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DOMESTIC VIOLENCE VICTIMS NEED SUPPORT AT STATE LEVEL

Rep. Scott Conklin

Domestic violence is a problem that affects people from all walks of life. The abuse, both physical and emotional, creates a lasting burden on its victims, no matter their economic background, age, ethnicity or gender.

Too often, this problem goes unchecked. We must correct this. Part of breaking the silence includes creating awareness for programs aimed at helping domestic abuse victims.

In Pennsylvania there are a host of helpful places a victim can turn to: 24-hour hotlines, individual and group counseling, court and emergency room assistance, shelters and safe homes, and state assistance programs to help compensate victims financially with hospital costs and destruction of property as a result of domestic violence.

I am thankful for these programs because many of them undoubtedly help domestic violence victims in Centre County. For some, that help is a lifeline and helping hand when there's nowhere else to turn.

Victim assistance is just part of the solution. As a state lawmaker, I realize the need to be proactive, not reactive in the fight against domestic violence.

The unfortunate victims of domestic violence need many advocates in state government. Since I was elected to serve, I have

been one of them. My record of support for victims of domestic violence is strong and consistent. During my tenure as a state legislator, I have sponsored a number of legislative initiatives to help women, particularly teens and young women, to recognize the early signs of abuse and become armed with the information they need to leave an unhealthy relationship. In addition, I am diligently working to expand protections for abuse victims who live in fear of being repeatedly victimized by their abuser.

Domestic violence is most commonly associated with abuse inside a home. The definition of domestic violence is outlined as behaviors used by one person in a relationship to control the other. Domestic violence knows no boundaries; it can happen outside of four walls and a picket fence. Sadly, it does. It happens between partners married and not married, those living together, separated or dating.

Shortly after being sworn in as a state legislator, I introduced a bill to curb sexual violence on the campuses of Pennsylvania's colleges and universities. The first few months of college are the most dangerous for new students due to the availability of drugs and alcohol, the absence of parental supervision and a lack of education and awareness about sexual assault.

The bill was aimed to require colleges in Pennsylvania to establish educational programs to provide discussion on various topics relating to sexual violence, including educating students about consent, the relation between drugs, alcohol and sexual violence, and the possibility of pregnancy and sexually transmitted diseases.

The legislation was also designed to establish a cohesive support network for victims among members of campus security, local law enforcement, the campus health center, women's center, rape crisis center and counseling services.

The statistics clearly show that the new freedom college provides students only months out of high school makes many far more susceptible to sexual violence, especially when one figures in the influence of alcohol and drugs. We need programs that will educate them about the warning signs so they can recognize when

something they are engaging in could lead to them becoming a victim and help them avoid an attack before it starts.

It is likewise important to make it clear to students when their own interaction with another student may be approaching what is considered sexual violence.

The programs proposed in my bill were designed to teach first-time students about the myths and truths concerning rape and sexual assault, to understand what constitutes rape or sexual assault, and create their own risk reduction strategy, as well as make students aware of options for individuals who are victimized. This initiative was well received by my colleagues, as it overwhelmingly passed the House of Representatives with a vast majority of state lawmakers voting in favor of the plan.

In addition, I was the author of a bill aimed to curb teen dating violence that was named the "Demi Brae Cuccia Law" after a Monroeville teen who lost her life as a result of dating violence.

Demi was a beautiful young lady, a high school cheerleader, a typical 16-year-old who idolized Jessica Simpson and one day planned on becoming a doctor or lawyer. On the day after her 16th birthday, Demi's ex-boyfriend, who had a reputation of being controlling and possessive, attacked Demi inside her home and fatally stabbed her.

Unfortunately, Demi's picture is now one that serves as a symbol of the tragic consequences dating violence can have. Oftentimes violence doesn't begin until a relationship has ended. Too many teens have been victims, and sadly too many have unnecessarily lost their life.

The statistics are alarming. In fact, teen girls face relationship violence three times more than adult women. That is why I introduced a bill that was designed to integrate teen dating violence education into middle and high school curriculums, by requiring school districts to develop an anti-dating violence policy that could be taught in health class, for example.

Teens need to know that if someone is texting them constantly and it feels uncomfortable, it's wrong; if they're being yelled at or pushed or hit, it's wrong. The numbers are staggering when you hear of students as young as sixth-graders have reported being hit by a boyfriend or girlfriend. It was imperative to me to have the tools in place so when teens are looking to talk, there is someone there to listen.

The Cuccia family joined me in my effort to pass this legislation to help raise awareness of teen dating violence issues. After it cleared the hurdle of the House, during one of the news conferences we held to call on the Senate to also pass the bill, Demi's father, Dr. Gary Cuccia, said: "My daughter was experiencing teen dating violence, we were all just unaware. Getting an education on the dangers of teen dating violence is the best defense we can offer our children. I stand with Representative Conklin to urge the state Senate to pass this bill so no other family has to go through the same agony mine has."

After the bill passed overwhelmingly in the House, it stalled in the state Senate. However, part of it was amended into the 2010 school code that passed alongside that year's state budget.

The language adopted in the school code was scaled back from my original proposal to recommend schools take up a dating violence education and response program rather than mandating them to do it. The law also instructed the state's Education Department to develop a model dating-violence complaint form to be distributed to Pennsylvania's public schools.

Even though I still think the dangers of teen dating violence and domestic violence are something that all young people need to be educated about, I am pleased that we were able to get to the point of passing a similar law.

And while domestic violence isn't confined to the home, in a perfect world that is where the education and awareness should start. In that perfect world, every family would eat dinner together every night of the week and discuss the tough issues. But the reality of the situation is that we have kids whose parents are unable to be there for them, kids whose parents aren't around to teach these things. These

things, like dating violence, don't always get discussed. That is one of the main reasons why I am pleased to say that we took a step forward in raising awareness of this issue so we don't lose one more young life unnecessarily.

I am continuing to fight against domestic violence by working to add protections to the current law for victims of abuse.

I originally introduced such legislation during the 2013-14 legislative session, and have reintroduced it in January, following the 2013 murder of Centre County resident Traci Ann Raymond Miscavish. Two months prior to her death Traci was granted a protection from abuse order, commonly known as a PFA, from her husband. Traci had a PFA against her husband yet lived in fear of him. Sadly those fears were valid, as he violated the order, tracked her down at work and took her life and his own.

My legislation would allow electronic GPS monitoring of an alleged abuser in certain domestic violence cases. Under the bill, courts could grant the monitoring in abuse cases while a PFA is in effect.

A PFA bans a suspected abuser from harassing, stalking, threatening or further abusing a protected person. Under Pennsylvania law, abuse is defined as causing or attempting to cause bodily harm, stalking, sexual assault, false imprisonment, and physical or sexual abuse of a minor.

Twenty-one other states, including neighboring Ohio, permit the use of electronic monitoring devices in domestic violence cases. We've got to get on board. We need to give domestic violence victims more peace of mind while expanding tools for law enforcement so they can get in front of abusers who try to break the law.

If this bill had been law in 2013, Traci's death might have been prevented. What happened to her was a tragedy. Passing this bill would be in her honor and send a message to domestic violence victims that we are listening to their calls for protection.

As a member of the state legislature, I am proud to be part of a body that can make laws against domestic violence. Just as the victim assistance programs, my efforts are one more part of the solution. It's going to take more than legislation. It's going to take education and empowerment, and it's going to take all of us being proactive. We can be proactive by implementing programs in our schools, like the teen dating violence program, and in community centers and churches. Stopping an abusive relationship before it starts is the ultimate goal and I believe if we continue to work together we can achieve that.

Throughout my legislative career, I have dedicated a good deal of time and effort to ensuring the safety and well-being of women – teens and adults alike - particularly the unfortunate victims of rape and domestic violence. I stand behind my accomplishments and will continue to place a high priority on this issue.

Rep. Scott Conklin represents the 77th Legislative District within the Pennsylvania House of Representatives. He serves constituents within the Centre Region who reside in Philipsburg, State College borough, Huston and Rush townships, and portions of Ferguson and Patton townships. Rep. Conklin is currently serving his fifth term upon taking the oath of office on Jan. 6, 2015. More information: www.pahouse.com/Conklin.

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***THE FORGOTTEN VICTIM: MEN AND DOMESTIC VIOLENCE – ISSUES FOR THE I-360 PETITION**

*Christine Grant, PhD**

Immigrant men who have been sexually, physically, emotionally and/or financially abused by their US Citizen spouses present very special issues for the practitioner. Common gender stereotypes, including perceptions of male roles and the belief that men are the typical aggressors can impede understanding of the male victim within a marital relationship. These impediments – whether conscious or not – can derail a successful VAWA petition for an otherwise deserving client.

Josef was a young man from the Ukraine who arrived in the USA on a J-1 visa. A quiet, reserved and uneducated man, he found employment as a rolling chair operator on the Atlantic City Boardwalk. Danielle was a vibrant, loud and gorgeous nightclub dancer who hailed his chair for a ride. Intrigued by her flamboyance and flirtatiousness, Josef agreed to a date. Within weeks, Danielle moved in with Josef and asked for \$1000.00 to help her out of a “jam.” Josef got a second job at a restaurant and eventually a third buffing floors on a nightshift in a grocery store. Josef fell in love and the couple married within the year. Their son was born four months later. However, their relationship was tumultuous, Danielle claimed to be working but never had any money to show for her job. Whenever Josef questioned her about the job she would barrage him with cursing and accusations of infidelity and then would physically attack him. Life fell apart when Josef finally decided to follow Danielle one morning. To his

* Dr. Grant has written affidavits and provided expert evaluations for the immigration law firm of Bagia & Associates, PC since 1997.

surprise, she unknowingly led him to a mental health clinic where she was in a methadone program for heroin addiction.

The challenge here is to “sort out” the addiction issues from the domestic violence issues. Careful interviewing of the client is required in order to determine the nature of the drug history of the abuser and to determine if drug use correlates to incidents of abuse. Too much attention to the drug addiction can deflect from the battering and can shift the focus away from the trauma the client has experienced. The examiner must be careful not to shift the attention from the abuse to the drug addiction as the ill-informed USCIS adjudicator may attribute the abuse as “involuntary behavior” as a consequence of drug addiction. In addition, too much focus on the addiction may result in an erroneous decision that the marriage was not bonafide, instead allowing one to conclude that the US Citizen married only to financially sustain their addiction.

Naresh was only five years old when his mother brought him to the USA from Trinidad. Growing up in North Philadelphia he was unaware of his illegal status until the age of 21. In his early twenties, he fell in love and married a gorgeous African American woman, Nekeisha. The couple organized a Caribbean honeymoon, but all their plans were thwarted when he realized he could not travel. Nekeisha lashed out at Naresh – physically and emotionally – and left him five days after the wedding. The couple resolved their differences and reunited after 3 months at which time Nekeisha became pregnant. She immediately asked for \$500.00 and told Naresh she was getting an abortion. Naresh begged her to keep the pregnancy, but she refused. Nekeisha escalated her physical and mental abuse towards Naresh throughout the year until she again pronounced that she was leaving him. Nekeisha returned to Naresh a year later with a baby girl in tow and promises that she really did love him. Naresh took them both in and raised the baby as his own. Nekeisha abandoned Naresh and her baby when the little girl was two years old. Nekeisha’s maternal grandmother petitioned the Family Court for the baby and Naresh had to give her up.

In this case, the difficulty confronting the practitioner is the fact that this man endured years of abuse – both emotional and physical – by a woman who, by all objective thinking, did not love him. Infidelity and abandonment are very difficult to process and to acknowledge. Men are expected to be able to ‘satisfy’ their partner, take a slap or a punch or a scratch, and control the situation. Men

are tough. Men believe the abuser will change. Men believe that love will overcome the issues. Men do not want to lose their children. Men feel guilty if they leave the relationship. Men experience the same identical feelings that women experience in violent relationships. Yet our American society has embraced the notion that men can and should “take it.” The practitioner’s job is to dispel these myths and preconceptions and explain in vivid and accurate detail the violence endured by the client.

Addison, from the Dominican Republic, was 37 years old when he married 27 year old Vicki who had three small children from three relationships. Addison also had three small girls from his first marriage in the DR. The couple married and within the year had a daughter together. Vicki preferred to spend time in Lancaster, Pennsylvania with her aging father rather than with Addison in Queens where he had a fulltime job as a locksmith. The couple met on the weekends. Their baby daughter was usually with Vicki. Addison walked in on Vicki and a man in bed at her father’s house when he arrived early to surprise her. The couple split up but got back together after rounds of tears and apologies. Their reunions never lasted long. Over the next three years, the couple endured a vicious cycle of break ups and reunifications. Vicki became increasingly abusive and demanded sex from Addison at least 4 to 5 times per weekend when they were together. If Addison refused sex or failed to achieve an erection, she resorted to throwing water on him, ripping his clothing, locking him in the bedroom alone, and destroying his personal possessions – such as his cell phone, photo albums and his locksmith tools.

Married men cannot be victims of sexual abuse. Men cannot be raped by women. Men don’t have to engage in sex if they don’t want to. All of these statements are misconceptions and must be addressed by the practitioner in order to accurately assess and interview the client. Understanding that men do experience involuntary erections and can be coerced into sexual relations is imperative when you accept cases involving abused men. When men are forced into a sexual act that they do NOT consent to – then that is abuse. Sexual intimacy is difficult to discuss and to inquire about forced sexual intimacy presents an incredible challenge. The astute practitioner must be aware that men are reticent to offer a sexual history and therefore the practitioner must be comfortable with asking detailed questions and be ready to “hear” the answers. Sexual violence is NOT uncommon within the confines of an abusive

relationship and must be addressed with your male clients. Men can be embarrassed, ashamed and confused if they have been sexually violated by a woman. They struggle to make sense of how it happened and why it happened. Careful questioning can reveal a pattern of sexual abuse that can be essential to a successful VAWA case.

Onyedi came to the USA from Nigeria to study. After failing his coursework, he took a job as a security guard for a parking garage. The same woman parked in his lot every day. They struck up a conversation and soon they were dating. The couple married the following year. After marriage, Amanda brought her four children to live with the couple. Onyedi had no idea she had children and was so astonished by the fact that he did not know how to respond. Once the children, who ranged in age from 5 to 14, were settled and in school, Amanda moved out. She refused to tell Onyedi where she was and only corresponded with him through text messages and emails. She would come by the house for food and clothes and to demand money from Onyedi. If Onyedi hesitated she threatened to call immigration. During one particularly angry interaction she pulled a knife on him. Onyedi went to the ER and had to have six stitches in his forearm.

Important to remember is that we should not excuse women for their violent behavior. As practitioners we have to be careful not to minimize the threats a man receives by a woman and to carefully examine the facts. The standard is that most people believe that men cannot really be physically hurt by a woman. Compounding the problem is that men do not call the police to report abuse; they do not seek assistance and if they must seek medical intervention, they are not asked about domestic violence. Men do not tell their co-workers or friends about their abuse and it is rare that men give off signs that they are abused. People just do not ask. Men do not take photos of their injuries and do not document their abuse. Men are not likely to leave an abuser. They believe if they try harder they can solve the issues and if there are children, men are afraid they will be cut off from them.

The bar to present a complete and convincing VAWA petition may be set higher for men. It is the practitioner's duty to directly confront the preconceived beliefs and issues in the VAWA submission. First and foremost proof must be offered that the

couple entered into the marriage in good faith. Second, battery or extreme cruelty – language used by USCIS must be delineated. Actual and threatened acts of violence must be clearly presented with corroborative documentation. Abuse can include physical or mental injury; psychological or sexual abuse or exploitation, including rape, molestation, and forced prostitution. The pattern of abuse needs clear definition and elaboration. Domestic violence is a sum of the parts in context. Separate isolated acts may not appear to the evaluator as abusive; so it is the practitioner's job to demonstrate that those small acts comprise a larger whole.

Our law firm has successfully filed hundreds of VAWA petitions. Seldom has an I-360 petition been approved without a Request for Evidence (RFE). This clinician has noted that every single RFE has contained the following language:

Submit evidence to show that you or your children have been the subject of battery or extreme cruelty. Submit one or more of the following as evidence:

Reports and affidavits from: police, judges, court officials, medical personnel, counselors, social works or other social service agency personnel or school officials.

Evidence that you have sought refuge in a shelter for the abused.

Photographs of your injuries, and affidavits from witnesses, if possible.

A statement in your own words describing the relationship with your abuser. Be as specific and detailed as possible.

It is imperative that each item be addressed and it is best if all this information is included in the original submission. If your client receives an RFE, then it is imperative that each item be thoroughly answered in-depth. A second affidavit is always recommended. The second one addresses the fact that the first affidavit was submitted

and this second submission provides supplemental information. The practitioner needs to offer detailed descriptions of abusive events in the client's own words and correlate these to important time periods in the relationship. For example, if the abuse escalated during the time the abuser was over-spending money – perhaps on drugs – overdraft statements from the bank could be presented as evidence. Medical records that correlate to injuries could support the victim's statements. Sworn affidavits which include all contact information including cell phone numbers have proven essential. Counselling notes, letters from therapists and professional evaluations all lend credibility to the client's statements.

Just as important are statements by the client as to WHY he cannot provide the requested evidence. Shelters for men do not exist in most states. Men do not call the police. Men do not seek counseling. Men do not seek out social services. Embarrassment, lack of knowledge and financial limitations are just a few reasons men are left thinking they must resolve their abuse on their own.

Asking men about their abusive experiences is a start. Advocating for their safety and their rights is a must.

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**ABUSED, ABANDONED, OR
NEGLECTED: LEGAL OPTIONS FOR
RECENT IMMIGRANT WOMEN AND
GIRLS**

Meaghan Fitzpatrick and Leslye E. Orloff

I. INTRODUCTION

The number of immigrants living in the U.S. has steadily increased in the last fifteen years. In 2014, over 42 million immigrants lived in the U.S. with women (51%) and children under the age of 18 (25%) representing a substantial proportion of the U.S. immigrant population.¹ Of that population, 2.1 million children are foreign-born and 17.5 million children are living with at least one foreign-born parent.² Many women and girls who have immigrated to the U.S. will have experienced gender based violence in their home countries and/or during their journey immigrating to the U.S.. Recently arriving immigrant women and girls are highly susceptible to gender based crime victimization in the U.S. including child abuse, child sexual exploitation, incest, dating violence, domestic violence sexual assault, and human trafficking.³ U.S. immigration laws offer

¹ Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the U.S.*, Migration Policy Institute (April 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Demographic, Educational, Linguistic>.

² *Id.*

³ *Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters: Hearing on S. 272 DHS Appropriations Bill before the S. Comm. on Appropriations*, 113th Cong. (2014) (statements of Jeh Johnson, Sec. of Dept. of Homeland Security, and Sen. Dick Durbin).

specific forms of immigration relief designed to offer humanitarian protections for immigrant children and youth who are victims of child abuse, abandonment, child neglect, sexual assault, or human trafficking perpetrated either in the U.S. or abroad. As greater numbers of immigrant children and youth arrive in the U.S., state family courts are seeing an increase in the numbers of immigrant children coming before the court in custody, protection from abuse, child support, children in need of supervision, and child abuse and neglect proceedings.

Special Immigrant Juvenile Status (SIJ) was created to benefit and protect children who had been abused, abandoned, or neglected, and ensures their continued safety in the U.S.. This article provides an overview of immigration relief available to help immigrant women and girls living in the U.S. and discusses how the process of applying for SIJ, in particular, requires involvement of both state family courts and the U.S. Department of Homeland Security's Citizenship and Immigration Services (USCIS). State courts play a vital role in SIJ applications. To petition for SIJ status, eligible immigrant children must obtain state court orders containing specified findings about the custody and best interests of the juvenile.⁴

This article discusses the legislative history and the social science research that supported both the creation of Special Immigrant Juvenile Status (SIJ) and the expansion of SIJ protections through the Violence Against Women Act of 2005 (VAWA) and the Trafficking Victim's Protection and Reauthorization Act of 2008 (TVPRA). The 2008 amendments to the Special Immigrant Juvenile Status program required that all children seeking SIJ obtain a court order from a state court containing statutorily required findings. SIJ applicants must submit state court orders as a mandatory part of the child's SIJ application. This article provides direction and analysis on the procedural and substantive legal questions arising in state family courts in cases involving SIJ eligible children. Common issues that arise at the intersection of state court and immigration law, such as "ageing out," and jurisdiction in state court will be discussed. The

⁴ IMMIGRATION AND NATIONALITY ACT § 101(a)(27)(J) defines "Special Immigrant Juveniles". This section was added by § 153 of the Immigration Act of 1990 and amended most recently by the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) in 2008.

article will also chronicle the broad range of state family court cases that involve custody, placement, care and/or best interests of children in which courts should be asked to issue SIJ findings. An overview of the forms of immigration relief offering protection from deportation and work authorization for immigrant children and youth will also be provided. Finally, the article will highlight the need for continuous screening of immigrant youth for SIJ, U visa, T visa, and VAWA eligibility from arrival in the U.S., through placement with a family, and the need for monitoring of the child's placement to screen for abuse that may occur in the U.S. following placement.

Women and children seeking safe haven in the U.S. are often fleeing severe forms of violence that they have suffered in their home countries.⁵ In recent years, the increase of gang violence, gender based violence, and poverty in some Central American countries has caused an influx of immigrant victims crossing the border into the U.S.⁶ The geographical region known as the "Northern Triangle," consisting of Guatemala, El Salvador, and Honduras, in particular has extremely high rates of violence against women and girls.⁷ El Salvador has the highest rate of femicide in the world, Guatemala the third highest, and Honduras the seventh.⁸ Women and girls living in countries with high levels of violence against women are more frequently attacked in public, including gang and intimate partner violence.⁹ Women and girls in these countries are also victims of physical and sexual assaults, child abuse, trafficking, economic crimes, and emotional violence, often with the local government unwilling or unable to help.¹⁰ This severe gender based violence has caused many women and children to flee their countries of origin seeking safe haven in the U.S.. The number of unaccompanied girls younger than 18 years old caught at the Mexican-American border

⁵ U.N. High Comm. for Refugees Report, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014) [hereinafter UNHCR Report].

⁶ *Id.* at 45.

⁷ *Id.* at 5.

⁸ Mathias Nowak, *Femicide: A Global Problem*, SMALL ARMS SURVEY 3 Figure 2 (2012).

⁹ *Id.* at 4.

¹⁰ UNHCR Report, *supra* note 3, at 30-38.

without documentation increased by 77% in 2014.¹¹ Women and girls face disproportionate risks of sexual assault and trafficking during the course of their journey. At least 60% of Central American women and girls crossing Mexico to get to the U.S. border are raped along the way.¹² The assaults are so rampant many girls take contraceptives as a preventative measure.¹³

Women and girls who survive the journey across the border and enter the U.S. without inspection are uniquely vulnerable. They remain at an increased risk for crime victimization in the U.S. due to previous victimization, undocumented immigration status, language, cultural, and economic barriers. Undocumented immigrants living in the U.S. can be very vulnerable to become victims of sexual assault, domestic violence, child abuse, and trafficking. Many immigrant women and girls suffer widespread sexual assault in route to the border and many are also likely to have suffered previous victimization in their country of origin. Additionally, many are particularly vulnerable to be targeted for crime victimization as women and girls living undocumented in the U.S.. Immigrants who have been victims of domestic violence, sexual assault, child abuse, child abandonment or child neglect or human trafficking in the U.S. and/or abroad may be eligible for Violence Against Women Act (VAWA), Trafficking Victims Protection Act and other humanitarian forms of immigration relief, including Special Immigrant Juvenile Status (SIJ).

It is important for government agencies, attorneys, advocates, and law enforcement to be aware of and understand the rates of victimization among recent immigrants and be knowledgeable about

¹¹ Jens Manuel Krogstad et al., *At the Border, a Sharp Rise in Unaccompanied Girls Fleeing Honduras*, PEW RESEARCH CENTER (2014).

¹² *Invisible Victims: Migrants on the Move in Mexico*, AMNESTY INTERNATIONAL PUBLICATIONS 15 (2010) [hereinafter Amnesty International Report]; Erin Siegal McIntyre & Deborah Bonello, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, FUSION (Sept. 10, 2014, 5:51 PM), <http://fusion.net/story/17321/is-rape-the-price-to-pay-for-migrant-women-chasing-the-american-dream/>; Jude Joffe Block, *Fronteras, Women Crossing the U.S. Border Face Sexual Assault with Little Protection*, PBS (Mar. 31, 2014, 1:49 PM), <http://www.pbs.org/newshour/updates/facing-risk-rape-migrant-women-prepare-birth-control/>.

¹³ See Amnesty International Report, *supra* note 12, at 17.

immigrant victims' legal rights in the U.S.. Advocates and attorneys play a crucial role in informing abused immigrants about their legal rights, supporting them through the legal process, safety planning, and encouraging those at greatest risk to turn to the justice system for help.¹⁴ Research has found that establishing real working relationships between advocates, police, and prosecutors working collaboratively on cases is the most effective approach in encouraging immigrant victims to come forward to seek immigration relief and pursue justice system protection.¹⁵ A significant proportion of the immigrant and undocumented crime victims who, with support from advocates and attorneys, file immigration cases and seek protection orders embark on a path in which they develop trust of the justice system that greatly increases their willingness to call police and turn to the justice system for help.¹⁶

II. IMMIGRATION RELIEF FOR VICTIMS OF CRIME AND CHILDREN

Women and girls who have been a victim of crime may be eligible for special forms of immigration relief designed to help vulnerable immigrant crime victims and immigrant children.

¹⁴ Mary Ann Dutton et al., *Cosmos Corp., Use and Outcomes of Protection Orders by Battered Immigrant Women: REVISED FINAL TECHNICAL REPORT*, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (2006); Nawal H. Ammar et al., *Battered Immigrant Women in the U.S. and Protection Orders: An Exploratory Research*, 37 CRIM. JUST. REV. 337 (2012); Praxis International, *Law Enforcement—Patrol Response*, in *THE BLUEPRINT FOR SAFETY* 43 (2007).

¹⁵ Giselle Hass et al., *Barriers and Successes in U Visas for Immigrant Victims: The Experiences of Legal Assistance for Victims Grantees*, ARTS SOC.SOCIAL SCI. J. 14 (2014); Giselle Hass et al., *U-Visa Legal Advocacy: Overview of Effective Policies and Practices*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013); Rachel Rodriguez, *Community Partnership Models Addressing Violence Against Migrant and Seasonal Farmworker Women*, Rockville, MD: National Criminal Justice Reference Service.

¹⁶ Leslye Orloff et al., *U-Visa Victims and Lawful Permanent Residency*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2012); Krisztina E. Szabo et al., *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, NATIONAL WOMEN'S ADVOCACY PROJECT (2014); Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending*, National Women's Advocacy Project (2014); Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, INT'L J. POLICE SCI. & MGMT 230, 240 (2005).

Immigration laws in the U.S. provide several specific protections for victims of domestic violence, sexual assault, child abuse, child abandonment, child neglect, human trafficking, and other criminal activities.¹⁷ The main forms of relief that women and girls crossing the border should be screened for are Special Immigrant Juvenile Status (SIJ), the U visa, the T visa, and eligibility for Violence Against Women Act (VAWA) Self Petitioning. In addition, Deferred Action for Childhood Arrivals (DACA) provides protection from deportation for immigrants who came to the U.S. as children. DACA is a form of temporary immigration relief not related to crime victimization.

A. Immigration Relief for Victims of Crime

1. *VAWA Self Petitions.* - Immigrant children who have been victims of child abuse, incest, or sexual assault perpetrated by the child's U.S. citizen or lawful permanent resident natural parent, adoptive parent or step-parent are eligible to VAWA self-petitions.¹⁸ The approved self-petition allows the immigrant victim and any children the immigrant included in the self-petition to apply for lawful permanent residency.¹⁹

To file for a self-petition, the abuse, defined as battering or extreme cruelty,²⁰ must have been perpetrated by a U.S. citizen or

¹⁷ See Section III (b).

¹⁸ Immigration and Nationality Act § 101(a), 8 U.S.C. § 1101(a).

¹⁹ Spouses and children under 21 years of age of U.S. Citizens can adjust to LPR immediately and can file the application concurrently with the VAWA self-petition. See IMMIGRATION AND NATIONALITY ACT § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i); Spouses and children under 21 years of age of LPRs and must wait for an immigrant visa to become available under the current wait list, the wait as of September 25, 2015 is 7 months. See *Visa Bulletin: Immigrant Numbers For October 2015*, U.S. DEPARTMENT OF STATE: BUREAU OF CONSULAR AFFAIRS (Sept. 25, 2015), http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_October2015.pdf.

²⁰ See generally Leslye E. Orloff et al., *Battering and Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

lawful permanent resident parent or step-parent.²¹ When filing the VAWA self-petition, the abused immigrant child must be under 21 years of age²² and unmarried.²³ Married immigrant youth who are battered or subjected to extreme cruelty by their U.S. citizen or lawful permanent resident spouses or former spouses also qualify for VAWA self-petitioning.²⁴ Formerly married immigrant youth must file marriage based self-petitions within two years of the termination of the marriage.²⁵ The survivor must reside or have resided at some time in the past (including periods of visitation) with the abusive U.S. citizen or lawful permanent resident. The applicant must also prove that they have good moral character which includes evidence about any criminal history the victim might have.²⁶

The self-petition allows spouses, parents, children, and step-children abused by a U.S. citizen or lawful permanent resident parents to apply for permanent residence confidentially without needing the abuser to file an immigration petition on their behalf. Within three months of filing a VAWA self-petition, victims will receive a prima facie determination making the applicant and any children included in the victim's application eligible for post-secondary educational grants and loans, public and assisted housing, health care insurance and some other state and federal public

²¹ *Policy Memorandum: Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen; Revisions to Adjudicator's Field Manual (AFM) Chapter 21.15 (AFM Update AD 06-32)*, U.S. DEPARTMENT OF HOMELAND SECURITY: U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Aug. 30, 2001), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/August/VAWA-Elder-Abuse.pdf>.

²² Leslye Orloff et al., *Battered Immigrants and Immigration Relief, in Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

²³ Immigration and Nationality Act § 204(a)(1)(D)(i)(I), 8 U.S.C. § 1154.

²⁴ Immigration and Nationality Act § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 8 U.S.C. § 1154.

