody of the Chinese government for the purpose of being present at depositions requested under the Treaty [sic]."⁶⁵ This procedure "requires the consent of the defendants," who in this case declined travel to China and thus waived their rights to face-to-face confrontation.⁶⁶ Defense counsel, however, was present in both the United States and China for the depositions.⁶⁷ The United States conducted the depositions according to United States federal procedural rules, but the defendants could only have exercised their right to in-person confrontation through travel to China because of the Chinese government's unwillingness to make witnesses available oth-

("Plaintiff's claims are frivolous because the facts underlying the claims do not comport with reality and fail to state a cause of action."), *aff'd*, 618 F. App'x 612 (11th Cir. 2015).

⁶² *A Personal History of U.S.-China Law Enforcement Cooperation*, *supra* note 14; see *supra* notes 1–14 and accompanying text (summarizing facts related to the Bank of China case).

⁶³ See *United States v. Chao Fan Xu*, 706 F.3d 965, 980 (9th Cir. 2013) (detailing "evidence of 'false loans,' totaling \$90–95 million from the Kaiping sub-branch"); *United States' Motion in Limine Regarding Admissibility of Chinese Marriage Registration Catalogue Page (Exhibit 7) at 1*, *United States v. Xu Chaofan*, 2008 WL 6873397 (D. Nev. July 14, 2008) (discussing the admissibility of "a certain public record of the Kaiping Civil Administration Bureau obtained pursuant to the Mutual Legal Assistance Agreement between the United States and the People's Republic of China").

⁶⁴ *Chao Fan Xu*, 706 F.3d at 973.

⁶⁵ *United States' Motion in Limine to Admit Rule 15 Depositions at 3*, *United States v. Xu Chaofan*, No. CR-S-02-0674-PMP(LRL), 2008 WL 6324131 (D. Nev. Apr. 17, 2008) [hereinafter *Motion in Limine to Admit Rule 15*].

⁶⁶ *Motion in Limine to Admit Rule 15*, *supra* note 65, at 3–4 (alleging that the defendants "further waived that right by . . . failing to respond to the government's offer . . . 'to proceed through extraordinary diplomatic channels in an effort to arrange for the defendants and counsel to travel to the PRC to physically attend the depositions'"); see also *Chao Fan Xu*, 706 F.3d at 973–74 (discussing the defendants' waiver of their "right to be present in China to confront the witnesses face to face").

⁶⁷ See *United States v. Xu Chaofan*, No. 2:02-CR-00674-PMP-LRL, 2006 WL 8425631, at *1 (D. Nev. Apr. 3, 2006) (describing the presence of counsel in China and Las Vegas for depositions and defendant Guo Jun Xu's presence in Las Vegas); see also FED. R. CRIM. P. 15(c)(3) (describing the requirements for taking a deposition outside of the United States without the defendant's presence, including when "secure transportation and continuing custody [of in-custody defendants] cannot be assured at the witness's location").

erwise.⁶⁸ Because the defendants, who lacked the protection that Yu's plea agreement provided him from torture, may have feared their treatment if they returned to China, the Chinese government may have coerced their constitutional waiver in an American court. Commentators have cited Wong Xong Xiao's appeal for asylum in the Goldfish Case to explain why the Chinese government insisted that the witnesses in China only offer testimony by video conference in the Bank of China case.⁶⁹

C. *Aligned Interests: Financial Crimes, Trafficking, Terrorism, and Some Cybercrime*

The MLLA sees its greatest potential where Chinese and American interests align and both countries have an interest in prosecution, such as transnational financial crimes. At Hu Jintao's January 2011 state visit to the United States, the two countries in a joint statement identified their shared interests in promoting regional and global peace, including cooperation to combat violent extremism, nuclear weapons, piracy, cybercrime,⁷⁰ transnational crime, and trafficking.⁷¹ As early as 1997, leaders of both countries identified "combating international organized crime, narcotics trafficking, alien smuggling, counterfeiting and money laundering" as areas of potential cooperation.⁷² More recently, the JLG identified and discussed "issues of

⁶⁸ See FED. R. CRIM. P. 15(c)(3)(B) (explaining that there must be "a substantial likelihood that the witness's attendance at trial cannot be obtained" and that "the witness's presence for a deposition in the United States cannot be obtained"); Motion in Limine to Admit Rule 15, *supra* note 65, at 6 ("The depositions were conducted pursuant to the Deposition Procedure Order, the Federal Rules of Civil and Criminal Procedure, and the Federal Rules of Evidence.").

⁶⁹ See *A Personal History of U.S.-China Law Enforcement Cooperation*, *supra* note 14 ("But recalling the Goldfish Case, the Chinese offered their witnesses for deposition only by overseas videoconference, when they were also cross-examined by defendants' counsel in the U.S.").

⁷⁰ Cybercrime has remained an area of cooperation between the two countries. See Press Release, Dep't of Justice Office of Pub. Affairs, First U.S.-China Law Enforcement and Cybersecurity Dialogue ¶ 3 (Oct. 6, 2017), <https://www.justice.gov/opa/pr/first-us-china-law-enforcement-and-cybersecurity-dialogue>.

⁷¹ U.S.-China Joint Statement ¶ 16, White House Office of the Press Sec'y (Jan. 19, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/19/us-china-joint-statement>; see also CONG.-EXEC. COMM'N ON CHINA, *supra* note 20, at 44 (reporting congressional recommendations that the administration "[e]ncourage and engage in continued regional cooperation to combat human trafficking through multilateral agreements and forums," "[p]ursue cooperation on anti-trafficking efforts through the [JLG]," and support the U.S. State Department's efforts "to build regional law enforcement capacity" in Asia).

⁷² Press Statement, James P. Rubin, U.S. Dep't of State Office of the Spokesman, Joint Press Statement: U.S.-China Law Enforcement Joint Liaison Group (May 13, 1998), <https://1997-2001.state.gov/briefings/statements/1998/ps980513c.html>.

common concern, including cooperation in anti-corruption, fugitive repatriation and asset recovery, combating cyber crimes, drug control and many other hotspot issues, charting the course for next-stage cooperation.”⁷³ In October 2017, the United States and China conducted their first bilateral Law Enforcement and Cybersecurity Dialogue. The meeting reiterated the shared interests in four areas: repatriation, counter-narcotics, cybercrime and cybersecurity, and fugitives.⁷⁴ This aligned with past cooperation since the passage of the MLAA, which included cooperative investigations and prosecutions of several major international drug trafficking operations.⁷⁵

Generally, U.S. prosecutors tend not to begin criminal investigations—and therefore do not make use of the MLAA—unless there is wrongdoing in the United States or Chinese authorities have alerted them to their own investigation. Chinese authorities have alerted American prosecutors to a variety of transnational criminal activity beyond corruption, including crimes like distribution of child pornography.⁷⁶ In the Foreign Corrupt Practices Act (FCPA) context, American prosecutors, as of 2017, “have only undertaken investigations under the [FCPA] in China when the Chinese have already uncovered corruption,” meaning that “any investigation or prosecution [was] contingent upon the findings of a Chinese investigation.”⁷⁷

⁷³ *China-US Joint Liaison Group on Law Enforcement Cooperation (JLG) Holds the 14th Plenary Session*, *supra* note 53.

⁷⁴ See Press Release, Dep’t of Justice Office of Pub. Affairs, *supra* note 70 (describing the Law Enforcement and Cybersecurity Dialogue meeting); see also Ron Cheng, *U.S. and China Department Heads Discuss Cybersecurity and Law Enforcement Cooperation*, FORBES (Oct. 13, 2017), <https://www.forbes.com/sites/roncheng/2017/10/13/u-s-and-china-department-heads-discuss-cybersecurity-and-law-enforcement-cooperation> (“The bilateral criminal issue, of course, extends beyond these four topics and includes counterterrorism, money laundering, immigration fraud, and, from the U.S. perspective, overseas bribery under the Foreign Corrupt Practices Act and similar laws.”).

⁷⁵ See Aronofsky & Qin, *supra* note 15, at 295–96 (describing three significant, post-MLAA narcotics prosecutions that involved both the United States and China).

⁷⁶ See, e.g., *United States v. Yong Wang*, No. 11-CR-730(PGG), 2013 WL 452215, at *4 (S.D.N.Y. Feb. 5, 2013) (“During the trip [from Wang’s apartment to the FBI offices], Wang asked the agents how they ‘found out about him.’ Agent Thompson told Wang that the investigation was the result of information provided by the Chinese government.” (quoting Suppression Hearing Transcript 14, June 21, 2012)); see also Press Release, Dep’t of Justice, U.S. Attorney’s Office, S.D.N.Y., *Operator of 18 Chinese-Language Child Pornography Websites Sentenced to 210 Months in Prison* (Apr. 24, 2014), <https://www.justice.gov/usao-sdny/pr/operator-18-chinese-language-child-pornography-websites-sentenced-210-months-prison> (reporting then-U.S. Attorney for the Southern District of New York Preet Bharara’s thanks to the Chinese Ministry of Public Security “for their cooperation and assistance”).

⁷⁷ Nicholas Leong, *China Has a Message for Western Companies: Corruption Does Not Pay*, SOUTH CHINA MORNING POST (Aug. 22, 2017) <https://www.scmp.com/comment/insight-opinion/article/2107769/china-has-message-western-companies-corruption-does-not-pay>.

