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**International Cooperation in Combating Fraud:
Beyond the Treaties and Conventions**

**For Presentation at Plenary Seven
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Abstract

Among all the major western countries, only Canada has signed a treaty of mutual legal assistance in criminal matters with the People's Republic of China. Financial crimes, with the exception of drug-related money laundering, are not covered under any international or regional convention to which China is a party. Since 1985, the United Nations have made great effort in promoting treaty-based international cooperation in crime prevention. This paper holds that, although treaties and conventions are important, between China and many western countries, there are still some major legal problems in preparing and applying mutual legal assistance and extradition treaties. Therefore, in the present context, while the countries need to continue their effort in negotiating the treaties and conventions, they should also go beyond the treaties in developing three levels of international cooperation: (1) the governments should assist each other to improve and harmonize the national legal systems; (2) there should be well-established routes for non-treaty based reciprocal assistance; (3) law enforcement agencies, security departments of the banking and financial industries, forensic accounting firms and law firms should develop their own direct networks for cooperation in combating and preventing international financial fraud.

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A. The Focus on Treaties and Conventions

The last ten to fifteen years have witnessed some important progress in the development of effective international cooperation for the prevention and control of financial fraud. As demonstrated in the 1994 Naples Political Declaration and Global Action Plan and the sessions of the United Nations Commission on the Prevention of Crime and the Treatment of Offenders, member states of the international community have reached the global consensus that the growth of financial fraud, especially when it is related to drug trafficking and corruption, is a serious threat to both the integrity of national financial industries and the international economic order. To countries in historical transition, major financial fraud can also pose an imminent danger to political stability and the basic safety of the society. The opening of this Symposium in Beijing is another indication that China and many countries in the western world are determined to work together in a joint effort to combat transnational financial fraud.

Over these years, a number of important instruments have been developed at international, regional and bilateral levels for combating certain types of transnational crime, including financial fraud. Much of the effort has been directed at the formation and adoption of treaties and conventions for cooperation and assistance in criminal matters. From 1985 to 1990, the United Nations Congresses on the Prevention of Crime and the Treatment of Offenders and the General Assembly recommended several model treaties, including the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters. In 1988, the United Nations passed the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Convention requires member states to criminalize drug-related money laundering and provide cooperation and assistance in combating money laundering, including extradition, mutual legal assistance and the transfer of criminal proceedings. Like many other countries, China and Canada are both member states to this important Convention. As many scholars put it, the Vienna Convention was a watershed in the development of coordinated international regulatory and policing action designed both to treat and prevent money laundering. The Convention however does not deal with other types of financial fraud, and money laundering is not yet an issue on top of the present Chinese agenda of combating fraud. More recently, many countries have engaged in United Nations discussions for the preparation of an international convention against organized crime. It may take many years to complete the legislative process for this convention and get enough countries to ratify it.

At the multilateral level, the western industrialized countries in particular, including the European Union member states, the United States, Canada and Australia, have progressed significantly in developing their own instruments, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceed of Crime, the 1991 European Community Directive on the prevention of the use of the financial system for money laundering, and the 1993 European Convention on Extradition (Fiscal Offences) order. These instruments, together with the 1957 European Convention on

Extradition, the 1959 European Convention on Mutual Assistance in Criminal Matters, the Additional Protocols and Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth, and other instruments are playing important roles in combating financial fraud.

At the bilateral level, both China and Canada succeeded during the past ten years in concluding the negotiations of a number of treaties for cooperation and assistance in criminal matters with other countries. In 1989, China signed its first mutual legal assistance treaty in criminal matters (with Mongolia). Four years later, China signed its first extradition treaty (with Thailand). In 1990, Canada's first Mutual Legal Assistance Treaty in Criminal Matters (with the United States) was ratified and came into force.

B. The Legal Problems and Practical Difficulties

Although the Cold War ended some years ago and the East and West are getting closer to each other, the differences between them still exist when it comes to treaties for cooperation in criminal justice.

China has legal assistance treaties with important western countries such as France, Belgium, Italy and Spain, but in civil and commercial matters only. Countries that are parties to extradition and criminal mutual legal assistance treaties with China are mostly from the former socialist bloc, such as Russia, the East European countries and Cuba. In addition, China has an extradition treaty with Thailand and criminal mutual legal assistance treaties with Egypt, Greece and Turkey. It has no extradition treaty with any western country. Among all the major western countries, only Canada has signed a treaty of mutual legal assistance in criminal matters with the People's Republic of China.