²⁵ Immigration and Nationality Act § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 8 U.S.C. § 1154; Michael A. Pearson, *Memorandum for Regional Directors: Eligibility to Self-Petition as a Battered Spouse of a U.S. Citizen or Lawful Permanent Resident Within Two Years of Divorce*, U.S. Department of Justice: Immigration and Naturalization Service (Jan. 2, 2002), https://www.uscis.gov/sites/default/files/files/pressrelease/VAWADv_pub.pdf.

²⁶ 8 C.F.R. § 204.2(c)(1)(i)(F)(2007)

benefits.²⁷ If granted, VAWA Self-Petitioners receive legal immigration status, access to certain public benefits, and work authorization.²⁸

The VAWA self-petition primarily helps immigrant children abused in the U.S.. However, immigrant children abused abroad by a parent, step-parent, spouse or former spouse who is a U.S. citizen or lawful permanent resident employee of the U.S. government or member of the uniformed services also qualify to file VAWA self-petitions.²⁹

2. *The U Visa*. - The U visa is available to victims of qualifying criminal activity who have suffered substantial physical or mental abuse as a result of the criminal activity and who are willing to be helpful to law enforcement, prosecutors, courts, child abuse investigators, labor enforcement agencies or other government agencies³⁰ in detection, reporting, investigation, prosecution, conviction or sentencing.³¹

Criminal activities perpetrated against immigrant children and adult victims that qualify for U visa protection include the following: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary

²⁸ See Moira Fisher Preda et al., *Preparing the VAWA Self-petition and Applying for Residence*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

²⁹ Immigration and Nationality Act §§ 204(a)(1)(A)(v), 204(a)(1)(B)(iv).

³⁰ The government agencies eligible to sign certifications include agencies with investigative authority that in the course of their work uncover or detect facts about criminal activities perpetrated against the survivor. See *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53019 (Sept. 17, 2007), <http://apps.americanbar.org/domviol/tip/trainings/Immigration%20Remedies%20for%20Trafficking%20Victims%20Workshop/U%20Visa%20Regs%20-%20Fed.%20Register%209.17.2007.pdf>.

³¹ For a full discussion on the U Visa see Leslye Orloff et al., *U Visas: Victims of Criminal Activity*, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and other related crimes, and include attempts, conspiracy, or solicitation to commit any of the above and other related criminal activities.³² The U visa qualifying criminal activity must have occurred in the U.S. or violate U.S. law.³³ Once the U visa case is approved, the applicant receives legal work authorization and access to health care insurance and may apply for legal permanent residence after four years.

Immigrant youth who are victims of U visa listed criminal activities committed against them in the U.S. may be eligible for a U visa.³⁴ When the criminal activity the child suffered would under state law be defined as abuse, abandonment or neglect the child may also qualify for SJIS.³⁵ The U visa may be an important avenue to attain legal immigration status for children and youth suffering dating violence, extortion, felonious assault and other U visa listed criminal activities that would not make the child SIJ eligible.

3. *The T Visa and Continued Presence.* - The T visa and Continued Presence are two separate forms of immigration relief available to protect victims of severe forms of human trafficking perpetrated in or being prosecuted in the U.S. Government officials investigating or prosecuting a human trafficking case may file requests asking DHS to grant the trafficking victims they are working with continued presence. Continued presence allows immigrant

³² U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies, DEPARTMENT OF HOMELAND SECURITY (2015). *available at* <https://www.dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide>

³³ In some cases, crimes committed outside of the U.S. may qualify under extraterritorial application of American Criminal Law; *see generally* Charles Doyle, *Extraterritorial Application of American Criminal Law*, CONG. RESEARCH SERV. (2012).

³⁴ Joanne Lin and Colleen O'Brien, *Immigration Relief for Child Sexual Assault Survivors*, in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT 4 (2013).

³⁵ *Id.*

trafficking victims to stay temporarily in the U.S. with work authorization and access to federal and state public benefits.³⁶

The T visa allows immigrant victims who have suffered severe forms of human trafficking to remain in the U.S. for four years.³⁷ Trafficking victims can file for a T visa whether or not a government official sought continued presence for that victim.³⁸ Victims awarded T visa status receive protection from deportation, work authorization, and access to state and federal public benefits.³⁹ Both continued presence and the T visa are available to victims of severe forms of human trafficking who are physically present in the U.S. on account of the trafficking. Victims applying for and receiving T visas are required to comply with reasonable requests for assistance from law enforcement and prosecution officials with an investigation or prosecution of the traffickers.⁴⁰ To be awarded a T visa a victim will also need to prove that they would suffer extreme hardship involving unusual and severe harm if removed from the U.S.⁴¹

Human trafficking, often referred to as “contemporary slavery,” may take the form of labor or sexual exploitation. Victims of severe forms of trafficking are eligible to receive either or both continued presence or T visas. Eligibility includes adults compelled to engage in “sex acts” through the use of force, fraud, or coercion. Children less than 18 years of age involved in the commercial sex trade or prostitution as a matter of law are victims of trafficking. For minors, no proof of force, fraud, or coercion is required. Additionally, both adult and child immigrants who are forced or fraudulently recruited, harbored, or transported for labor or services

³⁶ TVPA 2000 §107(c)(3), 22 U.S.C. §7105(c)(3).

³⁷ 8 U.S.C. § 1101(a)(15)(T).

³⁸ TVPA 2000 §107(c)(3), 22 U.S.C. §7105(c)(3); The award of continued presence does not guarantee an approval of a T-visa, there are separate statutory requirements for a T-visa. .

³⁹ TVPA 2000 §107(c)(3), 22 U.S.C. §7105(c)(3).

⁴⁰ Carol Angel and Leslye Orloff, *Human Trafficking and the T-Visa*, NATIONAL WOMEN’S ADVOCACY PROJECT 8 (2015).

⁴¹ *Id.* at 10.

that subject them to involuntary servitude, peonage, debt bondage, or slavery are also victims of severe forms of human trafficking.⁴²

Immigrant youth who are victims of human trafficking may qualify for several different types of immigration relief. These include the forms of relief discussed above: the T visa, continued presence, the U visa and, in a limited number of cases, VAWA self-petitioning. Immigrant child trafficking victims may also qualify for the two forms of immigration relief discussed below: Special Immigrant Juvenile Status and Deferred Action for Childhood Arrivals (DACA). Which remedy an immigrant child qualifies for and which they will be able to successfully pursue will depend on the facts of each individual child's case. Factors will include: whether the perpetrator was a parent or step-parent, whether the parent or step-parent is a U.S. citizen or a lawful permanent resident; how long the child has been in the U.S.; whether the child is a minor under state law; or whether an immigrant child is married or unmarried.⁴³ Additionally, some of these remedies can be pursued sequentially. A child who has been in the U.S. since 2007 may decide to first pursue DACA which will give the child protection from deportation and work authorization. Immigrant children who have been victims of human trafficking may also pursue either a U or T visa case depending on which evidentiary requirements the child can best meet. Which form of immigration relief is the best alternative for an immigrant child who has been a victim of trafficking will also be affected by the benefits a child can receive through the type of immigration case filed. T visa and continued presence have the most access to federal and state public benefits and the U visa has the least. Work authorization can be more quickly obtained through DACA and continued presence than other forms of immigration relief.

⁴² See Laura Simich, *Out of the Shadows: A Tool for the Identification of Victims of Human Trafficking*, THE VERA INSTITUTE (2014).

⁴³ See Leslye E. Orloff et al., *Comparing Forms of Immigration Relief for Immigrant Victims of Crime*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

B. Immigration Relief for Vulnerable Immigrant Children

1. Special Immigrant Juvenile *Status*. - Special Immigrant Juvenile Status (SIJ) is a unique form of immigration relief available for youth who have been abused, abandoned, or neglected. SIJ can be especially important for recent young immigrants because the abuse, abandonment, or neglect by at least one of the child's parents need not have taken place in the U.S.. It is available to immigrant youth who were abused, abandoned or neglected by the child's parent or parents in the child's home country. Abused, abandoned, and neglected immigrant children are among the most vulnerable individuals in the U.S. and as such, are very susceptible to domestic violence, sexual assault, and other crimes and victimization. For this reason, SIJ is also available to immigrant victims who experienced child abuse, incest, child exploitation, abandonment, or neglect by a parent, step-parent, or adopted parent in the U.S..

SIJ is only available to unmarried youths who have been abused, abandoned, or neglected by either one or both parents. Applicants for SIJ must reside in the U.S. at the time the SIJ application is filed. The SIJ application must include an order from a state court judge containing findings on abuse, abandonment or neglect, on the viability of reunification with the parent who committed the abuse, abandonment or neglect and on the best interests of the child to not be removed to the child's home country.⁴⁴ The state court issuing this order must have jurisdiction under state law to make judicial determinations about the care, custody, dependency, or placement of children.⁴⁵ It is important that advocates and attorneys working with immigrant women and children screen recent immigrants and all children involved in state family court proceedings for SIJ eligibility unless the child is a U.S. citizen or lawful permanent resident. Early and ongoing screening to identify abuse suffered after arrival in the U.S. is essential to ensuring that children eligible for SIJ are identified and provided the opportunity to obtain state court orders needed to apply for SIJ status before the child reaches the age of majority under state law.

⁴⁴ Immigration and Nationality Act § 101(a)(27)(J)(i)(ii), 8 U.S.C. § 1101

⁴⁵ *Id.*

This helps children gain lawful presence in the U.S. and avoid some of the dangers of re-victimization.

2. *Deferred Action for Childhood Arrivals* - Deferred Action for Childhood Arrivals (DACA) is a prosecutorial discretion program that provides temporary relief from deportation and work authorization for certain undocumented immigrants living in the U.S..⁴⁶ DACA may be available for women and girls physically present in the U.S. who have been continuously residing in the U.S. since June 15, 2007.⁴⁷ Deferred action provides qualifying individuals protection from deportation for a period of two years with the potential for renewal. DACA recipients are also authorized to work in the U.S., and will not accrue unlawful presence during the period deferred action is in effect. While it may be renewed after two years, deferred action is not immigration status, does not provide a path towards permanent residence or citizenship, and does not extend to family members.

Deferred action is a useful tool for immigrant women and girls who have been victims of a crime and may be eligible for longer term immigration relief. Individuals coming forward for DACA may also have been victims of domestic violence, sexual assault, human trafficking, and other crimes that would make them eligible for permanent legal immigration status as a result of having been crime victims. Survivors applying for DACA can apply prior to, concurrently with, or while waiting for approval of crime victim-related immigration remedies.⁴⁸ This benefits immigrant women and girls particularly, because it allows for faster access to work authorization so they can begin rebuilding their lives and allows them to feel secure and not fear deportation. Individuals can apply for longer term immigration relief and deferred action at the same time, as long as they are not currently in lawful status, and were under the

⁴⁶ USCIS guidelines can be found on their website. *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#top> (last visited APR. 20, 2016).

⁴⁷ *Id.*

⁴⁸ Orloff et. al. *Deferred Action for Childhood Arrivals: How is it helpful for Immigrant Crime and Violence Survivors?*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2012).

age of thirty-one as of June 15, 2012. As soon as VAWA, U, T, or SIJ is granted, however, the individual no longer needs deferred action. Deferred action is also an important tool for undocumented immigrants who are ineligible for other forms of immigration relief or their eligibility has lapsed due to timing restraints.

III. LEGISLATIVE HISTORY OF SPECIAL IMMIGRANT JUVENILE STATUS

Special Immigrant Juvenile Status was originally introduced as part of the Immigration Nationality Act (INA) of 1990.⁴⁹ SIJ was created to aid and provide stability for undocumented youth living in foster care.⁵⁰ Congress originally created SIJ to help undocumented youth gain lawful permanent residency when the state juvenile court system has taken jurisdiction over an immigrant child and is responsible for insuring their safety, without regard to the child's immigration status.⁵¹ Undocumented youth living in foster care in the U.S. had no parents they could rely upon, states bore the costs of the immigrant children's care, and the children had no path to self-sufficiency. In 1990, the federal government was exercising its prosecutorial discretion by not seeking to deport unaccompanied youths because "of their age and the impracticality of deportation" as well as the fact many of them were victims of child abuse.⁵² At its inception, to be granted SIJ only required proof that an undocumented child was living in the U.S., was in foster care, and

⁴⁹ See Immigration and Nationality Act § 203(b)(4), 8 U.S.C. § 1153 (allocating a certain number of immigrant visas for "special immigrants"); Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (defining Special Immigrant Juveniles).

⁵⁰ See Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 237-38 (2006).

⁵¹ *Special Immigrant Status for Alien Foster Children: Joint Hearings on S. 358, H.R. 672, H.R. 2448, H.R. 2646, and H.R. 4165 Before the Subcommittee on Immigration, Refugees and International Law of the House Committee of the Judiciary, and the Immigration Task Force of the House Education and Labor Committee*, 101st Cong. 614 (1990) (statement of Mark Tajima, Legislative Analyst, Chief Administrator Officer, County of Los Angeles, CA).

⁵² *Id.*

that reunification with the child's biological parents was not viable.⁵³ As the number of children eligible for SIJ grew, Congress made several amendments in furtherance of the law's original intent.

In response to a growing concern that the law as originally written might encourage immigrant parents to give up their parental rights so that their minor children could acquire Special Immigrant Juvenile Status, in 1997, Congress modified the INA's SIJ provisions to limit SIJ immigration relief to immigrant children who had been abused, abandoned, or neglected.⁵⁴ The 1997 amendments also added the stipulation that the state court orders containing the findings of dependency and abuse, abandonment, or neglect were not sought for the sole purpose receiving immigration relief through SIJ.⁵⁵ The court order needed to fulfill a state law purpose of remedying the abuse, abandonment, or neglect by providing for the care or needs of an immigrant child. Congress made these amendments to further the original intent of SIJ, which was to protect undocumented children from abuse, abandonment, and neglect.⁵⁶

The next significant amendment to SIJ was included in the 2005 Reauthorization of the Violence Against Women Act (VAWA).⁵⁷ Prior to VAWA 2005 when a child applied for Special Immigrant Juvenile Status, the government officials adjudicating the child's case would as part of their adjudication contact the child's abusive parent or parents directly as part of the investigation of the case.⁵⁸ The practice of government officials contacting or requiring

⁵³ Leslye Orloff et. al. *Comparison Chart of Violence Against Women Act (VAWA) Self-Petition, U Visa, and Special Immigrant Juvenile Status*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

⁵⁴ See *House Committee on Appropriations, Making Appropriations for The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1998, and for Other Purposes*, H.R. REP. NO. 105-405, at 22-23, 130 (1997) (Conf. Rep.).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Violence Against Women Act, Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 826, 119 Stat. 2960, 3065-66. (Rule 12.4(a), (c), (e) pgs. 116-17).

⁵⁸ Immigration and Nationality Act Section 287(i) VAWA 2005 amendment reads as follows: "(i) An alien described in section 101(a)(27)(J) of the

the child to contact their abusive parent was not considered to pose grave danger for immigrant children applying for SIJ. The harm that this contact could cause to abused children was well understood in the domestic violence and child abuse fields and by members of Congress involved in drafting the Violence Against Women Act.⁵⁹ To bring an end to this dangerous practice, VAWA 2005 amended § 287 of the INA to bar government officials from contacting or compelling an immigrant child applicant for SIJ to contact the child's parent who is alleged to have abused, abandoned or neglected the child.⁶⁰ This no-contact requirement also barred contact with family members of the alleged abusive parent.⁶¹ These restrictions were an important part of the VAWA 2005 legislative package in which

Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers. . . These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal

Immigration and Nationality Act who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 101(a)(27)(J)(iii)(I) of such Act." In implementing these provisions DHS directed its officers "Under no circumstances can an SIJ petitioner, at any stage of the SIJ process, be required to contact the individual (or family members of the individual) who allegedly abused, abandoned or neglected the juvenile. This provision was added by the Violence Against Women Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006) and is incorporated at section 287(h) of the INA." Donald Neufeld and Pearl Chang, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (March 24, 2009).

⁵⁹ Katrina Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

⁶⁰ Immigration and Nationality Act § 287(h), 8 U.S.C. 1357(h)

⁶¹ *Id.*

actions against their victims. This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims. . .⁶²

In discussing how these immigration law protections were applied by VAWA 2005 to Special Immigrant Juvenile Statue immigration relief, Congress provided:

that in the case of an alien applying for relief as a special immigrant juvenile who has been abused, neglected, or abandoned, the government may not contact the alleged abuser.⁶³

In the DHS policies implementing this VAWA 2005 statutory amendment to SIJ, DHS directed its officers not to question SIJ applicant children applying for SIJ status about the details of the abuse because these matters have been addressed by state family courts experienced in working sensitively with traumatized children.⁶⁴

The most significant change to SIJ came in 2008 with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).⁶⁵ The TVPRA expanded eligibility for SIJ in significant ways. Until 2008, in order to qualify for SIJ the applicant must have been deemed eligible for long term foster care by a

⁶² 146 Cong. Rec. H9046 (2000), at 126, H.R. REP. NO. 109-233 (2000).

⁶³ *Id.*

⁶⁴ Memorandum from Donald Neufeld, Acting Associate Director of Domestic Operations, & Pearl Chang, Acting Chief of Office of Policy and Strategy, to Field Leadership, U.S. Dept. of Homeland Security (March 24, 2009) (“During an interview, an officer should focus on eligibility for adjustment of status and should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law.”).

⁶⁵ *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); *See generally* William Wilberforce Trafficking Victim’s Protection Act of 2007, H.R. REP. NO. 110-430, Pt. 1 (2007).

juvenile court and must therefore have been adjudicated dependent on the state.⁶⁶ This approach had the effect of barring access to SIJ for large numbers of immigrant children who had suffered abuse, abandonment, or neglect. These immigrant children needed and deserved to receive access to the SIJ immigration remedy which provides the stability and protection from deportation SIJ children need to be able to heal, to overcome the impact of the abuse, and to move beyond the abuse to become productive well-adjusted adults.

Congress recognized that many abused, abandoned, or neglected children whose lives could benefit dramatically from access to SIJ relief were living with one non-abusive protective parent.⁶⁷ In domestic violence cases the protective parent may have been a victim of domestic violence perpetrated by the parent who also abused, abandoned, or neglected the immigrant child. Prior to the TVPRA 2008 amendments to SIJ, abused immigrant children living with a protective parent in a family relationship in which the child was healing and thriving, could only qualify for SIJ if the child was taken from the protective parent and placed in long-term foster care. This placed immigrant children and their protective parents in the untenable position of having to choose between two outcomes neither of which furthered the immigrant child's best interests. The child would have to sever their relationship with their protective parent so that the child could receive legal immigration status through SIJ so the child could remain with their protective parent. Alternatively, the child would continue living with their protective parent and by doing so forfeit access to legal immigration status that would otherwise be available to the immigrant child victim.

This approach was inconsistent with best practices and research on the needs of abused children and children who had witnessed domestic violence in their homes. State family laws prohibit or discourage placement of a child in the custody of perpetrators of domestic violence and instead encourage courts to

⁶⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, §235 (d)(1)(A); 22 USC 7101. *available at* <http://library.niwap.org/wp-content/uploads/2015/IMM-Lghst-PublicLaw110.457TVPRA08-12.23.08.pdf>

⁶⁷ The expansion of SIJ eligibility to include "one or both parents" reflects the recognition of the strong relationship between domestic violence and child abuse.

award custody to the non-abusive protective parent.⁶⁸ As a result, judges in domestic violence cases issue court orders granting custody to the non-abusive parent in a broad range of family court proceedings. The types of family court proceedings in which custody or care of abused children and children witnessing domestic violence are addressed include: protection order, guardianship, juvenile, abuse, neglect, custody, divorce, paternity, child support, probate or other state court proceedings in which rulings concerning the placement, custody and care of children are determined. State family courts recognize that the best interests of children who have suffered or witnessed abuse in the home is best served by placing the child in the care of a protective non-abusive parent rather than placing the child in foster care.⁶⁹

⁶⁸ Men who perpetrate domestic violence against their intimate partners who are the mothers of their children parent differently from non-abusive men. Jeffrey L. Edelson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE, 839 (1999); *Behind Closed Doors: The Impact of Domestic Violence on Children*, U.N. CHILDREN'S FUND (2006); PETER G. JAFFE, DAVID A. WOLFE, & SUSAN KAYE WILSON, CHILDREN OF BATTERED WOMEN, (1990), *cited with approval in* Rashida Manjoo, *Violence Against Women in the U.S. and the State's Obligation to Protect: Civil Society briefing papers on community, military and custody submitted to the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo in advance of her Mission to the U.S. of America January 24 – February 7, 2011* (2011), <https://www.gallaudet.edu/Documents/AF/EOP/vaw.pdf>. Perpetrators of domestic violence are less involved with their children and use parenting practices that are harmful to their children including spanking, shaming and displays of anger. George W. Holden & Kathy L. Ritchie, *Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women*, 62 CHILD DEVELOPMENT, 311, 321 (1991); George W. Holden, Joshua D. Stein, Kathy L. Ritchie, Susan D. Harris & Earnest N. Juries, *Parenting Behaviors and Beliefs of Battered Women*, CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES, 185 (George W. Holden, Robert Geffner & Earnest N. Juries eds., 1998), *cited with approval in* Manjoo. Abusive men do not serve as role models for healthy relationships and conflict resolution in relationships. R. LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002); Levendosky, A.A. & S.A. Graham-Bergmann, *Mothers' Perceptions of the Impact of Abuse on their Parenting*, 6 (3) VIOLENCE AGAINST WOMEN 247-271 (2000).

⁶⁹ H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, U.S. Department of Health and Human Services, Administration for Children and Families (2003), <https://www.childwelfare.gov/pubpdfs/domesticviolence.pdf> (issuing guiding

TVPRA 2008 made significant changes to Special Immigrant Juvenile Status eligibility designed to promote healing for abused, abandoned, or neglected immigrant children by allowing immigrant children to apply for SIJ immigration relief and to allow the child to continue living with a protective non-abusive parent.⁷⁰ The approach furthered the goal of keeping non-abusive one parent headed households together. After enactment of TVPRA 2008 a non-abusive battered immigrant mother whose child was also abused could leave the abuser and her child would be eligible to pursue SIJ protection while living in the care and custody of the child's non-abusive battered immigrant parent.⁷¹

principles for child protective services workers that recognize that offering protection to domestic violence victims, enhances protection for children and has the benefit in domestic violence cases of keeping children with their non-abusive parent. "The following guiding principles can serve as a foundation for child protection practice with families when domestic violence has been confirmed. The safety of abused children often is linked to the safety of the adult victims. By helping victims of domestic violence secure protection, the well-being of the children also is enhanced. Perpetrators of domestic violence who abuse their partner also emotionally or psychologically harm their children, even if the children are not physically or sexually harmed. Identifying and assessing domestic violence at all stages of the child protection process is critical in reducing risks to children. It is important to understand potential effects of domestic violence to children beyond those that are physical in nature. If the family's circumstances are clear and it is appropriate, every effort should be made to keep the children in the care of the non-offending parent. Supportive, non-coercive, and empowering interventions that promote the safety of victims and their children should be incorporated in child protection efforts. Once domestic violence has been substantiated, the perpetrators must be held solely responsible for the violence while receiving interventions that address their abusive behaviors. CPS must collaborate with domestic violence programs and other community service providers to establish a system that holds abusers accountable for their actions.").

⁷⁰ See Memorandum from Donald Neufeld, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICE, (March 25, 2009). (stating that "previously, the juvenile court needed to deem a juvenile eligible for long term foster care due to abuse, neglect or abandonment. . ." while ". . .under the TVPRA 2008 modifications, the juvenile court must find that the juvenile's reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law") *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

⁷¹ *Id.*

TVPRA 2008 made two significant changes to Special Immigrant Juvenile Status. First, it opened up SIJ eligibility to include immigrant children receiving state court orders placing them in the custody of an individual or an agency which includes the child's other non-abusive parent. Secondly, the amendments broadened SIJ eligibility to include immigrant children who suffered abuse, abandonment or neglect by one parent ending the requirement that both parents have been involved in the child's abuse, abandonment or neglect.

The TVPRA of 2008 included amendments of SIJ to include any child who has been placed under the *custody of an individual or entity appointed by a State or juvenile court* as eligible to apply for SIJ.⁷² This allowed children in the custody of a protective parent, relative or appointed a guardian by the court the opportunity to apply for SIJ. This change illustrated a Congressional recognition of the important role played in state family court proceedings of kinship care. The amendments reinforce the importance child placements based on a child's best interests by removing obstacles in immigration law that punished immigrant children whom courts had not placed in foster care.

Placement with an individual, as opposed to placement with an agency, allows for the child to remain in a familiar, stable environment with a non-abusive parent, another family member, guardian or other state court ordered kinship care arrangement. This TVPRA 2008 change removes the requirements in SIJ immigration laws that were directly contrary to social science research, state laws, and court rulings. The 2008 amendments follow best practices in the field that aim to promote placement with of children family members or other care providers who could provide the best care for children and youth traumatized by their experiences of abuse, abandonment or neglect perpetrated by one or both of their parents.⁷³ Children who are able to remain with family members and familiar custodians are better able to adjust to their settings and are less likely to face

⁷² *Id.*

⁷³ See *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, THE ANNIE E. CASEY FOUNDATION (2012) (reporting that "extended family members and close family friends care for more than 2.7 million children in this country, an increase of almost 18% over the past decade").

behavioral problems.⁷⁴ This amendment was intended to allow children the stability and safety of custody and guardianship placements with protective parents, guardians or other family members while retaining the opportunity to gain legal immigration status through SIJ. By deleting the long-term foster care requirement, an undocumented immigrant child now has the option to remain with kin including the protective, non-abusive parent and still receive SIJ benefits.

The second major amendment in the TVPRA 2008 altered the requisite findings a state court with jurisdiction over a minor must make as part of the SIJ application. The state family court is no longer required to find the child eligible for long term foster care based on abuse, abandonment, or neglect, but instead must find that the juvenile's *reunification with one or both of his or her parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.*⁷⁵ In amending SIJ, TVPRA 2008 explicitly deleted the long term foster care requirement from the law, and replaced it with a statutory provision that authorizes SIJ eligibility for immigrant children who were abused, abandoned, or neglected by one parent and who reside with a non-offending parent.⁷⁶ As a result of the TVPRA 2008 amendments, if a child has one abusive parent and one protective parent, the court may find that reunification of the abusive parent and the child is not viable due to abuse. The state court order placing the child with the child's protective battered immigrant or other non-

⁷⁴ *Id.*

⁷⁵ In light of the Violence Against Women Act of 2005 amendments, which directs that neither immigration officials nor the SIJ child applicant communicate with the parent who has battered, abused, neglected or abandoned (Immigration and Nationality Act § 287(h)), and the statutory language under Immigration and Nationality Act § 101(a)(27)(J)(i) "or similar basis found under State law," "extreme cruelty" may be the basis for SIJ findings in state court. Extreme cruelty has been defined by the Department of Homeland Security in other contexts and is among the behaviors that would constitute abuse or neglect for the purposes of SIJ status. The term has a long history in state court family law, and the final regulations should clarify that "extreme cruelty" can form a basis for SIJ status. Leslye Orloff et al., *supra* note 20, (describing behaviors of power and control and coercive control that constitutes battering or extreme cruelty).

⁷⁶ *See* Special Immigrant Juvenile Petitions, 76 Fed Reg. 54978 (proposed Sept. 6, 2011).

abusive parent would no longer cut off vulnerable immigrant children from SIJ eligibility.

These changes in SIJ eligibility updated immigration law to be consistent with changes occurring in the family courts and child protective services systems, which had been moving in recent years away from the foster care system and toward alternate placement for children designed to be less harmful and more nurturing, stable, and healing for children who had suffered trauma. Under the new approach, immigrant children who have experienced abuse, neglect, abandonment or other harm that under state law can receive the protection they need under state law and obtain the findings they need from state courts to qualify for SIJ. Examples of children who were to benefit from the TVPRA 2008 amendments include:

- children living with parents who have also been abused;
- children being returned from state custody to live with an abused protective parent; and
- children who benefit from the family court equivalent of “alternatives to detention” where courts and child protective services agencies placed an abused, abandoned or neglected child with a family member, school teacher, kinship care or other placement designed to be better for the child and more in line with the child’s best interests than foster care.

A cornerstone of recent evolution of the U.S. child abuse and neglect system has been family reunification. As state courts and state child protection agencies have gained experience on the intersection of child abuse and intimate partner violence, they have come to understand the impact that protecting the abused parent has on protecting the child from ongoing child abuse. Research among immigrant domestic violence victims found that protecting immigrant mothers through protection orders and access to legal immigration status had the effect of reducing the co-occurrence of child abuse and

domestic violence in immigrant families.⁷⁷ Offering protection for the child's non-abusive parent, results in less child abuse and neglect of children in immigrant families that experience domestic violence.

The strong relationship between child abuse and domestic violence is well documented,⁷⁸ with co-occurrence rates ranging from 30 to 60%.⁷⁹ Children living in houses where there was battering are twice as likely to be abused compared to those where there was no battering.⁸⁰ Further, 45-75% of women in shelters report that their children experienced one or more forms of maltreatment.⁸¹ Research among immigrant women has found similar domestic violence and child abuse co-occurrence rates among immigrants (40-44%).⁸² However, among immigrant women there was a significant difference in child abuse co-occurrence rates between battered immigrant women who had sought help from a service provider (e.g. shelter, protection orders, immigration relief) with a co-occurrence rate of 23%⁸³ compared to battered immigrants

⁷⁷ See generally Nawal Ammar et al., *Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status*, Presentation before the International Family Violence Conference (Sept. 19-25, 2004).

⁷⁸ Joy D. Osofsky, *Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention*, CLINICAL CHILD & FAMILY PSYCHOLOGY REVIEW 161-170 (2003); Christine E. Cox et al., *A longitudinal Study of Modifying Influences in the Relationship Between Domestic Violence and Child Maltreatment*, JOURNAL OF FAMILY VIOLENCE 5-17 (2003); Alissa C. Huth-Bocks et al., *The Direct and Indirect Effects of Domestic Violence on Young Children's Intellectual Functioning*, JOURNAL OF FAMILY VIOLENCE 269-90 (2001); Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention*, TRAUMA, VIOLENCE & ABUSE 321-42 (2000); Melissa Jonson-Reid, *Youth Violence and Exposure to Violence in Childhood: An Ecological Review*, AGGRESSION AND VIOLENT BEHAVIOR, 159-79 (1998).