Because of controls on the flow of Chinese currency, transnational crimes involving Chinese nationals often involve money laundering, and the Chinese government has expressed an interest in cracking down on such crimes, as well as on corruption.⁷⁸ This effort is also political: While Chinese President Xi Jinping has identified the anti-corruption drive within the Chinese Communist Party as one of his signature governing efforts, it has also allowed him to consolidate political power.⁷⁹ In the early 2000s, China “averaged 5 outgoing and 50 incoming” mutual legal assistance requests to and from all of its partners, with “at least 3 incoming and 7 outgoing requests involving corruption offenses.”⁸⁰ In money laundering cases, the mutual legal assistance “can be extremely useful as a means of obtaining banking and other financial records” from treaty partners and other parties to agreements, like China.⁸¹ In the United States, a conviction for money laundering requires proof that the funds involved were proceeds of, or

⁷⁸ See Sara Hsu, *China Cracks Down on Money Laundering*, FORBES (Aug. 22, 2017), <https://www.forbes.com/sites/sarahsu/2017/08/22/china-cracks-down-on-money-laundering> (describing recent Chinese efforts to create and enforce new anti-money laundering rules in response to past money laundering scandals that occurred as recently as 2015–2017); Sophia Yan, *Chinese Snap Up Fine Art for Use in Laundering Schemes*, CNN MONEY (Feb. 21, 2014), <http://money.cnn.com/2014/02/20/news/economy/china-art-laundering/index.html> (describing the use of fine art to circumvent “Beijing’s strict capital controls—which limit the amount of money an individual can move out of China to \$50,000 per year”). The Chinese corruption crackdown both dovetails and conflicts with the United States’ interest in increased enforcement of the FCPA in China. See Press Release No. 18-1436, Dep’t of Justice, Attorney General Jeff Session’s [sic] China Initiative Fact Sheet (Nov. 1, 2018) [hereinafter China Initiative Fact Sheet], <https://www.justice.gov/opa/speech/file/1107256/download> (listing increased FCPA monitoring as a goal of the DOJ’s new China Initiative); Sophia Yan, *China’s Anti-Corruption Crackdown Reaches U.S.*, CNN MONEY (Mar. 27, 2015) [hereinafter Yan, *Crackdown*], <http://money.cnn.com/2015/03/26/news/china-anti-corruption-us/index.html> (describing China’s “Operation Foxhunt” initiative to target Chinese suspects of financial crimes who have fled the country and citing U.S. State Department’s spokeswoman Jen Psaki’s statement that the Department “continue[s] to encourage China to provide strong evidence and intelligence to ensure that our law enforcement agencies can properly investigate and prosecute cases related to the alleged corruption” in the United States (internal quotations omitted)).

⁷⁹ See Jamie Fullerton, *Operation Skynet: China’s Anti-Corruption Campaign Goes International as Beijing Reaches out to Uncover Officials Fled Abroad*, INDEPENDENT (Mar. 29, 2015), <https://www.independent.co.uk/news/world/asia/operation-skynet-chinas-anti-corruption-campaign-goes-international-as-beijing-reaches-out-to-10142310.html> (“President Xi’s anti-corruption drive has . . . conveniently allowed him to strip power from his political enemies, such as the former senior party leader Zhou Yongkang, who was arrested on corruption charges and expelled from the party last year.”).

⁸⁰ ASIAN DEV. BANK & ORG. FOR ECON. CO-OPERATION AND DEV. ANTI-CORRUPTION INITIATIVE FOR ASIA AND THE PACIFIC, MUTUAL LEGAL ASSISTANCE, EXTRADITION AND RECOVERY OF PROCEEDS OF CORRUPTION IN ASIA AND THE PACIFIC 117 (2007) [hereinafter ADB/OECD REPORT], <http://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>.

⁸¹ INT’L NARCOTICS & LAW ENF’T AFFAIRS REPORT, *supra* note 31, at 20.

derived from, a predicate criminal offense.⁸² If the predicate offense occurred abroad, then transnational cooperation is necessary to prove the elements, even if the laundering occurred entirely within the United States.

The MLAA allows for countries to request freezing of funds in the other country, further facilitating prosecution of financial crimes, and federal seizure warrants issued by United States Magistrate Judges can provide support for American requests.⁸³ Some limits on control over Chinese banks, such as the limit of freezes to forty-eight hours, can complicate these efforts,⁸⁴ but this does not dissuade their use. In the Bank of China case, the United States requested that Chinese authorities freeze eight million dollars that the managers had transferred to the Caesars Palace casino.⁸⁵ Other cooperation efforts have resulted in, for example, the joint arrest of a Chinese citizen in the United States⁸⁶ and Chinese-assisted American prosecutions of Chinese officials found committing crimes within the United States.⁸⁷

D. Diverging Interests and the Shifting U.S.-China Relationship

While the MLAA seemed like a big step forward for the U.S.-China relationship at the time, it has stagnated, and areas of diverging interests have threatened further cooperation. Though the decade immediately following the MLAA showed a trend of generally

⁸² See 18 U.S.C. § 1956(a)(1) (2012) (criminalizing money laundering involving “proceeds of some form of unlawful activity”); § 1957(a) (criminalizing transactions of \$10,000 or more “derived from specified unlawful activity”).

⁸³ See, e.g., Verified Complaint for Forfeiture ¶ 5, *United States v. \$171,600.00 in Bank Funds*, No. CV 14-08859 DMG (AJWx) (C.D. Cal. 2015), 2014 WL 7691371 (describing the process by which the United States requested freezing of defendant funds pursuant to the MLAA).

⁸⁴ See Caixin, *Enforcement Key if Chinese Banks Want to Avoid Being Investigated*, GLOBAL TIMES (Feb. 26, 2017), <http://www.globaltimes.cn/content/1034936.shtml> (describing limits on Chinese prosecutions of money laundering, for instance that “[o]ften authorities cannot freeze illegal bank accounts before the money is transferred abroad,” and that “[u]nder Chinese law, the central bank’s president is [sic] only one who can authorize a freeze, which can last no longer than 48 hours,” meaning that as a result “the central bank almost never freezes bank accounts”).

⁸⁵ *United States v. Chao Fan Xu*, 706 F.3d 965, 973 (9th Cir. 2013).

⁸⁶ See Yan, *Crackdown*, *supra* note 78 (“Neither Beijing nor Washington have given details about the list of targets, though at least one Chinese citizen has already been arrested in the U.S. with China’s help, according to the Department of Justice.”).

⁸⁷ See, e.g., Press Release, Dep’t of Justice, U.S. Attorney’s Office, C.D. Cal., *Fugitive Chinese Official and Former Wife Named in Grand Jury Indictment Charging Immigration Fraud and Money Laundering*, <https://www.justice.gov/usao-cdca/pr/fugitive-chinese-official-and-former-wife-named-grand-jury-indictment-charging> (describing the unsealing of a United States federal grand jury indictment charging two Chinese nationals).

increasing cooperation,⁸⁸ it has now reached a period of tension between the mutual desire for further cooperation, as detailed above, and the compromise in values that a deeper relationship would entail. For instance, the United States often cites troubling treatment of criminal defendants as a major factor affecting relations with China.⁸⁹ The Chinese government's other treaties "expressly require foreign courts to follow 'a due process' in order for their judgments to be recognized,"⁹⁰ but this vague language may be insufficient to assuage criminal procedure concerns. Following President Donald J. Trump's 2017 state visit to China, the White House released a press release, stating that the President had committed to continuing joint law enforcement efforts and expressly mentioned cooperating under the MLAA.⁹¹ However, the U.S. Congressional-Executive Commission on China noted in 2018 that "there is a growing consensus that U.S.-China policy is in need of a readjustment."⁹² The Commission urged the Trump administration to "develop a comprehensive strategy to advance human rights through other issues on the U.S.-China agenda" and, together with Congress, "develop an action plan and implementation guidelines to embed human rights, rule of law, and democratic accountability goals into the critical mission strategies of all U.S. Government entities interacting with the Chinese government."⁹³ This naturally could include the Department of Justice, in its capacity as the primary authority on cooperation with Chinese law enforcement.

⁸⁸ See Lewis, *supra* note 16, at 83 (describing a general trend towards increasing U.S.-China cooperation).

⁸⁹ See CONG.-EXEC. COMM'N ON CHINA, *supra* note 20, at 29–32 (identifying the rights of criminal defendants as an area of concern in U.S.-China relations); CONG. RESEARCH SERV., R44897, HUMAN RIGHTS IN CHINA AND U.S. POLICY: ISSUES FOR THE 115TH CONGRESS 19, 22–27 (2017) (including the Chinese criminal justice system in a list of "prominent human rights concerns that frequently have been raised by . . . some Members of Congress" and describing specific types of abuses, including illegal detention, torture, and political persecution). The United States is not without its own troubling criminal procedure statistics relative to China, such as its high incarceration rate. See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), <https://www.nytimes.com/2008/04/23/us/23prison.html> ("The United States has, for instance, 2.3 million criminals behind bars, more than any other nation . . . China, which is four times more populous than the United States, is a distant second, with 1.6 million people in prison.").

⁹⁰ Andrea Conzatti, *The Recognition of U.S. "Opt-Out" Class Actions in China*, 44 GEO. J. INT'L L. 641, 663 n.91 (2013).

⁹¹ Press Release, White House, President Donald J. Trump's State Visit to China (Nov. 10, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-visit-china> ("The United States and China committed to fulfilling responsibilities under the U.N. law enforcement and terrorism conventions, as well as under the United States-China Mutual Legal Assistance Agreement . . .").

⁹² CONG.-EXEC. COMM'N ON CHINA, *supra* note 20, at 13.

⁹³ *Id.*

It is perhaps not a coincidence that the United States government seeks a more confrontational law enforcement relationship with China during a period of increasing economic competition.⁹⁴

Despite historical cooperation in money laundering cases, politically sensitive issues may complicate both countries' willingness to cooperate. In cases involving North Korean money laundering, for example, the United States has often proceeded without Chinese assistance, and statements from the Chinese government suggest potential unwillingness to cooperate with some requests. In one instance, the Chinese government opposed the prosecution of Mingzheng International Trading Limited, which the United States accused of money laundering for North Korea, "saying the United States is imposing its own domestic laws on other countries."⁹⁵ Nevertheless, there remains enough common ground that some mutual action may still occur. China's cooperation is essential to American efforts in North Korea, and the United States may tailor its efforts to encourage Chinese action, regardless of the form it takes.⁹⁶ After a Justice Department visit to Beijing, the Chinese government has been conducting its own inquiries into some financial crimes involving

⁹⁴ See Joshua P. Meltzer, *Developing a Mutually Beneficial US-China Economic Relationship*, BROOKINGS (Feb. 28, 2019), <https://www.brookings.edu/blog/up-front/2019/02/28/developing-a-mutually-beneficial-us-china-economic-relationship> (describing the shift from cooperation to competition in the U.S.-China economic relationship); see also Ana Swanson, *Spiraling Trade Tensions Threaten Economy as Trump Pressures China*, N.Y. TIMES (Aug. 2, 2019), <https://www.nytimes.com/2019/08/02/business/economy/china-us-trade-threats.html> (describing escalating threats of tariffs); Dorcas Wong & Alexander Chipman Koty, *The U.S.-China Trade War: A Timeline*, CHINA BRIEFING (Aug. 6, 2019), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline> (providing a continually updated timeline of U.S.-China trade tensions).

⁹⁵ Jonathan Soble, *U.S. Accuses Chinese Company of Money Laundering for North Korea*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/business/north-korea-money-laundering-mingzheng.html>.