The signing of the Sino-Canadian Mutual Legal Assistance Treaty in 1994 was a groundbreaking event in the history of Chinese-Western cooperation in criminal justice and crime prevention. The two countries have an excellent relationship in many areas. Canada established its diplomatic relation with China nine years ahead of the United States of America. China has become Canada's No. 4 trade partner and the No. 1 source of immigrants. However, the two countries still have a long way to go to start real cooperation in the area of criminal justice and crime prevention. Four years after the signing of the Mutual Legal Assistance Treaty, it is still unclear what has been achieved in real practice under this Treaty.

Also, Canada is a party to some 50 extradition treaties, but it does not have such a treaty with China. Although a bilateral extradition treaty is needed and indispensable to China and Canada, the two countries still seem to have a long way to go in developing such a treaty with each other.

To establish a treaty-based cooperation in criminal matters, countries need to be aware of the similarities and differences in their laws. Even if the treaties fit with the United models,

the actual implementation may still face serious problems that are originated from the differences between the legal systems.

As in many existing treaties, the United Nations Model Treaties on extradition and mutual legal assistance provides a number of restrictions that are either grounds for refusal or factors for consideration of approvals. In particular, this may become a problem when China requests extradition or assistance from a western jurisdiction.

1. Double criminality. Many offences do not have double criminality, as required under the model treaties and the Sino-Canada Mutual Legal Assistance Treaty. The Chinese Criminal Law and the Canadian Criminal Code are very different in many substantive definitions. With the 1997 Amendments, definitions under the China's Criminal Law with respect to financial fraud are now more compatible with those employed in western jurisdictions. The specific new definitions include saving and loan fraud, insider trading, money laundering, market manipulation, and many other offences. However, certain types of crimes against China's foreign currency control, for example, are not found under Canadian laws. These offences are among the top priority targets in recent Chinese initiatives to combat financial crimes. In addition, the requirement of "minimum punishment" is almost meaningless in the Chinese context, because all of the offences defined under the Criminal Law can meet the requirement of being punishable by "one year" sentence. With significant differences in punishment, the parties entering an extradition treaty may *de facto* take different levels of responsibilities.

2. Political offences. Unlike fiscal offences, political offences are still the grounds for mandatory refusals under most existing extradition and mutual legal assistance treaties. As well recorded in international studies, a strong political motivation is often found in international terrorist activities, whereas drug trafficking and counterfeiting are sometimes utilised in the course of a political movement or for the purpose to sabotage a government. States of different political systems often dispute on the nature of offences, although some efforts have been made in the international community to reduce the disputes in relation to the nature of terrorism. In a number of occasions, fugitives wanted by China claimed in foreign countries that the offences were of a political nature. In western jurisdictions, for some obvious reasons, the definition of "political nature" can be very flexible in court judgements or refugee hearings when it applies to China.

3. Prejudice against the offender. As in the case of "political offences," both the UN extradition and mutual assistance models set out that the requested State shall refuse a request if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of the person's political opinions. In practice, when it involves China, it is often the case where a non-political crime was committed by an individual who either claimed to have a political opinion or expresses such an opinion during a hearing in a foreign country. Consequently, a fugitive may succeed in applying for political asylum, and the request of legal assistance for investigation or prosecution can be turned down by the requested state.

4. Risk to public order. The model treaties also allows a refusal on the ground of public order and public interest. This may also be restrictive to the implementation of treaties between countries with different political and ideological systems.

5. Lack of procedural guarantees. Real problems may occur when an issue is raised about the legal rights of the offender. Under the United Nations Model Treaty on Extradition, the lack of the minimum guarantees in criminal proceedings as contained in the International Covenant on Civil and Political Rights, article 14, is a mandatory ground for refusal. These guarantees are also stipulated in the Canadian Charter of Rights and Freedoms which can be used in considering a request from China. Some of the rights were not clearly recognized under the Chinese law until 1996, when sweeping changes were introduced by the Amendments to the Law of Criminal Procedure. Still, China and a western country may still have different legal and practical standards regarding these rights of the accused persons: the right to be informed promptly and in detail of the nature and cause of the charge against him upon detention and arrest, the rights to have adequate time and facilities for the reparation of his defence and to communicate with counsel in pre-trial investigation, the right to be tried without undue delay, the right to have free legal assistance, the right to examine the witnesses against him and the right against self-incrimination.