⁷⁹ Jeffrey Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, VIOLENCE AGAINST WOMEN (1999).

⁸⁰ MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* (Christine Smith ed. 1989).

⁸¹ Mary M. McKay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, CHILD WELFARE, 29-29 (1994).

⁸² Nawal Ammar et al., Presentation at the International Family Violence Conference, *Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status* (Sept. 19-25, 2004).

⁸³ *Id.*

who had never sought help regarding domestic violence where co-occurrence rates rose to 77%.⁸⁴ Children of help-seeking battered women were 20% less likely to have the abuser threaten the child and were one third less likely that the abuser would threaten to take the child away from his or her mother.⁸⁵

Historically many states had practices of removing children from abused parents and placing them in foster care. After years of litigation, advocates for battered women secured court rulings that removals of children from the non-abusive battered parent's care was unconstitutional.⁸⁶ As a result of these decisions, the failures of the foster care system, and the benefits for children of remaining in the care and custody of their non-abusive parent, courts today generally place children with the non-abusive parent including when she has been a victim of domestic violence. Courts issue protection orders and other orders in custody, child abuse and neglect and other family court cases that offer protection to abused mothers, abused children, and other children in families in which domestic violence is occurring. The changes in SIJ immigration laws removing the requirement that a child have been placed in foster care, broadening the types of family court matters in which SIJ orders can be issued, and providing access to SIJ for children who suffered abuse, abandonment, or neglect by one parent are a federal SIJ parallel to this evolution in the law. Congress, in amending INA Section 101(a)(27)(J), accomplished several changes in Special Immigrant Juvenile law with the goal of improving consistency with state family laws and state court procedures regarding jurisdiction under state law to make determinations about the custody and care of children.⁸⁷

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See generally *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002); *Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003); *Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004). See also David Lansner, *The Nicholson Decisions New York's Response to 'Failure to Protect' Allegations*, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, (2008), https://www.americanbar.org/newsletter/publications/cdv_enewsletter_home/vo112_expert1.html.

⁸⁷ Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(27)(j), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101(a)(27)(j)), (*amended by* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,

Additionally, TVPRA of 2008 amended SIJ laws to clarify “age out” protections for SIJ applicants. For applications filed on or after December 23, 2008, if an SIJ petitioner was a “child” on the date on which an SIJ petition was properly filed, USCIS will not deny SIJ based on the petitioner’s age at the time of adjudication, so long as the petitioner was under 21 years of age on the date their SIJ application was filed.⁸⁸ Congress created this “age out” protection to provide immigration relief that includes protection from deportation, work authorization and a path to lawful permanent residency that are essential to promoting the best interests and long term stability to immigrant children who have been victims of abuse, abandonment or neglect by one or both of their parents.⁸⁹ Through the creation of SIJ and the amendments added in VAWA and the TVPRA Congress has demonstrated a clear intent to protect not only children dependent on the state, but all immigrant children who have been abused, abandoned, or neglected as well as victims of domestic violence who are mothers of immigrant children experiencing child abuse or witnessing domestic violence.

IV. SCREENING FOR IMMIGRATION RELIEF ELIGIBILITY: FACILITATING ACCESS TO HEALING FOR CHILD TRAUMA SURVIVORS AND REDUCING VULNERABILITY TO ABUSE

Immigrant women and girls who immigrate to the U.S. are very likely to have suffered crime victimization in their home countries, to have been abused or sexually assaulted during their

Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified as amended at 8 U.S.C. §1232 (2008))).

⁸⁸ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(6), 122 Stat. 5044 (2008); *see also* Memorandum from Dept. of Homeland Security on Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (May 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

⁸⁹ *Policy Memorandum: Updated Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement*, U.S. CITIZEN AND IMMIGRATION SERVICES (June 25, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Perez-Olano_Settlement_Agreement_PM_APPROVED.pdf.

journey to the U.S. and are very vulnerable to crime victimization following their arrival in the U.S.. Every immigrant's experience will be different. Some will arrive in the U.S. already meeting the criteria of eligibility for the special forms of immigration relief designed to help immigrant children who have been abused, abandoned or neglected, because they came to the U.S. fleeing domestic violence, sexual assault, persecution, or because they are victims of human trafficking. Others may arrive not having suffered traumas that would make them eligible upon entry for immigration relief and during their time in the U.S. become eligible for crime victim or child related immigration remedies because of harms they suffer here. Many immigrants who suffer these traumatic life experiences will be eligible for humanitarian forms of immigration relief including relief designed specifically to help immigrant children and immigrant crime victims, but most children and victims do not know that they qualify for protections under U.S. immigration laws.

Throughout their journey of resettlement, acculturation, and adaptation to their new life in the U.S., immigrant children, women and crime victims will encounter many professionals along the way who can play a key role in their healing. Healthcare providers, teachers, counselors, therapists, social workers, attorneys, advocates, police, prosecutors, judges, child abuse agency staff, foster care workers and staff at community based, immigrant and faith based organizations all encounter immigrant women and children in their work. These professionals can play a crucial role in screening for trauma history, identifying immigration relief eligibility, and supporting victims and children in the process of applying for immigration relief and seeking other justice and social services assistance available to assist them in overcoming trauma and crime victimization. It is crucial to screen immigrant women and children for immigration relief at every encounter possible. As their stories develop over time, because of abuse or crime victimization they suffer while in the U.S., immigrants may become eligible for immigration relief and child abuse or crime victim related services they were not previously able to apply for.

A. Vulnerability of Immigrant Girls and Need for Facilitating Access to Protection and Humanitarian Relief

Growing numbers of immigrant women and girls who immigrate to the U.S. have experienced domestic violence, sexual assault, or human trafficking in their home countries or in the process of their immigration to the U.S..⁹⁰ In addition, immigrant women and girls are at a significant risk of crime victimization after their arrival in the U.S., particularly as victims of domestic violence, sexual assault, and human trafficking.⁹¹

Rates of domestic violence among immigrant women are high due in part to the perpetrators' ability to use immigration related abuse and threats of deportation as an effective coercive control tool that locks victims in abusive relationships and cuts them off from available help.⁹² As a result, immigrant domestic violence victims stay longer in abusive relationships, have fewer resources and options, and sustain more severe physical and emotional consequences of abuse.⁹³

When immigrant women and girls immigrate to the U.S. they often reconnect with parents and other extended family members. This reunification results in a restructuring of immigrant families and introduction of young immigrant children into families that include step-parents, step-siblings and extended family members who are relatives of either the child's original family or the child's new step parent's family. Recently arriving immigrant children living in homes with step-fathers, step brothers, grandfathers, uncles, cousins, and/or the child's mother's new boyfriend or in-laws are at greater risk of

⁹⁰ *Review of the President's Emergency Supplemental Funding Request for Unaccompanied Children and Related Matters: Hearing Before the Senate Appropriations Comm. on Dept. of Homeland Security Appropriations Bill*, 113th Cong. (2014) (statements of Jeh Johnson, Sec'y of Dept. of Homeland Security, and Sen. Dick Durbin).

⁹¹ *Id.*

⁹² Leslye E. Orloff & Olivia Garcia, *Dynamics of Domestic Violence Experienced by Immigrant Victims*, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

⁹³ Giselle Aguila Hass et al., *Battered Immigrants and U.S. Citizen Spouses*, Washington, DC: *Legal Momentum, Immigrant Women Program*, LEGAL MOMENTUM, (2006).

child abuse, sexual assault and incest.⁹⁴ Undocumented, limited English proficient, girls may also be targeted for sexual assault by predators in their life outside of their new families at school, church, or in the new community in which they settle.

For newly arrived immigrant women and children, limited English proficiency, undocumented immigration status, the process of acculturation and the lack of knowledge about laws and services available to offer protection from family violence and sexual assault result in vulnerability to being targeted by abusers and sexual predators.⁹⁵ This explains, in part, why research has found that foreign born girls are twice as likely as U.S. born girls to have suffered multiple incidents of sexual assault by the time they reach high school.⁹⁶

Special Immigrant Juvenile Status was created to offer help and an opportunity for healing for immigrant children harmed by child abuse, child sexual assault, abandonment, or neglect. Many state laws recognize that witnessing domestic violence in the home falls within the behaviors that under state law constitute child abuse or neglect.⁹⁷ These state laws were developed based on recognition about the effect that experiences of child abuse, sexual abuse and witnessing domestic violence perpetrated against a parent have on children are significant. Children in homes where domestic violence is present are impacted by the trauma in a number of ways, leading to obesity, heart disease, bed-wetting or nightmares, headaches, flu, as well as long term psychological effects that include depression, post-traumatic stress disorder, substance abuse and an increased likelihood to become victims of family violence themselves.”⁹⁸

⁹⁴ Michele R. Decker et al., *Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation*, 13 VIOLENCE AGAINST WOMEN 498, 503 (2007).

⁹⁵ Jessica Mindlin et al., *Dynamics of Sexual Assault and the Implications for Immigrant Women*, NATIONAL IMMIGRANT WOMEN’S ADVOCACY PROJECT (2013).

⁹⁶ See Decker et al.

⁹⁷ Varies by state, check local statute.

⁹⁸ *The Facts on Children and Domestic Violence*, FUTURES WITHOUT VIOLENCE (2008).

It is important to note that best practices in cases of children witnessing domestic violence is for the state to bring charges of child abuse or neglect against the parent perpetrating the abuse. Best practices promote placement of the children with the battered non-abusive parent with protection orders, custody and child support and other supports in place to help the battered mother and her children heal from the effects of the abuse. Cases have overturned court findings of abuse against battered mothers for failure to protect their children from the perpetrator's abuse.⁹⁹ U.S. immigration laws contain waivers for battered immigrant mothers charged with or convicted of failure to protect in states that continue to bring such cases against battered mothers, despite best practices and research findings to the contrary.¹⁰⁰

For immigrant women and girls, the domestic violence or sexual assault they experience in the U.S. may trigger memories of prior victimization or dislocation occurring in their home country or on their journey to the U.S..¹⁰¹ Many immigrant children who immigrate to the U.S. have been the direct victims of violence including child abuse and sexual abuse in the child's home country. An estimated 21% of the children from Mexico, El Salvador, Guatemala, and Honduras who have crossed the border and are living in the U.S. reported direct victimization in their homes as a reason for immigrating to the U.S..¹⁰² In each country, these reports were primarily made by girls who reported sexual assaults by step-fathers, boyfriends, and physical abuse from other relatives if they attempted to get help.¹⁰³ Young girls immigrating to the U.S. from the four most common countries of origin, Mexico, El Salvador, Guatemala, and Honduras, all reported an express fear of sexual violence at the hands of gangs in their home country.¹⁰⁴ El Salvadorian youth reported the highest percentage of gang related criminal activity, with 63% of the children self-reporting gang

⁹⁹ See *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002); *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003); *Nicholson v. Scopetta*, 3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004).

¹⁰⁰ Immigration and Nationality Act § 237(a)(7), 8 U.S.C. 1227.

¹⁰¹ Decker, *supra* note 68 at 2.

¹⁰² UNHCR Report, *supra* note 3, at 28-29.

¹⁰³ *Id.* at 35.

¹⁰⁴ *Id.*

violence as the direct reason for immigrating to the U.S..¹⁰⁵ Girls reported death threats against themselves and their families if they refused gang members sexual advances.¹⁰⁶ These high rates of violence in their home counties drive immigrant women and children to flee and risk the dangerous journey to the U.S..

The journey from the home country to the U.S. exposes young girls and women to rampant sexual assault. Traveling alone, relying on guides for direction and sustenance, with no access to government authorities to report crimes, immigrant women and girls fall prey to sexual assault perpetrated by fellow travelers, by coyotes, and by other men they encounter along their route to the U.S..¹⁰⁷ Many women and girls have report being instructed to purchase birth control before they begin their journey to the U.S., engaging in the journey to help protect them against pregnancy as a result of rape.¹⁰⁸

Immigrant girls and women who suffered domestic violence, sexual assault, human trafficking, child abuse, child abandonment, or child neglect either in their home country or in the U.S. may qualify for Special Immigrant Juvenile Status and/or other forms of immigration relief designed to offer humanitarian protection for immigrant victims of crime. Some children will qualify for several forms of immigration relief due to abuse, abandonment, neglect or other forms of crime victimization. Some immigrant children may not qualify for immigration relief when they first enter the U.S. because they may not have suffered harm in their home country that would make them eligible for SIJ or other immigration relief. However, these children may suffer harms subsequent to their arrival in the U.S. that make them eligible for SIJ, the U visa, the T visa, VAWA self-petitioning or VAWA cancellation of removal. Some of the most common circumstances or experiences occurring to children after their arrival in the U.S. that would make them eligible for immigration relief include, but are not limited to:

¹⁰⁵ *Id.* at 32.

¹⁰⁶ *Id.*

¹⁰⁷ Steve Inskip, *The Rarely Told Stories of Sexual Assault Among Female Migrants*, NPR (Mar. 23, 2014), <http://www.npr.org/2014/03/23/293449153/the-rarely-told-stories-of-sexual-assault-against-female-migrants>.

¹⁰⁸ *Id.*

- Being held hostage by coyotes after crossing the border
- Being raped in the U.S. when the child is in the process of immigration to the U.S.
- Being subjected to human trafficking in the U.S.
- Experiencing child abuse, sexual assault, or incest perpetrated by a parent or extended family members in the household in which the child is living in the U.S.
- Becoming a victim of sexual assault at school, university, or at work in the U.S.
- Becoming a victim of dating violence in the U.S.

Depending on which side of the border a child's victimization occurred, children may qualify for different forms of immigration relief. Screening and the dissemination of information about legal rights in the U.S. is essential so that victims who may be eligible for immigration relief learn about their eligibility. Too often, cases go unreported due to threats, fear, and the high number of victims detained at the border, who are not fully screened for the full range of immigration relief children may qualify to receive. As a result children and young women can be deported before they are able to learn of their eligibility. Courts, advocates, and attorneys should distribute DHS produced brochures on immigration relief for crime victims and on Special Immigrant Juvenile Status at courthouses and other locations that immigrant children and women frequent in the community.¹⁰⁹

Advocates and attorneys should screen immigrant girls and young women for crime victimization early in their relationship with

¹⁰⁹ See *Special Immigrant Juveniles (SIJ) Status*, DEPARTMENT OF HOMELAND SECURITY, <https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status> (last visited March 22, 2016); see also Emily McCabe & Leslye E. Orloff, *Pathways to Immigration Relief for Students*, IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014).

the client. Screening could include screening for trauma history through which the advocate or attorney may detect additional crime victimization, abuse, abandonment or neglect that may not have initially been apparent. Knowing the full history of trauma, abuse, and crime victimization may help attorneys and advocates identify the full range of forms of immigration relief the immigrant child is eligible to receive. The forms of immigration relief available for immigrant crime victims and immigrant children vary with regard to a variety of factors. All immigration case types developed to offer help for immigrant children and crime victims offer protection from deportation. The remedies vary however in some significant ways¹¹⁰ that include:

- The length of time an applicant must wait to receive legal work authorization;
- Whether the form of immigration relief the child qualifies for includes a path to lawful permanent residency
- When a child can receive a driver's license or a state issued ID;
- Whether the applicant is eligible for federal or state public benefits;
- Whether the child can receive health care through the federal or state funded exchanges and whether the child qualifies for state or federal subsidies for health care
- If the child can qualify for food stamps, and

¹¹⁰ The National Immigrant Women's Advocacy Project, under a grant from the Department of Justice, Office on Violence Against Women, developed several comparison charts illustrating the different eligibility factors, benefits, processes, and access to state and federal services and public benefits for various victim based immigration relief. *See generally* Krisztina E. Szabo & Leslye E. Orloff, *Comparison Chart of U visa, Special Immigrant Juvenile Status (SIJ), and Deferred Action for Childhood Arrivals*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014).

- Whether the child qualifies for post-secondary educational grants or loans through FAFSA (spell out) or through state funded educational grants or loan programs.

Since immigrant children may have suffered abuse in their home countries and others may at a later time suffer abuse in the U.S., it is important that advocates, attorneys, school teachers, counselors, community programs working with immigrant youth and faith based programs be cognizant of signs of abuse and screen children at regular intervals for abuse. Ongoing screening for domestic violence, child abuse, witnessing domestic violence in the home, sexual assault, human trafficking and other U visa listed crimes is important to ensure that children eligible for relief are identified as early as possible.

This helps assure that children receive the help they need as soon as possible. More importantly, ongoing screening is critical, because it assures the immigrant children meet filing deadlines and do not “age out” of immigration protections that they are eligible to receive. There are age deadlines by which children must file applications for SJIS,¹¹¹ VAWA self-petitions,¹¹² and DACA.¹¹³ Age limitations also apply to a child’s ability to benefit from their

¹¹¹ 8 CFR § 204.11(c)(1).

¹¹² Children who suffer battery or extreme cruelty before the age of 21 that is perpetrated by a U.S. citizen or lawful permanent resident parent or step-parent are able to file a VAWA self-petition up until the date of which they turn age 25. *See* Immigration and Nationality Act § 204 (a)(1)(A)(iv), 204 (a)(1)(B)(iii), 8 U.S.C. 1154; *see also* USCIS Policy Memorandum PM-602-0048, on Continued Eligibility to File for Child VAWA Self-Petitioners After Attaining Age 21; Revisions to Adjudicator’s Field Manual (AFM) Chapter 21.14 (AFM Update AD07-02), U.S. Citizenship and Immigration Services (Sep. 6, 2011), <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/VAWA-SP-Child-Attains-Age-21-PM-comment-06-xx-10-v3.pdf>.

¹¹³ The current DACA eligibility criteria require that applicants were under 31 years of age on June 15, 2012, however, under the new guidelines in President Obama’s Executive Action of November 14, 2014 this age restriction was lifted. *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Apr. 20, 2016).

immigrant parent's immigration case. Children who are under the age of 21 can be included in the immigration applications of their immigrant parents who are victims of domestic violence, human trafficking, or crime victims filing for VAWA, or T or U visa immigration benefits.

In order for immigrant crime victims to be able to access the immigration and justice system relief available under VAWA and state laws access to help from lawyers and advocates is essential. Research has found that when advocates and attorneys offer immigrant victims safety planning, legal rights information, and support, greater numbers of undocumented immigrant victims are willing to come forward and seek help offered by state civil protection order laws¹¹⁴ and U.S. immigration laws.¹¹⁵ Furthermore, immigrant women receive the support they need to file a crime victim based immigration case and become more willing to call the police for help and avail themselves of justice system protections including protection orders, custody and participation in criminal cases.¹¹⁶ Access to legal services plays an important role in the ability of immigrant victims of domestic violence and child abuse to file for immigration relief and access justice system help. Based on this understanding, Congress in VAWA 2005 amended the immigration restrictions on Legal Services Corporation (LSC) funded agencies to represent immigrant victims of domestic violence, sexual assault, human trafficking, or U visa qualifying crimes on a wide range of legal matters related to the abuse or crime victimization.¹¹⁷

In 2006, LSC issued program guidance to LSC funded legal services agencies directing that under VAWA 2005 immigrant victims could be represented by LSC funded agencies.¹¹⁸ LSC in 2014

¹¹⁴ Dutton et al., *supra* note 14.

¹¹⁵ Ammar et al., *supra* note 14.

¹¹⁶ Szabo, *supra* note 16.

¹¹⁷ VAWA 2005: LSC Statute with VAWA 2005 Amendments, *available at* <http://iwp.legalmomentum.org/reference/additional-materials/access-to-legal-services-for-immigrant-victims/statutes/vawa-2005-legal-services-corporation-representation-for-immigrant-crime-victims/violence-against-women%20LSC%20Statute.pdf/view>.

¹¹⁸ *Letter from Helaine M. Barnett, President of Legal Services Corporation on Violence Against Women Act 2006 Amendments* (Feb. 21, 2006) [hereinafter LSC Program Letter], <http://niwaplibrary.wcl.american.edu/cultural->

amended its regulations¹¹⁹ and issued a program letter¹²⁰ creating a new path to legal representation by LSC funded agencies for immigrant victims covered by the Violence Against Women Act's (VAWA) and the Trafficking Victim Protection Act's (TVPA) anti-abuse laws. These new regulations and policies offer protection for vulnerable immigrant women and children expanding the scope of representation at LSC funded agencies to include immigrant women and girls fleeing violence including when the abuse happened in the victim's home country or in the process of the immigration to the U.S..¹²¹ The representation can be offered for in any case that is directly related to escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.¹²² Abused children and other victims of domestic violence, sexual assault, human trafficking or other U visa listed criminal activities occurring inside or outside of the U.S. can receive assistance from LSC funded attorneys without regard to whether the victim qualifies for or will be pursuing immigration relief.¹²³ These LSC regulations, implementing that change, create two avenues an immigrant can pursue to attain assistance from any LSC funded program. These two paths to representation are representation under anti-abuse laws or representation based on immigration status. Children who have been abused in their home countries or in the U.S. qualify for LSC representation.¹²⁴ LSC funded agencies may also be able to represent immigrant children whose abandonment or neglect by a parent was tantamount to child abuse in the facts of the specific case considering

competency/access-to-legal-services/CULTCOMP_LSCPgmLetter_2.21.06.pdf/view.

¹¹⁹ Restrictions on Legal Assistance to Aliens, 79 Fed. Reg. 21861 (Apr. 18, 2014), codified at 45 C.F.R. 1626 [hereinafter 45 C.F.R. 1626].

¹²⁰ LSC Program Letter, *supra* note 118.

¹²¹ *Id.*

¹²² 45 C.F.R. 1626, *supra* note 119.

¹²³ See generally Leslye E. Orloff & Benish Anver, *And Legal Services Access for All: Implementing the Violence Against Women Act of 2005's New Path to Legal Services Corporation Funded Representation for Immigrant Survivors of Domestic Violence, Sexual Assault, Human Trafficking, and Other Crimes*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014) [hereinafter Access for All].

¹²⁴ LSC Program Letter, *supra* note 118.

the parent's actions and the impact of the abandonment or neglect on the child.¹²⁵

B. Need For Screening of Children in Immigration Enforcement and Detention for All Forms of Immigration Relief Including U Visa and SIJ

For these reasons, it is also extremely important that immigration officials be required to screen immigrant women and children they encounter for the full range of humanitarian immigration relief that immigrant women and children might be eligible to receive. Screening should not be limited to the very important credible fear interviews conducted to screen new immigrants for asylum eligibility. Over the past two decades, numerous additional forms of humanitarian immigration relief have been created by Congress specifically designed for immigrant children and crime victims. DHS officials working for Immigration and Customs Enforcement (ICE), Customs and Border Patrol (CBP), Department of Health and Human Services, and Office of Refugee Resettlement (ORR) should be required to routinely screen immigrants who are detained and immigrants who become the subjects of enforcement actions to identify immigrants who may qualify for:

- T visas, continued presence or U visas as victims of human trafficking;
- Violence Against Women Act self-petitioning or cancellation of removal as victims of spouse abuse or child abuse (battering or extreme cruelty) perpetrated by the immigrant's U.S. citizen or lawful permanent resident family member;
- U visas as crime victims who suffered criminal activities committed in the U.S. including domestic

¹²⁵ *Id.*; see also, *Access for All*, *supra* note 123.

violence, sexual assault, kidnapping, felonious assault, and other crimes listed in the U visa,¹²⁶ and

- Special Immigrant Juvenile Status for children who have suffered abuse, abandonment, or neglect by at least one of their parents.

Screening for VAWA, T and U visas, and SIJ is appropriate and necessary at each new interaction and after every change in location or custody.¹²⁷ Federal agency officials, such as CBP and ICE, are often the first encounter for undocumented women and girls who either turn themselves in or are apprehended in the process of crossing the border. The Department of Homeland Security issued a brochure that briefly describes crime victim based forms of immigration relief under the VAWA, T visa, and U visa programs.¹²⁸ This brochure should be distributed and be available on display in multiple languages next to customs forms at ports of entry into the U.S. and should be distributed to all immigrants who are detained or subject to immigration enforcement. Additionally, DHS brochures on SIJ and DACA should be distributed to immigrant children and the organizations and professionals who work with and encounter immigrant children.¹²⁹ The DHS issued a specific brochure on SIJ which gives victims, law enforcement and advocates detailed information on the eligibility requirements for SIJ.¹³⁰ These tools can be used at every level of interaction with immigrant crime victims.

¹²⁶ See *U visas: Victims of Criminal Activity*, *supra* note 30.

¹²⁷ Leslye E. Orloff et al., *Comparing Forms of Immigrant Relief for Immigrant Victims of Crime*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

¹²⁸ *Immigration Options for Victims of Crimes*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.dhs.gov/immigration-options-victims-crimes> (Sep. 12, 2015).

¹²⁹ See generally *Special Immigrant Juveniles (SIJ) Status*, *supra* note 109; *Consideration of Deferre Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Apr. 20, 2016).

¹³⁰ U.S. Citizenship and Immigration Services, *Immigration Relief for Abused Children* (Apr. 2014), https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Immigration_Relief_for_Abused_Children-FINAL.pdf.

In addition to the change of fact and circumstance necessitating continuous screening as immigrant women and girls move from the country of origin through the immigration system, continuous screening is important because of the cultural, psychological, and emotional factors involved in disclosing personal and traumatic information particularly information about child abuse, rape, sexual assault and domestic violence. Individuals will feel more comfortable with different screening agents; healthcare professionals, health outreach workers, and immigrant women community based victim advocates are particularly trusted by victims and are often well versed in screening immigrant women for crime victimization.¹³¹

C. How Trauma Informed Screening Can Help Advocates and Attorneys Best Serve Clients Surviving Trauma

Advocates and attorneys should engage in comprehensive screening for immigration relief while being conscious of and sensitive to the trauma a victim may have suffered. It is crucial for attorneys and advocates to build a relationship that will help their clients feel safe enough to divulge traumatic information. As trust builds victims who have suffered trauma will be more willing and able to respond to questions that elicit the information necessary to build the victim's immigration case. In order to achieve this, attorneys and advocates have found it useful to use a trauma informed approach to interviewing clients.

A team of family and immigration attorneys and national experts on trauma informed care developed an approach to developing a victim's immigration case that simultaneously helps immigrant victims heal from trauma. What has been learned from evidence based research on healing from trauma is that the process working with a trauma survivor to write her own story is an effective approach to healing and overcoming the impact that trauma has had

¹³¹ To find programs with expertise working with immigrant crime victims and children who are knowledgeable about the forms of immigration relief discussed in this article see the National Immigrant Women's Advocacy Project's national service provider directory. *Directory of Service Providers*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, <http://www.niwap.org/directory> (last visited Apr. 20, 2016).

on a victim's life. This approach uses an evidence based, research tested, story writing intervention approach that therapists and psychologists have been using with trauma survivors to identify trauma experienced over a lifetime that helps victims heal.

In immigration cases all victims applying for immigration relief are required to write an affidavit. This affidavit tells the victim's story and is one of the key pieces of evidence a victim submits to DHS as part of their SIJ, VAWA, U, and T visa applications. Victim's affidavit provides an opportunity for Department of Homeland Security (DHS) adjudicators to hear directly from the survivor, in her or his own voice. When reading the survivor's story, the reader – ultimately, the DHS adjudicator – should be able to know and feel what the survivor felt after being subjected to abuse or crime victimization. The fact that the victim has to write their story for their immigration case provides an opportunity for the victim to go through the story writing process in a manner that parallel's the approach therapists use to treat trauma survivors.¹³²

The story writing intervention includes the following components. First the advocate, attorney, or therapist invites the survivor to write her story, uninterrupted. The person working with the victim's role during the story writing is to empathically listen, be aware of trigger points, and be ready to help should a survivor have difficulty during the process.¹³³ During the second stage of the story writing intervention process there will be an opportunity during the structured interview session to ask follow-up questions in order to gather more details. Some survivors may be comfortable with

¹³² Krisztina Szabo et al., *Advocate's and Attorneys Tool for Developing a Survivor's Story: Trauma Informed Approach*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013); see also Leslye E Orloff & Meaghan Fitzpatrick, *How to Prepare Your Case Through a Trauma Informed Approach: Tips on Using the Trauma Informed Structured Interview Questionnaire for Family Court Cases*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

¹³³ The story writing process can be emotionally difficult and the advocate, attorney or other professional should not send the client to write the story on their own. Sometimes the process of writing and retelling the story can trigger the client to relive the trauma and go into crisis. When this occurs, the advocate or attorney should intervene using crisis intervention techniques. See *Training for Advocates and Attorneys on Trauma-Informed Work with Immigrant women*, YouTube (Apr. 23, 2014), <https://www.youtube.com/watch?v=05Z95q1bkG4>.

speaking freely about their experiences and others may not. For those that are not, we may want to guide them along this process by asking open-ended questions that prompt an open dialogue. The second stage of the trauma informed approach is an interview in which the advocate or attorney leads the victim through a second interview using a Structured Interview Questionnaire (SIQI) which obtains greater detail about the survivor's trauma history. The third part of the trauma informed story writing intervention involves the survivor reading back her final story to the advocate/attorney. This assists attorneys and advocates working with survivors of trauma to facilitate meaningful information gathering with your client and to help prepare her for interactions with the justice system. This approach produces stronger more quickly approvable immigration cases and better more robust evidence for any family law case that will be filed on the child or immigrant victim's behalf. At the same time this approach helps survivors heal.

The SIQI is designed to encourage trauma survivors to disclose in-depth information. Some of the questions prompt responses that will help build a stronger case, while others may be helpful details to include as evidence. The SIQI establishes a series of questions to ask that are designed to facilitate the client's healing and to strengthen the client's immigration application or family law case by uncovering important details of the story. The SIQI helps advocates and attorneys working with immigrant women and children who have suffered trauma uncover additional incidents of abuse. The SIQI also identifies experiences and emotional harms that contribute to extreme cruelty, provide evidence of substantial mental or physical abuse, contribute evidence that will support a court in rulings regarding the best interests of a child and the viability of reunification with their abuser.¹³⁴ The more detail an application for immigration relief can provide the more likely it is to be approved and the approval is likely to come more swiftly reducing the need for requests that the attorney representing the immigrant child or victim submit to additional evidence to support the immigration case. Similarly, the more the detailed evidence provided in the family court

¹³⁴ Mary Ann Dutton et al., *Trauma Informed Structured Interview Questionnaires for Immigration Cases (SIQI)*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

case about the trauma and abuse the more likely a victim will be to win custody of her children or a protection order and the more detailed the court orders and findings will be supporting a child's application for SIJ.