⁹⁶ See Ellen Nakashima, *U.S. Charges Four Chinese, Firm with Aiding Pyongyang's Nuclear Program*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/world/national-security/us-charges-four-chinese-nationals-and-a-chinese-company-with-aiding-pyongyangs-nuclear-program/2016/09/26/1a7a4b16-8407-11e6-92c2-14b64f3d453f_story.html (quoting the statement of Zachary Goldman, a former Treasury Department official, that China is the "linchpin to disrupting North Korean proliferation" and that "anything the United States can do to goad the Chinese into greater action is going to be important"); see also Jane Perlez & Chris Buckley, *China Announces Inquiry into Company Trading with North Korea*, N.Y. TIMES (Sept. 20, 2016), <https://www.nytimes.com/2016/09/21/world/asia/north-korea-china-inquiry-hongxiang.html> (describing Chinese Public Security Department inquiries "compelled by two recent visits to Beijing by officials from the Justice Department to warn the Chinese of the illegal activities of the Dandong company").

North Korea, and United States officials anticipate assistance with their parallel investigations.⁹⁷

As shown above, and as both United States and Chinese officials recognized during President Trump's 2017 state visit to China, there is room for improvement in the MLAA, and a "need to carry forward working-level mechanisms to resolve outstanding issues."⁹⁸ However, both countries have taken steps that seem to exacerbate tensions, threatening future cooperation. When Chinese military hackers threatened American companies, the United States took unilateral action against them.⁹⁹ This contributed to the formation in late 2018 of the DOJ's China Initiative, with the goal of identifying and quickly resolving Chinese trade theft cases, as well as other corrupt practices such as FCPA violations.¹⁰⁰ Then-Attorney General Sessions and other officials described the threat of Chinese economic espionage in harsh terms, with Sessions claiming that, "Chinese economic espionage against the United States has been increasing—and it has been increasing rapidly. Enough is enough. We're not going to take it anymore."¹⁰¹ FBI Director Christopher Wray claimed that "[n]o country presents a broader, more severe threat to our ideas, our innovation, and our economic security than China."¹⁰² However, even as the China Initiative took a tough stance on China, one of the stated goals was to "[i]ncrease efforts to improve Chinese responses to requests under the Mutual Legal Assistance Agreement (MLAA) with the United States."¹⁰³ Law firms issued warnings to their multinational clients that the China Initiative could increase their exposure to legal

⁹⁷ See Nakashima, *supra* note 96 (noting that "[t]he two governments have a mutual legal-assistance agreement" and quoting Justice Department spokesman Marc Raimondi's statement that "[w]e expect China will assist us with requests submitted in accordance with that bilateral agreement").

⁹⁸ Press Release, White House, *supra* note 91.

⁹⁹ See Cheng, *supra* note 74 (describing cases "such as the U.S. indictment of five members of China's military for conducting commercial espionage directed at U.S. victims" that, while matters of U.S. concern, "are less likely candidates for cooperation, and have been unilaterally handled by the U.S."); see also Press Release, Dep't of Justice, Office of Pub. Affairs, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor> ("This is a case alleging economic espionage by members of the Chinese military and represents the first ever charges against a state actor for this type of hacking." (quoting then-U.S. Attorney General Eric Holder)).

¹⁰⁰ China Initiative Fact Sheet, *supra* note 78 (quoting Sessions's statement that the China Initiative "will identify priority Chinese trade theft cases, ensure that we have enough resources dedicated to them, and make sure that we bring them to an appropriate conclusion quickly and effectively").

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

risks, including from Chinese actions against American companies in retaliation.¹⁰⁴ Around the same time, the Chinese government took other steps that demonstrated its willingness to act independently, for example by amending its criminal procedure laws to allow for trial in absentia in cases including corruption.¹⁰⁵ This could facilitate future unilateral actions in China, while in the past the government might have cooperated to ensure defendants' presence.

II

FORMALISM, INEFFICIENCIES, AND IMPLICATIONS FOR FUTURE USE

In addition to the broader political context, the MLAA faces limitations that are endogenous to itself. Many of the issues and administrative burdens on the MLAA—such as issues reconciling differing legal systems—reflect concerns that also plague the MLAT process generally.¹⁰⁶ The MLAA has other more specific facial limitations, but both the United States and China may nevertheless find it useful when their interests align. This Part will summarize key features of the MLAA that show that it has not lived up to its potential to improve law enforcement cooperation. First, the MLAA is not binding, and, unusually among American law enforcement agreements, it was negotiated solely within the executive branch. Second, even when adhering to the text of the MLAA, it is easy for either country to refuse assistance, particularly when one party invokes political offenses or national security concerns. Finally, it does not include extradition, despite both countries' interest in extradition, because of a misalignment of values. Based on these inefficiencies and the fraying law enforcement relationship between the United States and China, this

¹⁰⁴ See, e.g., Bingna Guo et al., *DOJ's New "China Initiative" Places Chinese Companies Under the FCPA Microscope as US-China Trade Tensions Run High*, WHITE & CASE (Dec. 20, 2018), <https://www.whitecase.com/publications/alert/dojs-new-china-initiative-places-chinese-companies-under-fcpa-microscope-us-china>; Bradley A. Klein & Steve Kwok, *DOJ Announces 'China Initiative' to Investigate and Prosecute Chinese Companies*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Nov. 29, 2018), <https://www.skadden.com/insights/publications/2018/11/doj-announces-china-initiative>.

¹⁰⁵ See LANEY ZHANG, LIBR. CONGR., *China: Criminal Procedure Law Amended to Allow Criminal Trials in Absentia in Corruption Cases* (Jan. 10, 2019), <http://www.loc.gov/law/foreign-news/article/china-criminal-procedure-law-amended-to-allow-criminal-trials-in-absentia-in-corruption-cases>.

¹⁰⁶ See Gail Kent, *The Mutual Legal Assistance Problem Explained*, STAN. L. SCH.: CTR. FOR INTERNET & SOC'Y (Feb. 23, 2015), <http://cyberlaw.stanford.edu/blog/2015/02/mutual-legal-assistance-problem-explained> (explaining some of the issues that countries face in implementing MLATs, such as lengthy response times to requests, administrative burdens in fulfilling assistance requests, and mismatched legal systems).

Part will draw the conclusion that substantive changes to the MLAA are unlikely to occur in the foreseeable future.

A. *Not (Yet) a Treaty: The MLAA as a Longstanding Statement of Intent*

The MLAA occupies a unique legal space and, lacking a two-thirds Senate vote, does not meet the constitutional requirements of a treaty.¹⁰⁷ This means that, while it is potentially useful, the MLAA is not binding under domestic or international law in the same way as a treaty is.¹⁰⁸ It does not *require*, for example, that the United States cooperate with the Chinese government in law enforcement matters in American prosecutions relating to Chinese nationals or corporations operating in the United States.¹⁰⁹ In this way, the MLAA creates a process that more closely resembles letters rogatory than a true MLAT: The honoring of MLAA requests is based on comity and intent rather than law.

Though the United States and China have each consistently reaffirmed their commitments to using and improving the MLAA,¹¹⁰ neither country has shown any willingness to change the MLAA's form, nor has there yet been any incentive to do so. In legal practice, there seems to be little meaningful difference between the MLAA and a typical MLAT, and U.S. courts have even referred to the MLAA as a "treaty."¹¹¹ However, because it has not passed the Senate, the MLAA, like other international sole executive agreements, raises separation-of-powers concerns about whether it is

¹⁰⁷ See *Country Profile: China*, ACCESS NOW: MUTUAL LEGAL ASSISTANCE TREATIES, <https://web.archive.org/web/20190413023750/https://www.mlat.info/country-profile/china>; see also U.S. CONST. art. II, § 2, cl. 2 (defining the power of the U.S. President to negotiate treaties with foreign nations, subject to the approval of two-thirds of the Senate).

¹⁰⁸ Cf. CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 1, 3–4 (Comm. Print 2001) <https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf> (describing the binding effects of treaties under both international and domestic law).

¹⁰⁹ See *United States v. Chitron Elecs. Co.*, 668 F. Supp. 2d 298, 300–01, 306 (D. Mass. 2009) (rejecting the argument that the MLAA "precludes the service of a criminal summons upon a Chinese corporation except with the assent and assistance of the Chinese government" when the corporation had an office in Waltham, Massachusetts, and authorities served summons on the corporation's president while the president was in federal custody).

¹¹⁰ See, e.g., Press Release, White House, *supra* note 91.

¹¹¹ See, e.g., *Chitron Elecs.*, 668 F. Supp. 2d at 306–07 (referring to the MLAA as a treaty); *United States v. Xu Chaofan*, No. 2:02–CR–00674–PMP–LRL, 2006 WL 8425631, at *1–3 (D. Nev. Apr. 3, 2006) (describing the defendant's allegation that "the government did not adhere to the requirements of the Mutual Assistance Treaty" in taking depositions of four witnesses, three of whom were Hong Kong residents and one of whom was located in China during the deposition).

appropriate for the Executive to negotiate longstanding international agreements in the absence of Article II Senate approval or explicit congressional authorization as a congressional-executive agreement.¹¹² Though the President enjoys broad foreign affairs powers, sole executive agreements have traditionally been limited in scope or duration.¹¹³ As demonstrated by the fact that every other long-term international law enforcement agreement that the United States has entered, save that with Taiwan, takes the form of an MLAT, law enforcement agreements typically submit to Senate votes.¹¹⁴ When the United States enters into MLAAAs, they are often precursors to formal treaties rather than longstanding agreements in their own right.¹¹⁵ The text of the MLAA, by contrast, states that it has “enter[ed] into force” and “remain[s] in force” so long as it is renewed,¹¹⁶ and the United States and China have cooperated according to the MLAA for nearly two decades. For the executive branch to negotiate indefinitely appli-

¹¹² Compare Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 187 (1945) (“The practices of successive administrations, supported by the Congress and by numerous court decisions, have for all practical purposes made the Congressional-Executive agreement authorized or sanctioned by both houses of Congress interchangeable with the agreements ratified under the treaty clause by two-thirds of the Senate.”), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1250–52 (1995) (arguing in favor of an exclusive reading of the Treaty Clause of Article II that would disallow congressional-executive agreements on foreign affairs matters), and Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 144–47 (2009) (describing the increasing shift of international lawmaking power toward the executive branch as “troubling not merely as an abstract constitutional matter” but also because of “real concerns about the quality of governance and representation”).

¹¹³ See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1027–33 (2013) (observing that sole executive agreements “tend to be more modest international legal commitments than treaties approved through the Treaty Clause” and describing two types of sole executive agreements: claims settlement agreements, which are limited to the claims at issue, and *modi vivendi*, which are temporary agreements that often serve as precursors to permanent agreements); see also Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT’L L. 885, 897–98 (2016) (describing a spectrum of congressional authorization for international executive agreements that spans the three categories of the *Youngstown* framework for executive power (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring))).

