The fate of criminal defendants in China remains a roadblock to some forms of international legal cooperation, especially extradition. Some countries are finding mutual benefit in sharing evidence with China on transnational cases, but difficult human rights concerns remain.

In 1999, Lai Changxing, the alleged mastermind behind a multi-billion dollar smuggling and bribery operation in the port city of Xiamen, fled the People’s Republic of China for Canada. The Chinese government has been trying to secure his return ever since. On April 5, 2007, the Canadian courts handed Lai, his ex-wife and their children a victory when a federal judge granted the applications for judicial review of their removal orders. The family remains in Vancouver.

In another recent headline-grabbing case, China is seeking the return from Canada of Gao Shan, the former head of a Bank of China branch in the northeastern city of Harbin. Gao allegedly diverted one billion yuan ($130 million) from customers’ accounts to Canada between 2002 and 2004. Canadian authorities arrested Gao in February 2007 on charges that he lied on his immigration forms when entering Canada.²

Meanwhile, south of the border, four Chinese nationals await trial in Las Vegas on charges of racketeering, money laundering and fraud stemming from a complex plan to defraud the Bank of China of a reported $485 million.³ A fifth participant in the scheme earlier entered a guilty plea and returned to China, where he was convicted of embezzlement and related charges.

Lai, Gao and the participants in the Bank of China case may be among the most notorious fugitives from China, but they are far from the only ones. The official Xinhua News
Crime in China has taken on an increasingly transnational dimension. Agency quoted sources from the Ministry of Public Security as saying that “800 suspects at large abroad were wanted for economic crimes. They are accused of embezzling a total sum of almost 70 billion yuan (US$8.75 billion).” And these are just the fugitives accused of economic crimes. According to the same report, China has brought back only about 70 criminal suspects from foreign countries since 1998.

Undeniably, crime in China has taken on an increasingly transnational dimension. In part this is due to the cross-border nature of certain crimes, such as smuggling and drug trafficking. In other situations, the crimes are committed solely within China but the suspects flee, sometimes with the alleged fruits of the crime in hand. In either case, there is a need for cooperation between Chinese and foreign law enforcement and judicial authorities. This cooperation comes in many forms. China’s Ministry of Justice lists three major avenues for cooperation in criminal matters: 1) bilateral judicial-assistance treaties, 2) multilateral conventions with provisions on judicial assistance and extradition, and 3) cooperation in individual cases with countries that have not concluded a treaty with China. This article focuses on bilateral treaties and their relevance to the protection of human rights, including issues presented by politicized prosecutions, limits on criminal defendants’ access to evidence, and cases where criminal defendants may face the death penalty in China.

Bilateral judicial-assistance treaties

Bilateral treaties concerning criminal matters can be divided into two general types: mutual legal assistance treaties (MLATs) and extradition treaties. There is no reason that these two forms of cooperation cannot be combined in a single agreement, but the common practice of many countries, including China, has been to keep them separate. By the end of January 2007, China had signed a total of 86 legal assistance treaties with 52 countries, including 54 MLATs covering civil or criminal matters, 28 extradition treaties and four agreements for the transfer of sentenced persons. Already this year, China has signed a new MLAT with Pakistan and an extradition treaty with France; ratified extradition treaties with Namibia and Angola; and issued a joint statement with Japan on their intent to conclude an MLAT. In addition, previously signed MLATs with Australia and Spain have entered into force.

Both MLATs and extradition treaties allow for exceptions based on human rights concerns. Extradition treaties commonly contain provisions to protect people from being returned for political reasons—the so-called “political offense” exception. Likewise, MLATs usually provide that a country may deny assistance if the request relates to a political offense. The sufficiency of these safeguards, however, is a subject of increasing debate. For example, there are provisions to prevent an extradition from occurring, but not to protect those who are returned. One option is post-return monitoring, but as noted in more detail below, this is also subject to mounting criticism.

For the time being, human rights concerns are arguably better served if countries do not enter into extradition treaties with China, but rather adopt more flexible ways of
returning fugitives to China on a case-by-case basis while evolving norms develop more fully. Although an adaptable approach lacks the virtues of predictability and horizontal justice (whereby similarly situated suspects receive similar treatment), these drawbacks are outweighed by the need for discretion in individual cases. In any case, the lack of an extradition treaty does not mean that it will never be appropriate for a country to repatriate a fugitive to China. As described below, the United States recently returned a fugitive to China through a plea bargain acceptable to both the fugitive and the Chinese authorities.