V. SPECIAL ROLE OF STATE COURTS IN SPECIAL IMMIGRANT JUVENILE CASES¹³⁵

SIJ was created to protect a class of especially vulnerable immigrant children from further upheaval in their lives and offer them a path forward with greater stability that attaining lawful permanent residency provides. SIJ offers abused, abandoned, or neglected immigrant children a path to lawful permanent residency and protection from deportation. SIJ involves a bifurcated system with proscribed roles for the Department of Homeland Security's Office of U.S. Citizenship and Immigration Services (USCIS) and state courts with jurisdiction over the immigrant children.¹³⁶ USCIS relies on the state court, as experts on child welfare issues, children's best interests, and state law. State courts issue findings applying state laws to the facts of the SIJ child applicant's case. The state court findings are not an adjudication of the child's immigration case. They provide evidence as to some of the factors that an immigrant child must prove if their SIJ case is to be approved. USCIS receives these findings as required evidence to prove abuse, abandonment or neglect in the SIJ case together with the totality of evidence in the case and adjudicates whether to grant an immigrant child applicant SIJ status or lawful permanent residency.

Congress chose to statutorily rely on state court adjudications relying on the expertise of state courts that are responsible for insuring children's safety and well-being regardless of the child's immigration status. The TVPRA 2008 amendments recognized the

¹³⁵ State courts also have a role in U visa certification and T visa endorsement. See Leslye E. Orloff et al., *U Visa Certification Toolkit for Federal, State, and Local Judges and Magistrates*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014).

¹³⁶ 8 C.F.R. § 204.11(a).

“presumptive competence”¹³⁷ of the state court in child welfare matters. Federal immigration law does not define abuse, abandonment, or neglect.¹³⁸ Instead, federal law relies on state courts to make factual findings describing in each case how the treatment the child has suffered meets the statutory definitions of abuse, abandonment, or neglect under the laws of the state in which the court is presiding. Federal law requires this finding be made in a court proceeding in which the court is exercising its jurisdiction under state law to issue orders involving care, custody or placement of the child.¹³⁹

State family law courts have deep expertise and experience in assessing the needs of children and issuing court orders that promote the healing, well-being, and best interests of children. State court judges issue orders involving children on a daily basis in a wide variety of cases. Congress chose to rely on state courts’ expertise in crafting court orders that promote child development, best interests and child welfare in making amendments to SIJ statutes. Congress required that state court judges be the finders of fact as to the abuse, abandonment, or neglect the child suffered, the viability of reunification with the abusive parent and the child’s best interests. Receiving specific types of state court findings are a prerequisite to an immigrant child’s ability to file an application for SIJ immigration benefits. Children applying for SIJ must prove to USCIS that they:¹⁴⁰

- Are under the age of majority as set by state law at the time the SIJ findings are issued by the court and on the date the SIJ application is filed (the maximum allowable age is 21);
- Are unmarried both at time of filing and at time of adjudication;

¹³⁷ *Gao v. Jenifer*, 185 F.3d 548 (1999) at 556, citing *Holmes Fin. Assocs. v. Resolution Trust Corp.*, 33 F.3d 561, 565 (6th Cir. 1994).

¹³⁸ TVPRA 2008 § 235(d).

¹³⁹ See *Special Immigrant Juvenile Status: Information for Juvenile Courts*, U.S. CITIZEN AND IMMIGRATION SERVICES, https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Juvenile_Courts_-FINAL.pdf.

¹⁴⁰ 8 U.S.C. § 1101(a)(27)(J).

- Present in the U.S.; and
- Have a state court order finding that:
 - The court has declared the juvenile dependent on the court, *or* has legally committed the juvenile to, or placed the juvenile under the custody of, an agency or dept. of a state *or an individual* or entity appointment by the state or a juvenile court located in the U.S.;
 - Reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis found *under state law*;
 - It is not in the best interest of the juvenile to be returned to the juvenile's or parent's previous country of nationality or country of last habitual origin.

The child must receive the state court order from a state court that under state law has jurisdiction over the child's care, custody or placement at the time the order is issued.¹⁴¹ State court jurisdiction is determined under the jurisdictional rules that apply to the type of proceeding the court is being asked to issue SIJ findings in. For example, in a custody case it may be difficult for a child who recently crossed the border to meet the traditional home state jurisdiction requirement that applies to interstate custody cases. For children who have recently crossed the border, family court custody jurisdiction can be difficult to establish. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), mere presence in the state is not sufficient for a state court to have jurisdiction over child in custody a custody case. The child must be present in the state for six months for the court to be considered the child's home state under the UCCJEA. Until that time the previous

¹⁴¹ *Policy Memorandum: Updated Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement*, U.S. CITIZEN AND IMMIGRATION SERVICES (June 25, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Perez-Olano_Settlement_Agreement_PM_APPROVED.pdf.

domicile in which the child lived for a period of six is considered the child's home state in which the custody action should be initiated. Under the UCCJEA foreign countries constitute and are treated like home states for custody jurisdiction purposes. If a child is living in a state and there are extenuating circumstances that require the court to exercise emergency jurisdiction the UCCJEA typically allows temporary emergency jurisdiction of that child which can ripen into continuous jurisdiction in some states. Cases that involve child abuse or neglect or domestic violence are the most common examples of when state courts will exercise emergency jurisdiction under the UCCJEA.

The child must receive state court orders before the child reaches the age at which the state court loses jurisdiction over the child. Under many state laws the point at which the state court loses jurisdiction over the child will be the age of majority in the state. There are some family law matters in which the court could continue to have jurisdiction over a child after the child reaches the age of majority under state law including, for example, cases involving child support obligations and enforcement and care for older disabled children.¹⁴² For example, some states allow child support to extend beyond the age of majority if the child is in college. In this scenario, a court may have the power to adjudicate the child support and simultaneously recognize the placement or responsibility of the care of the child in order to make the requisite SIJ findings.

Under USCIS policies once a child receives an order from a court with jurisdiction over the child under state statutes, the child is no longer required to file their SIJ application before turning the age of majority under state law.¹⁴³ The fact that the child aged out of the state court's jurisdiction after receiving the state court order will not

¹⁴² *E.g.* child support, over 18 year olds who have not yet graduated high school, children with disabilities; varies by state, be sure to consult local statutes.

¹⁴³ *See* Perez-Olano, et al. v. Holder, et al., 2:05-cv-03604-DDP (C.D. Cal.); *see also* Settlement Agreement in Perez-Olano, et al. v. Holder, et al., Case No. CV 05-3604, in U.S. District Court for the Central District of California, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/laws/legal-settlement-notices/settlement-agreement-perez-olano-et-al-v-holder-et-al-case-no-cv-05-3604-us-district-court-central-district-california>.

preclude the child from filing for SIJ status.¹⁴⁴ The policies issued by USCIS in June of 2015 offer important clarification they state that an SIJ “applicant who is otherwise eligible will remain eligible will remain eligible even if he or she:

- Turns 21 years of age after filing the SIJ petition. . . but prior to USCIS’ decision on the SIJ petition.
- Ages out of the juvenile’s court jurisdiction prior to filing the SIJ petition. . .”¹⁴⁵

The SIJ policies issued in June 2015 confirm that applicants for SIJ face two important age related deadlines:¹⁴⁶

- They must obtain a state court order containing SIJ findings before the child turns the age of majority under state law or before the state court otherwise loses jurisdiction over the child; and
- The child must file for SIJ status before the child turns 21 years of age.

Finally, once a child has filed an application for SIJ that meets these age related filing requirements, the fact that the child turns 21 before their SIJ case has been adjudicated by USCIS will not affect the approval of their SIJ application. It will also not preclude the child from filing for and receiving lawful permanent residency based on the child’s timely filed SIJ application.¹⁴⁷ Similarly, if the state court’s jurisdiction over a child issued SIJ findings comes to a natural conclusion prior to the child aging out of state court jurisdiction and USCIS adjudication of the child’s SIJ case or lawful permanent residency based on an approved SIJ application, USCIS will not

¹⁴⁴ *Id.*

¹⁴⁵ USCIS Policy Memorandum PM-602-0117, Updated Implementation of the Special Immigrant Juvenile *Perez-Olano* Settlement Agreement at 3 (June 25, 2015), *reprinted in* 92 Interpreter Releases 1165 (July 6, 2015) *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Perez-Olano_Settlement_Agreement_PM_APPROVED.pdf.

¹⁴⁶ *Id* at 3.

¹⁴⁷ *Id* at 1.

penalize the child. For example, in an adoption proceeding, the case comes to its natural conclusion when the adoption is finalized and the child no longer needs the help of the state court. While USCIS prefers that the child be under the continuous jurisdiction of the court throughout the USCIS adjudication, USCIS will often accept orders in cases that have concluded if the placement for the child is permanent.

A. State Courts With Authority Under Federal Immigration Laws to Issue SIJ Required Findings

Prior to the TVPRA 2008 amendments only juvenile courts hearing foster care related child welfare cases could make SIJ findings. When it is said the state court must have jurisdiction over the juvenile, it does not mean that the only court that can make the necessary findings are traditionally “juvenile” courts that have jurisdiction. Although federal SIJ statute continues to use the term “juvenile” court, it is clear that the TVPRA 2008 statutory amendments contemplate broadly opening up the types of state court cases in which judges can issue SIJ findings. The amendments made by TVPRA 2008 authorize any state family or juvenile court located in the U.S. with jurisdiction over the care, custody, placement, or dependency of a child to make SIJ findings.¹⁴⁸ As a result of these amendments, an SIJ applicant must either be dependent on the state court or the court must have the jurisdiction to place the juvenile under the custody of an agency or department of state, or an individual or entity appointed by a state court.¹⁴⁹ Court awards of custody, guardianship, or placement¹⁵⁰ of a child with an individual

¹⁴⁸ 8 C.F.R. 204.11(a); *See also Special Immigrant Juveniles (SIJ) Status, supra* note 80.

¹⁴⁹ USCIS defines juvenile court as: a court in the U.S. that has jurisdiction under state law to make judicial determinations about the custody and care of children. Examples include: juvenile, family, orphans, dependency, guardianship, probate and delinquency courts. 8 U.S.C. § 1101(a)(27)(J); *See also Special Immigrant Juveniles (SIJ) Status, supra* note 109.

¹⁵⁰ Placement can include court orders recognizing or sanctioning an already existing placement. This could occur, for example, in the context of court issuing a declaratory judgment that recognizes the placement of a 17 year old child with an adult (e.g. parent, next friend, school teacher) who has been caring for the child with the recognition of the child’s resident with the caretaking adult providing

could include a parent, grandparent, aunt, uncle, other relative, next friend or other caretaker or guardian. A wide range of state courts hearing cases involving children that are authorized under federal immigration laws to make SIJ findings include:¹⁵¹

- Adoption
- Child abuse
- Child neglect
- Children in need of supervision
- Child Support
- Custody/visitation/modification
- Delinquency
- Dependency
- Divorce
- Guardianship
- Legal Separation
- Motions for declaratory judgement
- Protection order
- Paternity
- Termination of Parent Rights

documentation the child needs to maintain enrollment in school or gain access to health care or other benefits.

¹⁵¹ See *Special Immigrant Juveniles (SIJ) Status*, *supra* note 109.

B. The Court Must Make a Determination Regarding the Care or Custody of the Juvenile

There are a wide range of circumstances in which a state court could, under state law, enter orders that address the custody, placement, or dependency or orders that provide for the care, well-being, and/or the best interests of children. State family courts regularly encounter children in a range of judicial proceedings and court dockets. Any proceeding involving a foreign born child who has not already become a citizen or lawful permanent resident could be a court case in which an immigrant could appropriately request and receive SIJ findings.

Many of the youth crossing the border are between the ages of 15 and 17.¹⁵² It can take many months for a recent immigrant child to make their way to family court. For children who are detained after crossing the border by immigration enforcement officials the process from that point forward is as follows. After the child is apprehended, immigration enforcement officials have 48 hours to screen the child for immigration relief eligibility that includes screening for political asylum eligibility and recently began including screening for human trafficking. As of this writing immigration enforcement officials at Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) are not routinely screening children for eligibility for other forms of humanitarian relief including SIJ and the U visa. After 48 hours in immigration enforcement detention, the unaccompanied minor child is transferred to the custody of the U.S. Department of Health and Human Services' Office of Refugee Resettlement (ORR). ORR is responsible for seeking a safe placement for immigrant children placed in their custody. The length of a child's stay in ORR custody is usually one month. During that time ORR identifies a parent, a family member, or other person willing to take custody and responsibility for the child. Once a potential custodian is identified, ORR screens them to determine whether the placement is safe for the child. ORR seeks agreement from the persons in whom they place custody of the child

¹⁵² *Frequently Asked Questions: Unaccompanied Immigrant Children on the Southern U.S. Border*, NATIONAL IMMIGRANT JUSTICE CENTER, http://www.immigrantjustice.org/frequently-asked-questions-unaccompanied-immigrant-children-southern-us-border#.VgxVi_IVhBc (last visited Apr. 20, 2016).

to provide for care of the child and bring the child to immigration court proceedings. Placement with of the child with family members or other sponsors is accomplished without inquiry into and without regard to the immigration status of the adult family member in whose custody the child is placed. Through this process most unaccompanied minor children are released from government custody and placed with family members or other sponsors in the community while the child goes through the process applying for immigration relief the child qualifies to receive and appearing before the immigration court in removal proceedings.

Only after placement with a family member or other custodian would the child need to turn to the state court for orders regarding custody. In some states the adult in whose custody the child was placed would need to obtain a state court order in a guardianship case so that the adult custodian can enroll the child in school. Additionally, children for whom ORR is unable to locate a safe placement will remain in federal HHS custody. For children placed in ORR custody either the agency given custody of the child or the child with their own attorney may come to court seeking orders that include SIJ findings. Courts can issue family orders regarding the care and recognizing the custody of a children in ORR custody with consent of HHS only required if the state court would be modifying the custody placement. This process is largely responsible for why courts may see adolescents coming to state court to receive court orders mere days before immigrant child reaches the age of majority seeking a custody, confirmation of placement, or other court orders regarding the child's care and additionally requesting SIJ findings. While it may be unusual for courts to see custody matters involving children ages 16 or 17, so long as the state court has jurisdiction under state laws to issue orders that benefit children courts can sign SIJ orders.

The TVPRA 2008 also modified the “express consent” requirement to state that, “the Secretary of Homeland Security (Secretary) must consent to the grant of special immigrant juvenile status.”¹⁵³ Through policy memos, USCIS has interpreted this to mean that the SIJ petition must be “bona fide” and was not “sought

¹⁵³ Immigration and Nationality Act § 101(a)(27)(J)(iii)

primarily for the purpose of obtaining the status...rather than for the purpose of obtaining relief from abuse or neglect or abandonment.”¹⁵⁴ There are many ways in which state court orders regarding care or custody benefit older adolescent children serve legitimate purposes under state family laws. The following are examples of orders that have a legitimate purpose under state law beyond immigration relief. An adolescent may seek state court orders needed to ensure that the child can remain a dependent on their custodian’s health insurance. The adolescent may need the state court order to stay enrolled in high school, to enroll in a vocational school or to receive state funded post-secondary educational grants or loans. An older child may need a custody order that allows a child to continue living with their non-abusive battered immigrant parent. Providing an adolescent with stability as they enter adulthood is a valid purpose for a juvenile court order that goes beyond the need for immigration relief. Even if the order will only be valid for a short time, state family courts have seen the benefits for a child’s development and protection of issuing orders that implement, recognize and validate support systems for the child that as a practical matter will continue beyond the date a child turns the state law age of majority. Such court sanctioned arrangements do not in practice terminate on the date the child reaches the state law age of majority solely because the court’s jurisdiction over the juvenile does. The Department of Homeland Security CIS Ombudsman recognized the need for increased guidance on the current interpretation of the consent function, arguing “(r)ather than retain the elements of ‘express consent’ derived from the 1997 amendments, a proper implementation of the TVPRA language requires that USCIS verify whether State court orders contain the necessary factual findings and whether the State court has articulated the foundation for such findings.”¹⁵⁵ The Ombudsman further advises that securing relief from abuse and seeking immigration benefits are mutually beneficial rather than exclusive, noting the current interpretation of primary purpose “relies on a false dichotomy that suggests it is possible that a

¹⁵⁴ USCIS Memorandum, HQOPS 70/8.5 “Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions” (Mar. 24, 2009) *citing* H.R. Rep. No. 105-405, at 130 (1997).

¹⁵⁵ Recommendations from Maria Odom, *Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications*, DEPT. OF HOMELAND SECURITY CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN 7 (December 11, 2015).

State court action may only focus on *either* protections against future harm *or* securing immigration benefits, when almost always, the court protections inevitably provide both in tandem.”¹⁵⁶

As state courts receive training on the important role of state family courts in Special Immigrant Juvenile Status courts will likely be able to identify immigrant children who may benefit from the SIJ program. In potential cases in which a child may be SIJ eligible, courts can ask counsel for the child to explore the issue directing counsel to USCIS produced materials on SIJ status. For example, if an immigrant minor is before the court without a parent or guardian present and child does not have a birth certificate, the court may take notice of potential SIJ eligibility and direct counsel to brief the court on SIJ. When courts issue SIJ orders for children at younger ages, this will reduce then number of children coming into court with urgent cases seeking court orders containing SIJ findings before the child turns the age of majority under state law.

C. Reunification Is Not Viable With At Least One Parent Based on the Abuse, Abandonment, or Neglect by That Parent As Defined by State Law

Once the court has exercised jurisdiction over an immigrant child and made rulings regarding the care or custody of the child, the court can include in its court order the findings SIJ statutorily requires as a prerequisite to a child filing an SIJ petition. These findings address two matters. The first finding articulates facts of the child’s case documenting that the child was abused, abandoned, or neglected by at least one of the child’s parents and that reunification with that parent is not viable. This finding will be discussed in detail in this section. The second finding discussing facts that demonstrate why the court finds it is not the child’s best interests to be returned to their home country will be discussed in the next section.

When SIJ was created, federal deportation priorities did not seek to deport unaccompanied youths because “of their age and the impracticality of deportation” as well as the fact many of them were

¹⁵⁶ *Id.* at 8

victims of child abuse, abandonment or neglect.¹⁵⁷ Congress decided that state courts were best suited to determine whether a child suffered abuse, abandonment, or neglect as defined by state family laws. Determinations as to whether a child has been abused, abandoned or neglected by a parent are made on a daily basis in child abuse and neglect, civil protection order, custody, adoption, delinquency, guardianship and other family court proceedings. State family courts are well versed in the state law definitions of “abuse,” “abandonment,” and “neglect” and are well positioned to make findings as to whether the facts of the case before the court involving a Special Immigrant Juvenile constitutes abuse, abandonment or neglect as defined by state law. Cases brought to court for SIJ findings will include acts of abuse, abandonment or neglect that were perpetrated by an immigrant child’s parent or parents either inside or outside of the U.S..

In determining whether the child has been subjected to abuse, abandonment, or neglect by one or both of their parents, state courts apply the state law definitions of abuse, abandonment, or neglect without regard to where the abuse, abandonment, or neglect occurred. If the actions or inactions regarding the child would be considered abuse, abandonment, or neglect under the laws of the state, the court is authorized to enter SIJ findings including in cases in which all of the abuse, abandonment, or neglect occurred outside of the U.S..

1. *Findings Must be Based on Relevant State Law Definitions of Abuse, Abandonment, or Neglect.* - In entering SIJ findings courts must apply the *state* law definitions of abuse, abandonment, neglect or another similar act against a child under state law to the facts of the immigrant child’s case that the court is adjudicating. There is no federal definition of abused, abandoned, or neglected in the Immigration and Nationality Act (INA). Therefore courts should include citations to the state law definitions of these offenses against a child in the court order and make findings that detail how the facts of the specific case before the court constitute abuse, abandonment,

¹⁵⁷ *Special Immigrant Status for Alien Foster Children: Joint Hearings on S. 358, H.R. 672, H.R. 2448, H.R. 2646, and H.R. 4165 Before the Subcommittee on Immigration, Refugees and International Law of the House Committee of the Judiciary, and the Immigration Task Force of the House Education and Labor Committee*, supra note 51.

neglect or other similar harm to a child under state law. It is legally incorrect for state court orders to find that abuse, abandonment, or neglect took place under the under the sections of the INA that define Special Immigrant Juvenile Status. If a court cites to the INA for the definitions of abuse, abandonment or neglect rather than state law the court order will likely be insufficient to support an award of SIJ to the immigrant child by USCIS. When seeking court orders to submit with an SIJ application attorneys and courts should avoid citing to the INA and cite instead to the relevant state code section that the court is relying upon to make its abuse, abandonment or neglect findings. Just as the court order needs to include factual details that are the basis for the court's the abuse, abandonment or neglect findings, court orders should include a factual basis for the findings that parental reunification is not viable. The order should state the child cannot be reunited with the offending parent discussing the evidence of abuse, abandonment, or neglect and that reunification is not viable. The SIJ statute only requires a state court to find reunification is not viable with the offending parent; the statute does not necessitate a termination of parental rights. Therefore, a child may have contact or visitation with the offending parent but formal reunification of the parent and child remains not viable. .

While the definitions of abuse, abandonment, and neglect vary by state, most state statutes recognize neglect, maltreatment, physical, sexual, and emotional abuse. Every state has a civil and criminal statute for child abuse and neglect. In delegating the determination that the child has suffered abuse, abandonment or neglect to state courts under state laws, the federal statute gave the state courts the flexibility to make SIJ findings under any definitions of abuse, abandonment or neglect contained in state law including but not limited to definitions contained in civil, criminal, protection order and jurisdictional statutes. This discussion will generally reference civil statutes, as USCIS does not require the state court to prosecute the party accused of abuse, abandonment, or neglect, and does not require the evidence meet the criminal standard or statutory definition. Most states either include abandonment in their definition of abuse or neglect. In other states abandonment is defined as a separate offense.

a. *State definitions*¹⁵⁸ of abuse will include emotional abuse, sexual abuse, physical abuse, and sometimes parental substance abuse and omission of parental responsibility. - The term “abuse” of a child can encompass a large array of abusive behaviors. Almost every state defines physical, emotional, and sexual abuse as part of their child abuse statutes.¹⁵⁹ The specific acts that constitute these types of abuse vary by statute. Generally “non-accidental” injuries to a child are considered physical child abuse. Common examples include intentional physical acts to induce pain, such as burning, kicking, or hitting. Other states include acts of omission that result in injury as part of their definition of physical abuse, such as a not bringing the child to the doctor. In 38 states behavior that threatens a child with harm or creates a substantial risk of harm is deemed physical abuse.¹⁶⁰ In Hawaii, Illinois, Louisiana, and North Carolina the definition of physical abuse includes human trafficking. This can be particularly important because in these states SIJ could provide an additional avenue for immigration protection for victims of trafficking who are young immigrant girls when one of the child’s parents was involved in the trafficking. Some child trafficking victims may seek SIJ relief because accessing continued presence or a T visa may be more difficult if the trafficking is not being locally or federally investigated or prosecuted. Immigrant women and girls face high rates of sexual assault and are often trafficked as part of that pattern of abuse, in either sex trafficking or labor trafficking rings. In the states identified, if the facts amount to human trafficking and the victim’s parent or step-parent had a role in the trafficking, if she is otherwise eligible, she may be able to apply for SIJ as a result.

Parental substance abuse is included in the state law definitions of either child abuse or neglect by 24 states.¹⁶¹ Possible types of behavior that may qualify as child abuse under state law include:

¹⁵⁸ See state statute for individual definitions.

¹⁵⁹ Georgia and Wisconsin do not include emotional abuse in their definitions of abuse or neglect.

¹⁶⁰ See *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY (June 2014).

¹⁶¹ *Id.*

- Prenatal exposure of a child to illegal drugs¹⁶²;
- Manufacturing controlled substances in the presence of a child¹⁶³;
- Allowing a child to be present where the chemicals or tools to manufacture illegal drugs are kept¹⁶⁴;
- Furnishing a child with drugs or alcohol¹⁶⁵; and
- Using controlled substances that impair a caregiver's ability to provide proper care to their child.¹⁶⁶

Attorneys and advocates working with immigrant children should be aware in states where certain forms of substance abuse related activities are considered child abuse or neglect, that these actions or activities can be the basis for findings of child abuse for SIJ purposes. Immigrant children with parents who have a history of substance abuse should be screened for parental substance abuse related offenses.

Sexual abuse and/or exploitation of a child is included as part of the definition of abuse in every state. Additionally, seven states identify sex trafficking in their definition of sexual abuse.¹⁶⁷ For purposes of SIJ, the abuse must have been committed by either a parent or step-parent to qualify for immigration relief. Sexual exploitation is included in most of the definitions of sexual abuse; typically it includes behaviors such as allowing or encouraging a

¹⁶² Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, North Dakota, Oklahoma, Oregon, South Dakota, and Wisconsin. *Id.*

¹⁶³ Colorado, Indiana, Iowa, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, and Washington. *Id.*

¹⁶⁴ Arizona, Arkansas, and Washington. *Id.*

¹⁶⁵ Arkansas, Florida, Hawaii, Illinois, Minnesota, Ohio, and Texas. *Id.*

¹⁶⁶ California, Delaware, Kentucky, Minnesota, New York, Oklahoma, Rhode Island, and Texas. *Id.*

¹⁶⁷ Florida, Louisiana, Maryland, Massachusetts, Minnesota, North Carolina, and Texas. *Id.*

minor to engage in prostitution or child pornography. For SIJ purposes, the qualifying abuse, abandonment, or neglect may have taken place either in the U.S. or abroad, so long as the behavior described would violate the state statutes in the state in which the child is seeking the order. USCIS will adjudicate the totality of the facts, history, and evidence provided in the immigrant child's application. The state court in entering its SIJ findings need only determine if the abuse the applicant is alleging that the court credits as having occurred would be a violation of that state's statutes. A young immigrant girl who fled her home country because her stepfather was sexually abusing her can go to court in any state in the U.S. and that court can issue an order factually stating that the facts of what occurred to the child constitutes sexual abuse as defined by the state law.

Emotional abuse is defined as part of the definition of abuse or neglect in 33 states and the District of Columbia. Examples of common statutory language include "injury to the psychological capacity or emotional stability of the child as evidenced by an observable or substantial change in behavior, emotional response, or cognition" and injury as evidenced by "anxiety, depression, withdrawal, or aggressive behavior." When discussing cases of domestic violence, this can include behavioral patterns of coercive control, witnessing domestic violence perpetrated by one parent on the other parent, or extreme cruelty.¹⁶⁸ The state statutes vary significantly as to what constitutes emotional abuse, some states include allowing others to emotionally abuse the child, mental injury resulting from sexual abuse, and incidents resulting in impairment of the child's normal range of behavior.

b. *Obtaining SIJ orders based on neglect.* - Neglect is typically defined as the failure to provide a basic need for a child. State law definitions of what constitutes need differ, but most include failure to provide a child with food, clothing, shelter, medical care, or supervision substantially affecting the child's health, safety, or well-being. Neglect statutes differ more from state to state in comparison to abuse statutes that contain more consistent definitions. Some state neglect statutes include forms of abuse, or the fact the child was

¹⁶⁸ Leslye Orloff et al., *supra* note 18.

abused as evidence of neglect. Other states have adopted very broad definitions of neglect and include homelessness as a means of neglect, regardless of willfulness of the parent. It is therefore very important and best practice for courts to include in the court order a neglected immigrant child will be using to file for SIJ relief the following:

- A quote and citation to the state law definition of child neglect;
- Specific factual findings detailing the facts that the court determined constitutes child neglect; and
- An articulation of the basis for the court's conclusion that applying the state law definition of child abuse to the facts of the case before the court, the court concludes as a matter of law that the immigrant child before the court was neglected by the child's parent or parent(s).

This detailed approach is best practice for state court orders in SIJ cases and is particularly important for neglected immigrant children. The state definition of neglect, for purposes of special finding needed for the SIJ application, may apply to events that occurred outside of the U.S.. If an immigrant child was made homeless by her caretaker parent in her home country, that evidence is enough for a state court finding of neglect in certain states.¹⁶⁹

Other types of neglect some states have adopted in statute are failure to educate. Failure to educate as required by law is recognized in state statutes as neglect by 29 states and territories.¹⁷⁰ Every state has different mandatory education requirements. In states that consider failure to educate neglect, a parent's failure to comply with

¹⁶⁹ Colorado, Connecticut, South Dakota, American Samoa. *Definitions of Child Abuse and Neglect*, *supra* note 155.

¹⁷⁰ Failure to educate as required by law is statutorily recognized as neglect by Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, and Wyoming, District of Columbia, Puerto Rico, American Samoa, Virgin Islands. *Id.*

minimum educational requirements for children is sufficient for a finding of neglect. Fifteen states and territories include variations of failure to provide certain types of medical care as child neglect under state law. This includes the withholding of medical treatment or nutrition from infants with life-threatening conditions and failure to provide special medical or mental health treatment that the child needs as a form of neglect.

Nationwide, neglect statutes include many nuanced forms of abuse, control, and lack of parental accountability and responsibility. It is important for attorneys and advocates working with special immigrant youth to become familiar with the child neglect laws of the state in which the immigrant child seeking SIJ is living. Knowledge of state neglect laws will help advocates and attorneys detect conditions, events, and the treatment by a parent in the child's home country that would constitute a form of child neglect under the state laws of the state in which the court is being asked to provide SIJ findings. Close analysis of the relevant state statute combined with detailed questions and focused interviewing of immigrant youth is necessary to fully evaluate if an immigrant child may be eligible for SIJ based on neglect by at least one parent.

c. *Abandonment.* - Abandonment is defined in two distinct state statutes. First, the majority of states and territories define abandonment within the state child protection code where address abuse and neglect is addressed. Thirty-nine states and territories either include abandonment as part of the definition of abuse or neglect or define it separately. State courts can find abandonment took place by one parent in a variety of family court and juvenile proceedings. States have generally defined abandonment to include:

- Failure to retain contact with
- Failure support a child;
- The fact that the child lacks knowledge as to the identity of a parent;
- An articulated intent to forego parental responsibility; and

- The physical act of leaving the child.¹⁷¹

The second place that the term “abandonment” is defined is in the family law jurisdictional statute governing custody cases. The governing jurisdictional statute in custody cases in virtually every state¹⁷² is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in which abandonment is defined and used as a means for asserting jurisdiction over the child in custody cases. Abandonment can be based on either state law definition. Both definitions can serve as the governing law used by the court to make its SIJ findings. Abandonment, as defined under state law, is a valid ground for SIJ findings in any state court proceeding in which the court has jurisdiction over the child. .