6. Judicial independence and fair trial. Although the Chinese law recognizes the right to fair and public trial by a competent, independent and impartial court established by law, disputes may still be raised from a western perspective of the separation of state powers. In addition, the existence of a certain level of judicial corruption can also become an issue relating to fair trial.

7. Punishment and treatment of offenders. For many years, alleged incidents of torture in police investigation have been reported in western press, and lawyers have succeeded in arguing for their clients by using these reports. Further, although China has made the effort to control the use of the death penalty, there are still a broad range of offences legally carrying this punishment. Given the fact that most major financial fraud cases involve the crime of corruption, which carries death penalty under Chinese law, China may have difficulties in effectively using the treaties to request assistance from a western country in combating these cases.

8. Insufficient proof. Refusal may also be given if the requested state that requires a judicial assessment of the sufficiency of evidence concludes that the requesting state has failed to establish the case against the alleged offender. Given the huge differences in the laws of evidence between China and common law countries, treaties may become unworkable when different standards are applied in determining the “sufficiency” of evidence.

Most of these problems reflect differences or perceived differences between the legal systems with respect to the legal rights of the individuals. These differences have made international cooperation in law enforcement and justice very difficult. Some years ago, a

Chinese citizen convicted of drug trafficking in Shanghai was sent to the United States by the Chinese police at the request of the United States as a key witness in a major international drug trafficking case. Promises were made for his return to China after the trial. This person, however, was granted refugee status when he arrived in the United States and was never returned back to China. This incident added difficulties to the process of establishing an FBI liaison office in Beijing. Incidents of the same nature may also happen even if a Mutual Legal Assistance Treaty is in place between the two countries.

There are other legal and practical difficulties in relation to the treaties. For example, under the Sino-Canadian Mutual Legal Assistance Treaty, the requested state “*may*” (rather than “*shall*” as under both the 1995 Sino-Bulgarian Treaty and the 1990 United Nations Optional Protocol) assist in locating, forfeiting and recovering the proceeds of crime within its territory. Under this type of soft agreement, without an asset sharing agreement, the requested state may have little incentive to provide the assistance. Also, in a transnational fraud case, it is self-defeating if the result of mutual assistance is neither the effective recovery of stolen property or the apprehensive and extradition of the criminal, but the release of the sometimes self-embarrassing information about the crime, whereby the requested state eventually confiscates and keeps the assets that were stolen from the requesting state. When a requested state sees the possibility of keeping the stolen property, it may tend to regard the crime as having been committed in part within its territory and jurisdiction can become a complicated issue. There is little difficulty in legal techniques to do so in transnational fraud and money laundering cases, no matter what type of “most substantial connection test” is applied by the parties to a treaty.

The discussion of problems and difficulties in implementing the treaties should not lead to the conclusion that treaties are useless in Sino-Western cooperation for the prevention and control of financial fraud. Rather, the countries should continue to develop and improve the treaties, address the legal issues in interpreting the treaties and make effective use of the treaties in practice. Therefore, it was encouraging to see that, during President Clinton’s visit to China in June 1998, the United States and China agreed to begin negotiations of a mutual legal assistance treaty in criminal matters.

To further utilise the treaties for crime prevention, China and western countries should not only work on treaties for the investigation and prosecution of crimes, but also consider treaties on the **transfer of foreign offenders**. The United Nations have recommended two model treaties on this subject matter. In 1985, the Seventh Congress adopted the Model Agreement on the Transfer of Foreign Prisoners. Five years later, the Eighth Congress adopted the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentences or Conditionally Released.

The 1985 model agreement states that the transfer of a foreign prisoner to his country of nationality or residence is to help him avoid the hardship of serving the sentence in an environment that is foreign to him. Therefore, the 1985 model sets out that the transfer is not only dependent on an agreement between the sentencing and administrating states, but

also based on the consent of the prisoner. This perspective appears to be one-sided, since the transfer of offenders should also further the ends of justice, which include deterrence and the prevention of recidivism. Like the 1985 model, the 1990 model treaty also sets out “social settlement of sentenced persons” as its primary objective, but does not explicitly require a consent as a condition of transfer. This 1990 model only allows the offender, his or her legal representative or close relatives to express his interest in the transfer of supervision and his or her willingness to fulfil any conditions to be imposed. Indeed, even if social resettlement is the sole objective and no consent is given by the offender, effective rehabilitation is more likely to be achieved in his own country.