MLATs, on the other hand, offer a more mutually advantageous option. For individual cases, they provide avenues to obtain evidence, including witness testimony, thus boosting the chances that the defendant will be able to more fully present his or her case. On a broader scale, they increase communication and promote interpersonal contacts that could facilitate international cooperation in the future. ¹⁰

This paper will first examine the positive options offered by legal cooperation under MLATs, specifically how the bilateral agreement between the United States and China was used in the Bank of China case. The paper will then turn to Lai Changxing case to examine the more troubling questions that extradition and other channels for returning fugitives raise in ensuring domestic compliance with international human rights protections, especially when suspects face the risk of torture and capital punishment.
Mutual legal assistance treaties

In September 2005, five witnesses gave testimony via a live video-conference from a hotel in Guangzhou for use in the Bank of China case pending in U.S. federal court. This was the first time that the Chinese government allowed the U.S. government to take a video deposition on the mainland for a criminal case. A U.S. Department of Justice (DOJ) lawyer who is involved intimately in the case heralded it as the “poster boy” for cooperation between the two countries.

This cooperation did not come about overnight. In a joint statement issued on October 29, 1997, during President Clinton’s state visit to China, the two countries announced that they would “strengthen cooperation in combating international organized crime, narcotics trafficking, alien smuggling, counterfeiting and money laundering. To this end, they intend to establish a joint liaison group for law enforcement cooperation composed of representatives of the relevant agencies of both governments. They agree to begin consultations on mutual legal assistance aimed at concluding a mutual legal assistance agreement.”

Following this call to action, legal cooperation between the U.S. and China took a significant step forward in 2000 with the signing of the Agreement between the Government of the People’s Republic of China and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (the U.S.-P.R.C. MLAA).

Both China and the United States have a history of using MLATs. They had also cooperated with each other on criminal matters prior to the existence of the U.S.-P.R.C. MLAA, but in an informal manner.

As is common with these types of agreements, the U.S.-P.R.C. MLAA addresses various forms of judicial assistance such as serving documents, taking testimony, providing documents, seizing evidence and locating and identifying persons (Art. 1). Separate articles elaborate the procedures for taking evidence in the other party’s territory (Art. 9); inviting people to appear to give evidence or assist with investigations (arts. 11, 12); providing records of government agencies (Art. 10); and executing requests for the inquiry, search, freezing and seizure of evidence (Art. 14).

When the need for any of these forms of assistance arises, the first step is for the central authority of one party to send a request to its counterpart. The central authorities designated by the U.S.-P.R.C. MLAA are the P.R.C. Ministry of Justice and the U.S. Attorney General (Art. 2). The U.S. Attorney General has delegated authority to DOJ’s Office of International Affairs (OIA), which “coordinates the extradition or other legal rendition of international fugitives and all international evidence gathering.”

If the request meets all requirements, the central authority will contact the relevant body to execute the request. In the United States, this generally entails contacting the U.S. Attorney’s office that has jurisdiction over the geographic area at issue. In China, the Ministry of Justice often enlists the help of the Ministry of Public Security. Problematically, the Ministry of Justice’s powers do not rival those of the public security authorities. This power imbalance is vividly illustrated by the inclusion of the Minister
of Public Security, Zhou Yongkang, in the Politburo of the Central Committee of the Chinese Communist Party, while neither the president of the Supreme People’s Court nor the Minister of Justice holds comparable rank. DOJ would effectively remove a bureaucratic hurdle if it were able to develop means of involving the Ministry of Public Security directly.  

Each party agrees to use “everything in its power” to execute requests promptly (Art. 6), but a party may deny assistance in certain circumstances, such as when the request relates to a purely military offense, or would prejudice public order or national security (Art. 3).

Of key importance to human rights concerns, a party may also deny assistance if the request relates to a “political offense” (Art. 3). Although the political offense exception is commonly built into MLATs, determining what qualifies as a political offense can be a nettlesome matter. A 2007 report by the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific  explains, “Although the concept of political offences is found in many arrangements, the definition of such offenses is usually nebulous. There is no consensus about its scope, and hence the application of this doctrine is unclear.”  

To lessen this confusion, the U.S.-P.R.C. MLAA uses a broad formulation by providing that a central authority may deny assistance if “the request 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” (Art. 3.1(d)). This expansive language gives considerable leeway when a party is confronted with a request that treads on any of the enumerated protected grounds. It also comports with language in the U.N. Model Treaty on Extradition, which was proposed by the Seventh and Eighth U.N. Congresses on the Prevention of Crime and the Treatment of Offenders in 1985 and 1990. Nonetheless, one cannot overlook the tit-for-tat implications of denying assistance. Governments are sensitive to the fact that if one party repeatedly or readily denies assistance, chances are that it will encounter greater push-back when the tables are turned.

THE BANK OF CHINA CASE

The transnational component of the Bank of China case came about after Xu Chaofan, Xu Guojun (unrelated to Xu Chaofan) and Yu Zhendong (collectively, the three managers) allegedly committed the initial crime of embezzling funds from the Kaiping City branch of the Bank of China where they all worked as managers. Rather than enjoy their profits in China, the three managers decided to remove themselves and the money to the United States and Canada. This required additional players to siphon money through Hong Kong, and to serve as vehicles for the three managers and their wives to settle abroad. Consequently, investigating and prosecuting the case required international cooperation on several levels, which is still ongoing. China needs help from the U.S. in order to recover the suspects and proceeds of the crime. In turn, the U.S. needs China’s assistance to obtain evidence and witness testimony that is available only in China.
Cooperation between authorities has enabled the presentation of more evidence than would otherwise have been the case.