The federal law does not define abandonment and instead for SIJ purposes relies on state law definitions. USCIS has addressed the fact that children who entered the U.S. unlawfully to join his/her parent may be considered “abandoned” by the other parent for SIJ purposes.¹⁷³ So long as the individual facts of a case support a finding of abandonment based on state law, a judicial officer can make that finding and USCIS can favorably adjudicate an the immigrant child’s application for SIJ.

The UCCJEA was adopted to ensure stability and full faith and credit in custody and visitation proceedings. It has been adopted by almost all of the states and territories and provides guidance on how and when states should assert jurisdiction over a child based on factors other than mere presence of the child in the jurisdiction. One factor included in UCCJEA determinations of abandonment of a child by a parent. Typically, under the UCCJEA, a child must be present in the state for at least six months before the court can exert the preferred home state jurisdiction to adjudicate matters involving the care and custody of a child

¹⁷¹ *Id.*

¹⁷² Adopted by every state except Massachusetts, which still uses the Uniform Child Custody Jurisdiction Act (UCCJA) instead of the more recent Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Id.*

¹⁷³ ILRC, Primer for One Parent Cases at 11 (citing Amy S. Paulick, Assistant Chief Counsel, Department of Homeland Security, DHS Line, In the Matter of [Redacted]).

An exception to this rule, which almost every state adopted, is emergency jurisdiction based on abandonment. If a child has been abandoned and is physically present in the state the court may assert emergency jurisdiction over a child who has been in the jurisdiction for less than six months. The UCCJEA defines abandonment as “left without provision for reasonable and necessary care or supervision.”¹⁷⁴ Every state has adopted this definition of “abandon” except Ohio, where “abandoned” means the parents of a child have failed to visit or maintain contact with the child for more than 90 days, regardless of whether the parents resume contact with the child after that 90-day period.¹⁷⁵ It is not necessary that the abandonment be occur at the time of the assertion of jurisdiction. The abandonment requirement is met when the child is without proper care from a parent. It is not an assertion of jurisdiction based on abandonment that can only be made when the child is in imminent need of protection because of the abandonment. Many children have been abandoned by parents as babies or young children and do not come to family court seeking assistance until they have entered the U.S. and found stability with their other parent or a family member. They come to court seeking to legal recognition of that stability in a guardianship, custody, or child support proceeding. If the child has just re-settled in a new household with a parent, relative, or guardian and this home life has not been in place for the 6 months to establish home state jurisdiction for purposes of UCCJEA, the family can assert emergency jurisdiction based on the child’s presence and abandonment. The state UCCJEA definition of abandonment can be applied to the facts and findings of the case, and the court’s findings would support an application for SIJ.

2. *One or Both Parent Requirement.* - When seeking SIJ orders, the qualifying offense need only be committed by one of the immigrant child’s parents and this finding accompanied by a finding that reunification with that offending parent is not a viable option would be sufficient to for SIJ purposes. The child’s other non-offending parent may be the custodian of the child without affecting the child’s eligibility for SIJ. SIJ was initially created to assist children living in long term foster care, Congress decided in 2008 to amend

¹⁷⁴ UCCJEA art. 1, § 102(1).

¹⁷⁵ 47 Ohio Jur. 3d Family Law § 1109.

that statute in order to provide equal treatment and protection for children who have been provided a nurturing relationship with the child's other non-offending parent.

Although the SIJ statute was amended in 2008 to greatly expand the SIJ protections to a larger group of immigrant children, the federal regulations governing the SIJ program have not been amended to reflect the changes in the new law. Many provisions of the prior federal regulations governing SIJ were overruled by the 2008 statutory amendments.¹⁷⁶ USCIS acknowledges that the law and the regulation are inconsistent and advises courts to “be familiar with current immigration law.” Where federal regulations are inconsistent with and/or have been explicitly overruled by subsequent federal statutes, courts should apply the most up to date federal laws.

The Immigration and Nationality Act (INA) section 101(a)(27)(J) establishes the definition of a Special Immigrant Juvenile. This definition was last amended by Congress in the Trafficking Victims Protection Reauthorization Act of 2008.¹⁷⁷ The TVPRA statutory changes supersede portions of the Code of Federal Regulations relating to SIJ cases.¹⁷⁸ USCIS has made it abundantly clear through policy, memos, and practice that the federal law only requires findings of abuse abandonment, or neglect by perpetrated by one parent, not both.¹⁷⁹ When identifying SIJ eligible children, USCIS

¹⁷⁶ The Proposed Rule was issued in September 2011, the Final Rule is expected in the next year. *Proposed Rules*, Federal Register (Sept. 6, 2011), <http://www.justice.gov/sites/default/files/eoir/legacy/2011/09/15/fr06sept11.pdf>.

¹⁷⁷ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

¹⁷⁸ 8 CFR 204.11 has been amended by statute to redefine eligibility therefore sections overruled include but are not limited to the following: §204.11(a), (c)(3), (c)(4), c(5), (d)(2)(i), and (d)(2)(ii).

¹⁷⁹ See *Special Immigrant Juvenile Status: Information for Juvenile Courts*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Juvenile_Courts_-FINAL.pdf (stating an eligible child must be abused, abandoned, or neglected by a parent); See *Immigrant Relief for Abused Children*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Immigration_Relief_for_Abused_Children-FINAL.pdf (stating an eligible child may be living with the non-abusive parent).

lists children living with the non-abusive parent, foster parent, or legal guardian as part of a non-exhaustive list of eligible family scenarios in which an SIJ eligible child may be living.

The legal inconsistency between the SIJ statutory requirements and incorrect information contained in the regulations that were overruled by the statute amendments in 2008 has led to confusion among courts and attorneys who have struggled to understand how to obtain SIJ findings when only parent has abused, abandoned, or neglected the child. Nebraska and New Jersey have issued published judicial opinions incorrectly that rely on the overruled regulations and interpreted the amended statute to require court findings that both parents must have been at fault for abuse, abandonment, or neglect in order for state court judges to issue special findings to be used in SIJ applications.¹⁸⁰

Both cases relied on the fact the reunification was possible with one of the biological parents and therefore the refused to issue an SIJ finding to the child based abuse, abandonment or neglect by the child's other parent. The New Jersey case held the "1 or both" phrase to require that reunification with neither parent is viable because of abuse, neglect or abandonment of the juvenile."¹⁸¹ Both courts also looked to the pre TVPRA 2008 legislative history and the pre TVPRA 2008 administrative history of the SIJ statute, despite the plain meaning of the statutory language. The New Jersey court acknowledged that the legislative history supported the fact the amended statutory language required one parent but went on to justify its failure to follow the requirements of the federal statute by imposing the court's own view on what it sees as the "competing goals" of protecting the non-abusive parent and protecting against immigration abuse. The New Jersey court created its own interpretation of the SIJ legislative and regulatory histories to fit the court's stated goals.¹⁸² There is no legislative history to support the assertion that Congress intended to preclude children reunification with the non-abusive parent from SIJ protections. To the contrary, the statute was amended and the legislative history

¹⁸⁰ *In re Interest of Erick M.*, 820 NW 2d. 639 (Neb. 2012); *H.S.P. v. J.K.*, 87 A.3d 255 (N.J. Super. Ct. App. Div. 2013).

¹⁸¹ *H.S.P. v. J.K.*, 87 A.3d at 266.

¹⁸² *Id.*

provide evidence that Congress explicitly intended to protect the immigrant SIJ eligible child's relationship with the child's non-abusive parent. The plain meaning of the statute should suffice when courts are interpreting the "one or both" parent requirement. If the federal statute was interpreted to mean that "one or both" means both, the phrase "or both" would be superfluous in the statute.¹⁸³

The Immigrant Legal Resource Center explains, "Congress used the disjunctive to indicate that SIJ findings could be made when reunification is not viable with just one parent, and also could be made when reunification is not viable with both parents."¹⁸⁴ Further, if the statute omitted the words "or both" and simply read, "reunification is not viable with one of the immigrant's parents," the plain meaning of that phraseology would render immigrant youth for whom reunification was not viable with both parents ineligible for SIJ. This would clearly be at odds with the purpose of SIJ, which is to protect vulnerable immigrant children. Lastly, the court's decision "did not consider the federal agencies' interpretation of the SIJ statute."¹⁸⁵

There are currently four published state court opinions that interpret the one or both parent requirement consistently with USCIS published statements and with federal guidance.¹⁸⁶ In addition to statements and brochures clearly identifying the requirement that only one parent is abusive, USCIS has proposed revisions to the application for SIJ to reflect USCIS agreement that immigrant children are eligible for SIJ relief if the one of their parents abused, abandoned, or neglected the child. The form change would allow an applicant to check that he or she is eligible based on a non-viability

¹⁸³ *Special Immigrant Juvenile Status: A Primer for One Parent Cases*, IMMIGRANT LEGAL RESOURCE CENTER (2014) [hereinafter ILRC, Primer for One Parent Cases].

¹⁸⁴ *Id.* at 6.

¹⁸⁵ *Id.* at 5.

¹⁸⁶ *Matter of Mario S.*, 954 N.Y.S.2d 843 (N.Y. Fam. Ct. 2012); *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 973 N.Y.S.2d 714 (N.Y. Fam. Ct. 2013); *In re Israel O.* (2015), 233 Cal. App. 4th 279; *Eddie E. v. Superior Court*, 183 Cal. Rptr. 3d 773 (Cal. Ct. App. 2015).

with one parent or check a box for both parents, establishing a clear distinction.¹⁸⁷

U.S. Immigration and Customs Enforcement filed a brief in Baltimore Immigration Court stating “[C]ounsel for USCIS has confirmed that a child who enters the U.S. illegally to join his/her parent in the U.S. may be considered “abandoned” for the purposes of an I-360. However, a child who enters the U.S. illegally to join both parents may not be considered abandoned.”¹⁸⁸ An I-360 is the immigration form used to file an application for SIJ. The important distinction made is that if the child is rejoining both parents and is living together with their parents, then the child has not been abandoned by either parent. If, however, the child has been abandoned by one parents and the child is living with the other parent, the child may file for SIJ.

The Executive Office for Immigration Review (EOIR) has stated on two separate occasions that the one or both requirement incorporated into the SIJ statute in the TVPRA 2008 amendments means at least one parent, not both. In January 2014, in a publication about SIJ rules, EOIR clarified the intent of the TVPRA amendments that “it is only reunification with one parent that must not be viable, the alien child could potentially be living with one parent and still qualify for SIJ status.”¹⁸⁹ EOIR made it very clear the one or both, means at least one. The court stated in its opinion, “the respondent demonstrated that reunification was not viable with one of his parents, thus, satisfying the requirements of the statute.”¹⁹⁰ This EIOR approach is consistent with USCIS practice since the TVPRA amendments in 2008 became law, USCIS regularly accepts and grants petitions for SIJ based on only one parent abusing, abandoning, or neglecting the immigrant child applying for SIJ

¹⁸⁷ See AILA InfoNet, USCIS Comment Request on Form I-360, p. 9, Part 8, Question 3.A, available at <http://www.aila.org/content/fileviewer.aspx?docid=50482&linkid=281819>.

¹⁸⁸ ILRC, Primer for One Parent Cases, *supra* note 139.

¹⁸⁹ Laura E. Ploeg, *Special Immigrant Juveniles: All the Special Rules*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 2014, available at <http://www.justice.gov/eoir/vll/ILA>.

¹⁹⁰ ILRC, Primer for One Parent Cases, *supra* note 179.

All of the federal agencies responsible for implementing SIJ statute and regulations, the Department of Homeland Security and the Department of Justice and each of their components, have published policy memoranda regarding their consistent statutory interpretation of the 2008 TVPRA amendments to the definition of which immigrant children qualify for Special Immigrant Juvenile Status. State courts are there obliged to defer to the federal interpretations of these federal agencies.¹⁹¹

D. Best Interest of The Child

The final required finding in SIJ cases is the finding that it is not in the immigrant child's best interests to return to the child's home country.¹⁹² The best interest of the child standard to be applied by state courts in SIJ cases is the same best interest of the child factors that courts routinely apply in the child custody and child abuse and neglect proceedings that the state courts adjudicate. The best interest of the child standard strives to achieve a safe and comfortable environment so that every child can develop and flourish. State best interest of the child laws list number of factors that courts are to consider when making best interest of the child determinations. The state best interest of the child statutes include a non-exclusive list of factor the courts must consider in making best interests of the child determinations. Courts can also consider other evidence and factors that arise based on the specific facts of the case before the court. Common factors listed in state best interests of the child statutes that courts are required to consider include:

- The wishes of the child as to which parent should be the child's custodian;
- The interaction and interrelationship of the child with their parent or parents, their siblings, and any other person who may significantly affect the child's best interest;

¹⁹¹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹⁹² Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

- The child's adjustment to their home, school, and community;
- The mental and physical health of all individuals involved;
- The capacity of parents to provide for the child; and
- The presence or history of domestic violence in the home.

SIJ cases are unusual in family law cases because they require judges to make a best interest determination that is not in the child's best interest to return to the home country.¹⁹³ This type of comparison of legal protections and services available in the U.S. with those available in the child's country of origin has precedents in U.S. immigration law. One relevant example is the extreme hardship determination that immigration judges are required to make when adjudicating Violence Against Women Act (VAWA) cancellation of removal applications filed by immigrant spouses and children who have been subject to battering or extreme cruelty by their U.S. citizen or lawful permanent resident spouses or parents. Some of the factors immigration judges consider in deciding whether an abused immigrant child's or spouse's removal will cause extreme hardship to the immigrant applicant spouse or child include:¹⁹⁴

¹⁹³ The primary types of cases coming before family courts in which the courts may be called upon to make similar comparisons are international child custody cases including those that implicate the Hague Convention – The Convention on the Civil Aspects of International Child Abduction, held at the Hague on October 25, 1980 (the Hague Convention), and its US implementing legislation, the International Child Abduction Remedies Act (ICARA) 42 USC §§11601-11610.; *see also* Nunez-Escudero v Tice-Menley, 58 F.3d 374, 379 (8th Cir. 1995) (holding that a child should not be sent back to Mexico due to grave risk to the child).

¹⁹⁴ 8 C.F.R. §§ 1240.20(c) and 1240.58(c); *See also* INS Memorandum from Paul W. Virtue, INS General Counsel, to Terrance M. O'Reilly, Director of INS Administrative Appeals Office on Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children (October 16, 1998), *available at* <http://niwaplibrary.wcl.american.edu/pubs/extreme-hardship-and-documentary-requirements/>.

- The nature and extent of the physical and psychological consequences of the battering or extreme cruelty;
- The impact of the loss of access to the U.S. courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, alimony, maintenance, child custody, and visitation);
- The applicant's or applicant's child's need for social, medical, mental health, or other supportive services, particularly those related to the abuse or surviving the abuse, which would not be available or reasonably accessible in the foreign country;
- The existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the applicant or applicant's child for leaving an abusive situation, or for taking action to stop the abuse;
- The abuser's ability or lack thereof to travel to the foreign country, and the ability, willingness, or lack thereof of foreign government authorities to protect the applicant and/or the applicant's child from future abuse; and
- The likelihood that the abuser's family, friends, or others acting on the abuser's behalf in the foreign country would physically or psychologically harm the applicant or the applicant's children if they were deported.

These factors illustrate some of the types of considerations courts might entertain in making best interest of the child determinations in addition to the best interest of the child factors listed in the state best interest of the child statute. Other factors the court could consider are the traditional factors that immigration

courts apply in all cancellation of removal cases including those cases filed by battered immigrant spouses and children. These factors are include, but are not limited to:¹⁹⁵

- The age (youth/old age) of the applicant;
- The children's ability to speak the native language of the foreign country and the children's ability to adjust to life there;
- Serious illness of the person or her child that necessitates medical attention not adequately available in the foreign country;
- A person's inability to obtain adequate employment abroad;
- The child's length of residence in the U.S.;
- Existence of other family members residing legally in the U.S. and lack of family in the home country;
- Irreparable harm arising from a disruption of educational opportunities;
- The adverse psychological impact of removal;
- The impact of separation that could be caused by removal on both mother and child;
- The extent to which deportation would interfere with court custody, visitation, and child support awards; and
- The extent to which the child applicant is an asset to or involved with their community in the U.S. (i.e., involvement in church/temple/mosque,

¹⁹⁵ 61 Fed. Reg. 13,067 (Mar. 29, 1996) (to be codified at 8 C.F.R. pts. 103, 204, 205, and 216).

children's school, community, other service programs).

Courts are required under federal immigration laws to apply state best interest of the child factors to make SJIS findings regarding whether it is in the child's best interests to not return to the child's home country. The state law family court judges apply to this determination is the same law that courts routinely apply in custody and child abuse and neglect cases. SIJ findings do not require that courts apply these factors in a direct comparison of risks, options, and the child's ability to thrive in the child's home country and in the U.S.. Courts may consider country conditions in making this determination but it is not necessary. It is sufficient to state that it is not in the child's best interest to return to the country of origin because it is in the child's best interest to be placed in the care or custody of the petitioner in the state court case. For example, if SIJ findings are requested in a guardianship case, the state court could correctly state in the SIJ order, it is in not in the best interest for child to return to the country of origin because child is in the care of guardian, which is in child's best interest. Attorneys representing immigrant children seeking SIJ determinations may present evidence in the state court proceedings regarding the services, support, and educational opportunities the child is receiving in the U.S.. This evidence and evidence of the abuse, abandonment or neglect that the child suffered can be presented through testimony of the child, testimony of the child's guardians, counselors, therapists, teachers, health care providers and others who can attest to the child's adjustment to and investment in their life in the U.S.. Several of these witnesses may also be able to attest to the support system the child has and needs in the U.S. to overcome the impact that the abuse, abandonment or neglect the child suffered has had on the child. Attorneys representing immigrant children may also choose to introduce testimony of the child, witnesses, or other evidence regarding country conditions in the child's home country and the treatment, risks, dangers and options for the child if the child were to be returned to their country of origin.

In making best interest of the child findings courts may include in their orders information about the unique facts of the child's case that played a role in the court's ruling that returning the

child to their country of origin would not be in the child's best interests. Like the finding of abuse, abandonment, or neglect, this factors that courts must consider in making the best interest of the child determination are to be based on state laws applied to facts of the case. Some of the facts that the court is considering and ruling on in SIJ cases are U.S. based fact and some will be facts that took place abroad or conditions that exist abroad that would affect the child if the child was returned to their home country. USCIS recognizes that state juvenile courts are the most appropriate determiners of fact as they have the most experience making adjudications that affect the care and custody of children based on state law including best interest of the child determinations.

VI. CONCLUSION

Congress's growing support of kinship care and the removal of the long-term foster care requirement from the statute show a desire to keep the immigrant child, when possible, with family members, friends, and other individuals who are in the best position to nurture the child applying for SIJ immigration protections. All SIJ eligible children have suffered trauma as a result of being abused, abandoned or neglected by at least one of their parents. Both the family court orders in which state court judges enter orders regarding the care or custody of the immigrant children including SIJ findings and the grant of Special Immigrant Juvenile Status by USCIS together provide critical stability and support for immigrant children. This approach involving state family courts and USCIS offering protection from deportation and access to lawful permanent residency for immigrant children who have suffered abuse, abandonment or neglect helps children heal, succeed in school and move on with their lives to become productive and contributing members of our communities.

Recent immigrant women and girls should be screened early and often experiences of abuse, neglect, or abandonment that children suffer perpetrated by their parents and step-parents to detect SIJ eligibility. This screening may also detect criminal activities suffered in the U.S. perpetrated by the child other family members or caretakers that could lead to the child's eligibility for U visa

protections. Continuous screening over time by various professionals working with immigrant children can uncover abuse occurring to the child after their arrival in the U.S. and can also result in the child building enough trust to divulge information about past abuses that may make the child SIJ eligible.

Courts should receive training to help courts detect cases in which non-citizen immigrant children before the court may be SIJ eligible. Training can also help courts craft orders containing SIJ findings that include sufficient detail about the facts of the case to provide a ruling from which USCIS adjudicators can see how and why the court reached its conclusions regarding abuse, abandonment, or neglect, the viability of reunification with the offending parent and the child's best interests. Finally, courts should distribute at courthouses DHS produced information about Special Immigrant Juvenile Status and other immigration remedies available for immigrant crime victims. This will improve access to justice as that immigrant victims of child abuse, child abandonment, child neglect, domestic violence, sexual assault, human trafficking and other U visa covered criminal activities. Immigrant victims who find the courage to seek help from state courts will learn about their legal rights to pursue immigration relief offering them the safety, stability and opportunity to receive protection from deportation and the ability to live, work, and heal under the protection of U.S. family court and immigration laws.

**CAUGHT IN THE ACT BUT NOT
PUNISHED: ON ELITE RULE OF LAW
AND DETERRENCE**

Francesca R. Jensenius and Abby K. Wood

Most literature on criminal deterrence in law, economics, and criminology assumes that people who are caught for a crime will be punished. The literature focuses on how the size of sanctions and probability of being caught affect criminal behavior. However, in many countries entire groups of people are “above the law” in the sense that they are able to evade punishment even if caught violating the law. In this paper we argue that both the perceived probability of being punished if caught and the cultural acceptance of elites evading punishment are important parts of theorizing about deterrence, particularly about corruption among political elites. Looking at data on parking violations among diplomats in New York City 1997–2002, we explore how diplomats from different rule-of-law cultures respond to sudden legal immunity. The empirical observations provide clear evidence of both the stickiness and the gradual weakening of cultural constraints.

Keywords: Corruption, rule of law, criminal deterrence, political elites, legal enforcement.

I. INTRODUCTION

Most literature on deterring criminal behavior assumes that people who are caught for a crime will be punished. In the classic deterrence model, deterrence depends on the expected benefit of the criminal act, weighed against the probability of being caught, and the size of the sanction if caught. Yet, in many parts of the world, there are entire groups of people who are not really subject to the rule of law, as they are able to evade punishment even if caught breaking the law. Who these groups are, and how large they are, varies from country to country. *De facto* immunity from punishment can run with class status, kinship, wealth, ethnicity, or status as a political elite. For people who are above the law, no increase in the size of the formal sanction for committing a crime or corrupt act, and no increase in detection efforts by the government, will alter their propensity to engage in criminal or corrupt behavior, because the probability of being punished if caught is too low for legal enforcement to affect their behavior.

An important question is how elites respond to *de facto* immunity and to *changes* in the probability of being punished if caught for a criminal act. Such changes may occur more often than we might think: Civil wars end and relative power shifts between groups; constitutional amendments are passed, resulting in less-favored groups being given formal equality; the presidency changes hands and with it one family rises while another falls.

In this paper, we explore data from another such change, which is more easily accessible. We use data from a paper by Raymond Fisman and Edward Miguel to examine the propensity of diplomats from across the world to accumulate unpaid parking tickets in New York City, where they for several years enjoyed diplomatic immunity.¹ Dividing diplomats' countries into four rule-of-law cultures, we show that there is great variation in the reactions of diplomats from different cultures. Elites hailing from cultures where it is common to abuse elite privileges were quick to embrace the opportunity to do so. Diplomats from countries in which elites

¹ Raymond Fisman & Edward Miguel, *Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets*, 115 J. POL. ECON. 1020 (2007).

tend to be more accountable were more law-abiding. And interestingly, those diplomats from strong rule-of-law cultures who started violating in higher numbers over time, did so occasionally rather than constantly. These findings suggest that both the perceived probability of being punished if caught and the cultural acceptance of elites evading punishment are important parts of theorizing about deterrence, particularly about corruption among political elites.

The paper proceeds as follows. Section II explains a concept implicit in general deterrence theory: the perceived probability of being punished if caught for a crime, and also discusses the importance of ethics and culture in constraining behavior. Here we also describe the data from New York that we use to explore how political elites from different rule-of-law cultures respond to a zero-enforcement legal environment. In section III, we explain the typology that divides countries into four categories of corruption types that we use in our analysis. Section IV presents diplomats' responses, by group, to entering a zero-enforcement environment. Section V concludes.

II. RULE OF LAW AND ELITE DETERRENCE

Scholars of law, economics, sociology, and public policy have built an extensive literature exploring criminal deterrence in various contexts.² The basic model in the literature theorizes that general deterrence from criminal behavior is a function of the probability of detection, the size of the sanction, and the benefit that the would-be violator stands to gain if not detected. Scholars have focused especially on how changes in the perceived or actual probability that a

² See generally FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Daniel S. Nagin & Greg Pogarsky, *Integrating Celebrity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001); Mitchell A. Polinsky & Steven Shavell, *Corruption and Optimal Law Enforcement*, 81 J. PUB. ECON. 1 (2001); Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature* (May 9, 2014) (unpublished manuscript) (on file with author).

crime is detected and changes in the size of the formal or informal sanction affect levels of deterrence. Yet, the probability of being punished if caught for a criminal act is also a key determinant of how people behave, and therefore of the efficiency of deterrence. In a review of deterrence literature, Steven N. Durlauf and Daniel S. Nagin conclude that there is limited evidence of an effect of the size of a sanction in deterring criminal acts, but considerable evidence that the *certainty* of a sanction affects behavior.³ They point out that while there is an extensive literature about how this certainty is affected by the probability of detection, little is written about the probability of being prosecuted and sentenced, that is: the probability of being punished if caught.

It is not an unreasonable simplification to assume that people are sanctioned when they are caught for a crime when studying non-elites, but it is a heroic assumption to make about elites. Across the world there is great variation in elite's propensity of being sentenced if caught for a criminal act. In some cases, the law actually mandates prosecution with a probability of zero. For example, sitting heads of state enjoy *de jure* immunity from prosecution under international law, and the U.S. Department of Justice does not consider a sitting U.S. President to be "amenable to prosecution."⁴ Nevertheless, *de jure* immunity is a relatively rare phenomenon. Most people in the world who are immune from punishment do not enjoy *de jure* immunity – the law does not protect them. Rather, they enjoy *de facto* immunity. *De facto* immunity covers a broader set of people across the world and is based on suspects being able to use bribes, friendships, threats, coercion, or other means of pressure in order to avoid, minimize, delay, or completely avoid the sanction.⁵

³ Steven N. Durlauf & Daniel S. Nagin, *Overview of "Imprisonment and Crime: Can Both Be Reduced?"* 10 CRIMINOLOGY & PUB. POL'Y 9 (2011).

⁴ Randolph D. Moss, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 OP. O.L.C. 222 (2000), http://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf.

⁵ See Brian J. Fried, Paul Lagunes & Atheendar Venkataramani, *Corruption and Inequality at the Crossroad: A Multimethod Study of Bribery and Discrimination in Latin America*, 45 LATIN AM. RES. REV. 76 (2010); Michael Johnston, *Corruption, Inequality, and Change*, in CORRUPTION, DEVELOPMENT AND INEQUALITY: SOFT TOUCH OR HARD GRAFT 13 (Peter M. Ward ed., 1989); Brian

The extent to which elites are able to avoid punishment when caught for criminal acts is closely related to corruption. Polinsky and Shavell demonstrate the logic of how corruption undermines deterrence by making it possible to bribe or extort one's way out of punishment.⁶ Missing from the discussion is how the ability to evade punishment differs based on individual characteristics: we know that elites are much more likely to be able to evade punishment than non-elites. We also know that there is great cultural variation in the acceptance of some people being above the law. In some cultural contexts, elites can literally get away with murder.

While many countries could provide examples of elites enjoying a high degree of *de facto* immunity, we offer examples from India and Brazil to build intuition. In India's 2014 elections for the 543 seats in the *Lok Sabha* (lower house of parliament), more than one third of the candidates faced criminal charges – and more than 60% of those faced especially serious charges.⁷ Moreover, Indian elites are notorious for using their networks and bribes to make sure their criminal cases join the judicial backlog, which is now 30 million cases long.⁸ In Brazil, experimental evidence suggests that, when compared to lower-class drivers, upper-class drivers are both less likely to be stopped when committing a traffic violation and more likely to receive only a warning during traffic stops that do occur.⁹

There is great variation in which groups of elites are above the law both between countries and within countries – people with a

J. Fried, Paul Lagunes & Atheendar Venkataramani, *Corruption and Inequality at the Crossroad: A Multimethod Study of Bribery and Discrimination in Latin America*, 45 *LATIN AM. RES. REV.* 76 (2010); Joel S. Hellman & Daniel Kaufmann, *The Inequality of Influence* (Dec. 2002) (unpublished manuscript) (on file with author).

⁶ Polinsky & Shavell, *supra* note 2.

⁷ *Lok Sabha Elections 2014 Analysis of Criminal Background, Financial, Education, Gender and other details of Winners*, report by the Association for Democratic Reform, May 18, 2014, <http://www.adrindia.org/research-and-report/election-watch/lok-sabha/2014/lok-sabha-2014-winners-analysis-criminal-and-finan>.

⁸ Ram Mashru, *Justice Delayed is Justice Denied: India's 30 Million Case Judicial Backlog*, *THE DIPLOMAT*, Dec. 25, 2013, <http://thediplomat.com/2013/12/justice-delayed-is-justice-denied-indias-30-million-case-judicial-backlog/>.

⁹ Fried, Lagunes & Venkataramani, *supra* note 5.

high socioeconomic status, from historically advantaged ethnic groups, families or castes, or those who hold government positions, could all enjoy *de facto* immunity. Our main point is that for these elites, neither the size of the formal sanction for committing a crime nor the detection efforts by the government are the main determinants of whether they choose to commit a crime.

1. Culture, Institutions, and Ethics

Not all those who have an opportunity to go unpunished will take advantage of their impunity. Both personal ethics and group-level culture could serve as constraints. For example, while it is well known that some civil servants and politicians in India take kick-backs, speed money, and bribes, many officials are also proud to say that they never do so.¹⁰

Whereas the institutional framework we examine in the deterrence literature is usually quite clear, the cultural and ethical mechanisms are not only less tidy, but also less explored in political science and economics. The line between culture and institutions is also quite fuzzy. Many aspects of culture can be thought of as a series of informal institutional rules, some of which work to improve governance, and some of which work against good governance.¹¹ Moreover, many sanctions are informal, rather than formal,¹² such that an elite who takes advantage of her immunity might still be ostracized by fellow elites who think that her behavior reflects poorly on them as a group. But the concept of informal institutions does not capture all of culture, and does not fully explain the mechanism by which individuals bring their culture to a new institutional

¹⁰ See Francesca Refsum Jensenius, *Power, Performance and Bias: Evaluating the Electoral Quotas for Scheduled Castes in India* (2013) (unpublished Ph.D. thesis, University of California, Berkeley) (on file with University of California, Berkeley) (interviews with politicians and civil servants in Himachal Pradesh, Delhi, and Uttar Pradesh in 2010 and 2011).