¹¹⁴ See INT’L NARCOTICS & LAW ENF’T AFFAIRS REPORT, *supra* note 31, at 20 (describing the United States’ existing MLATs and noting that “[i]n addition to MLATs, the United States has a Mutual Legal Assistance Agreement (MLAA) with China”). The MLAA between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States is the result of Taiwan’s contested sovereignty, a constraint that China does not share. *Cf. id.* at 169.

¹¹⁵ See David Whedbee, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 PAC. RIM L. & POL’Y J. 561, 563 n.12 (2003).

¹¹⁶ U.S.-P.R.C. MLAA, *supra* note 6, art. 23, ¶ 1.

cable agreements that closely resemble treaties seems to end-run the constitutional treaty process in an arguably anti-democratic manner.¹¹⁷ The lack of a treaty is not an inevitable result of a country's history of competition with the United States; Russia has also historically antagonized the United States but has a formally ratified MLAT.¹¹⁸ Nevertheless, political wariness of China may explain why a ratification vote has never passed the Senate and why calls to increase the MLAA's use have not included proposals to do so.¹¹⁹

On the Chinese side, by contrast, the MLAA is unique because its scope is relatively limited as compared to other agreements. Though China "has entered into 'bilateral judicial cooperation' treaties with a number of countries," the MLAA, in contrast to agreements with other countries, "merely focuses on criminal judicial cooperation, not touching on either civil cooperation or on the acknowledgment or enforcement of civil and commercial decisions."¹²⁰

B. Inefficiencies in Information Requests: Delays, Denials, and Unaccountability

Generally, the MLAA covers assistance in procuring evidence, but a catch-all provision allows for countries to request "any other form of assistance which is not contrary to the laws in the territory" of the nation receiving the request.¹²¹ The MLAA does not create jurisdiction or allow for extraterritorial enforcement of subpoenas; American-issued orders of contempt and default judgments will be meaningless in Chinese courts, and a court in the United States cannot order seizure of China-based assets.¹²² Instead, the Chinese legal

¹¹⁷ See Hathaway, *supra* note 112, at 146 (critiquing strong sole executive foreign affairs powers as "inconsistent with the principle of separation of powers on which our government relies" and asserting that "a single branch of government should not be able to unilaterally make law over an immense array of issues simply by concluding binding international agreements").

¹¹⁸ See INT'L NARCOTICS & LAW ENF'T AFFAIRS REPORT, *supra* note 31, at 20 (listing countries with which the United States has MLATs in force).

¹¹⁹ See *supra* Section I.D (discussing perceptions in the United States of a lack of protection for criminal defendants in China and U.S. protestations against Chinese economic espionage).

¹²⁰ Conzatti, *supra* note 90, at 663.

¹²¹ U.S.-P.R.C. MLAA, *supra* note 6, art. 1, ¶ 2(j).

¹²² See Winston Y. Chan & Susannah Stroud Wright, *Against the Chinese Wall: The US Government's Limited Investigative Reach*, L.A. DAILY J. (Nov. 17, 2011), <https://www.gibsondunn.com/against-the-chinese-wall-the-us-governments-limited-investigative-reach> (observing that, if a Chinese company lacks sufficient presence in the United States, U.S. federal executive authorities will not be able successfully to subpoena evidence held in China).

system seeks this evidence on the American court's behalf, theoretically in compliance with American criminal procedure.¹²³

The text of the MLAA outlines the parties authorized to make requests and the procedure by which they may do so, but beyond the text there remain procedural imbalances and easy methods by which one country can pretextually deny assistance. In the United States, the "Central Authority," or the authority with the power to make requests pursuant to the MLAA, is the Attorney General, who has delegated the process to the DOJ's Office of International Affairs (OIA).¹²⁴ OIA will generally forward requests from China to the local U.S. Attorney's Office with jurisdiction over the requested evidence or witnesses. Requests to China go to the Ministry of Justice, which often then seeks assistance from the Ministry of Public Security.¹²⁵ These authorities handle disputes in agreement execution before diplomatic channels do.¹²⁶ The DOJ is the primary authority for federal criminal law enforcement in the United States, and federal agencies take primary responsibility for investigating and responding to transnational crime.¹²⁷ The Chinese Ministry of Justice is not the DOJ's precise counterpart; the Chinese system splits law enforcement authority between the Ministry of Justice and the Ministry of Public Security, with the latter being more influential in the Chinese Communist

¹²³ See U.S.-P.R.C. MLAA, *supra* note 6, art. 6, ¶ 3 (providing that assistance must be consistent with the laws in the territory of the requested party but can be executed in a manner that the requesting party identifies, for example in compliance with the requesting party's constitution). *But see* Lyman, *supra* note 34, at 280 (observing that domestic courts lack the power to enforce MLAT obligations in partner countries, using the example that "[a] U.S. court cannot levy fines on or order the arrest of a recalcitrant treaty partner as it could with a troublesome witness or party in a domestic case" to show that "[i]n that sense, an MLAT does not provide precisely the same sort of compulsory process available within the country").

¹²⁴ See U.S.-P.R.C. MLAA, *supra* note 6, art. 2, ¶¶ 1–2 (designating the Attorney General as the Central Authority for the United States); Lewis, *supra* note 16, at 86 (describing the OIA's authority over MLAA requests and its practice of reaching out to local U.S. attorneys' offices to execute requests that meet all requirements).

¹²⁵ See U.S.-P.R.C. MLAA, *supra* note 6, art. 2, ¶¶ 1–2; Lewis, *supra* note 16, at 86–87 (describing the Ministry of Justice's sharing of authority over MLAA requests with the more powerful Ministry of Public Security).

¹²⁶ See U.S.-P.R.C. MLAA, *supra* note 6, art. 22, ¶ 2 ("Any dispute arising out of the interpretation and application of this Agreement shall be resolved through diplomatic channels if the Central Authorities of both Parties are themselves unable to reach agreement.").

¹²⁷ CALIBER ASSOCS., STATE AND LOCAL LAW ENFORCEMENT RESPONSE TO TRANSNATIONAL CRIME 7 (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/209521.pdf> ("Primary responsibility for responding to transnational crime has fallen to federal agencies, because of the cultural, political, legal and language differences that exist when working with other nations." (citing COMM. ON LAW & JUSTICE, NAT'L RESEARCH COUNCIL, TRANSNATIONAL ORGANIZED CRIME: SUMMARY OF A WORKSHOP 34 (Peter Reuter & Carol Petrie eds., 1999))).

Party.¹²⁸ This division of authority may contribute to inefficiencies in the request process. Current efforts to improve processes under the MLAA have included encouraging greater involvement of the Ministry of Public Security.¹²⁹

Article Fifteen of the MLAA provides that a country that produces evidence may request return of any evidence provided “as soon as possible,” but of course, this is not always possible.¹³⁰ The MLAA provides several methods by which a country receiving a request may deny or delay assistance. For example, a country receiving a request may deny assistance when asked to assist with investigating conduct that would not be a crime in its own territory or when rendering assistance may lead to double jeopardy or otherwise unconstitutional results in the requested territory.¹³¹ Article Six expressly allows for postponement or conditional acceptance of requests based on determination that “execution of a request would interfere with an ongoing criminal investigation, prosecution, or proceeding” in the requested territory.¹³² A country also may deny assistance when rendering such assistance would prejudice its “sovereignty, security, public order (ordre publique), important public policy or other essential interests.”¹³³ This can include state secrets, which, broadly defined, can include economic and technological matters.¹³⁴ Article Ten explicitly grants discretion to deny copies of documents that are not publicly available.¹³⁵ It is possible that new institutionalization of transparency measures by the Chinese Communist Party may improve access to information within China, where it has long been lacking, but this remains unclear.¹³⁶ Likewise, the United States government is prone

¹²⁸ See Lewis, *supra* note 16, at 86–87 (describing the balance of power between the Chinese Ministry of Justice and the Ministry of Public Security).

¹²⁹ See *id.* at 87 n.16 (suggesting that increasing direct participation of the Ministry of Public Security would be consistent with the United States’ and China’s mid-2000s overtures toward stronger ties between the countries’ law enforcement operations).

¹³⁰ U.S.-P.R.C. MLAA, *supra* note 6, art. 15.

¹³¹ See *id.* art. 3, ¶ 1.

¹³² See *id.* art. 6, ¶ 4.

¹³³ *Id.* art. 3, ¶ 1(c). Sovereignty of borders appears to be a particularly strong concern for China. See Associated Press, *China Takes Tough Line on Sovereignty Amid Territorial Spats with Neighbors*, NBC NEWS (Aug. 1, 2017), <https://www.nbcnews.com/news/world/china-takes-tough-line-sovereignty-amid-territorial-spats-neighbors-n788386> (reporting on Chinese President Xi Jinping’s statements that “[n]o one should expect [China] to swallow the bitter fruit of damage to our sovereignty, security and development interests”).

¹³⁴ See Chan & Wright, *supra* note 122 (“China’s state secrecy laws . . . broadly define the scope of ‘state secrets’ to include matters involving economic interests and technology.”).

¹³⁵ See U.S.-P.R.C. MLAA, *supra* note 6, art. 10.

¹³⁶ See Jamie P. Horsley, *The Chinese Communist Party’s Experiment with Transparency*, DIPLOMAT (Feb. 1, 2018), <https://thediplomat.com/2018/02/the-chinese->

to “overclassification,” which can inhibit flow of information between offices.¹³⁷ Because of the sheer volume of documents both governments shield from the public, this can leave huge swaths of evidence unavailable, and it is possible that state secrets can be used as a smokescreen or pretext for unwillingness to cooperate.¹³⁸

The civil securities counterpart to the MLAA, the 1994 Memorandum of Understanding (MOU) between the SEC and China Securities Regulatory Commission (CSRC), expressly provides that the CSRC can deny assistance that would be “contrary to the public interest” of China.¹³⁹ In the United States, the Classified Information Procedures Act (CIPA) governs state secret disclosures.¹⁴⁰ CIPA “pre-supposes” a government’s privilege to refrain from disclosing classified information “when disclosure would be inimical to national security.”¹⁴¹ In criminal cases, the state secrets privilege “must give

communist-partys-experiment-with-transparency (describing the Chinese Communist Party’s 2018 adoption of “Open Party Regulations” and noting that they mark the first time the CCP has “adopted rules requiring itself to be more transparent”).

¹³⁷ See ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 1 (2011) (observing that “[e]xcessive secrecy prevents federal agencies from sharing information internally, with other agencies, and with state and local law enforcement, making it more difficult to draw connections and anticipate threats” and that overclassification has been a problem in the United States government for decades).