China’s work to recover suspects has been done outside the framework of the U.S.-P.R.C. MLAA, but the U.S.-P.R.C. MLAA does address cooperation with respect to the recovery of proceeds and instrumentalities of crime (Art. 16). Despite much-touted cooperation, efforts to locate missing funds in the Bank of China case have brought little success to date. In 2004, the U.S. Attorney General returned $3.5 million in seized funds to China. Charges against the defendants also include two forfeiture allegations that cover seized currency, jewelry, computers, real property and cars. Even so, the value of the recovered assets pales in comparison to the $485 million allegedly embezzled.

Requests from the United States have centered on assistance under the U.S.-P.R.C. MLAA in the provision of “originals, certified copies or photocopies of documents, records or articles of evidence” (Art. 1(1)(c)). Piecing together the activities of the three managers and their cohorts required documents from both the mainland and Hong Kong. According to the minutes of a January 23, 2007, status conference in the U.S. District Court, all of the U.S. government’s requests to China for documents had been satisfied, though “still outstanding are the translation of the previous documents that have been provided to defense that are in Chinese, only.”

Apart from physical evidence, Article 9 of the U.S.-P.R.C. MLAA addresses the taking of testimonial evidence. In order to obtain testimony from Yu Zhendong and other witnesses in China for the upcoming trial in the United States, DOJ raised three options with the Chinese government: 1) U.S. officials and the detained defendants all traveling to China, 2) use of a video-link, or 3) sending all witnesses to the United States at the U.S. government’s expense. China chose the second option. In September 2005, Yu and four other witnesses gave testimony via a live video-conference from a hotel in Guangzhou. Xu Guojun’s attorney and a U.S. prosecutor traveled to China for the event. Over the course of the investigation, Chinese officials have traveled to Nevada in hopes of meeting with defendants in custody there, but thus far the defendants have steadfastly refused to talk with them.

In any event, cooperation between authorities in the U.S. and China has enabled the presentation of more evidence at the upcoming trial than would otherwise have been the case. Yet the mere fact that the government has unearthed additional evidence does not necessarily mean that this evidence is available to the suspect. In a typical criminal trial, the suspect is among the parties who benefits from the availability of evidence, but the U.S.-P.R.C. MLAA contains a standard MLAT stipulation that the agreement is strictly for requests between government agencies. A criminal suspect thus has no right to access information or otherwise request assistance through the U.S.-P.R.C. MLAA. Despite this limitation, a suspect can benefit from information obtained by a party government if inter-governmental cooperation is carried out with a high level of transparency. In the Bank of China case, defense attorneys were present in Guangzhou to question witnesses. In future cases, efforts will need to be made to ensure that suspects and their lawyers, both in the U.S. and in China, have access to relevant evidence and information obtained by governments under the U.S.-P.R.C. MLAA.

More generally, the U.S.-P.R.C. MLAA reaches beyond case-specific cooperation to provide that the United States and China may “consult on criminal justice matters,
including informing each other of the laws in force or the laws which used to be in force and the judicial practices in their respective countries” (Art. 18). Under this provision, law enforcement groups from China regularly visit the United States to meet with U.S. prosecutors, a process that helps build interpersonal ties and facilitates the sharing of information on concrete issues. Evidentiary requirements is one area where further cooperation and consultation is needed. The U.S.-P.R.C. MLA (Art. 10) calls for evidence to be transmitted in a form or accompanied by certification that makes it admissible in the other party’s courts, but this is easier said than done. Under U.S. law, the “chain of custody” rule requires a careful paper trail showing the seizure, custody, control, transfer, analysis and disposition of physical evidence. It is difficult for evidence from China to meet these requirements, given the logistical hurdles of tracing the path of evidence from China across the Pacific and, more acutely, the less stringent practices of Chinese law enforcement agencies.

The U.S.-P.R.C. MLA is not an end in itself, but rather a building block in a larger process. Going forward, the goal of building more meaningful cooperation between the United States and China—as with China’s other bilateral relationships—will be best served by continuing broad legal exchanges while also seeking out case-specific win-win situations such as the Bank of China case. Both countries want to see the three managers and their accomplices behind bars, and the lack of a political element has prevented the triggering of the political offense clause or other exceptions to cooperation under the U.S.-P.R.C. MLA. Cooperation is inevitably trickier when religious (e.g., Falun Gong followers) or political (e.g., democracy advocates) factors are in play. In such cases, either party may invoke the political offense exception and deny assistance, and international attention and pressure may also be brought to bear. But in cases where both governments want to see criminal suspects apprehended and tried, the U.S.-P.R.C. MLA provides a helpful framework to facilitate this process.