¹¹ INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA 11 (Gretchen Helmke & Steven Levitsky eds., 2006).

¹² FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973); Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 *CRIMINOLOGY* 721 (1989).

environment, or how culture affects behavior, particularly where host-environment and home-environment cultural norms conflict.

Social psychologists have long studied acculturation, emphasizing that a mix of both the person and the situation predicts behavior.¹³ Cultures condition the availability and accessibility of different implicit theories that people use to interpret the social world. The nature of the situation is comprised, in part, by whether there is cultural consensus on what the situation is and what the right course of action will be in a given situation.¹⁴ For example, cultures might vary on interpersonal levels of agreement on whether a certain behavior – like a political elite not paying a parking ticket – is acceptable for a given person.¹⁵

2. Constraint Decay and Zero-Enforcement Environments

The data we use in this paper are from a study that examines how diplomats in New York City who had enjoyed legal immunity responded to a sudden legal crackdown on illegal parking.¹⁶ The part of the data we focus on is the information about parking violations among diplomats in the pre-crackdown zero-enforcement environment. Some of these elites neither had *de jure* nor *de facto* immunity in their home countries. For them, moving to New York City therefore meant a change in the probability of being sanctioned – providing immunity where none was enjoyed before. For other elites, who enjoyed immunity in their home countries, there was little change in their relationship to the law when entering a zero-enforcement environment – they remained above the law. The result of the legal crackdown studied by Fisman and Miguel was clear: enforcement worked. In this paper we are more interested in further

¹³ Walter Mischel, *On the Interface of Cognition and Personality: Beyond the Person–Situation Debate*, 34 AM. PSYCHOL. 740 (1979).

¹⁴ Shane T. Mueller & Elizabeth S. Veinott, *Cultural Mixture Modeling: A Method for Identifying Cultural Consensus*, 4 ARA TECH. REV. 39 (2008).

¹⁵ See generally Ying-yi Ho Hong & Desiree YeeLing Phua, *In Search of Culture's Role in Influencing Individual Social Behaviour*, 16 ASIAN J. SOC. PSYCHOL. 26 (2013) (providing a brief review of the literature).

¹⁶ Fisman & Miguel, *supra* note 1.

exploring the variation in the behavior of the diplomats from different legal cultures in the zero-enforcement environment.

A rational choice analysis of a zero-enforcement environment would predict that, on average, elites would violate the law often, or at least as often as the benefits of doing so outweigh the costs, showing at least a partial convergence on a high-violation equilibrium. A theory of cultural constraints would predict that elites in a zero-enforcement environment would continue to follow the norms to which they were accustomed.

But we might imagine that there is a “constraint decay” that could happen over time, as those who initially are constrained by culture enter a new environment in which the previously stigmatized behavior is not stigmatized. This happens regularly in the non-criminal context, as people move from more conservative cultures spheres to more liberal cultures spheres. It happens in the criminal context, too, as people travel between jurisdictions that criminalize certain behaviors (say, possession of marijuana, or consuming alcohol below a certain age) and those that do not. And finally, it can happen as elites gain or lose *de facto* legal immunity.

Our idea of “constraint decay” is similar in nature to what Nagin refers to as “stigma erosion,” but it is on the opposite end of the enforcement spectrum.¹⁷ Stigma erosion is the gradual decline in the stigma associated with a behavior after an enforcement change occurs and behavior becomes newly stigmatized. Here, we examine a context in which the constraint comes from the culture or institutions of a previous environment, and we explore whether those constraints decay over time in a zero-enforcement environment.

There are several ways in which constraint decay could occur. One is through personal experience, or what is increasingly discussed as Bayesian updating.¹⁸ As a person acts with impunity in a way that would constitute a violation under the prior regime, the prior

¹⁷ Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME AND JUST. 1, 23 (1998).

¹⁸ See Shamena Anwar & Thomas A. Loughran, *Testing a Bayesian Learning Theory of Deterrence Among Serious Juvenile Offenders*, 49 CRIMINOLOGY 667 (2011).

constraint will slowly erode. In some conservative cultures, members of the opposite sex are to avoid physical contact, including shaking hands. In a culture in which no such constraint exists, people from the conservative cultures might start to shake hands with members of the opposite sex in order to facilitate other goals (such as business opportunities or social integration), and the hesitation to offer one's hand will decrease with each new handshake that occurs without social sanction. Or, in the wake of the legalization of possession of small amounts of marijuana by the City of Denver, Colorado, someone might smoke marijuana openly in their front yards and experience no sanction from a nearby police officer. Each time that happens, they learn that there really is no sanction for possessing and consuming small amounts of marijuana in that jurisdiction.

Similarly, in an enforcement environment in which political elites enjoy immunity from parking tickets, elites that are accustomed to having to pay parking tickets in their home environment could shed their hesitation from parking illegally over time, as their number of unpaid parking tickets accumulated without sanction.

Another pathway by which constraint decay could occur is via the observation of the experiences of others. With the handshake example, people from conservative cultures would observe handshakes between men and women without any social disapproval shown. They do not have to actually take the "risk" of shaking hands with someone of the opposite sex to learn that no social sanction exists. Similarly, when it comes to elites, we can imagine them changing their behavior solely based on the experiences of others who have been in the new legal environment for a longer time.¹⁹

¹⁹ Constraint decay should happen faster for people who have fewer, or less intense, ties to the home culture upon arrival in the new environment so that the cultural norms of the home culture are not being consistently refreshed. For example, a 20 year old college student from the United States (where the drinking age is 21), who goes to Mexico on a church-related mission project with several other members of the home church, is much less likely to drink alcohol while in Mexico (where the drinking age is 18), than if she traveled to Mexico alone for a study abroad program. The number and intensity of cultural ties among the elite diplomats we study is impossible for us to observe with our data, so we leave this hypothesis for others to test.

Our notion of constraint decay can serve to reconcile the predictions of rational choice theory and a theory of fixed cultural constraints. If constraint decay drives behavior of elites in a zero-enforcement environment, then we should see a gradual increase in violations among people from different rule-of-law-cultures over time, but also a persistence in cultural differences. We might observe it happen via the experience pathway, such that each ticket predicts that the next ticket will happen with a shorter delay. And we might simply observe it happen over time, regardless of the number of tickets accumulated, which is consistent with the informal contacts pathway.

III. DATA AND MEASUREMENT

The variation in the legal enforcement of unpaid parking violations for diplomats in New York City provides an excellent opportunity to explore what happens to elites from different rule-of-law cultures in a zero-enforcement environment. Due to the legal immunity of diplomatic personnel, the City of New York experienced enormous amounts of illegal parking and unpaid parking tickets by diplomats in the city. Illegal parking presented particular challenges when the illegally parked diplomatic cars blocked fire hydrants and access to handicapped parking spots, in addition to blocking traffic by double-parking. The police would issue parking tickets every time they found an illegally parked car from a diplomatic mission,²⁰ but if the mission did not voluntarily pay the ticket, the police had no further way of sanctioning the parking violations, since diplomats could not be taken to court for failing to pay the ticket. As of 2002, UN diplomats owed the City \$18 million because of the 150,000 unpaid parking tickets that they had accrued.²¹

²⁰ As we explain below, the vast majority of diplomats had no unpaid tickets over the time period, and we can assume, given the difficulties of parking in New York City, that many did receive parking tickets over the same time period and paid them. Hence, ticketing cars with diplomatic plates was a rational strategy for the NYC parking enforcers.

²¹ Fisman & Miguel, *supra* note 1, at 1024.

When it came to parking, diplomats from across the world who came to New York City found themselves in a legal environment where they were above the law. To limit the extensive abuse of illegal parking, the City of New York enforced a legal crackdown on diplomatic parking violations in October 2002. The particular form of the enforcement was not to issue more tickets, but instead to revoke diplomatic license plates on diplomatic cars that had accumulated three or more parking violations that went unpaid more than 100 days.

Using a dataset of month-wise unpaid parking violations for diplomats in New York City, Fisman and Miguel showed a strong correlation between the score on a commonly-used, unidimensional country-level corruption index and the propensity for diplomats from that country to park illegally in this zero-enforcement environment.²² They also analyzed individual-level data and demonstrated that the number of unpaid violations per month increased with tenure in New York City. While the emphasis in their article is on the impressive effect of *enforcement* after 2002 – when the New York police started towing cars that had an unpaid parking ticket – it is also an excellent empirical example of what Durlauf and Nagin describe as a sudden change in the *certainty* of punishment. The data are interesting because they provide a unique insight into petty violations among elites from across the world, rather than the more commonly studied college students and non-elite criminals.²³ Finally, it provides evidence of what happens when individuals from various contexts encounter a situation where it is common and fairly acceptable to commit an infraction.

²² Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004* WORLD BANK POLICY RESEARCH, (May 2005), <http://go.worldbank.org/2GF3HGVDO0>. (The “Kaufmann” corruption index is one of the most common unidimensional ways to analyze corruption. It is based on the work of Daniel Kaufmann and coauthors. Kaufmann was Director of the World Bank Institute when the score was developed). Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004* (World Bank Policy Research, Working Paper, May 2005), <http://go.worldbank.org/2GF3HGVDO0>.

²³ Durlauf & Nagin, *supra* note 3, at 16.

In this paper, we use data from the pre-enforcement time period to gain insight into what happens when political elites from different cultures arrive in a zero-enforcement regime. The data include the monthly number of parking violations for 1,995 diplomats present in New York for some or all of the time December 1997 until October 2002 – adding up to a total of 17,972 violations or an average of about 1 violation per diplomat per month across these years.

1. Rule-of-Law Cultures

Fisman and Miguel found that the overall corruption score of a country was strongly correlated with unpaid parking violations, but why was this the case? Why should the overall level of corruption in a society result in diplomats feeling comfortable breaking the law while abroad? Why should the habit of business elites in a country paying their way to contracts, or bureaucrats extorting grease payments for provision of simple services, or police extorting the citizenry, predict these elites feeling comfortable parking illegally and not paying for the parking ticket afterwards? We posit that it is not the level of corruption in the country *per se*, but rather the rule-of-law culture and the extent to which elites are used to (and comfortable with) being above the law that predicts their behavior.

Measuring the cultural background of diplomats and their perceived probability of being punished for a crime is not an easy task. Corruption measures incorporate much more than the rule of law, and rule of law measures incorporate much more than just the “thin” concept of whether the government is subject to the law. A growing literature calls into question the usefulness of existing measures of the rule of law itself finding that they are both under- and over-inclusive for measuring both “thick” and “thin” concepts of the rule of law.²⁴ General measures of the average rule of law in a

²⁴ See generally THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed. 2006); Gillian K. Hadfield & Barry R. Weingast, *Microfoundations of the Rule of Law*, 17 ANN. REV. POL. SCI. 21 (2013); Daniel B. Rodriguez, Matthew D. McCubbins & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455 (2009); Melissa A. Thomas, *What Do*

country do not capture the perceived probability of being punished for the *elite* in a country. Our ideal measure might take into account perceptions of whether the law governs the governors and whether the judiciary is independent from other branches of government. It would be less concerned with other aspects of existing measures, like civil rights protection.²⁵

To approximate the concept we are interested in, we turn to an interesting effort to measure corruption that emphasizes the role and importance of elites specifically. Michael Johnston proposed four “Syndromes of Corruption,” or clusters of country corruption in multidimensional space.²⁶ His four clusters present an intuitive, facially valid, description of elite subjection to the rule of law – indeed, his conception of corruption, on which his clusters are based, is “uses of and connections between wealth and power that significantly weaken open, competitive participation and economic and political institutions, or delay or prevent their development”, in other words, elites’ uses of their elite status in ways that, even if not illegal, undermine the country’s institutional frameworks.²⁷

In creating the four syndromes, Johnston conducted a cluster analysis on data for 97 countries. He used the Polity score to measure the level of democracy in 1992 and 2002, the World Economic Forum’s 2002 score for institutional and social capacity, the Heritage Foundation’s 2002 measure of property rights, and the Economic Freedom in the World ranking from the Fraser Institute from 1990

the Worldwide Governance Indicators Measure, 22 EUR. J. DEV. RES. 31 (2010); Svend-Erik Skaaning, *Measuring the Rule of Law*, 63 POL. RES. Q. 449 (2010).

²⁵ In recent years the World Justice Project has made great gains in creating such a measure. However, these measures are not available for the time period of the parking data we use.

²⁶ MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY, 3 (2005); *See also* Mark David Agrast, et al., *Rule of Law Index 2011*, WORLD JUSTICE PROJECT 2011, http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf (A more recent measure which could be used to operationalize elite law abidingness now exists: the World Justice Project’s Rule of Law Index, which measures rule of law according to multiple dimensions, one of which is the likelihood that elites are punished).

²⁷ Johnston, *supra* note 27, at 12.

and 2001.²⁸ Democratic development and institutional and social capacity would all tend to improve the rule of law, moreover, impressions of elite legal compliance probably inform the measures that are survey based. Using data from 1992 and 2002 allowed Johnston to measure rates of change in these countries, as some of the countries democratized and liberalized after their transitions from communism and authoritarianism. Based on these data, Johnston identified four groups of countries, which he described as Influence Markets, Elite Cartels, Oligarchs and Clans, and Official Moguls.²⁹ Importantly, the groups of countries cut across region, and one of their most important distinctions is the status and power of elites in each country.

Influence Markets (IMs) are eighteen countries that have a generally high level of human development, are established democracies, and have a strong rule of law. Leaders face competition and are constrained from acting arbitrarily, economies are free, and society is generally able to focus on quality of life, rather than survival. These countries are called Influence Markets because the rich generally have access to and influence on power, but the institutionalization of the state does not allow corruption to violate the established institutions. In Johnston's words, "often politicians serve as middlemen, putting their connections out for rent in exchange for contributions both legal and otherwise."³⁰ Influence markets include Japan, Austria, Uruguay, Finland, Germany, and Costa Rica, among others. In terms of our discussion, elites' perceived probability of being punished if caught in Influence Markets countries probably does not vary much across individuals, and is close to one for almost all people.

Elite Cartels (ECs), which include Argentina, Belgium, Botswana, Greece, Israel, and South Korea, among others, are less

²⁸ For more information about Johnston's methodology, see his description in Johnston, *supra* note 27. Our efforts to re-cluster his data by systematically dropping one indicator at a time have resulted in poorer separation between clusters.

²⁹ See *infra* p. 33 Appendix A (providing a full list of the countries, the rule-of-law cultures to which they pertain, and the distance from the statistical center of the cluster identified by Johnston's ANOVA).

³⁰ Johnston, *supra* note 27, at 42.

tightly clustered in Johnston's data, but do share plenty of commonalities. Namely, "the rules of the game" are less certain in these twenty-one countries. Elites inside and outside of government are less constrained by the rule of law, and "relatively established elites collude within a moderately strong institutional framework."³¹ The citizens of these countries are "relatively affluent," and their markets are relatively stable and open. However, institutionalization of government is less well-developed or less-well controlled than in the IM countries. Because of rapid industrialization or democratization, elites in these countries find alliances across sector lines and across the public/private sector divide. Black markets are more prominent in Elite Cartels than in Influence Markets. In terms of our discussion, we might expect the probability of being punished to have a higher variance in ECs than in IMs but to still be fairly close to one for most people. South Korea is a typical example: the "rules of the game" are not as predictable as in IM countries, yet two sons of two different South Korean presidents recently served time in prison for corruption.³²

Oligarchs and Clans (OCs) comprise thirty countries, including Albania, Bangladesh, Colombia, Ghana, India, Nepal, Turkey, Russia, and the Philippines. Oligarchs and Clans countries have reformed politics and economics to a degree, but their institutionalization has not caught up with their success in those areas. Rule of law is uncertain in Oligarchs and Clans countries. As a result of under-institutionalization, political elites will be "ill-equipped to resist [...] abuses."³³ Political and civil rights are not always guaranteed as a result. Security is low, which results in capital flight, and political regimes are unstable. Regulation is "extensive and of dubious quality", and black markets are extensive.³⁴ People are generally poor in these countries, and primary exports are relied upon heavily. In the case of our example, the perceived probabilities of

³¹ *Id.* at 45.

³² See Caroline Gluck, *S. Korean President's Son Jailed*, BBC NEWS WORLD EDITION (Nov. 1, 2002), <http://news.bbc.co.uk/2/hi/asia-pacific/2384707.stm>; Nicholas D. Kristof, *Seoul's Mighty, Once Immune, Now Feel the Arm of the Law*, N.Y. TIMES (Oct. 14, 1997), <http://www.nytimes.com/1997/10/14/world/seoul-s-mighty-once-immune-now-feel-the-arm-of-the-law.html>.

³³ Johnston, *supra* note 27, at 45.

³⁴ *Id.* at 57.

punishment for elites in OC countries will vary according to the would-be offender's connections to the Oligarchy or Clan that is in power. Diplomats at the UN Headquarters are likely to be well-connected to the elite and their home-country expectation of punishment is therefore likely to be low.

The twenty-nine Official Mogul countries (OMs) are similar to Oligarchs and Clans countries in that they are riddled with black markets and poverty with ineffective governance and corruption controls. However, in these countries, political elites are not accountable to the people and are therefore effectively immune from accountability. “[P]olitical power is personal, and is often used with impunity.”³⁵ Of all the groups, Official Mogul countries offer the least protection of civil and political rights. They are also heavily dependent on primary exports, and foreign aid that enters the country can easily be skimmed off by elites. These countries include countries like Chad, China, Haiti, Indonesia, Iran, Kenya, Kuwait, Morocco, Nigeria, and Zimbabwe. In terms of our model, it is clear that the perceived probability of being punished for a crime for members of the elite is close to zero. Elites from these countries are therefore likely to be used to being above the law and feel quite comfortable with this state of affairs.

When we divide the data for New York diplomats between December 1997 and October 2002 according to the four rule-of-law cultures, the data includes 516 diplomats from 17 IM countries, 427 diplomats from 21 EC countries, 566 diplomats from 29 OC countries and 485 diplomats from 27 OM countries.³⁶

³⁵ *Id.* at 46.

³⁶ Dividing the data into rule-of-law cultures reduces the amount of information analyzed, because whereas the original parking tickets data included 151 countries, Johnston only has complete data on 95 of those countries. Most of the countries that are omitted are small, but there are some exceptions such as Israel and Saudi Arabia that we would like to be able to analyze but cannot for lack of data. Overall, the patterns in the data do not change much in this reduced form. Johnston's sample has a mean corruption level of -0.19, which is slightly less corrupt (around four percent less corrupt) than the parking ticket data's mean of -0.009. This is a tiny difference in the data – it is 0.2 standard deviations on the corruption indicator, and in the original dataset, there are only a few countries between the original mean (-0.009) and the new mean (-0.19). In the Appendix we

In the following sections we use these data to explore or ideas about rule-of-law cultures and constraint decay.

Our first hypothesis is that because of the varying levels of elite subjection to the rule of law among the four rule-of-law cultures, on average, $\bar{V}_{IM} < \bar{V}_{EC} < \bar{V}_{OC} < \bar{V}_{OM}$, where \bar{V} is the mean number of violations per diplomat per month, and the subscripts define the group of countries. In other words, there should be a clear difference in the behavior of diplomats from different cultures.

Our second hypothesis is about changes in diplomat behavior over time. According to a Rational Choice perspective we should expect to see that as diplomats' time in New York increases, the importance of the rule-of-law culture of origin rapidly *disappear*, such that $\bar{V}_{IM} = \bar{V}_{EC} = \bar{V}_{OC} = \bar{V}_{OM}$. A culturalist explanation would, on the other hand, would predict little change in behavior over time. Based on our discussion we would rather expect to see cultural differences persist ($\bar{V}_{IM} < \bar{V}_{EC} < \bar{V}_{OC} < \bar{V}_{OM}$) but *weaken* as the diplomats' home-country cultural constraints fade over time.

IV. EMPIRICAL FINDINGS

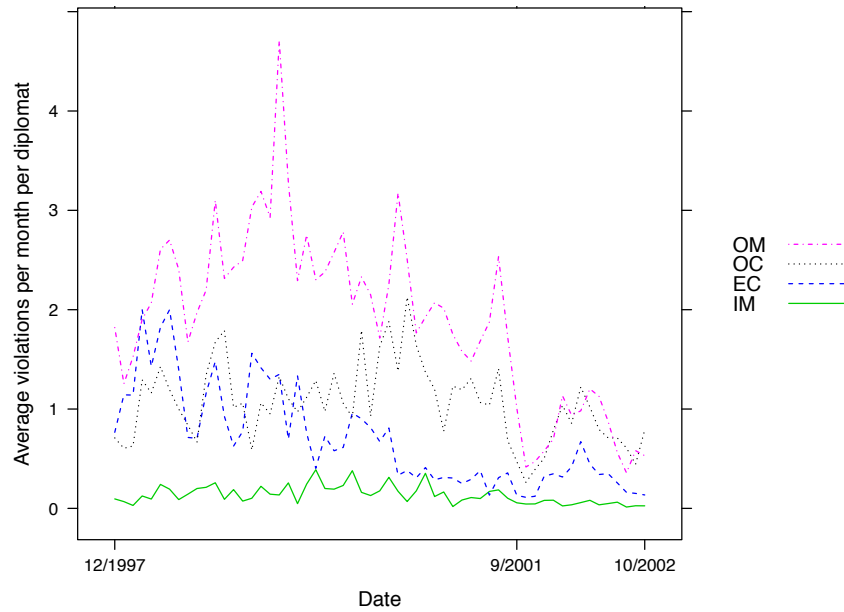
In this section we will look at overall patterns, patterns over time, and individual-level patterns in parking violations based on the four rule-of-law cultures introduced in the previous section. We begin our analysis by calculating the average number of parking violations per diplomat per month, by group, as illustrated in Figure 1.

As is clear in Figure 1, there was considerable variation in the average monthly number of violations across diplomats from countries with different rule-of-law cultures for the period 1997–2002. The differences in means between the four groups are reported in Table 1. A series of two-sample permutation tests comparing the differences in average monthly violations per diplomat between the different groups of countries indicate that there are clear differences in the behavior of diplomats from different cultures. In particular it

should the full list of countries in each group, how the groups related to the Kaufman corruption score and also how it relates to Rule of Law measures.

should be noted that the OC and OM countries (which have very similar scores on *corruption* indices) differ significantly from each other.³⁷

Figure 1: Average number of parking violations per diplomat per month, by group (1997-2002)



³⁷ We include in the appendix a box plot of both corruption indicators and rule of law indicators by cluster. See Figures B.1 and C.1.

Table 1: Mean violations per diplomat per month (1997-2002), by legal culture

	Mean by group	Difference	P-value
IM	0.14	–	–
EC	0.70	0.56	<0.01
OC	1.06	0.36	<0.01
OM	1.91	0.85	<0.01

Note: The comparison is between the group of countries on the reporting line and the one listed above it. Data is individual-level diplomat data on monthly violations aggregated to the country group. P-values are from two-sample permutation tests with 10,000 permutations, using the `perm.test()` package in R.

But did all the diplomats start violating the law in this zero-enforcement environment? Table 2 shows the data for the diplomats present in NYC between December 1997 and 2002. We present diplomats' average number of violations per month during the whole time they were in the city. In this case the sample size given is for diplomats, not diplomat-months.

We can see that among the diplomats from IM countries about 92% never accumulated unpaid parking tickets even once during their stay in New York; about 7% let tickets go unpaid on average between 0 and 1 times per month and four diplomats had an average of more than one unpaid violation per month.

Table 2: Percentages of diplomats with different average numbers of violations per month

Average monthly violations	IM (N=516)	EC (N=427)	OC (N=566)	OM (N=485)
0	92.4	77.3	79.5	61.2
(0,1]	6.8	17.1	11.8	21.6
(1,3]	0.8	4.0	4.4	11.6
(3,5]	0.0	0.5	2.7	2.7
>5	0.0	1.2	1.6	2.9

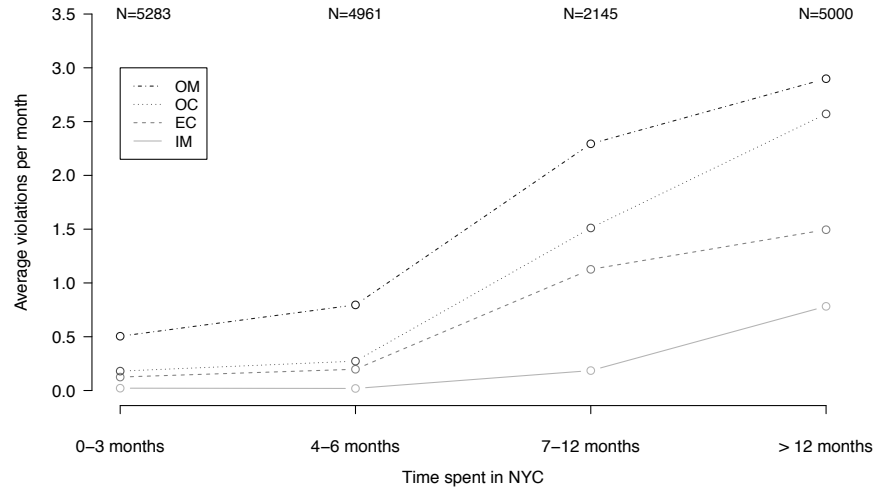
Interestingly, there is a major jump from the behavior of diplomats from IM countries to EC countries. In the case of EC countries, about 77% of the diplomats always paid their tickets, while the rest failed to pay, at least occasionally. The trend we see is that many of the diplomats from EC countries seemed to have adapted to the new cultural environment by violating *a bit*, while few of them were extreme violators. Among the diplomats from OC countries, on the other hand, about 79.5% never violated, but there were a few extreme violators that pulled up the average for the rest.

Looking finally at the diplomats from the OM countries, the difference is striking: Among the diplomats from the OM countries about 39% failed to pay parking tickets during their time in New York City, and several of the diplomats failed to pay more than five tickets every single month. Coming from a culture where they were used to being above the law, and being placed in a zero-enforcement environment, the diplomats from OM countries seem to have felt the least compelled to follow parking regulations by paying their parking tickets, or, put another way, the most willing to take advantage of their immunity.

This provides empirical support in favor of our first hypothesis: there is a clear rank-ordering in both the number of violations and the number of diplomats choosing to violate.

We now turn to our hypotheses about convergence and cultural constraints over time. In Figure 2 we look at the average monthly number of violations for diplomats broken down by how long they had been in New York. If diplomats behave purely rationally, then we should observe them adapting quickly to the zero-enforcement environment. Whatever their number of violations in the early days, we should see a convergence at a relatively high level of violations across groups. If diplomats behave purely according to their home country cultures, we should see stable cultural differences in the number of violations, which persist over time. However, if constraint decay occurs, then we should see cultural differences at the outset, with an upward creep in the number of violations over time.

Figure 2: Average number of violations over time, by rule-of-law culture



As we show in Figure 2, cultural constraints appear to be present, but they also seem to decay over time. Interestingly, few of the new diplomats accumulated unpaid tickets during their first three months in the city. As expected, the diplomats from OC and OM countries were quicker to start taking advantage of the zero-enforcement environment, increasing violations after only three months in New York City. The diplomats from IM and EC countries seem to have been more constrained by their cultures, although these constraints gradually seemed to have weakened over time, with violations accumulating after 6-12.³⁸ We view the gradual increase in unpaid parking tickets in IM and EC countries as evidence of considerable

³⁸ The separation is much clearer than if we run the simple quantiles of the corruption index, implying that the typology of rule-of-law cultures gives more explanatory power than the corruption score. Also, in this picture the difference in the number of violations in OM and OC countries does not look as stark as in in the previous table. The reason is that more of the diplomats from the OM countries had stayed in NYC for more than one year. Their overall average was therefore pulled up by all the frequent violators who had lived in the city for a long time. We break down the length of diplomatic stay by rule-of-law culture in the appendix. See Figure D.1.

constraint decay: the cultural view that it is ethically wrong to take advantage of one's elite status dissipated when enough of others in this new environment violated on a regular basis. At the same time, Table 2 reminds us that less than 1% of all IM diplomats accumulated more than one unpaid ticket per month on average. Substantial cultural constraints remained.

Data on repeat violators helps to complete the picture. We reduce the data to only the sub-sample of violators who left more than one ticket unpaid during the time in New York. Among these repeat violators, the average number of violations *the first month they violated at all* was less than 1.5 for IM and EC diplomats. For OC and OM diplomats it was 2.25 and 2.34, respectively, and these numbers increased to 3.33 and 2.89 in the second month. Repeat violations among diplomats from IM and EC countries held more or less steady in their second month. Looking at how fast diplomats started to violate, 20% of repeat violators from IM countries accumulated at least one parking ticket during their first month in the city, a number that was closer to 30% for the diplomats from EC, OC and OM countries. On average, repeat violators received their first ticket after they had spent about three months in the city, with the exception of diplomats from OM countries, who got their first ticket after less than two months in the city. Diplomats from IM countries were the slowest to repeat violations, and diplomats from OC and OM countries were the fastest. We summarize these results in Table 3.

Table 3: Violation Behavior Among Repeat Violators

	IM (N=34)	EC (N=79)	OC (N=88)	OM (N=146)
Percent of Diplomats who were Repeat Violators	21.21	29.11	28.41	30.82
Average Month of First Violation	3.03	3.38	3.5	1.80
Average Number of Violations, First Month Violating	1.15	1.49	2.25	2.34
Average Number of Violations, Second Month Violating	1.14	1.57	3.33	2.89
Average Number of Months between First and Second Violation	8.10	5.81	4.27	3.49
Average Number of Months between Second and Third Violations	5.15	3.32	2.41	2.81

Based on our theoretical discussion we believe that for OC and OM diplomats, a home-country cultural background that views them as largely above-the-law increased their readiness to “hit the ground violating”, when compared to diplomats from IM, and to perhaps a lesser degree, EC cultures.