¹³⁸ See HUMAN RIGHTS IN CHINA, STATE SECRETS: CHINA’S LEGAL LABYRINTH 29 (2007) (“While access to evidence in cases where the defendant is charged with state secrets will be restricted, evidence in other cases may also be restricted under this provision, because there is nothing to suggest that only state secrets crimes fall under the term ‘involving state secrets.’”); *id.* at 37 (“State secrets regulations provide a pretext for information cover-ups, including information that deals with official corruption and that may embarrass officials if made public.”).

¹³⁹ Memorandum of Understanding Between the United States Securities and Exchange Commission and the China Securities Regulatory Commission Regarding Cooperation, Consultation, and the Provision of Technical Assistance, Apr. 28, 1994, https://www.sec.gov/about/offices/oia/oia_bilateral/china.pdf (“Where the provision of assistance would be contrary to the public interest of the State of an Authority, such assistance may be denied.”). Unlike the MLAA, the MOU is facially forthcoming about its nonbinding status. See *id.* (“This Memorandum of Understanding is a statement of the intent of the Authorities and does not create any binding international legal obligations.”).

¹⁴⁰ See generally Classified Information Procedures Act, 18 U.S.C. app. III §§ 1–16 (1980) (defining trial procedures in cases involving classified information and authorizing measures such as redaction and substitute statements). Section 6(e) provides that, when a defense depends on disclosure of state secrets, the court may dismiss or otherwise reform the case in the interest of justice.

¹⁴¹ *United States v. Abu-Jihaad*, 630 F.3d 102, 140–41 (2d Cir. 2010) (citations omitted). This privilege applies if “(1) there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged, and (2) the privilege is lodged by the head of the department which has control over the matter” *Id.* at 141 (quoting *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008)).

way’ when the information ‘is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.’”¹⁴²

Perhaps most importantly, a country may deny assistance when it “relates to a political offense or the request is politically motivated or there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing, or otherwise proceeding against a person on account of the person’s race, religion, nationality, or political opinions.”¹⁴³ There is “no precise definition” of a political offense.¹⁴⁴ American federal courts have noted the ambiguity of the term in international agreements and have interpreted it according to negotiation, ratification, and subsequent history.¹⁴⁵ As with state secrets, an exception for political offenses can be troubling if either party uses it as a smokescreen for a lack of cooperation. Perhaps in anticipation of such denials, the MLAA requires that central authorities consult before rejecting requests, and rejections must be explained.¹⁴⁶ Delaying action upon a request does not require consultation or explanation, and these procedures may incentivize informal delays. The MLAA states that the receiving party “shall promptly execute the request or arrange for its execution through the appropriate competent authorities,” and “do everything in its power to execute the request.”¹⁴⁷ However, the text of the MLAA leaves these terms undefined. The MLAA also places costs of complying with requests upon the party completing the request, further disincentivizing cooperation.¹⁴⁸

¹⁴² *Aref*, 533 F.3d at 79 (quoting *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957)). This standard is an even lower bar to clear than *Brady v. Maryland*, 373 U.S. 83 (1963). *Aref*, 533 F.3d at 80 (“To be helpful or material to the defense, evidence need not rise to the level that would trigger the Government’s obligation under *Brady v. Maryland* . . . to disclose exculpatory information.” (citations omitted)).

¹⁴³ U.S.-P.R.C. MLAA, *supra* note 6, art. 3, ¶ 1(d).

¹⁴⁴ ADB/OECD REPORT, *supra* note 80, at 51.

¹⁴⁵ See, e.g., *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000) (construing the Vienna Convention and the Bilateral Convention on Consular Relations with the People’s Republic of China as follows: “To the extent that the treaties’ terms are ambiguous with respect to the issue before us, we will rely upon nontextual sources ‘such as the treaty’s ratification history and its subsequent operation’” (quoting *United States v. Stuart*, 489 U.S. 353, 366 (1989))).

¹⁴⁶ See U.S.-P.R.C. MLAA, *supra* note 6, art. 3, ¶¶ 2–3 (requiring that, before denial of assistance, the two central authorities “shall consult . . . to consider whether assistance may be granted subject to such conditions as [the Requested Party] deems necessary” and that, if refusal still follows, the refusing country “shall inform the Central Authority of the Requesting Party of the reasons for the refusal”).

¹⁴⁷ *Id.* art. 6, ¶ 1.

¹⁴⁸ See *id.* art. 6, ¶ 2 (providing that the party producing documents and evidence “shall make all necessary arrangements for and meet the costs of the representation” of the other country in the producing party’s territory). But see *id.* art. 20 (listing exemptions including

Because of the tolling of statutes of limitations, delays do not necessarily prejudice investigations.¹⁴⁹ A prosecutor can invoke the tolling by motion without ever providing exact copies of MLAA requests, and a federal judge can issue a tolling order after an *ex parte* hearing without providing notice to a defendant.¹⁵⁰ The government need only provide “enough evidence to prove that it submitted the Request.”¹⁵¹ With delays potentially spanning years, excessive tolling may implicate speedy trial and due process concerns.¹⁵² These issues apply to MLATs generally; in one case, a judge overturned a conviction after discovering that the statute of limitations had been improperly tolled when the government could not prove that it had sent an MLAT request.¹⁵³ However, because MLATs do not offer any support or protection to targets or defendants who may seek to bolster their cases,¹⁵⁴ the MLAA is no different. By its terms, it only allows for government requests, and it expressly does not create a private

witness travel expenses, expert fees, and translation, which shall be borne by the requesting party).

¹⁴⁹ See 18 U.S.C. § 3292 (2012) (allowing for tolling of the statutes of limitations in cases where evidence must be retrieved from abroad).

¹⁵⁰ See Rush & Kephart, *supra* note 29, at 3 (“Although obtaining a tolling order requires judicial approval, the hearing will be *ex parte* and the potential defendant has no right to notice. Tolling will continue for up to three years or until the foreign government takes its final action on the request.”).

¹⁵¹ *United States v. USPLABS, LLC*, 338 F. Supp. 3d 547, 578 (N.D. Tex. 2018). A preponderance of the evidence standard governs the court’s finding of fact as to whether MLAT requests have actually been sent. See *United States v. Wilson*, 249 F.3d 366, 373 (5th Cir. 2001) (“[T]he plain language of the statute requires the district court to decide by a preponderance of the evidence whether the statute of limitations shall be tolled.”), *abrogated on other grounds by* *Whitfield v. United States*, 543 U.S. 209 (2005); see also *United States v. Wilson*, 322 F.3d 353, 361–62 (5th Cir. 2003) (holding that the district court was mistaken in finding by a preponderance of the evidence that the government had sent a request to the Bahamian government pursuant to an MLAT).

¹⁵² See FUNK, *supra* note 36, at 15 (suggesting that judicial involvement limiting the government’s case may be warranted to facilitate more expeditious MLAT proceedings when delays “have an impact on the management of a domestic case or present speedy trial issues”).

¹⁵³ See *Wilson*, 322 F.3d at 361–62 (reversing a conviction and vacating the defendant’s sentence when the district court improperly tolled the statute of limitations for an MLAT request that was never sent); see also 18 U.S.C. § 3292 (2012) (allowing for the federal government to apply for tolling of the statute of limitations before indictment in federal district court when prosecutors demonstrate by a preponderance of the evidence that they made an official request and that the evidence reasonably could be located abroad). A qualifying request can include “a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.” *Id.* § 3292(d).

¹⁵⁴ See Rush & Kephart, *supra* note 29, at 1 (describing MLATs as “a little known but very powerful” prosecutorial tool for obtaining evidence from abroad but “unabashedly one-sided, offering no assistance to defendants involved in cross-border investigations”).

cause of action or an official mechanism for defendants to request exculpatory evidence abroad.¹⁵⁵

The lack of a court remedy is not unique to the MLAA. Courts have observed that treaties, negotiated between sovereigns on their own behalves as independent governments, “do not generally create rights that are privately enforceable in the federal courts.”¹⁵⁶ Defendants attempting to assert private causes of action have almost uniformly failed, with courts often pointing to disclaimers of private rights in treaty text.¹⁵⁷ The MLAA does provide that potential witnesses may assert immunity, incapacity, or privilege under the laws of the requesting party. However, it also requires that “the evidence taking shall not be impeded,”¹⁵⁸ thus often relying on exclusion of the evidence only after the fact of production to afford the witness the asserted immunity, incapacity, or privilege. Universal compliance is difficult to ensure between differing legal systems¹⁵⁹—foreign courts are ill-suited to assess whether evidence meets another country’s procedural standards, and active monitoring is prohibitively burdensome.

This can create an imbalance in criminal cases, when there is no obligation beyond the constitutional baseline for a prosecutor to obtain exculpatory evidence from abroad. Actual requests for exculpatory evidence risk misinterpretation on the producing party’s side, where, for example, a Chinese official in the Ministry of Public Security might not have experience to judge what impeachment evidence is. The opacity of the process can create difficulties for defendants, who do not know what evidence has been obtained through mutual legal assistance and cannot discern if obligations to turn over

¹⁵⁵ U.S.-P.R.C. MLAA, *supra* note 6, art. 1, ¶ 3 (“The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.”).

¹⁵⁶ *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000); *see also* *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (“A treaty is, of course, ‘primarily a compact between independent nations.’” (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884))).

¹⁵⁷ *See, e.g., In re Request from U.K. Pursuant to Treaty Between Gov’t of U.S. & Gov’t of U.K. on Mut. Assistance in Criminal Matters In Re Dolours Price*, 685 F.3d 1, 11–12 (1st Cir. 2012) (finding that the U.S.-U.K. MLAT expressly did not create private rights and that “[o]ther courts considering MLATs containing terms similar to the US–UK MLAT here have uniformly ruled that no such private right exists,” so the defendants could not move to quash subpoenas issued under the MLAT on the basis of allegedly deficient procedure).

¹⁵⁸ U.S.-P.R.C. MLAA, *supra* note 6, art. 9, ¶ 4.