**Extradition treaties and other channels for the return of fugitives**

The Chinese government’s receptivity to sharing evidence, conducting joint investigations and engaging in other forms of legal cooperation is often linked to an ultimate goal of securing the return of Chinese criminal suspects who have fled abroad. Extradition proceedings provide a principal channel to achieve repatriation. Extradition involves the formal surrender of a fugitive by one jurisdiction for criminal trial or punishment in another jurisdiction based on either international comity or a treaty, and it is fundamentally a function of the executive branch. The courts still play a role: in the United States, for instance, the courts hold hearings at which the evidence of criminality is considered and, if deemed sufficient, the person facing extradition may be detained pending surrender to the foreign government. However, extradition proceedings are not criminal in nature and, consequently, the person facing extradition cannot invoke constitutional protections that apply only to criminal cases, such as the right to confront witnesses under the Sixth Amendment.

Extradition arrangements typically require the requesting state to produce some evi-
dence of the alleged crime. At the end of the day, however, it is the Department of State that must approve extraditions from the U.S. Under the P.R.C. Extradition Law, promulgated and effective on December 28, 2000, the Ministry of Foreign Affairs is the main authority for handling extraditions from China (Art. 4). The law includes detailed procedures for evaluating requests, including examination and review by the relevant High People’s Court and the Supreme People’s Court to confirm that the request meets all legal requirements (arts. 16-28), but it is the State Council that makes the final decision on whether to extradite (Art. 29). The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific reports that many Asia-Pacific countries follow a similar two-stage procedure whereby the person sought is first brought before a judge and, if the necessary conditions for extradition are met, the executive branch then decides whether the person should be surrendered based on all of the circumstances.

China has concluded extradition treaties with close to 30 countries, although under the P.R.C. Extradition Law, China also welcomes extradition without the existence of a treaty. While not necessarily a deal-breaker, China’s use of the death penalty has been a sticking point in concluding extradition agreements with some countries, in particular European Union members. Spain and China overcame this hurdle by including a provision in their 2005 extradition treaty that China promises not to execute extradited persons. While some Chinese criticize this concession as an unacceptable limitation on sovereignty, others, like Huang Feng, director of the Institute of International Criminal Law at Beijing Normal University, contend, “Yes, we’re limiting our legal sovereignty but, if we can’t repatriate the person, then we can’t exercise that sovereignty. By making a concession, we can exercise some or all of it.” Likewise, under the extradition treaty

Criminal suspect Yu Zhendong is taken into custody upon his arrival in Beijing in April 2004. Photo: Associated Press
signed by France and China in March 2007, France will only extradite someone accused of a crime punishable by death if China guarantees that the person will not be executed.\textsuperscript{33} Amnesty International France has objected that there is “no certainty that a Chinese citizen extradited one day with the clearest guarantees will not be sentenced to death at a later date on a different charge.”\textsuperscript{34}

Unlike Spain and France, the United States and Canada have not concluded extradition treaties with China,\textsuperscript{35} nor is either expected to conclude one anytime soon.\textsuperscript{36} Then how is it that Yu Zhenhong is back in China, and there is a real possibility that Lai Changxing will be sent back too? The short answer is that extradition is just one method for repatriating fugitives.

In Yu’s case, the channel used was “removal proceedings,” the standard process for expelling aliens from the United States.\textsuperscript{37} U.S. authorities arrested Yu in Los Angeles on December 19, 2002, on immigration charges.\textsuperscript{38} In his plea agreement, Yu submitted to a judicial order of removal, thereby accepting his return to China and waiving any claim to relief from removal, such as claims under the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).\textsuperscript{39} As part of the deal for Yu’s return, China provided the United States with a formal written promise that Yu would not be sentenced to more than 12 years in prison, nor would he be sentenced to death or tortured.\textsuperscript{40}

Yu was more fortunate than most Chinese fugitives in obtaining the P.R.C. government’s written assurances that he would not be tortured, put to death or sentenced to more than 12 years in prison. Nonetheless, not everyone finds such assurances convincing. In response to reports that Xu Chaofan and Xu Guojun of the Bank of China case were offered plea bargains with similar terms to Yu’s deal, Xu Guojun’s lawyer told reporters, “We think it is still old China and at some point they are going to shoot all of them anyway.”\textsuperscript{41}

These are not idle concerns. As discussed below, judges, UN officials and the human rights community have raised serious questions regarding the reliability of diplomatic assurances. Unlike in the extradition context, however, the plea bargain accepted by Yu, and those reportedly offered to Xu Chaofan and Xu Guojun, required their consent. In other words, the person facing the risk that the diplomatic assurance would not be upheld was given the opportunity to judge for himself and decide accordingly.