The data we have presented in the previous sections reveal several interesting patterns. First, we can to a large extent predict the behavior of diplomats based on their rule-of-law culture. Diplomats from OM and OC cultures were less likely to have entered New York with any constraints on their immunity, and they were quick to start violating the law. They also responded with frequent violations. Second, even for diplomats from IM and EC countries, the propensity to break the law increased over time, suggesting that their cultural constraints decayed over time.

Even so, it is important to note that most diplomats actually complied with the law. Even in a zero-enforcement environment, most diplomats paid their parking tickets, and among those who did violate, most violated only once. In light of zero-enforcement and constraint decay, a large proportion of diplomats seem to have seen it as legitimate to violate *occasionally*, but not constantly.

Together these findings point to interesting interactions between rule-of-law cultures and institutional constraints. Members of a society might vary in their probability of sanction even if caught red-handed, and deterrence might function quite differently for elites than for others.

V. CONCLUSION

Rule-of-law cultures and the social status of the actors involved are both important and under-theorized considerations of corruption deterrence. While deterrence is often thought of in terms of the probability of detection and the size of the sanction, the probability of punishment conditional on being caught is a missing piece of the theory, and one that we hope to have illuminated in this paper. This is particularly important in the case of elites, as there are many groups and individuals across the world that may go unpunished even in countries with otherwise well-functioning legal systems.

When diplomats from across the world found themselves to be effectively immune from punishment for parking illegally, diplomats from some countries – namely those where elites are accustomed to being able to evade punishment for criminal acts – took advantage of the zero-enforcement environment. While existing theories of deterrence would predict that all diplomats would abuse this rule to the same extent, or that culture would dominate and levels of violations would remain unchanged, we see instead that the diplomats from countries in which elites tend to be more accountable were more law-abiding. Some diplomats from strong rule-of-law cultures also started violating in higher numbers over time, as their cultural constraints decayed.

Our study has focused on a rarified example – that of political elites from all over the world living in a zero-enforcement environment – but it joins other cross-cultural socioeconomic studies that find cultural differences in economic behavior.³⁹ Future research on the mechanisms underlying the differences in behavior between elites and non-elites would deepen our understanding about how people behave in new institutional settings.

³⁹ See, e.g., Joseph Henrich, et al., *Economic Man in Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 BEHAV. AND BRAIN SCIENCES 795 (2005).

A. APPENDIX: RULE-OF-LAW CULTURES

Table A.1: Influence Markets

	Influence Market (IM) Country name	Distance from Cluster Center
1	New Zealand	0.91
2	Germany	2.32
3	Switzerland	13.65
4	Netherlands	3.87
5	Sweden	8.76
6	Ireland	8.30
7	Austria	3.60
8	Australia	7.28
9	UK	1.29
10	Costa Rica	3.84
11	Denmark	3.65
12	Canada	2.78
13	USA*	3.86
14	Uruguay	9.90
15	France	9.24
16	Finland	8.24
17	Norway	7.66
18	Japan	2.92

Table A.2: Elite Cartels

	Elite Cartel (EC) Country name	Distance from Cluster Center
1	Czech Rep	2.49
2	Slovak Rep	2.31
3	Greece	9.01
4	Chile	2.34
5	Paraguay	4.65
6	Panama	5.72
7	South Africa	5.52
8	Spain	7.39
9	Israel	6.88
10	Italy	2.98
11	Hungary	5.75
12	Namibia	4.57
13	Korea South	3.22
14	Portugal	2.63
15	Botswana	3.64
16	Belgium	9.07
17	Poland	3.75
18	Bolivia	8.03
19	Zambia	10.62
20	Brazil	5.54
21	Argentina	5.72

Table A.3: Oligarchs & Clans

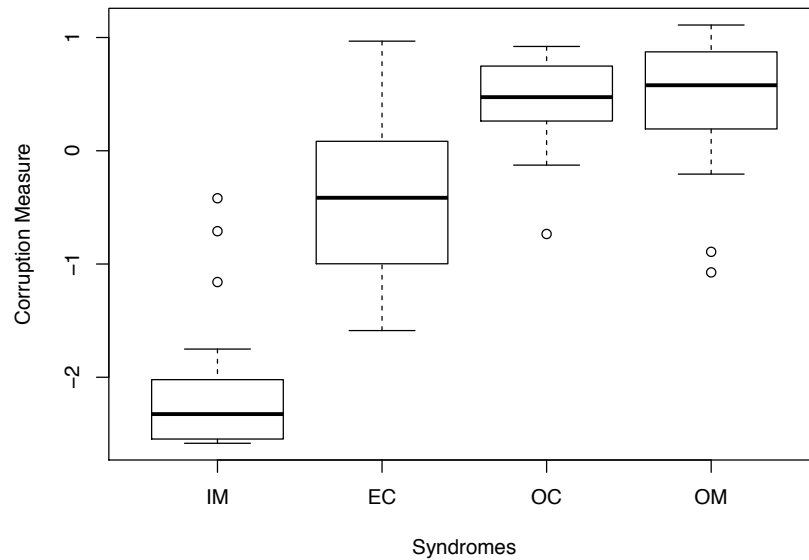
	Oligarchs & Clans (OC) Country name	Distance from Cluster Center
1	Sri Lanka	9.49
2	Malaysia	7.20
3	Mexico	7.10
4	Malawi	2.48
5	Russia	12.69
6	Peru	11.62
7	Pakistan	14.73
8	Romania	4.25
9	Philippines	4.14
10	Nicaragua	2.86
11	Nepal	3.08
12	Senegal	7.90
13	Niger	9.07
14	El Salvador	2.31
15	Ecuador	3.99
16	Benin	1.64
17	Guatemala	3.63
18	Ghana	6.99
19	Turkey	3.24
20	Bangladesh	9.41
21	Albania	8.67
22	Colombia	4.81
23	Venezuela	8.28
24	India	3.72
25	Thailand	7.53
26	Madagascar	6.79
27	Jamaica	9.04
28	Trinidad & Tobago	8.89
29	Bulgaria	3.69
30	Honduras	2.99

Table A.4: Official Moguls

	Official Mogul (OM) Country name	Distance from Cluster Center
1	Tunisia	2.36
2	Syria	12.33
3	Zimbabwe	8.38
4	Uganda	13.63
5	Togo	3.96
6	United Arab Emirates	7.44
7	Tanzania	5.66
8	Rwanda	2.94
9	Gabon	5.50
10	Egypt	5.58
11	Central Africa Republic	10.60
12	Indonesia	9.59
13	Haiti	2.54
14	Guinea-Bissau	7.93
15	Cameroon	2.82
16	Algeria	5.87
17	Congo Rep of	11.17
18	China	6.12
19	Morocco	7.79
20	Malawi	13.85
21	Kuwait	5.56
22	Oman	8.63
23	Nigeria	10.03
24	Ivory Coast	7.20
25	Iran	11.66
26	Chad	2.94
27	Myanmar	11.53
28	Jordan	13.77
29	Kenya	2.11

B. COMPARING RULE-OF-LAW CULTURES AND THE CORRUPTION INDEX

Figure B.1: Level of corruption among the countries belonging to countries in each of the rule-of-law cultures



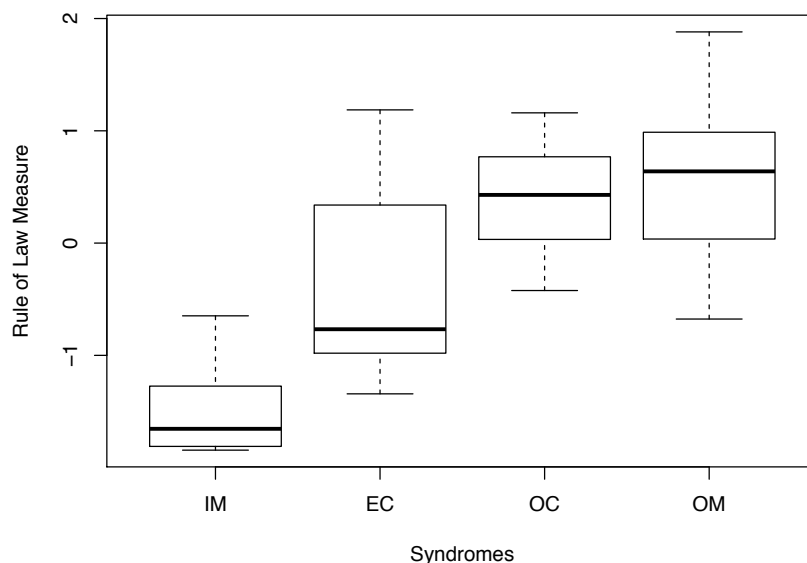
How do the rule-of-law cultures relate to the Kaufman corruption index used by Fisman and Miguel? Figure B.1 shows corruption levels by rule-of-law culture. As can be seen in Figure B.1, the Influence Markets' mean level of corruption is much lower than for the other groups, the mean level for the Elite Cartels is slightly higher, while the Official Moguls and Oligarchs and Clans have a similar and high level of corruption. While the Oligarchs and Clans and Official Moguls have a fairly low variance on the corruption index (0.12 and 0.29, respectively), Influence Markets and Elite Cartels have a much higher variance of corruption levels, 0.44 and 0.51, respectively. Since the Official Moguls and Oligarchs and Clans have similarly high levels of corruption, using only corruption as an

indicator would predict a similar level of parking violations by diplomats from the countries from these rule-of-law cultures. However, as we observe in the analysis in the main text, diplomats from the two groups of high-corruption countries behave differently, lending credence to the idea that rule of law is not adequately captured by corruption measures.

C. RULE OF LAW INDEX AND RULE-OF-LAW CULTURES

We do not pursue a strategy involving a new rule of law typology here because of the under-conceptualization and difficult operationalization of rule of law over the time period. Specifically, we lack quality data underlying the 2002 Rule of Law indicator measure from the World Bank Institute, but even if it existed, is it largely built on overlapping indices that do not separate nicely into clusters for analysis. Instead, we show here that the rule-of-law cultures overlap with the 2002 rule of law indicator in a very similar way as we saw in Figure B.1, though the pattern is more muted.

Figure C.1: Syndromes by Rule of Law Measure



We believe that future scholars will be able to better approximate rule of law measures – both “thick” and “thin” concepts. The World Justice Project has already made great gains. Its data, unfortunately, does not overlap with the time period under analysis here.

**INTERNATIONAL LEGAL
INSTRUMENTS AND NEW JUDICIAL
PRINCIPLES FOR RESTITUTION OF
ILLEGALLY EXPORTED CULTURAL
PROPERTIES***

*Ho-Young Song***

Worldwide, many cultural properties have been wrongfully exported to other countries in times of war and colonization. Furthermore, cultural properties are currently constant targets of illegal transaction due to their substantial economic value. Illicit trade in cultural properties is now the third largest black market after drug and firearms. There are several international treaties aimed at combating the illicit export and enabling the restitution of cultural properties. Despite these efforts, more legislative and judicial cooperation between countries will be necessary to truly solve the problem. This article reviews international legal instruments for restitution of illegally exported cultural property, and suggests some new judicial principles that should be applied by domestic courts for supplementing drawbacks of international treaties. The author suggests to adopt "lex originis" rule for choice of governing law instead of traditional "lex rei sitae" rule and to apply to shifting burden of proof to a certain extent to find a solution for disputes over cultural properties.

Keywords

Cultural property, *res extra commercium*, The 1954 Hague Convention, The 1970 UNESCO Convention, The 1995 UNIDROIT Convention, *lex rei sitae*, *lex originis*, Shifting the Burden of proof

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I. INTRODUCTION

In 2011, two significant incidents occurred regarding the restitution of cultural properties: Korea recovered 297 volumes of the royal *Uigwe*¹ that had been carried away by French soldiers from the *Oegyujanggak*² during the French Invasion of 1866 and stored in the *Bibliothèque Nationale de France* (BnF)³; and Turkey recovered the Bogazköy Sphinx, which was the object of a long-running dispute between Turkey and Germany, from the Pergamon Museum in Berlin, Germany.⁴ Those cases captured the world's attention.

The cultural properties in those cases were illegally exported during the Imperial Period. The matter of restitution of cultural properties is mostly recognized as pertaining to cultural properties illegally exported during World War I, World War II, or the period when imperialism was rampant, as these types of cultural properties are at the center of a significant portion of restitution disputes. According to the Cultural Heritage Administration of Korea, as of 2015 a total of 160,342 pieces Korean cultural properties reside overseas. Among those cultural properties, approximately 75,000 pieces are thought to have been illegally exported to an estimated 20 countries.

Most of those cultural properties were illegally exported during the Japanese colonial period, the U.S. military government period, and the historical turmoil of the Korean War. Most cultural

1 The *Uigwe* are Royal Records of the State Rites of the Joseon Dynasty, which ruled the Korean peninsula from 1392 until 1897. Douglas Cox, Case Note, "*Inalienable*" Archives: Korean Royal Archives as French Property under International Law, 18 INT'L J. CULTURAL PROPERTY 410 (2011).

2 The *Oegyujanggak* was the Royal Library of the Joseon Dynasty, located outside of the royal palace. *Id.* at 411.

3 See S. Korea welcomes accord with France on transfer of 'Oegyujanggak' royal books, KOREA HERALD, Mar. 17, 2011, <http://english.yonhapnews.co.kr/national/2011/03/17/34/0301000000AEN20110317001800315F.HTML>; see Cox, *supra* note 1, at 409-23 (for a case study of the *Uigwe*).

4 Çorum - Anatolia News Agency, *Hattusa reunites with sphinx*, HURRIYET DAILY NEWS, Nov. 7, 2011, <http://www.hurriyetdailynews.com/hattusa-reunites-with-sphinx.aspx?pageID=238&nID=7062&NewsCatID=385>.

properties plundered and illegally exported during the age of imperialism have not been returned so far. Even so, the restitution of cultural properties is becoming a bigger global issue. However, not all cultural properties were exported during past, unfortunate periods. Cultural properties are currently constant targets of illegal transaction stemming from their inherently enormous value. According to the United States Department of Justice (DOJ), illegal cultural properties make up the third largest concentrated black market— after the illegal drug and firearms markets.⁵ In particular, illegal transactions of cultural properties in the Middle East are reported to be a basis for funding terrorist groups.^{6,7}

With the development of means of communicating and conducting transactions, the current illegal trade of cultural properties has grown to include not only criminal organizations, but also ordinary people. For example, the illegal transaction of cultural properties is frequently carried out using online auction sites such as *eBay*⁸ and international parcel delivery services.⁹ This situation is

⁵ Noah Charney et al., *Protecting Cultural Heritage from Art Theft: International Challenge, Local Opportunity*, FBI LAW ENFORCEMENT BULL. (U.S. DEP'T OF JUSTICE, D.C.), Mar. 2012, <https://leb.fbi.gov/2012/march/protecting-cultural-heritage-from-art-theft-international-challenge-local-opportunity>.

⁶ See Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 609-611 (2012); Russell Howard et al., *Digging in and Trafficking out: How the Destruction of Cultural Heritage Funds Terrorism*, 8 CTC SENTINEL 14, 14-17 (2015); Janine di Giovanni et al., *How does ISIS fund its reign of terror?* NEWSWEEK, Nov. 6, 2014, <http://www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html>.

⁷ On Feb. 12, 2015, the UN Security Council adopted Resolution 2199 at its 7379 meeting. Resolution 2199 condemns the destruction of cultural heritage in Iraq and Syria, particularly by ISIL and ANF, and also decrees that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural properties and other items of archaeological, historical, cultural, rare scientific, and religious importance that have been illegally removed from Iraq since Aug. 6, 1990 and from Syria since Mar. 5, 2011, including by prohibiting cross-border trade in such items. United Nations, Press Release, Unanimously Adopting Resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens Further Targeted Sanctions, Feb. 12, 2015, <http://www.un.org/press/en/2015/sc11775.doc.htm>.

⁸ Kurt Siehr, *Unidroit Convention of 1995 and Unclaimed Cultural Property without Provenance*, 2013 ELTE L. J. 89, 95 (2013).

additionally problematic given the people involved in such transactions are often unaware that the transactions run afoul of the law.

International societies agree on the necessity of preventing illegal transactions of cultural properties and returning them to their source countries. In response to this increasing problem, they have established various international norms, such as the 1970 UNESCO Convention¹⁰ and the 1995 UNIDROIT Convention.¹¹ However, some disputes over the restitution of cultural properties cannot be resolved through such conventions. Those disputes can be resolved through diplomatic channels, mutual agreements, or decisions of domestic courts.

Although each country usually has a national law to prevent illegal exportation of cultural properties, few nations have any special act applicable to disputes over the restitution of cultural properties. Therefore when a lawsuit for the restitution of illegally exported cultural properties is filed in a domestic court, the competent court has no option but to apply general legal principles applicable to a lawsuit over other goods. However, if the court applies general legal principles, it might overlook the unique characteristics of cultural properties. Cultural properties differ from typical goods given that the property contains special relevance to the historical, spiritual, and cultural identity of a state unlike other goods. This intrinsic and specialized value exemplifies why cultural properties should not be distributed by normal market forces.

⁹ *Crime ring busted for smuggling Korean relics overseas*, DONG-A IIBO, Apr. 27, 2012, <http://english.donga.com/List/3/all/26/403691/1>.

¹⁰ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Nov. 14, 1970, 823 U.N.T.S. 321, reprinted in 10 I.L.M. 289 (1971) [hereinafter 1970 UNESCO Convention]. The Convention has been in force since Apr. 27, 1972, with 131 State Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (last accessed May 4, 2016).

¹¹ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 35 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention]. The Convention has been in force since July 1, 1998, with 37 State Parties as of April 2016. <http://www.unidroit.org/status-cp> (last accessed May 4, 2016).

Based on such a viewpoint, this paper suggests some legal principles that could be applied to international disputes over restitution of cultural property, particularly in the global context. Chapter II examines the meaning and characteristics of cultural property. Chapter III reviews international legal instruments for prevention of illegal exportation of cultural property and restitution. Chapter IV identifies some problems posed in cases where a lawsuit over restitution of cultural property is filed in a domestic court, and suggests new judicial principles to solve the problems. Chapter V summarizes the conclusions.

II. THE MEANING OF CULTURAL PROPERTY

A. The Definition of Cultural Property

At the outset, it is imperative to clarify what should be identified as *cultural property*. The classification of the property itself is a preliminary question to all legal challenges in the restitution of cultural property issues. It is difficult to establish a universal definition of cultural property. Broadly stated, the term *cultural property* refers to objects with artistic, ethnographic, archaeological, or historical value.¹² Cultural property includes art, artifacts, antiques, historical monuments, rare collections, religious objects of importance to the cultural identity of a group of people, and other items representing significant historical, artistic, and social accomplishments.¹³

The word *property* has a semantic nuance limited to tangible things. However, a product of the cultural activities of a human being or tribe contains a myriad of intangible things. Therefore, the term *cultural heritage* is sometimes used as a broad concept encompassing not only tangible, but also intangible cultural products.¹⁴ Also, the use of word *property* in relation to cultural property slants considerably

¹² JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 27 (2nd ed. 2009).

¹³ Christine K. Knox, Note: *They've lost their Marbles: 2002 Universal Museums' Declaration, the Elgin Marbles and the Future of the Repatriation Movement*, 29 SUFFOLK TRANSNAT'L L. REV. 315, 317-318 (2006).

¹⁴ Lyndel V. Prott & Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, 1 INT'L J. CULTURAL PROP. 307, 307-08 (1992).

toward economic value and connotes protection of the rights of the possessor.¹⁵ Thus, the term *cultural object* is sometimes used instead of cultural property to exclude the implication of ownership. Because uniform standards have not been established for the definition of cultural property, and each country defines the term according to its national laws or classification by its experts.¹⁶ The terms are commonly used interchangeably without strict differentiation. Since, in the interest of brevity, all the legal definitions of cultural property by each state cannot be reviewed, this section focuses on the definitions in major conventions.

It is noted that the 1954 Hague Convention¹⁷ is the first time the term *cultural property* was employed in an international legal context.¹⁸ The 1954 Hague Convention compromised in defining cultural property by using an illustrative definition in the form of lists of cultural properties as objects of protection. Article 1 of the 1954 Hague Convention describes the objects entitled to consideration as cultural properties regardless of their origin and ownership.¹⁹ By

¹⁵ *Id.* at 307, 309-10.

¹⁶ ART LAW HANDBOOK 391 (Roy S. Kaufman ed., 2000).

¹⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. The Convention has been in force since August 7, 1956 with 127 States Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E> (last accessed May 4, 2016)

¹⁸ Manlio Frigo, *Cultural property v. cultural heritage: A "battle of concepts" in international law?*, 86 INT'L REV. RED CROSS 367, 367 (2004).

¹⁹ See 1954 Hague Convention, *supra* note 17, at 242. [Definition of cultural property].

For the purpose of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph

contrast, Article 1 of the 1970 UNESCO Convention provides a specific definition of cultural property.²⁰ As regards the notion of cultural property, Cultural nationalism and cultural internationalism

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- (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
 - (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’.

²⁰ See 1970 UNESCO Convention, *supra* note 10, at 234-35.

For the purposes of this Convention, the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

have been a source of contention,²¹ and international conventions properly consider both views. The 1954 Hague Convention defines cultural property as objects of protection from the standpoint of cultural internationalism.²² Although the 1970 UNESCO Convention embraces both cultural nationalism and cultural internationalism, it is generally perceived to have favored cultural nationalism.²³ This understanding is supported by the preamble of this Convention:

Cultural property constitutes one of the basic elements of civilization and national culture, that its true value can be appreciated only in relation to the fullest possible information regarding origin, history and traditional setting, and that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export.²⁴

This expression puts stresses on the national characteristics of cultural property.

Article 1 of the 1970 UNESCO Convention enumerates 11 abstract categories in its definition of cultural property and commissions a concrete definition of cultural property to a special designation within each state. That is, among the items enumerated from (a) to (k), only those “specifically designated” by each state are acknowledged as cultural properties.²⁵ In other words, the 1970 UNESCO Convention vests each country with broad discretion to determine what should be protected as cultural properties. Accordingly the State Parties deem which specifically designated items will be protected as cultural properties under their national laws pursuant to this Convention. In addition to the categories provided in Article 1, Article 4 establishes five categories of cultural properties.²⁶ Article 4 protects items that are worth protecting, but

²¹ John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT’L L., 831, 831-833 (1986).

²² *Id.* at 833.

²³ *Id.* at 842.

²⁴ See 1970 UNESCO Convention, *supra* note 10, at 232.

²⁵ See *supra* text accompanying note 20.

²⁶ See 1970 UNESCO Convention, *supra* note 10, at 237-38:

not specifically designated as cultural property under national law per Article 1.

The most controversial issue in the drafting of the 1995 UNIDROIT Convention was how to define *cultural objects*.²⁷ Some advocated a comprehensive definition, while others sought a concrete and enumerative definition. Ultimately, the Convention used an eclectic approach.²⁸ Particularly, the Convention adopted a comprehensive clause for the definition of cultural property in Article 2²⁹ and enumerated concrete objects to be regarded as cultural property in the Annex.³⁰

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
- (d) cultural property which has been the subject of a freely agreed exchange;
- (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

²⁷ IRINI A. STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW 72 (2011).

²⁸ *Id.*

²⁹ See 1995 UNIDROIT Convention, *supra* note 11, at 464, which states: For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

³⁰ *Id.* at 473. The Annex states:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of

B. Cultural Property as *res extra commercium*

Things (goods) can be classified according to diverse academic criteria. One type of classification is the characterization of goods as *res in commercio* (a thing inside commerce) or *res extra commercium* (a thing outside commerce).³¹ *Res in commercio* includes objects that can be transacted under private laws; contrariwise *res extra commercium* objects cannot be so. Most countries have cultural property protection–related laws, which prohibit the transfer or distribution of cultural property. The origin of such provisions needs some explanation.

The classification of objects into *res in commercio* and *res extra commercium* dates back to the *Institutiones* and *Digesta* of the *Corpus iuris civilis* issued from 529 to 534 by order of Justinian I, Eastern Roman Emperor.³² The *Corpus iuris civilis* classifies objects into those subject

national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

³¹ AMAILE WEIDNER, KULTURGÜTER ALS RES EXTRA COMMERCIMUM IM INTERNATIONALEN SACHENRECHT 15 (2001).

³² *Id.* at 15.

to human law (*res humani iuris*) and those subject to divine law (*res divini iuris*). *Res divini iuris*, things that build the relationship between god and man, were regarded as *res extra commercium* and could never be alienable in any case.³³ Things among *res humani iuris* could also be regarded as *res extra commercium*, such as *res publicae*, which belongs to the state; *res communes omnium*, which refers to natural things such as air, sea, and rivers; and *res in patrimonio Caesaris*, which refers to Caesar's Legacy.³⁴ In the case of artworks, the *Corpus iuris civilis* established some as *res divini iuris* and others as *res publicae*, both of which were *res extra commercium*. The remaining artworks could be transacted as *res private*, which were personal belongings.³⁵ The current classification of things and the concept of cultural property under the cultural property protection-related laws of each country thus fundamentally originated in the *Corpus iuris civilis*. *Res sacra* under Canon Law succeeded *res extra commercium* for artworks under the *Corpus iuris civilis*. Afterwards, first in Europe, Greece promulgated a cultural property protection law in 1834, followed by France in 1887, Italy in 1902, and Germany in 1955.

Currently, most states acknowledge inalienability for certain types of cultural properties according to their own cultural property protection-related laws. Nowadays, the idea of cultural properties as *res extra commercium* means the property can be inalienable and imprescriptible under private law. Furthermore, the property can be state-owned under public law and thus be forbidden goods for export and import under international trade law.³⁶

In Korea, Article 21 of the Cultural Heritage Protection Act forbids the export of cultural properties. Article 54 of the same Act prohibits any transfer or establishment of private rights for state-owned cultural properties. The foundation of those provisions is in

³³ *Id.* at 15-16.

³⁴ *Id.* at 18-19.

³⁵ *Id.* at 19-21; MARC WEBER, UNVERÄUßERLICHES KULTURGUT IM NATIONALEN UND INTERNATIONALEN RECHTSVERKEHR 6 (Dr. Wilfried Fieldler, Dr. Dr.h.c. Erik Jayme, Dr. Kurt Siehr, eds., 2002)

³⁶ WEIDNER, *supra* note 31, at 35-43. See also Kurt Siehr, *Legal Aspects of the Mystification and Demystification of Cultural Property*, 16 ART, ANTIQUITY & LAW 173, 202-203 (2011).

the classification of *res extra commercium* for artworks under the *Corpus iuris civilis*.

III. INTERNATIONAL LEGAL INSTRUMENTS FOR RESTITUTION OF CULTURAL PROPERTY

A. Multilateral Conventions

1. The 1954 Hague Convention

World War I and World War II brought unprecedented plunder and destruction of cultural property to the world, which clarified a need to establish an international convention to protect cultural heritage in time of war. In 1954 at The Hague, the Convention for the Protection of Cultural Property in the Event of Armed Conflict³⁷ and a separate optional protocol called the First Protocol were adopted. The 1954 Hague Convention and the Regulations for the Execution of the Convention, which constitute an integral part of it, are the basic and comprehensive international treaty focusing on the protection of cultural property during wartime or armed conflict.³⁸ The 1954 Hague Convention is supplemented by the First Protocol,³⁹ adopted with the Convention, and the Second Protocol,⁴⁰ adopted in 1999. It is also influenced by incidents that took place in Yugoslavia during the 1990s.

³⁷ See 1954 Hague Convention, *supra* note 17.

³⁸ John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENV'T'L L. & POL'Y J. 1, 38 (2004).

³⁹ Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, The Hague 14 May 1954 [hereinafter First Protocol] First Protocol of has been in force since 7 August 1956 with 104 States Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=15391&language=E> (last accessed May 4, 2016).

⁴⁰ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 26, 1999

The major content of the 1954 Hague Convention about the restitution of cultural property is contained in the First Protocol. Each signatory state agrees to prevent the exportation of cultural property from any territory it occupies during an armed conflict⁴¹; to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory⁴²; and to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property in its territory.⁴³ Cultural property taken from the territory of a signatory state and deposited by it in the territory of another signatory state for the purpose of protecting such property against the dangers of an armed conflict shall be returned by the latter at the end of hostilities to the competent authorities of the territory from which it came.⁴⁴

2. The 1970 UNESCO Convention

Given the 1954 Hague Convention was promulgated on the premise of a special situation, the protection of cultural property in the event of armed conflict, international society started debating the need to establish a more comprehensive international instrument applicable for a broader protection of cultural property.

Immediately after World War I, the League of Nations debated the matter of plunder of cultural property.⁴⁵ UNESCO prepared a draft convention about the restitution of artistic, historical, or scientific objects illegally transferred in cooperation with the *Office International des Musées* (OIM).⁴⁶ However, this attempt failed to advance further because of the outbreak of World War II in 1939, and afterward, UNESCO could not help concentrating on the 1954

[hereinafter Second Protocol]. The Second Protocol has been in force since 27 April 1972 with 68 State Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E> (last accessed May 4, 2016).

⁴¹ First Protocol, *supra* note 39, at Part I.

⁴² *Id.* at Part I.2.

⁴³ *Id.* at Part I.3.

⁴⁴ *Id.* at Part II.5.

⁴⁵ PATRICK J. O'KEEFE & LYNDEL V. PROTT, CULTURAL HERITAGE CONVENTIONS AND OTHER INSTRUMENTS 64 (2011).

⁴⁶ PATRICK J. O'KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION 3 (2nd ed. 2007).

Hague Convention.⁴⁷ As newly independent and East European countries with particular interest in the restitution of cultural property increasingly participated in that Convention, UNESCO came to face new challenges. In particular, Mexico and Peru posed problems of unlawful trade in cultural property during the 11th General Conference of UNESCO in 1960, and it became clear that the First Protocol to the 1954 Hague Convention alone could not deal with these problems comprehensively.⁴⁸ Accordingly, UNESCO adopted the *Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property* in 1964 as a preliminary step.⁴⁹ A convention draft based on that Recommendation was circulated to collect the opinions of member states in 1968, and the *Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property* was adopted on November 14, 1970 by the General Conference of UNESCO at its 16th session. This is called the 1970 UNESCO Convention, and it established an international normative framework to prevent the illicit traffic of cultural property during peacetime.⁵⁰

This Convention, which contains a preamble and 26 articles, protects cultural property from illicit trade by means of administrative enforcement and international cooperation, rather than by private law. The major contents of this Convention are as follows: (a) the Convention acknowledges that the import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention is illicit⁵¹; (b) member states undertake to set up national services and establish a list of important public and private cultural properties to be protected⁵²; (c) they undertake to introduce an appropriate certificate for the export of cultural property⁵³; (d) they agree to take the necessary measures

⁴⁷ O'KEEFE & PROTT, *supra* note 45 at 64.