¹⁵⁹ *See* Yue Ma, *The Amended Criminal Procedure Law of China: The Powers of the Police and the Rights of Criminal Suspects*, 53 CRIM. L. BULL. 5, 9–12 (2017) (describing the Chinese discretionary exclusionary rule and noting that “[t]he United States stands virtually alone in implementing a mandatory exclusionary rule; whereas all other countries implement a discretionary rule”).

exculpatory evidence have been met.¹⁶⁰ These concerns apply to MLAT procedure at large. Some commentators have argued that due process requires that defendants be able to benefit from MLAT requests in all cases, or at least all cases where prosecutors can do the same.¹⁶¹ Others have suggested that, because MLATs do not limit motives for requests, prosecutors should use the process to procure exculpatory evidence for the defense.¹⁶² In extraordinary situations, prosecutors have indeed done so and made MLAT requests on defendants' behalves.¹⁶³

When defendants attempt to challenge MLAA-procured evidence on procedural grounds, neither the defendant nor the court has any grounds on which to mount a meaningful objection, leaving the defendants powerless to rebut the presumption of validity.¹⁶⁴ In one case, a district judge faced with such a challenge, rather than review the MLAA procedures, wrote that "because Defendants have not been provided with the actual Request, their argument that the Government did not wholly comply with the MLAA's requirements for making an official request is speculative."¹⁶⁵ Something similar happened in the Bank of China case, when defendant Xu Guojun objected to the introduction into evidence of documents from Hong Kong, arguing that the United States had violated its MLAT with Hong Kong.¹⁶⁶ Though a well-informed court may not have ultimately

¹⁶⁰ See Lyman, *supra* note 34, at 283–84 (observing how there are few meaningful checks on prosecutors' treatment of exculpatory evidence obtained—or not—through MLATs); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (establishing that due process creates an obligation for prosecutors to furnish exculpatory evidence upon the defense).

¹⁶¹ See Lyman, *supra* note 34, at 287 ("The obvious solution is to order, where a defendant can make some threshold showing of materiality and favorableness, that the defendant be granted access to MLAT procedures.").

¹⁶² See Farbiarz, *supra* note 43, at 680 (arguing that due process might require prosecutors to obtain evidence from abroad on the defense's behalf because "MLATs do not generally limit *why* the United States might make a given request"). Farbiarz argues that the added costs to the government are justified by the high stakes for the defendant, as compared to the government "which can have no legitimate interest in securing a conviction of a defendant who, on a reasonably fuller record, would have been acquitted." *Id.* at 681–82.

¹⁶³ *Id.* at 680–81 ("And, indeed, there are ample indications that prosecutors sometimes make MLAT requests for defendants, especially when pressed." (citing *United States v. Marteau*, 162 F.R.D. 364, 372 & n.5 (M.D. Fla. 1995))). *But see* *United States v. Jefferson*, 594 F. Supp. 2d 655, 673 (E.D. Va. 2009) ("[I]t is clear that defendant is not entitled to make use of the MLA Treaty and that this result does not violate defendant's constitutional right to compulsory process.").

¹⁶⁴ See *United States v. USPLABS, LLC*, 338 F. Supp. 3d 547, 576–78 (N.D. Tex. 2018).

¹⁶⁵ *Id.*

¹⁶⁶ See Defendant Guo Jun Xu's Response to United States' Motion in Limine to Admit Rule 15 Depositions at 4, *United States v. Guo Jun Xu*, No. CR-S-02-674-PMP(LRL), 2005 WL 6305003 (D. Nev. Dec. 12, 2005) (documenting the defendant's objection to evidence based on allegations that the government had not followed the requirements of the MLAT

concluded that these challenges had any merit, it is hard to see how even a meritorious claim can rebut the presumption of procedural validity. The MLAA is nonexclusive and expressly contemplates that the two governments may use other means of providing assistance, such as “through the provisions of other applicable international agreements,” “through the provisions of its national laws,” or “pursuant to any other agreement, arrangement, or practice which may be applicable.”¹⁶⁷ Some statutory schemes like the Foreign Corrupt Practices Act include jurisdictional and evidentiary provisions both intended to get around the problem of gathering evidence abroad, and emphasize transnational cooperation.¹⁶⁸ When there is no such statute to facilitate an investigation, however, law enforcement may turn to informal means, which can have even less accountability and transparency than a typical MLAT request.¹⁶⁹

The inefficiencies in collecting cross-border evidence incentivize alternate solutions, and, “[w]ithout better and faster ways to collect cross-border evidence, countries will be tempted to take unilateral actions to deal with a fundamentally multilateral problem.”¹⁷⁰ This can include, for example, attorneys from a U.S. Attorney’s Office reaching out to a material witness’s counsel in China to arrange an interview. When this happened in a 2015 case, the witness’s counsel advised him that “he would be violating Chinese law if he submitted to an interview by U.S. prosecutors unless the interview took place according to [the MLAA].”¹⁷¹ Ad hoc negotiations on a personal level

with Hong Kong when the government did not provide a copy of the request to the defendant).

¹⁶⁷ U.S.-P.R.C. MLAA, *supra* note 6, art. 21.

¹⁶⁸ See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 997–1001 (2012) (describing congressional concern with government enforcement burdens in the legislative history of the FCPA); see, e.g., H.R. REP. NO. 95-640, at 18–19 (1977), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf> (describing the difficulties of finding evidence of bribery and corruption abroad and the need for cooperation with foreign governments in order to obtain such evidence).

¹⁶⁹ See *MLAT: A Four-Letter Word in Need of Reform*, *supra* note 15 (“After all, why would anyone go through layers of bureaucracy and months of waiting when they can just call a friend in another country? And when things are done through informal processes, there is usually little to no transparency or accountability.”).

¹⁷⁰ Walker, *supra* note 48.

¹⁷¹ *In re Grand Jury Investigation 2011R00774*, No. 11-CR-90758 JSC, 2015 WL 3630526, at *1 (N.D. Cal. June 10, 2015). Though the U.S. government agreed to make the formal request in this case, “[t]he record does not reflect that the government ever responded to Mr. Zhuang’s counsel’s letter or that it did anything further with respect to its request to interview Mr. Zhuang.” *Id.*; see also *id.* (documenting a different material witness’s travel difficulties “because the United States did not formally request [their] presence to testify pursuant to [the MLAA]” (citations omitted)). Corporate defendants tend to be better equipped to respond to government inquiries. In civil and criminal

are not as predictable as a regimented process, and whether a prosecutor obtains evidence can depend more on individual discretion and relationship-building than on the merits of a request.

C. *What We Do in the Shadows of the Law: Ad Hoc Extradition*

The relationship between the United States and China is unique because the countries lack an extradition treaty but still, in some circumstances, endeavor to cooperate. The United States has extradition treaties with over one hundred other nations and the European Union, but it lacks formal extradition procedures with China.¹⁷² Other countries that are not traditional allies of the United States, such as Russia, also lack extradition treaties but have MLATs with the United States.¹⁷³ The MLAA refers to assistance locating or identifying “persons,” but it only allows transfer of such persons for the purpose of giving evidence or assisting in investigations, not prosecution or imprisonment.¹⁷⁴

The general state of extradition to China is more complicated, often thanks to mistrust of Chinese criminal justice. For example, France negotiated an extradition treaty with China in 2007, but the French Parliament, facing lobbying from human rights groups, did not ratify the treaty and allow it to enter into force until 2015.¹⁷⁵ Australia also negotiated an extradition treaty in 2007, but the Australian Parliament shelved action on ratification in 2017, with some members citing fair trial concerns and a lack of appropriate safeguards for Australian citizens.¹⁷⁶ Canadian government officials have expressed

enforcement matters involving China-based companies, the SEC and the DOJ may make an initial attempt to bypass diplomatic channels and instead “approach . . . in the first instance with voluntary disclosure requests.” Chan & Wright, *supra* note 122 (explaining how U.S. law enforcement, lacking “formalized procedures” in transnational investigations “are left with the traditional poles of evidence gathering—a request for voluntary disclosure or, if the company has some presence in the United States, a subpoena”); see, e.g., Richard L. Cassin, *Feds Open New GSK China Bribery Investigation*, FCPA BLOG (Feb. 8, 2018), <http://www.fcpablog.com/blog/2018/2/8/feds-open-new-gsk-china-bribery-investigation.html> (“GlaxoSmithKline said in a securities filing Wednesday that the DOJ and SEC asked for information about third-party advisers the company hired in China during a corruption investigation there.”).

¹⁷² See 18 U.S.C. § 3181 (2019) (listing the United States’ bilateral extradition treaties).

¹⁷³ See *id.*; INT’L NARCOTICS & LAW ENF’T AFFAIRS REPORT, *supra* note 31, at 20.

¹⁷⁴ See U.S.-P.R.C. MLAA, *supra* note 6, art. 1, ¶¶ 2(f), (i). Transfer of persons in custody requires the consent of both governments and the person, return independent of extradition requests, and time-served credit for the person in their sending country. See *id.* art. 12.

¹⁷⁵ See Extradition Treaty Between the French Republic and the People’s Republic of China, Fr.-P.R.C., Mar. 20, 2007, No. 53645* (noting entry into force on July 17, 2015).

¹⁷⁶ See Media Release, Minister for Foreign Affairs, China Extradition Treaty (Mar. 28, 2017), https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5182624/upload_binary/5182624.pdf; Stephen Dziedzic, *Australia-China Extradition Treaty Pulled by*

reluctance even to negotiate an extradition treaty until Chinese criminal procedure improves, though the Canadian government has deported individuals to China on an ad hoc basis.¹⁷⁷

The prospect of extradition to China can even be explosive, such as in the case of a now-withdrawn proposed bill in Hong Kong, popularly known simply as the extradition bill. The bill, introduced in early 2019, would allow detention and extradition of people from countries that lack formal extradition agreements with Hong Kong, including mainland China.¹⁷⁸ The plan received wide criticism from both within and without Hong Kong. For example, the Hong Kong Bar Association did not support the bill initially and expressed “concerns over the significant differences between the judicial and criminal justice systems practised in Hong Kong and the Mainland in terms of protection of fundamental human rights.”¹⁷⁹ Subsequent revisions did not allay these concerns.¹⁸⁰ The U.S. Congressional-Executive Commission on China introduced legislation in both chambers reaffirming the United States’ commitment to Hong Kong’s autonomy, with sponsors commenting that the extradition bill would erode the

Federal Government After Backbench Rebellion, ABC NEWS (Mar. 27, 2017, 9:55 PM), <https://www.abc.net.au/news/2017-03-28/government-pulls-australia-china-extradition-treaty/8392730> (describing the concerns of some opposing Australian MPs “that people extradited to China would not be able to secure a fair trial” and skepticism “that safeguards within the agreement will offer sufficient protection to Australians deported there”).

¹⁷⁷ See Nathan Vanderklippe, *Canada ‘a Long, Long’ Way from China Extradition Deal*: McCallum, GLOBE & MAIL (Apr. 3, 2017), <https://www.theglobeandmail.com/news/world/canada-a-long-long-way-from-china-extradition-deal-mccallum/article34560846> (discussing Canada’s then-ambassador to China’s belief that “Canada remains far from formally discussing an extradition treaty with China” and commenting on the Canada Border Services Agency’s deportation of 1386 people to China between 2014 and 2017).