C. Beyond the Treaties and Conventions

In the present context, to combat international financial fraud, it is not enough for the countries to continue the negotiation of treaties and conventions. Rather, they should also go beyond the treaties and make greater effort in developing non-treaty-based cooperation. China and the western countries can develop this cooperation at three levels: (1) the governments should assist each other in improving and harmonize the national legal systems; (2) the governments should establish routes for non-treaty based reciprocal assistance; (3) law enforcement agencies, security departments of the banking and financial industries, forensic accounting firms and law firms should develop their own direct networks for cooperation in combating and preventing international financial fraud.

The effectiveness of treaties and conventions is, to a large extent, dependent on the sharing of core principles, general standards and basic norms in national legal systems. Confrontation in the field of human rights hinders the development of real cooperation in crime prevention and criminal justice. Therefore, great effort must be directed at the **harmonization of legal systems** under well-established international standards. For Sino-western joint initiatives, the reform of law has to address these general problems:

1. Remaining ideological contradictions in defining criminal conduct, criminal law and the criminal justice system;
2. Lack of consensus on the criminal nature of certain specific types of criminal conducts;
3. Differences between the national procedural laws concerning criminal investigation, prosecution and trial; and
4. Differences in legally defined punishment and sentencing practice.

During the past twenty years, the Chinese legal reform has progressed in a right direction. The recent changes however have not been fully appreciated in the outside world. The development of treaty-based or non-treaty-based cooperation in criminal justice between China and the western countries requires expertise in foreign legal systems and a thorough understanding of their changes.

The recognition of well-established international standards is directly relevant to the development of international cooperation in combating transnational crime. On October 5,

1998, China signed the International Covenant on Civil and Political Rights. This may have profound impact on the reform of the Chinese legal system. In particular, the incorporation of the minimum guarantees under Article 14 of the Covenant into the Chinese law of criminal procedure will greatly reduce the legal difficulties in treaty-based and non-treaty-based cooperation between China and the western jurisdictions.

The establishment of routes for non-treaty based reciprocal assistance is extremely important when the countries do not have treaty-based relations. Over the last fifteen years, China and a number of western countries have provided reciprocal assistance to each other through various routes including the Interpol in detecting and investigating some major criminal cases and in the apprehension and deportation of a limited number of criminal suspects. Not long ago, during President Clinton's visit to China, the United States and China concluded a memorandum of understanding to establish a law enforcement joint liaison group in order to combat narcotics trafficking, alien smuggling, counterfeiting and organized crime. While making the effort to expand this type of cooperation, it is also desirable to start a legislative process in China to enact specialized national laws for extradition and mutual legal assistance in order to standardise these routes for cooperation. In this aspect, Canada and other western countries can also provide advice and assistance.

International cooperation in combating financial fraud cannot solely rely on the "central authorities" of the governments as defined in the treaties. Direct assistance between law enforcement agencies, security departments of the banking and financial industries, forensic accounting firms and law firms is important. International cooperation in combating financial fraud should also involve other interested institutions and organizations. As demonstrated in the Bre-X case, the public media can play an extremely active role in detecting and investigating major international fraud cases.

Direct assistance between the relevant legal and financial institutions leads to the establishment of strong working networks to deal with incidents of financial fraud, better sharing of expertise in prevention, and improved training for the staff. Much can be learned by studying the models of the Financial Action Task Force on Money Laundering and other relevant international organizations. Also, when it involves the private sector only, the mechanisms might be less formal, but more efficient and effective. For example, rather than relying on the governments, banks may do a better job in helping each other to establish and improve the banking security systems, even if the focus is on the protection of the interest of the banks. Indeed, the public and private sectors should work together in promoting international cooperation in this area. It has always been a challenge to the police, prosecutors and criminal judges to effectively access and understand financial data in their own countries, let alone to obtain and utilize sophisticated financial information and evidence from foreign jurisdictions.

The 1998 Beijing Symposium on the Prevention and Control of Financial Fraud, therefore, is an event for the promotion of cooperation at all levels and among all the interested organizations, be it under the treaties and conventions or beyond the treaties and

conventions. We have been working for preparing this Symposium for two years. To China and all the countries involved, this Symposium is just another effort to open all the doors and windows for all of us to work together in the future.