It further bears underscoring that the U.S.-P.R.C. MLAA contains no mechanism for transferring people for prosecution or punishment. The only provision that addresses any transfer of persons in custody is Article 12, which allows such transfer for the purpose of giving evidence or assisting in investigations. At the same time, the U.S.-P.R.C. MLAA does not protect people from being returned outside of the extradition context. It is still possible for the U.S. government to repatriate Xu Chaofan and Xu Guojun using the standard removal proceedings for illegal aliens, as in Yu’s case. Likewise, in Canada, Gao Shan faces repatriation not for his alleged involvement in embezzling money from the Bank of China, but rather because he lied on his immigration forms. The Canadian government is reportedly seeking to revoke the permanent residency sta-
tus of Gao and his wife on the basis that they failed to declare all the money they were carrying when entering Canada.42

In any case, Yu Zhendong is now in prison in China, and both countries hail his return as a glowing success.43 In his opening remarks to the U.S.-P.R.C. Joint Liaison Group in February 2005, the U.S. Ambassador to China, Clark T. Randt, highlighted Yu’s return as one of the “fruits of this close cooperation” in criminal cases.44 Yet the relationship is not without strain. China focuses on the return of high-profile fugitives, especially those who abscond with large sums, but has been less enthusiastic in pursuing the much more common and mundane cases of P.R.C. citizens who are in the U.S. illegally. In 2006, Michael Chertoff, head of the U.S. Department of Homeland Security, visited Beijing in hopes of persuading the government to accept some 39,000 P.R.C. citizens who the U.S. government claims are in the United States illegally.45 Further complicating matters is that citizenship can be difficult to prove when identifying documents are unavailable (either accidentally missing or intentionally destroyed) or possibly forged.

Lai Changxing’s situation is markedly different from that of Yu Zhendong. Unlike Yu, who was facing prison time in the United States, Lai is not battling criminal charges in Canada. He is in the courts for a different reason. Lai has spent the past seven years contesting the denial of his application for refugee status, and the end is not yet in sight. In April 2007, after two immigration hearings and six court appeals—all of which supported his removal—the federal courts granted Lai’s application for judicial review of his removal order.46 The chief issue the Canadian courts have been grappling with is whether China’s assurances that it will not execute or torture Lai are reliable.

The P.R.C. government issued a diplomatic note in 2001 in which it undertook that “after [Lai’s] repatriation to China, the Chinese appropriate criminal court will not sentence [Lai] to death for all the crimes he may have committed before his repatriation.” Moreover, during investigation, trial and imprisonment (if convicted), “Lai will not be subject to torture and other cruel, inhuman or degrading treatment or punishment,” which comports with China’s obligations as a party to CAT.47 Although the Canadian court upheld the immigration officer’s conclusion that the assurances against the death penalty were reliable, the court found that the immigration officer erred in her determination that the assurances regarding torture met the essential requirements to make them meaningful and reliable.

In her discussion, the judge looked to a joint report issued by Amnesty International, Human Rights Watch and the International Commission of Jurists (the Joint Report),48 which argues that diplomatic assurances are not an effective safeguard against the risk of torture, “even if the assurances contain arrangements for a post-return monitoring mechanism.” The Joint Report asserts that reliance on such assurances in sending people to a state where they face a risk of torture or other ill-treatment violates the international law principle known as the non-refoulement obligation. This obligation, which is enshrined in Article 3 of CAT,49 prohibits the return or transfer of any person to a country where there are substantial grounds for believing he or she would be at risk of being subjected to torture. The U.N. Special Rapporteur on Torture has also expressed concerns that post-return monitoring is ineffective. During a discussion on the devel-
The contours of the “fair trial” requirement are far from clear despite its repetition in the ICCPR and other international human rights documents, and it remains an evolving issue as to how courts might invoke this requirement to block repatriation of a person facing criminal charges. Further complicating matters, the “fair trial” requirement is in tension, if not direct opposition, with the rule of non-inquiry, according to which “courts of many states refuse to inquire into the standards of criminal justice to which the fugitive is likely to be subjected in the requesting state on the grounds that it is a matter best left to executive determination.” In other words, courts are hesitant to judge other courts. In practice, however, courts vary considerably in the application of this rule. Adding another wrinkle, China signed the ICCPR in 1998, but has not yet fulfilled repeated promises to ratify it and undertake the necessary reforms to bring P.R.C. laws and practice in line with the ICCPR’s standards. In short, there is swirling debate over how the right to a fair trial and extradition law intersect, and no swift or easy resolution is in sight.

**Balancing procedural efficiency and human rights protections**

China should be applauded for its rapid embrace of international legal cooperation, as exemplified by the ongoing Bank of China case. The U.S. government has openly praised the close work: “Investigators were able to piece together the complex scheme of racketeering, money laundering and fraud charged in this indictment because of the extensive cooperation we received from our law enforcement partners overseas.” At the same time, countries need to consider the impact specific forms of legal cooperation with China might have on human rights.
MLATs, as used in the Bank of China case, offer a positive example of facilitating the exchange of information and evidence in individual cases while nurturing interpersonal ties among law enforcement and other government authorities. However, because MLATs are expressly for government use alone, procedures are needed to ensure that suspects and defense lawyers have access to relevant evidence and information. In the United States, this can be accomplished through the so-called Brady rule, which requires prosecutors to turn over to the defense any evidence that might tend to negate guilt or reduce punishment. To enhance protections for the accused in cases involving MLATs, foreign governments should work with the P.R.C. government to apply a Brady-rule approach when the suspect is located in China.