¹⁷⁸ See Mike Ives, *What Is Hong Kong’s Extradition Bill?*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/world/asia/hong-kong-extradition-bill.html> (outlining the bill’s essential elements and describing widespread protests of the bill in Hong Kong).

¹⁷⁹ CitizenNews Reader, *Observations of the Hong Kong Bar Association on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, HKCNEWS.COM (Apr. 2, 2019), https://www.hkcnews.com/article/19529/bar_association-fugitives_bill-19529/observations-of-the-hong-kong-bar-association-on-the-fugitive-offenders-and-mutual-legal-assistance-in-criminal-matters-legislation-amendment-bill-2019.

¹⁸⁰ *Id.*

democratic values and protection of human rights.¹⁸¹ The Commission also urged Hong Kong executive Carrie Lam to withdraw the bill.¹⁸²

Most notably, hundreds of thousands—if not millions—of people in Hong Kong turned out in a series of mass protests against the bill.¹⁸³ The protests began in early June and have continued without any signs of abatement, as of writing in late September.¹⁸⁴ Though other governments do not share Hong Kong's concerns with political autonomy, the Hong Kong people's concern for human rights is generalizable to other states considering extradition agreements with China, including the United States. Without contemplation in the MLAA or an independent extradition treaty, return of fugitives between the United States and China happens on an ad hoc basis. Commentators have indicated the view that an extradition treaty with China is likely "off the table" until the United States is satisfied that the Chinese justice system sufficiently protects the rights of criminal defendants.¹⁸⁵ This reluctance may also help explain the MLAA's non-treaty status. Nevertheless, the United States is willing to work with China in service of its own law enforcement goals, for example in securing the return of University of Washington firebombing suspect, American Justin Solondz, who was serving time in Chinese prison for unrelated drug crimes.¹⁸⁶ The parties stipulated in Solondz's plea as to the

¹⁸¹ See S. 1838, 116th Cong. § 1(D)(3) (2019) (affirming the United States' commitment to Hong Kong's autonomy); H.R. 3289, 116th Cong. § 1(D)(3) (2019) (same); Press Release, Cong.-Exec. Comm'n on China, Commissioners Reintroduce the Hong Kong Human Rights and Democracy Act (June 13, 2019), <https://www.cecc.gov/media-center/press-releases/commissioners-reintroduce-hong-kong-human-rights-and-democracy-act> (commenting that the extradition bill would undermine democratic values and human rights).

¹⁸² See Holmes Chan, *More Int'l Criticism of Hong Kong's Controversial Extradition Bill, as Legislature Caves to Gov't Demands*, H.K. FREE PRESS (May 25, 2019, 9:24 PM), <https://www.hongkongfp.com/2019/05/25/intl-criticism-hong-kongs-controversial-extradition-bill-legislature-caves-govt-demands> (quoting representatives from the United States Congressional-Executive Commission on China asking Carrie Lam to withdraw the extradition bill).

¹⁸³ See *Hong Kong's Descent to Emergency Rule: 118 Days of Unrest*, BLOOMBERG (Aug. 16, 2019, 12:00 AM), <https://www.bloomberg.com/graphics/hong-kong-protests-timeline> (providing a timeline of protests, including estimates of protest attendance ranging from 128,000 to 1.7 million).

¹⁸⁴ See *id.*

¹⁸⁵ See Shannon Tiezzi, *US 'Top Destination' for China's Fugitive Officials*, DIPLOMAT (Aug. 11, 2014), <https://thediplomat.com/2014/08/us-top-destination-for-chinas-fugitive-officials> ("A broader problem, (and indeed one of the major obstacles to an extradition treaty) is U.S. concern with the Chinese justice system—particularly its safeguards (or lack thereof) for defendant's rights. . . . At present, an extradition treaty is off the table. . . ."). See generally McCormack, *supra* note 16 (assessing the prognosis for an extradition treaty between the United States and China circa 2009).

¹⁸⁶ See John de Leon, *Firebomb Maker Gets 7 Years for 2001 UW Arson*, SEATTLE TIMES (Mar. 16, 2012), <http://blogs.seattletimes.com/today/2012/03/firebomb-maker-gets-7>

remainder of his Chinese sentence.¹⁸⁷ This case may have informed Jeff Sessions's later remark, when announcing DOJ's China Initiative, that "China cannot be a safe haven for criminals who run to China when they are in trouble, never to be extradited."¹⁸⁸

Ad hoc extradition from the United States to China occurs based on the State Department's determination that extradition would not lead to violations of individual rights.¹⁸⁹ Chinese authorities have chafed at the "complex and lengthy legal procedures" needed to repatriate Chinese fugitives and have called an extradition treaty with the United States "essential" towards the Chinese goal of greater repatriation.¹⁹⁰ Chinese government efforts, such as Operations Foxhunt and Skynet, have increased pressure on alleged offenders abroad, though it is possible that some of these targets are victims of political persecution.¹⁹¹ Most of the individuals the Chinese government identified as "Top 100" fugitives are suspected to have fled to the United States or Canada, giving China a particular interest in working with the United States on a more stable solution.¹⁹² Until recently, repatriation of Chinese nationals from the United States was rare.¹⁹³ American officials returned Yu Zhendong to China to serve his sentence after he

years-for-2001-uw-arson (describing Solondz's arrest "after his expulsion from China, where he had been serving a prison term for selling drugs").

¹⁸⁷ See Plea Agreement at 4, United States v. Solondz, No. 05CR05828, 2011 WL 7639999 (W.D. Wash. Dec. 20, 2011) ("The parties further agree that they each will recommend that this sentence be consecutive to the criminal sentence that Defendant served in China.").

¹⁸⁸ Jeff Sessions, Remarks as Prepared for Delivery, Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage (Nov. 1, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>.

¹⁸⁹ Yan, *Crackdown*, *supra* note 78 (quoting a State Department official's statement that, as a requirement for extradition, the government "must be satisfied that an individual extradited from the United States to another country would receive a fair trial and not be subject to torture or other forms of mistreatment in that country"); see also Lewis, *supra* note 16, at 84–85 ("[H]uman rights concerns are arguably better served if countries do not enter into extradition treaties with China.").

¹⁹⁰ Tiezzi, *supra* note 185 (quoting the statement of Ministry of Public Security official Liao Jinrong).

¹⁹¹ See Fullerton, *supra* note 79. Many of these individuals are fleeing alleged financial crimes. *Id.* (describing the opinion of Xue Lei, an international law specialist at the Shanghai Institutes for International Studies, that "most of the names on China's hit list stand accused of financial crimes, making them more likely to be liable under money laundering laws in their new host country," with the effect of "ratchet[ing] up the pressure").

¹⁹² Zhang Yan, *China Releases Wanted List for Worldwide Fugitive Hunt*, ST. COUNCIL, CHINA, http://english.gov.cn/news/top_news/2015/04/23/content_281475094239182.htm. Canada, like the United States, does not have an extradition treaty with China. See *supra* note 177 and accompanying text.

¹⁹³ See Tiezzi, *supra* note 185 (noting that China had only extradited and prosecuted two wanted individuals from the United States between 2004 and 2014).

negotiated a plea for his involvement in the Bank of China case.¹⁹⁴ Yu was “the first corrupt Chinese official to be repatriated since China ratified the United Nation’s [sic] Convention Against Corruption in October, 2005,”¹⁹⁵ but his repatriation “didn’t spark a new trend of trans-Pacific judicial cooperation.”¹⁹⁶ After Yu, there were no deportations until 2015 when the United States made several returns, including that of Yu’s co-conspirator Kuang Wanfang.¹⁹⁷ Though Kuang had already been convicted in the United States and was serving a prison sentence at the time, Chinese authorities indicated that they would investigate her further after her return.¹⁹⁸

It is possible that, with no extradition treaty in sight and in light of changing attitudes towards China, repatriation of Chinese nationals in custody will remain the exception rather than the rule. Many in the West have expressed deep skepticism of extradition requests from China, suggesting that some charges may simply be convenient ways to dispose of political enemies.¹⁹⁹ Famously, Tiananmen Square protesters sought refuge in the United States which protected them from extradition and likely long prison sentences and political persecution in China.²⁰⁰ Similarly, the United States refused to release Uyghur prisoners into Chinese custody from Guantanamo Bay (a facility that has faced its own scrutiny).²⁰¹

Since 2017, China has sought return of billionaire political dissident Guo Wengui, who has filed for asylum in the United States after alleging high-level corruption within the Chinese Communist Party. Guo denies the Chinese government’s allegations of his involvement

¹⁹⁴ See *United States v. Chao Fan Xu*, 706 F.3d 965, 973 (9th Cir. 2013).

¹⁹⁵ *Corrupt Banker Sentenced 12 Years in Prison*, *supra* note 8.

¹⁹⁶ Tiezzi, *supra* note 185.

¹⁹⁷ James T. Areddy, *U.S. Deports More Criminal Suspects to China*, WALL ST. J. (Sept. 24, 2015), <https://www.wsj.com/articles/another-chinese-fugitive-deported-by-u-s-1443087121>.

¹⁹⁸ See *US Repatriates “Sky Net” Economic Fugitive Kuang Wanfang to China*, CRI ENG. (Sept. 24, 2015), <http://english.cri.cn/12394/2015/09/24/3685s897299.htm> (reporting on the 2015 repatriation of Kuang Wanfang to China after she “had already been declared guilty and imprisoned in the U.S [sic] in 2001” and noting that “[h]er case will be further investigated by Chinese authorities”).

¹⁹⁹ *Cf.* Fullerton, *supra* note 79 (suggesting that Xi Jinping’s anti-corruption drive has “conveniently allowed him to strip power from his political enemies”).

²⁰⁰ See Tiezzi, *supra* note 185 (“After all, some of the most famous fugitives to come to the U.S. from China were leaders of the Tiananmen Square protests, who managed to escape from China in the aftermath of the military crackdown. They would have faced lengthy prison sentences had they been extradited to China.”).

²⁰¹ See *id.* (“The U.S. even refused to repatriate Uyghur prisoners in Guantanamo Bay back to China, citing human rights concerns (somewhat ironic given Guantanamo’s own dismal record in that regard).”).

in over a dozen crimes.²⁰² The lengths to which the Chinese government has gone to attempt to retrieve Guo, including sending agents into the United States in violation of their tourist visas and vigorously demanding extradition from the White House, have exceeded a proportionate response for Guo's alleged criminal offenses and suggest that China views Guo as a political threat.²⁰³ The incident likely informed the DOJ's renewed focus on the Foreign Agents Registration Act in creation of the China Initiative.²⁰⁴ These and other actions have caused great concern for the Congressional-Executive Commission on China, which recommended in 2018 that the United States "stop all cooperation on the extradition of Chinese nationals who have fled to avoid pending corruption charges until a law enforcement agreement can be signed that guarantees verifiable due process protections and an end to torture in detention and all forms of arbitrary detention," particularly in light of the new Supervision Law of China.²⁰⁵ The explicit relationship between the Party, the Chinese government, and the judiciary raises further concerns.²⁰⁶

²⁰² See *Most-Wanted Chinese Tycoon Applies for US Political Asylum*, CNBC (Oct. 2, 2017), <https://www.cnbc.com/2017/09/08/most-wanted-chinese-tycoon-applies-for-us-political-asylum.html>.