Extradition treaties present a different story. In light of the evolving debate over how to reconcile extraditions with human rights concerns and, in particular, with concerns over weaknesses in China’s criminal justice and penal systems, the most prudent course at this time appears to be for countries to refrain from entering into extradition treaties with China. Some may contend that protections built into the treaties with Spain and France are sufficient to assuage human rights concerns, but mounting skepticism over the efficacy of pre-return diplomatic assurances and post-return monitoring brings these safeguards into question. For now, a wait-and-see attitude may be more sound.

Notes

1. No formal charges have been filed against Lai, but the Canadian courts report in the April 5, 2007, decision that he is wanted for smuggling and bribery under Articles 153 and 389 of the P.R.C. Criminal Law: http://cas-ncr-nter03.cas-satj.gc.ca/rss/IMM-2669-06.pdf, Order, Lai Cheong Sing and Tsang Ming Na (Applicants) and the Minister of Citizenship and Immigration (Respondent), April 5, 2007, Docket: IMM-2669-06, Citation: 2007FC 361, page 38.
3. This amount is taken from U.S. court documents. The trial is scheduled to commence on October 29, 2007.
5. A crime is commonly considered transnational when it is committed in more than one country, planned in one country and committed in another, or committed in one country but substantially affects another country. The need for international cooperation can also arise when a witness or piece of physical evidence is located abroad. Other issues arise when crimes under international law are involved, i.e., crimes that are prohibited by international treaties, norms and customs. For example, the U.N. International Law Commission is currently studying the obligation to extradite or prosecute (aut dedere aut judicare) in cases of crimes under international law, such as genocide. See U.N. General Assembly, A/CN.4/571, Preliminary report on the obligation to extradite or prosecute, by Zdzislaw Galicki, Special Rapporteur, June 7, 2006.
7. Even when there is a formal agreement, governments may choose to use flexible forms of cooperation, such as a letter rogatory, which involves a direct request from a court in one state to a foreign court that the latter supply evidence or other assistance. This procedure is gener-
ally less reliable (non-obligatory) and efficient (no centralized authority or stipulated time-frame) than using treaties.


10. Of course, two countries can violate a suspect's human rights in tandem as severely as, if not more egregiously than, when they operate independently. As widely reported (see for instance Jane Mayer, "Outsourcing Torture; The secret history of America's 'extraordinary rendition' program," The New Yorker, February 14, 2005), the U.S. government has used the technique of "extraordinary rendition," whereby suspects are sent from one foreign state to another for interrogation and prosecution under conditions unacceptable in the U.S.


12. Mutual legal assistance arrangements are not always formally "treaties" and are sometimes called "agreements" for political or other reasons. The difference is not material for purposes of this article, but it is curious that the Chinese government describes the U.S.-P.R.C. MLA as a "treaty" on the Ministry of Foreign Affairs' English-language Web site: (http://test.fmprc.gov.cn/eng/wjzb/zzjg/bmdyzs/gjlb/3432/default.htm). The Chinese-language Web site more accurately calls the U.S.-P.R.C. MLA a "xieding," which is commonly translated as "agreement": http://www.fmprc.gov.cn/chn/wjzb/zzjg/bmdyzs/gjlb/1948/default.htm. The U.S.-P.R.C. MLA covers only criminal matters. For civil matters, judicial assistance between the United States and China is governed by the Vienna Convention on Consular Relations, the U.S.-China Consular Convention and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. There is no online source for the full text of the U.S.-P.R.C. MLA, which is on file with the U.S. Department of State, Office of Treaty Affairs, but the author and HRIC have copies of the MLA.

13. This cooperation met with varying degrees of success, a low point being the heroin smuggling case of Wang v. Reno, 81 F.3d 808 (9th Cir. 1996)—known as the "goldfish" case because a shipment of heroin was concealed in the cavities of dead goldfish. U.S. officials secured Wang as a witness but disregarded the fact that he would face torture and possible execution upon his return to China. The U.S. federal court ruled that the U.S. government's conduct violated Wang's Fifth Amendment due process rights, and in an unusual move, the court permanently enjoined DOJ from removing Wang from the United States or from returning him to the custody of officials from China.

14. The use of central authorities is common practice. Participants at the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (see note 17 below) commented at a 2006 meeting that "many countries in Asia-Pacific have established central authorities to transmit, receive, and handle all requests for assistance." ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, Denying Safe Haven to the Corrupt and the Proceeds of Corruption, Papers Presented at the 4th Master Training Seminar in Kuala Lumpur, Malaysia, March 28-30, 2006, p. xiii.

15. The OIA further assists in the negotiation of judicial assistance agreements and participates in international committees under the United Nations and other bodies. In short, the OIA is the hub for all things criminal and international at DOJ. Information on OIA is available from the DOJ website at http://www.usdoj.gov/criminal/links/oia.html.

16. Both the Ministry of Justice and the Ministry of Public Security are designated as central
authorities under the U.N. Convention against Transnational Organized Crime, and it might be possible to amend the U.S.-P.R.C. MLAA in line with this approach. Recent efforts to increase contacts with the Ministry of Public Security bode well for such a development. In July 2006, at the conclusion of the Minister of Public Security’s visit to the United States, the two countries issued a Joint Statement on Further Strengthening Law Enforcement Cooperation, which built on the 1997 Joint Statement by “promis[ing] to deepen pragmatic cooperation in bilateral law enforcement and to increase mutual visits of Chinese and U.S. personnel at various levels and exchanges of various forms.” See BBC Monitoring Asia Pacific, Text of Sino-US joint statement on law-enforcement cooperation, July 31, 2006 (text of report by Xinhua News Agency).

17. Launched in 1999, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific is a joint project of the Asian Development Bank (ADB) and the Organisation for Economic Co-operation and Development (OECD). The Initiative developed an Anti-Corruption Action Plan for Asia-Pacific, to which 27 countries and economies have signed on, including China in 2005. The Initiative supports dialogue and capacity building activities.


19. For a recent detailed discussion of the “political offense” exception under U.S. law in the extradition context, see Ordinola v. Hackman, 478 F.3d 588 (4th Cir. 2007). As explained by the court, “[t]raditionally, there have been two categories of political offenses: ‘pure’ and ‘relative.’ The core ‘pure’ political offenses are treason, sedition, and espionage. . . . Such crimes are perpetrated directly against the state and do not intend to cause private injury. Most extradition treaties preclude extradition for ‘pure’ political offenses. ‘Relative’ political offenses, on the other hand, are common crimes that are so intertwined with a political act that the offense itself becomes a political one.”

20. Article 3 of the Model Treaty provides, in part, that extradition shall not be granted “[i]f the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person’s position may be prejudiced for any of those reasons.” GA Res. 45/116, annex, UN GAOR, 45th Sess., Supp. No. 49A, at 211, UN Doc. A/45/49 (1990), 30 ILM 1407 (1991), http://www.un.org/documents/ga/res/45/a45r116.htm.


22. Article 16 provides, in part, “The Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses. This may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings.”

23. Extensive documentation in the Bank of China case is available through the Public Access to Court Electronic Records (PACER) system, which is a public access service with information on cases in U.S. federal courts.

24. This third option was possible under Article 12 of the U.S.-P.R.C. MLAA, which addresses the transfer of persons in custody for giving evidence or assisting in investigations. In such case, “the receiving Party shall not require the sending Party to initiate extradition proceedings for the return of the person transferred” (Art. 12).

25. Article 1(3) provides, “This Agreement is intended solely for mutual legal assistance between the Parties. 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.”

26. Prisoner transfers are a separate matter. Under U.S. law, a foreign national convicted of a crime in the United States, and U.S. nationals convicted of a crime in a foreign country, may apply for a transfer to their home country if there is a relevant treaty in force. DOJ’s Office of Enforcement Operations is in charge of prisoner transfers.

27. U.S. law on international extraditions, as set forth in 18 U.S.C. 3181, et seq., includes provisions regarding the place and character of hearings, permitted evidence, protections of the accused, provision arrest and detention, and the role of the Secretary of State, among other matters.

28. In a review of practices in the Asia-Pacific region, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific describes “two common evidentiary tests for extradition: 1) the prima facie evidence test under which “there must be evidence which would justify a person to stand trial had the conduct been committed in the requested state,” and 2) the probable cause evidence test under which “there must be ‘sufficient information as would provide reasonable grounds to suspect . . . that the person sought has committed the offense”’ (see ADB/OECD 2007 Report).


30. A common threshold requirement is that of “dual criminality” (or “double criminality”), meaning that a persons may be extradited only if his conduct is a crime punishable at a given level of severity (e.g., by more than one year imprisonment) in both countries. Some treaties, especially older ones, use the "list" method, which requires that the person have committed one of the enumerated offenses in order to be extradited. The concept of dual criminality is also used in MLATs with regard to when a party may deny assistance. The U.S.-P.R.C. MLAA does not hold to a strict dual-criminality standard. Instead, it provides that a party may deny assistance if “the request relates to conduct that would not constitute an offense under the laws in the territory of the Requested Party, provided that the Parties may agree to provide assistance for a particular offense, or category of offenses, irrespective of whether the conduct would constitute an offense under the laws in the territory of both Parties” (Art. 3).

31. The Extradition Law does not allow for the extradition of Chinese nationals to a foreign state (Art. 8).

32. Mark O’Neill, “A Landmark Treaty with Spain Signifies a Tactical Change in the Mainland’s Hunt for Corrupt Officials in Exile,” South China Morning Post, May 11, 2006, p.13. Under the P.R.C. Extradition Law, the Ministry of Foreign Affairs may, on behalf of the P.R.C. government, give promises to the extraditing country regarding additional requirements, provided that the promises do not harm China’s sovereignty, national interests, or public interests. Promises with respect to limitations on prosecutions must come from the Supreme People’s Procuratorate, and promises with respect to punishments must come from the Supreme People’s Court (Art. 50).