²⁰³ See Lauren Hilgers, *The Mystery of the Exiled Billionaire Whistle-Blower*, N.Y. TIMES MAG. (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/magazine/the-mystery-of-the-exiled-billionaire-whistleblower.html> (profiling Guo Wengui and quoting Professor Minxin Pei, who believes that China's extreme reaction suggests that Guo, who has made accusations of varying levels of believability about corruption within China's ruling elite, may have important information and "must mean something to the government").

²⁰⁴ China Initiative Fact Sheet, *supra* note 78 (listing as a goal of the China Initiative that the DOJ will "[a]pply the Foreign Agents Registration Act to unregistered agents seeking to advance China's political agenda, bringing enforcement actions when appropriate").

²⁰⁵ CONG.-EXEC. COMM'N ON CHINA, *supra* note 20, at 14–15; see also *China: New Supervision Law a Systematic Threat to Human Rights*, AMNESTY INT'L (Mar. 20, 2018, 3:18 PM), <https://www.amnesty.org/en/latest/news/2018/03/china-new-supervision-law-threat-to-human-rights> (criticizing the Supervision Law's violations of human rights and lack of accountability). See generally *Zhonghua Renmin Gongheguo Jiancha Fa* (中华人民共和国监察法) [Supervision Law of the People's Republic of China] (promulgated by the first meeting of the 13th Session of the Nat'l People's Cong., Mar. 20, 2018) (authorizing investigative methods such as extrajudicial confinement without charge, legal process, or assistance of counsel).

²⁰⁶ See Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 320, 390 (2019) ("China has recently garnered attention for sending its agents into other countries to surveil, intimidate, and even attempt to kidnap Chinese fugitives there. This means that more individuals worldwide will be brought before a judiciary that does not even conceive of itself as independent.").

D. *The MLAA Will Likely Remain in Legal Limbo*

Because of various obstacles to either formal or informal modifications, changes are unlikely to occur, rendering the resolution of these outstanding issues unlikely. The MLAA does not require congressional involvement in modifications and “may be modified at any time by mutual written agreement between the Parties.”²⁰⁷ It also may be terminated unilaterally “at any time by means of written notice to the other Party through the diplomatic channel.”²⁰⁸ In the most extreme case, the parties could abandon the MLAA entirely, leading mutual legal assistance between the United States and China to become more like the current extradition process: unpredictable, unaccountable, and subject to individual, unmonitored discretion. Given the dissatisfaction that both the United States and China have expressed towards the current state of extradition proceedings, extradition is a poor model for other law enforcement cooperation. Another path forward for the MLAA could be development into a formal MLAT after a two-thirds vote in the Senate, bringing it in line with the United States’ agreements with other countries.²⁰⁹ This is unlikely when Senate leaders have expressed skepticism of Chinese law enforcement,²¹⁰ and President Trump continues to escalate trade tensions with China.²¹¹

Because of the broad consensus that the MLAT process generally needs improvement,²¹² formalizing the MLAA as an MLAT would

²⁰⁷ U.S.-P.R.C. MLAA, *supra* note 6, art. 23(3).

²⁰⁸ *See id.* art. 23(2). The MLAA does not specify the authority within each government with the power to deliver such notice. By default, this is likely to be the designated Central Authority (the DOJ in the United States), but the vagueness of the text leaves the door open for Congress to pass a statute or resolution that abrogates the MLAA, similar to treaty modifications or repeals. *Cf.* *Head Money Cases*, 112 U.S. 580, 598–99 (1884) (establishing the principle that an act of Congress, signed by the President, can modify a treaty negotiated by the President and Senate).

²⁰⁹ *See* U.S. CONST. art. III, § 2, cl. 2.

²¹⁰ *See generally* CONG.-EXEC. COMM’N ON CHINA, *supra* note 20 (expressing a distrust of Chinese law enforcement).

²¹¹ *See* Swanson, *supra* note 94 (describing escalating trade tensions between the United States and China).

²¹² *See, e.g.*, Farbiarz, *supra* note 43, at 680 (proposing that MLATs, “widely thought of as tools that only prosecutors can use,” should be extended to offer defendants a wider range of evidence); Kent, *supra* note 106 (detailing the long process of obtaining information through MLATs, as well as the issues that arise “when a crime is not a crime in both countries”); Lyman, *supra* note 34, at 262 (arguing that the imbalance MLATs create in evidence-gathering power “offends the Compulsory Process Clause of the Sixth Amendment”); *MLAT: A Four-Letter Word in Need of Reform*, *supra* note 15 (highlighting the difficulties the MLAT system has with keeping up with “the pace and complexity of data transfers across multiple jurisdictions”); Walker, *supra* note 48 (“Without better and faster ways to collect cross-border evidence, countries will be tempted to take unilateral actions to deal with a fundamentally multilateral problem.”).

leave many issues unaddressed. It is also likely to have little practical effect because of how similarly the MLAA is already treated to an MLAT.²¹³ Some efforts at improving the MLAT process have taken place,²¹⁴ and broadly-worded language of statutory changes can encompass non-MLAT assistance requests, including the MLAA.²¹⁵ Despite these efforts, problems remain. Advocacy groups have suggested additional measures including regular government transparency reports providing information on incoming and outgoing MLAT requests and providing public guidance on information subject to requests and procedural safeguards.²¹⁶ Other proposals suggest streamlining the process and building expedited MLAT mechanisms for trusted nations, with private rights of action as a way both to increase transparency and ensure compliance.²¹⁷ Ultimately, many stakeholders have an interest in improving cross-border evidence collection, “including not just law enforcement and national security perspectives, but also . . . citizens, civil society groups and providers of information services that cross national borders.”²¹⁸

A new defining incident in the law enforcement relationship between the United States and China could be the development of the high-profile case against Chinese tech giant Huawei and its CFO, Meng Wanzhou, who was arrested in Canada and indicted in the

²¹³ See, e.g., *United States v. Xu Chaofan*, No. 2:02-CR-00674-PMP-LRL, 2006 WL 8425631, at *2 (D. Nev. Apr. 3, 2006) (treating the MLAA identically to the United States’ MLAT with Hong Kong).

²¹⁴ Congress passed the Foreign Evidence Request Efficiency Act in 2009 to provide statutory tools for helping the United States complete incoming MLAT requests. See 18 U.S.C. § 3512 (2012) (clarifying procedures for foreign assistance requests and authorizing federal judges to issue “such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses” and related proceedings). The Obama White House later identified the increasing “concentration of U.S.-based cloud storage providers” as a factor driving greater numbers of MLAT requests to the United States and noted the need to “speed up and centralize MLAT processing” to keep pace, with a goal of cutting response time in half by the end of 2015. Press Release, White House, Office of the Press Sec’y, Fact Sheet: Review of U.S. Signals Intelligence (Jan. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/fact-sheet-review-us-signals-intelligence>. The White House increased funding and aimed to increase efficiency, transparency, and “international outreach and training to help ensure that requests meet U.S. legal standards.” *Id.*

²¹⁵ See generally 18 U.S.C. § 3512 (2012) (referring to “requests” throughout without identifying specific authorizations for those requests).

²¹⁶ See *MLAT: A Four-Letter Word in Need of Reform*, *supra* note 15.

²¹⁷ See generally Yonatan L. Moskowitz, *MLATs and the Trusted Nation Club: The Proper Cost of Membership*, 41 *YALE J. INT’L L. ONLINE* 1, 2 (2016) (describing MLAT modification proposals that “generally try to build various mechanisms to induce more trust between parties so that individual requests can undergo less review in receiving states” and ways to balance the governmental expediency interests with concerns for individual rights).

²¹⁸ See Walker, *supra* note 48.

United States on charges of skirting sanctions against Iran.²¹⁹ In its early stages, the case already illustrated the growing gulf between the two countries.²²⁰ Official statements surrounding the arrest reflected the DOJ's newly tough stance on China, with then-Acting Attorney General Matthew G. Whitaker commenting that "China must hold its citizens and Chinese companies accountable for complying with the law."²²¹ President Trump even expressed a willingness to use Meng as a political bargaining chip.²²² With China's lack of interest in prosecuting its own prominent companies and executives, the MLAA is not likely to see use in this case. Just as with the Goldfish and Bank of China cases before it, the Huawei case may become a blueprint for cases to come.

CONCLUSION

As two of the largest and wealthiest countries in the world, the United States and China will continue to have a law enforcement relationship, regardless of the future of the MLAA. Still-developing cases, such as that of Meng Wanzhou, show that there remain areas where Chinese and American interests diverge and cooperation is not possible. Despite historical frustrations and distrust, the United States and China have attempted to follow a framework for law enforcement and have expressed an intention to continue following the framework and improving upon it. However, nearly twenty years on, further development of law enforcement cooperation has moved at a snail's pace, and many issues remain unresolved. The MLAA's inability to constrain each country from denying assistance and acting unilaterally proves that the MLAA is best understood as a longstanding statement of intent. Recent hostility has endangered any possibility that citizens of either country will see more efficiency or accountability in this relationship anytime soon.

²¹⁹ See Press Release, Dep't of Justice, Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Financial Fraud (Jan. 28, 2019), <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial>.

²²⁰ See Steven Arrigg Koh, *The Huawei Arrest: How It Likely Happened and What Comes Next*, JUST SECURITY (Dec. 10, 2018), <https://www.justsecurity.org/61799/huawei-arrest-happened> (describing Meng's arrest as a "foreign affairs prosecution," or one "characterized by prosecutorial decisions with foreign policy ramifications").

²²¹ Press Release, *supra* note 219.

²²² See Carol Morello, *Canadian and U.S. Diplomats Say Politics Has No Place in Extradition of Chinese Executive*, WASH. POST (Dec. 14, 2018), https://www.washingtonpost.com/world/national-security/canadian-and-us-diplomats-say-politics-has-no-place-in-extradition-of-chinese-executive/2018/12/14/79732690-ffc7-11e8-ad40-cdf0e0dd65a_story.html.