34. "France backs extradition to China," BBC News, March 20, 2007. Under the widely accepted principle of specialty (or “speciality”), an extradited person will be tried or punished by the requesting state only for conduct in respect of which the extradition was granted. However, a person may also be tried for conduct committed after extradition.

35. Canada and China have an MLAT that addresses criminal matters. The United States and Canada both signed MLATs and agreements for the surrender of fugitive offenders with Hong Kong prior to the handover. The U.S.-Hong Kong agreements are expected to be used in the
A case of a man who was arrested in Hong Kong in May 2007 for charges of raping his daughter in the United States. According to news reports, investigators learned that he was traveling from Suzhou to Hong Kong, and he was arrested at the Hong Kong airport. MSNBC.com, "Arrest in Hong Kong child abuse case," May 2, 2007, http://www.msnbc.msn.com/id/18437930/. U.S. law (18 U.S.C. 3184) provides that extradition may be granted only pursuant to an extradition treaty, subject to two narrow exceptions. The P.R.C. Extradition Law allows extradition without a treaty, but it provides that the requesting country should make "reciprocal promises" (Art. 15). Presumably, the U.S. was unwilling to do this.

36. Unlike Spain, France and Canada, the United States still allows the death penalty, and countries have refused to extradite people to the United States based on concerns that the death penalty will be applied. This is not a new issue. A 1924 article in the American Journal of International Law discusses how the Costa Rican and Portuguese governments required that people extradited to the United States not be subjected to the death penalty. J.S. Reeves, Extradition Treaties and the Death Penalty, 18 Am. J. Int’l L. 298 (1924).

37. Under old terminology, removal proceedings were divided between exclusion and deportation proceedings.


39. It is common for aliens in removal proceedings to pursue several avenues of relief concurrently, most notably, asylum, withholding of removal and protection under CAT. For example, U.S. courts held that a P.R.C. citizen husband was eligible for asylum and withholding of removal on the ground that his P.R.C. citizen wife had been involuntarily sterilized pursuant to population control programs. Qu v. Gonzales, 399 F.3d 1195 (9th Cir. 2005). In another case, U.S. courts held that a P.R.C. citizen was entitled to withholding of removal on the basis of an imputed anti-governmental political opinion involving the Falun Gong. Zhou v. Gonzales, 437 F.3d 860 (9th Cir. 2006).

40. DOJ press release, ibid.

41. Elaine Wu, “U.S. and Mainland Strike Rare Deal to Try Accused Officials,” South China Morning Post, September 13, 2005, p. 8. According to Article 383(1) of the Criminal Law, the severity of punishment for embezzlement varies based on the seriousness of the circumstances. A person who embezzles not less than 100,000 yuan (approximately $13,000) is subject to fixed-term imprisonment of not less than 10 years or life imprisonment and may also be sentenced to confiscation of property. Further, if the circumstances are especially serious, he shall be sentenced to death.

42. “Lawyer: Banker could face execution.”


45. Chertoff told reporters that almost 700 P.R.C. nationals were held in U.S. detention centers, and an additional 38,000 had been released on bond after spending the maximum 180 days in lockup. Mark O’Neill, A Landmark Treaty with Spain Signifies a Tactical Change in the Mainland’s Hunt for Corrupt Officials in Exile, South China Morning Post, May 11, 2006, p.13.

46. The courts also granted the applications for judicial review made by Lai’s ex-wife and three children. The ex-wife’s return raises similar concerns to Lai’s because she was allegedly involved in the criminal enterprise. The children’s claims for refugee status are derivative of their parents’ claim. For simplicity, this article focuses on Lai.

47. The English version of the diplomatic note is reprinted in the April 5, 2007, decision, which is


49. Article 3 provides, in part, “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”


51. The issue as to whether Lai would receive a fair trial was not addressed in the diplomatic note from China. In Yu Zhendong’s case, it was basically a done deal that he would receive 12 years in prison as capped in the agreement for his return. Because of this understanding, the U.S. government and Yu did not focus on whether there would be a fair trial, or even anything resembling a full trial. As previously mentioned, the Chinese media published reports on Yu’s court hearing in August 2005.

52. The U.N. Model Treaty on Extradition similarly provides that extradition shall not be granted “if the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the [ICCPR]” (Art. 3(f)).

53. John Dugard and Christine Van den Wyngaert, Reconciling Extradition with Human Rights, 92 Am. J. Int’l L. 187, 189 (1998). As described by a U.S. federal court, “[U]nder what is called the ‘rule of non-inquiry’ in extradition law, courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely.” Lopez-Smith v. Hood, 121 F.3d 1322 (9th Cir. 1997).

54. Even in the absence of ratification, Article 18 of the Vienna Convention on the Law of Treaties provides that states that have signed but not yet ratified a treaty are obliged to refrain from acts that would defeat its object and purpose.


56. This rule was first set forth by the Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963).