⁴⁸ O'KEEFE, *supra* note 46 at 5.

⁴⁹ *Id.*

⁵⁰ Jennifer N. Lehmen, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and The UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 538 (1997).

⁵¹ 1970 UNESCO Convention, *supra* note 10, art. 3.

⁵² *Id.* at art. 5.

⁵³ *Id.* at art. 6.

against the acquisition or import of illegally removed cultural property⁵⁴; (e) they undertake to impose penalties or administrative sanctions on any person involved in the illicit import or export of cultural property⁵⁵; (f) they undertake to participate in a concerted international effort to determine and carry out the necessary concrete measures under the Convention⁵⁶, and (g) the Convention regards the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power as illicit.⁵⁷

3. The 1995 UNIDROIT Convention

Problems with the 1970 UNESCO Convention underlay the emergence of the 1995 UNIDROIT Convention.⁵⁸ First, the 1970 UNESCO Convention was not self-executing, and thus the signatory states had to adopt domestic legislation to implement it.⁵⁹ In other words, unless the signatory states to the UNESCO Convention legislate domestic laws, the Convention does not become effective to the signatory states directly. Second, with respect to the implementation of the Convention, the signatory states can adjust the provisions or measures of the Convention pursuant to their domestic laws or regulations. Thus, the contents or level of scrutiny of the Convention adopted by each signatory state lack uniformity. This becomes an impediment to achieving purposes of the Convention.⁶⁰ Third, Article 1 of the UNESCO Convention defines *cultural property* only as cultural properties specifically designated by each member state, leaving undiscovered or unexcavated cultural property

⁵⁴ *Id.* at art. 7.

⁵⁵ *Id.* at art. 8.

⁵⁶ *Id.* at art. 9.

⁵⁷ *Id.* at art. 11.

⁵⁸ Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does The UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L., 469, 490-91 (1994); Carol A. Roehrenbeck, *Repatriation of Cultural Property-Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT'L J. LEGAL INFO 185, 196 (2010).

⁵⁹ ANDREA F. G. RASCHÈR, *KULTURGÜTERTRANSFER UND GLOBALISIERUNG* 53 (2000).

⁶⁰ *Id.* at 61.

unprotected.⁶¹ Fourth, because the UNESCO Convention operated mainly in terms of public law, it had limitations to stipulating clear regulations in terms of private law, such as good faith acquisition.⁶²

To solve those problems, UNESCO requested the *International Institute for the Unification of Private Law* (UNIDROIT) to complement the regulations of private laws for a substantial implementation of the 1970 UNESCO Convention.⁶³ Accordingly, a preliminary draft was prepared by an expert study group, mainly written by Austrian professor *Gerte Reichelt*. The Diplomatic Conference to adopt the draft convention was held in Rome under the auspices of the Italian government in June 1995, and the current 1995 UNIDROIT Convention⁶⁴ was adopted through the voting of member states on July 24, 1995. The 1995 UNIDROIT Convention was intended to solve the problems inherent in the 1970 UNESCO Convention, to embody the regulations of the UNESCO Convention, and to establish uniform rules among states that would facilitate the effective restitution of unlawfully possessed cultural properties in terms of private law.

The adoption of the 1995 UNIDROIT Convention does not reduce the meaning or function of the 1970 UNESCO Convention. Whereas the UNESCO Convention aimed to “prohibit” and “prevent” the export, import, and transfer of ownership of stolen or illegally exported cultural properties, the UNIDROIT Convention focuses on the “restitution” or “return” of stolen or illegally exported cultural properties. So, the directing points of these two conventions differ. Besides, the UNESCO Convention authorizes the contracting “state” to take mainly “administrative” measures to prevent the export and import of unlawful cultural properties, whereas the UNIDROIT Convention gives the “owner” or “state” “judicial”

⁶¹ Ian M. Goldrich, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 FORDHAM INT'L L. J. 118, 137-138 (1999); Kathleen Anderson, *The International Theft and Illegal Export of Cultural Property*, 8 NEW ENG. J. INT'L & COMP. L. 411, 421 (2002).

⁶² RASCHÈR, *supra* note 59, at 65.

⁶³ Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, 1 UNIF. L. REV. 59, 61 (1996).

⁶⁴ See 1995 UNIDROIT Convention, *supra* note 11.

powers to demand restitution or the return of cultural properties. In this sense, the two Conventions have complementary goals.⁶⁵

The features of the 1995 UNIDROIT Convention are summarized as follows: First, the UNIDROIT Convention enables claimants to demand the restitution of unregistered cultural properties or privately owned cultural properties, unlike the UNESCO Convention.⁶⁶ Second, the UNIDROIT Convention does not allow the good faith acquisition of stolen or illegally exported cultural properties. Instead, such cultural properties should be compulsorily returned.⁶⁷ Third, it stipulates that a fair and reasonable compensation should be paid to an acquirer in good faith instead of unconditional restitution.⁶⁸ Forth, the Convention imposes limitation periods within which claimants must demand the return or restitution of cultural property.⁶⁹

B. Bilateral Agreements

1. Overview

Because multilateral conventions must contain common concerns among all stakeholder countries, agreeing on concrete content is difficult. In contrast, bilateral agreements can express the interests of both parties; therefore, bilateral agreements are more effective than a multilateral convention in attaining specific goals. In cases where the return of a specific cultural property emerges as an issue between country A and country B, the best way to solve the problem is generally to conclude a bilateral agreement on the return of the cultural property in dispute. For instance, Korea recovered the *Oegyujanggak Uigwe*, stored previously in the BnF, through an Intergovernmental Agreement on the Restitution of the *Oegyujanggak Uigwe* between France and Korea in 2011.⁷⁰ That same year, Korea recovered another *Uigwe* of the Joseon Dynasty, which had been held

⁶⁵ STAMATOUDI, *supra* note 27, at 67.

⁶⁶ 1995 UNIDROIT Convention, *supra* note 11, at art. 3, 5.

⁶⁷ *Id.*

⁶⁸ *Id.* at art. 4, 6.

⁶⁹ *Id.* at art. 3, 5.

⁷⁰ *See supra* notes 1-3.

in the Kunaicho of Japan, by an Agreement on the Return of Historical Archives between Japan and Korea.

Bilateral agreements not only target the restitution of specific cultural property, but can also comprehensively handle overall matters related to the restitution of cultural property between two countries. There are many agreements which exemplify what can be covered by a bilateral agreement. In the Belgo-Zairian Cultural Agreement, concluded in 1970, Belgium agreed to return to Zaire⁷¹ all the ethnological and artistic cultural properties acquired during the colonial period.⁷² The Treaty on the Return of Stolen Cultural Property, established in 1970 between the U.S. and Mexico, concluded in 1970⁷³ stipulates that, e.g., when the Mexican government requests the U.S. government to return stolen cultural property, the U.S. government shall recover and return it to the Mexican government.⁷⁴ Similarly, in 1997 the U.S. and Canada concluded an agreement prohibiting the import and export of objects of archaeological and ethnological value⁷⁵ in accordance with the UNESCO Convention.

Bilateral agreements are effective in preventing illicit trade of cultural property between neighboring states. Because of the wide perception that multilateral conventions have little effect on the restitution of cultural property, the adoption of bilateral agreements is increasing.

⁷¹ Known as “Democratic Republic of the Congo” since 1997.

⁷² Huguette van Geluwe, *Belgium’s Contribution to the Zairian Cultural Heritage*, 31 MUSEUM 32, 35 (1979); Treaty of Cooperation Between the United States of American and the United Mexican States Providing for the Recovery and Return of stolen Archaeological, Historical and Cultural Properties, July 17, 1970, 22 U.S.T. 494, T.I.A.S. No. 7088.

⁷³ Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, 22 U.S.T. 494, T.I.A.S. No. 7088.

⁷⁴ Regarding the meaning of this Treaty, see Michael S. Blass, *Legal Restrictions on American Access to Foreign Cultural Property*, 46 FORDHAM L. REV. 1177, 1193-1194 (1978).

⁷⁵ Agreement between the Government of Canada and the Government of the Unites States Concerning the Imposition of Import Restrictions on Certain Categories of Archeological and Ethnological Material, April 10, 1997, CA1 EA 97T08 EXF.

2. Exkurs: Agreement on Cultural Property Between the Republic of Korea and Japan

A typical example of a bilateral agreement on the restitution of cultural property signed by Korea is the *Agreement on the Art Objects and Cultural Co-operation between Japan and the Republic of Korea*⁷⁶ in 1965. After Korea's emancipation from Japanese colonization in 1945, Korea and Japan held seven rounds of bilateral talks from 1951 to 1965, culminating in the *Treaty on Basic Relations Between Japan and the Republic of Korea*,⁷⁷ which stipulated normalization of their relations.⁷⁸ Based on that Treaty, the Agreement on Cultural Property Between Korea and Japan, which has a preamble, 4 articles of text, and an annex, was also signed.

Among the contents of this Agreement, the significant article related to the restitution of cultural property is Article 2: "The Government of Japan shall, in accordance with the procedure to be agreed upon between the two Governments, turn over to the Government of the Republic of Korea the art objects enumerated in the Annex within six months after the entry into force of the present Agreement."⁷⁹ Article 2 mentions the subject, object, procedure, and time of the turnover of cultural property.⁸⁰

⁷⁶ Agreement on the Art Objects and Cultural Co-operation between Japan and the Republic of Korea, June 22, 1965[hereinafter Agreement on Cultural Property Between Korea and Japan], translated in "The World and Japan" Database Project at the University of Tokyo, available at <http://www.ioc.utokyo.ac.jp/~worldjpn/documents/texts/JPKR/19650622.TNE.html>, (last visited May. 4, 2016).

⁷⁷ Treaty on Basic Relations between Japan and the Republic of Korea, June 22, 1965, translated in "The World and Japan" Database Project at the University of Tokyo, available at <http://www.ioc.utokyo.ac.jp/~worldjpn/documents/texts/docs/19650622.T1E.html>, (last visited May. 4, 2016).

⁷⁸ See Geoffrey R. Scott, *Spoilation, Cultural property, and Japan*, 29 U. PA. J. INT'L L. 803, 854-57 (2008) (discussing the background and proceeding of this Treaty).

⁷⁹ Agreement on Cultural Property Between Korea and Japan, *supra* note 76.

⁸⁰ *Id.*

The subject of the turnover is the Japanese government, and the subject of the takeover is the Korean government. The objects of transfer are cultural properties enumerated in the Annex. The Annex specifies a list of cultural properties totaling 1,432 pieces, including: ceramic ware, archaeological relics, stone-made art objects, books, and articles related to the postal service and telecommunications. The procedure of turnover complies with a mutual agreement between Korea and Japan.⁸¹ The time of turnover is stipulated as within six months of the entry into force of the Agreement.

However, this Agreement has the following problems: First, because the cultural properties exported to Japan during the colonial period were illegally exported, the action to be taken should be expressed as ‘recovery (回收)’ or ‘restitution (返還),’ but it is instead neutrally expressed as ‘turnover (引き渡).’ This fails to make clear the illicitness of the original export of the cultural property to Japan. Second, this Agreement limits the cultural properties for turnover to the 1,432 pieces of cultural property enumerated in the Annex.

After the Agreement on Cultural Property Between Korea and Japan was signed in 1965, the 1970 UNESCO Convention and the 1995 UNIDROIT Convention were concluded. There is a need to review the correspondence between the Agreement on Cultural Property Between Korea and Japan and the two Conventions. Although both Korea and Japan signed the 1970 UNESCO Convention, neither of them signed the 1995 UNIDROIT Convention. I here review the relationships among those three treaties as if both Korea and Japan had signed the 1995 UNIDROIT Convention.

The Agreement on Cultural Property Between Korea and Japan is a bilateral agreement, and the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are multilateral conventions. Therefore, the Agreement on Cultural Property Between Korea and Japan is special law (*lex specialis*), and the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are general law (*lex generalis*). According to the principle of *Lex specialis derogat legi generali*,⁸² the

⁸¹ *Id.* at art 2.

⁸² Latin maxim meaning “Special law repeals general laws.”

Agreement on Cultural Property Between Korea and Japan should be applied over both Conventions. In terms of enforcement date, the Agreement on Cultural Property Between Korea and Japan corresponds to prior law, and the 1970 UNESCO Convention and the 1995 UNIDROIT Convention correspond to posterior law. Thus, according to the principle that *Lex posterior derogat legi priori*,⁸³ the 1970 UNESCO Convention and the 1995 UNIDROIT Convention should be applied over the Agreement. Although those ideas seem contradictory, they are actually not. If only the cultural properties in the Annex to the Agreement on Cultural Property Between Korea and Japan are targeted, this Agreement will take precedence as *lex specialis*. However, if cultural properties illegally exported to Japan other than those enumerated in the Annex are included, then the 1970 UNESCO Convention and the 1995 UNIDROIT Convention take precedence as *lex posterior*.

IV. NEW JUDICIAL PRINCIPLES

A. International Conventions, National Laws and Domestic Courts

As of 2015, 129 states have signed the 1970 UNESCO Convention, and only 37 states have signed the 1995 UNIDROIT Convention.⁸⁴ The difference between those two numbers is caused by a considerable difference in normative aspect rather than the gap between the enforcement dates of these two conventions.

Under the 1970 UNESCO Convention, the subjects of its rights and obligations are the governments of signatory states, which should meet its requirements. In contrast, under the 1995 UNIDROIT Convention, not only signatory states, but also organizations and individuals, obtain rights or obligations for restitution of cultural properties. In other words, the 1970 UNESCO Convention has the nature of public and administrative law⁸⁵, whereas the 1995 UNIDROIT Convention has the nature of private law centered on the restitution relationship between the current

⁸³ Latin maxim meaning “Posterior law abrogates prior laws.”

⁸⁴ See *supra* notes 10 and 11.

⁸⁵ RASCHÈR, *supra* note 59, at 65.

possessor and original owner.⁸⁶ In determining whether cultural property is illicitly acquired or not, the 1970 UNESCO Convention stipulates that the national laws of contracting states should be applied,⁸⁷ whereas the 1995 UNIDROIT Convention directly specifies ‘theft’ and ‘illicit export’ as the object of regulation.⁸⁸ The two conventions also show a great difference in the binding force of their provisions. Since the 1970 UNESCO Convention is not self-executing, it secures no executive power against non-implementation. On the contrary, the 1995 UNIDROIT Convention is self-executing and a competent court in a signatory state can directly apply the Convention’s provisions as governing law.⁸⁹

This difference works as an important factor when each state decides to join the convention. The 1970 UNESCO Convention concerns mainly the intent of signatory states’ administrative actions for protecting cultural property, and so it is not difficult to implement. Besides, because the Convention is not self-executing, signatory states do not have to worry about normative binding power or feel a great burden in signing this Convention. However, since the 1995 UNIDROIT Convention has direct effects on not only the governments of signatory states, but also common individuals, it can collide with domestic legal systems such as civil law. Thus, states have shown reluctance to sign the 1995 UNIDROIT Convention until the relations between its provisions and those of national laws have been properly established.⁹⁰ Thus, notwithstanding the international convention to prevent illicit traffic in cultural property, national laws still play an important role in tackling disputes over the restitution of cultural property.

⁸⁶ Zsuzsanna Veres, *The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention*, 12 SANTA CLARA J. INT’L L. 91, 100 (2014).

⁸⁷ 1970 UNESCO Convention, *supra* note 10, art. 3. See PATRICK J. O’KEEFE, *supra* note 46, at 41 (providing interpretation of this Article).

⁸⁸ 1995 UNIDROIT Convention, *supra* note 11, art. 2, 3, and 5.

⁸⁹ RASCHÈR, *supra* note 59, at 70; see also BETTINA THORN, INTERNATIONALER KULTURGÜTERSCHUTZ NACH DER UNIDROIT-KONVENTION 97 (2005).

⁹⁰ Michael L. Durta, *Sir, How Much is that Ming Vase in the Window?: Protecting Cultural Relics in the People’s Republic of China*, 5 ASIAN-PACIFIC L. & POL’Y J. 62, 76-77 (2004).

Suppose a cultural property owned by a private museum in country A has been illegally exported to country B. If both country A and country B are signatory states to the 1995 UNIDROIT Convention, the original owner of country A can file a lawsuit in a court in country B to demand the restitution of cultural property against the current possessor. In this case, the court decides on the restitution of the cultural property based on the 1995 UNIDROIT Convention.⁹¹ If neither country A nor country B is a signatory to the 1995 UNIDROIT Convention, a court would decide on the restitution of the cultural property according to domestic norms. In that case, the civil law and cultural property protection law of the country concerned are most central to domestic norms. Civil law and cultural property protection law differ among countries. For instance, under the Korean legal system, Korean civil law and cultural property protection law are written in a code. Under the Anglo-American legal system, civil law consists primarily of judicial precedent. The definition of cultural property also varies by country, as do the contents or scope of laws regulating cultural property.

The principles of trial are not currently specifically established to handle disputes about the restitution of cultural property. Thus, each country's court is likely to handle a lawsuit filed for the restitution of cultural property in the same way it handles a dispute over the restitution of other objects. However, as reviewed above, cultural property is *res extra commercium*,⁹² and thus it is not desirable to handle lawsuits about cultural property in that way. Considering the peculiarities of cultural properties, courts should apply special legal doctrines to a case of restitution of a cultural property. For a given cultural property, a new principle should apply in choosing the governing law relevant to the dispute, and the burden of proof should shift to the defendant.

B. New Principle for Choice of Governing Law

When a cultural property has been exported from a country and situated in the territory of another country, and a person claiming

⁹¹ To apply the 1995 UNIDROIT Convention to this case, a cultural property had to be stolen or exported after both states became parties to the Convention. 1995 UNIDROIT Convention, *supra* note 11, at art. 10.

⁹² See *supra* notes 31-36.

ownership of the cultural property has filed a lawsuit in a court, the court must choose which state's law governs.⁹³ The substantial legal issues in the ownership of an exported cultural property are summarized as follows: First, if a cultural property was illegally exported and distributed, and a third party has acquired the cultural property without perceiving this inherent illegality, the court must decide whether to recognize good faith acquisition for the third party. Second, in cases where a third party has acquired the property outside a transaction process and fails to meet the requirements for good faith acquisition, the court must decide whether to recognize the ownership based on the acquisitive prescription and whether the right to demand restitution is extinguished according to the extinctive prescription.

Representatively, the case of *Winkworth vs. Christie, Manson & Woods Ltd.*⁹⁴ was a case of whether to recognize good faith acquisition. The case of *Koerfer vs. Goldschmidt*⁹⁵ was a case of whether acquisitive prescription was completed. The case of *Greek Orthodox Patriarchate of Jerusalem vs. Christie's, Inc.*⁹⁶ was a case of whether or not the extinctive prescription was completed. The requirements and exercise processes for good faith acquisition, acquisitive prescription, and extinctive prescription vary by country. So, in legal relationships with foreign elements, which country's law will be chosen as the governing law is a decisive factor affecting lawsuit results.

The courts where the above-mentioned lawsuits were filed chose the governing law according to the principle of *lex rei sitae*. More specifically, those cases were decided according to the laws of the countries where the cultural properties were situated at the time a juristic act to acquire it was performed or a juristic fact to create its legal ownership was completed. When a court decides on a right about an object, especially a movable object, it is not inherently wrong to choose, as a governing law, the local law of the country

⁹³ MICHAEL ANTON, INTERNATIONALES KULTURGÜTERPRIVAT- UND ZIVILVERFAHRENSRECHT 426 (2010).

⁹⁴ *Winkworth v. Christie, Manson & Woods Ltd.*, 1 All E.R. 1121 (1980).

⁹⁵ *Koerfer gegen Goldschmidt*, BGE 94 II 297 (Swiss Federal Court, Dec. 13, 1968).

⁹⁶ *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 1999 WL 673347 (S.D.N.Y. 1999).

where the act of altering a right is performed or a fact of creating a right is completed. In fact, that choice is a general principle of private international law.⁹⁷ Also, if a court decides the dispute according to the principle of *lex rei sitae*, the local law of that time is applied to a transaction or acquisition performed within the territory where the object is situated. Another result is that, insofar as the court of a third country respects the sovereignty of the country where the object is situated, the court observes international comity.⁹⁸

Although the principle of *lex rei sitae* is generalized in that way, its application to cultural properties as if they were ordinary objects can hardly deflect criticism for mechanically applying the law without any thought of the nature of cultural properties. Suppose that a cultural property owned by person □ of country A was stolen and exported to country B and there purchased at an antique shop by person □, who does not know how it came to the shop. If person □ filed a lawsuit in a court of country B against person □ demanding the restitution of the property, the court in country B should decide which country's law is governing. In this case, if the court in country B chooses according to the principle of *lex rei sitae*, the law of country B where the object is currently situated will become the governing law. If country B's law recognizes good faith acquisition, person □ will be able to maintain ownership through good faith acquisition.

Furthermore, suppose that person □ now sells this object to person □ in country C, and person □ currently has possession. If person □ has filed a lawsuit in a court of country C against person □ demanding the restitution of the property, the court of country C must also decide which country's law is governing. This time, if, according to the principle of *lex rei sitae*, the court of country C decides whether or not person □ has properly acquired ownership of the object, it will judge whether or not person □ meets the requirements of good faith acquisition. In that case, the governing law would be the law of country B where the object was situated when person □'s good faith acquisition was completed. Also, if the court of country C judges that person □ fails to meet the

⁹⁷ Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 115 (2008).

⁹⁸ *Id.* at 115.

requirements of good faith acquisition but person □ is likely to meet them, it can choose and apply, as a governing law, the law of country C where the object was situated when person □'s good faith acquisition was completed.

That is the mechanism for the choice of a governing law according to the principle of *lex rei sitae* currently applied. However, it can be justified only on the condition that the cultural property in question is viewed as an object of transaction. In other words, that procedure is only justifiable if the features of *res extra commercium* are completely excluded from the cultural property, and it is considered a normal object. However, cultural property is an object *sui generis* that has inalienability as part of its basic nature; therefore, it is inappropriate to treat cultural properties like normal objects. Moreover, the legal regulations protecting cultural properties vary by country. Suppose that a cultural property is illegally exported from country A to country B. If country A's law prohibits the distribution or good faith acquisition of a cultural property, but country B's law recognizes good faith acquisition, the ownership of the cultural property can be easily changed or laundered in country B by illegally exporting the cultural property from country A to country B and there involving an innocent third party for completion of good faith acquisition. Afterwards, the illegal cultural property can be legally distributed. In this hypothetical, country A's law for cultural property protection becomes meaningless. Thus, the principle of *lex rei sitae* is likely to be abused as means of ownership laundering for cultural properties, which require a principle of governing law different from that of normal objects.

To this end, the principle of *lex originis* has been suggested as an alternative.⁹⁹ In cases where the principle of *lex originis* is adopted as a governing law applicable to legal disputes about cultural properties, the problem becomes deciding what should be viewed as

⁹⁹ German scholar Prof. Erik Jayme has already proposed connecting the factor "Heimatrecht" (law of home-country) and the developed *lex originis* rule in international disputes over cultural property. Erik Jayme, *Internationales Kulturgüterschutz: Lex originis oder lex rei sitae – Tagung in Heidelberg*, IPRAX 1990 at 347; see also Erik Jayme, *Neue Anknüpfungsmaximen für den Kulturgüterschutz im internationalen Privatrecht*, in DOLZER ET AL., RECHTSFRAGEN DES INTERNATIONALEN KULTURGÜTERSCHUTZES 5 (1994).

the ‘origin’ of a cultural property to determine the ‘connecting factors.’ Because cultural properties are historical products unlike other objects, it is difficult to uniformly define their origin, which requires consideration of multiple criteria,¹⁰⁰ such as: religious value, national identity, place where the cultural property was produced, place where the cultural property is situated, place where the cultural property was installed, place where the cultural property was found, place where the cultural property was inherited, and place where the cultural property was designated as *res extra commercium*.

In summation, a court having jurisdiction over cultural property disputes should judge what connecting factors should be established and which country’s law should be adopted as a governing law. In this regard, two values can conflict: transaction safety and cultural property protection. In other words, the court must decide whether to place a high value on protecting a good faith purchaser of a cultural property or to privilege the original owner of a cultural property. A court that emphasizes the former will generally determine governing law according to the conventional principle of *lex rei sitae*, whereas a court that regards the latter as more important will adopt the alternative principle of *lex originis* as governing law. In short, the principle of *lex rei sitae* is generally appropriate as governing law for normal objects, whereas the principle of *lex originis* is appropriate for cultural property.¹⁰¹

C. Shifting the Burden of Proof

Who bears the burden of proof in a civil suit greatly affects the results. In the period of Roman law, the general principal for the burden of proof was not stably established. However the principle “*Necessitas probandi incumbit ei qui agit*”¹⁰² was in common use. Afterwards, with the development of the law of evidence, a contemporary principle of the burden of proof was established by

¹⁰⁰ WEIDNER, *supra* note 31, at 194-201; ANTON, *supra* note 93, at 851-91.

¹⁰¹ Fincham, *supra* note 97, at 146; Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT’L L. 1177 (2005).

¹⁰² Latin maxim meaning “The burden of proof is on the one who declares, not on one who denies.”

German scholar Leo Rosenberg: Each party to proceedings must assert and prove the existence of the conditions for application of the rule on which s/he relies.¹⁰³ According to this principle, if an object has been transferred from its owner to another person without legal ground and is currently kept by the other person, the owner should prove ownership of the object.

But what if the object is a cultural property? Current civil procedure laws have no specific regulations in that regard. If the principle of the burden of proof is equally applied to a cultural property, the person who asserts ownership of the cultural property currently possessed by another person must prove ownership of the object and that the other person possesses it illegally. However, that principle is inappropriate to cultural properties because they have basically the nature of inalienability, unlike normal objects. If a cultural property designated as *res extra commercium* by a national law is transferred to other place, it does not exist under normal conditions. So in that case, the person who currently possesses the cultural property should be required to prove he has duly acquired it. If he fails to prove his legitimacy in possessing the cultural property, the property should be returned to the original owner.

It could cause confusion to the current property system to shift the burden of proof for all cultural properties in restitution lawsuits. Accordingly, the burden of proof should be shifted only for cultural properties that meet certain requirements. Such cultural properties can be reviewed in terms of two aspects. The first is category, such as cultural properties that represent royal authority and religious cultural properties that belonged to churches or temples. It should be difficult to assume that a state or churches or temples sold or donated such cultural properties to other persons. An individual person who possesses those kinds of cultural property should be required prove that s/he acquired it legitimately. The second aspect concerns the time of acquisition. If a cultural property was exported without a legitimate source of right in a time of war or colonization, it cannot be easily accepted that the current possessor of the cultural

¹⁰³ “Jede Partei hat die Voraussetzungen der ihr günstigen Norm (= derjenigen Norm, deren Rechtswirkung ihr zugute kommt) zu behaupten und zu beweisen.” *in* LEO ROSENBERG, DIE BEWEISLAST 98-99 (1965).

property acquired it legitimately. Therefore, in that case, the current possessor should be required to prove that s/he acquired it legitimately. However, it is necessary to set a time limit for that shift in the burden of proof to recent wars or colonial periods with reasonable current influence.

As a possible example for shifting the burden of proof, consider a special exhibition called the Ogura¹⁰⁴ collection in the Tokyo National Museum, Japan. It contains a helmet and armor worn by King Gojong, who reigned when Japan annexed Korea. That armor and helmet are those King Gojong put on in war and are the symbols of the supreme commander. Thus, they cannot have been transferred or donated to another person. They were quite likely to have been exported during the Japanese colonial period, and it is unlikely that they were sold or donated to Ogura. Thus, if the Korean government were to demand that the Tokyo Museum return them, the Tokyo Museum, as current possessor of the cultural properties, should be required prove that it acquired them legitimately.

V. CONCLUSION

These days, each state tries to protect its cultural properties and recover illicitly exported cultural properties. There is controversy over whether cultural properties are the exclusive property of each country (cultural nationalism) or the common heritage of humanity (cultural internationalism). However, it is obvious illicit trafficking of cultural properties should be prohibited and illicitly exported cultural properties should be returned to their country of origin. The 1970 UNESCO Convention and the 1995 UNIDROIT Convention are based on that perception. These international conventions are important because they are international standards to prevent the illicit export of cultural properties and enable the restitution of illicitly exported cultural properties. However, because the 1970 UNESCO

¹⁰⁴ Ogura Dakenoske (小倉 武之助: 1870–1964) was a Japanese businessman who collected a huge number of Korean cultural properties during the Japanese colonial era in Korea. He donated his collected Korean cultural properties to the Tokyo National Museum. Park Soo-mee, *Legacy Lost: Korea's Missing Treasures*, KOREA JOONGANG DAILY, Dec. 22, 2008, <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2898892> (last accessed May 4, 2016).

Convention focused on administrative measures of the government to “prevent” the illicit trafficking of cultural properties and lacks self-executing power, it is limited to being a basic norm for the restitution of illicitly exported cultural properties. To reinforce those weak points, the 1995 UNIDROIT Convention was promulgated, but countries worried about recession in the art market are reluctant to sign. These two Conventions cannot be applied to restitution of cultural properties exported illicitly to other countries before signing the Convention because neither of them has retroactive effects. Therefore, countries involved in disputes over the restitution of cultural properties tend to solve them by concluding bilateral conventions. The 1965 Agreement on Cultural Property Between Korea and Japan has a significant meaning in that it was a comprehensive attempt made between Korea and Japan to handle the restitution of cultural properties exported during the Japanese colonial period.

Disputes over restitution of cultural properties that are not subject to multilateral or bilateral conventions can be solved through the decision of a court. However, no specific legal regulation under domestic laws is applicable to disputes over restitution of cultural properties, which means that legal principles applied to normal objects have been applied to disputes over cultural properties. However, cultural properties are basically *res extra commercium*, a concept that originated in Roman law and is acknowledged in each country’s cultural property protection law. Disputes over cultural properties require application of legal principles different from those used for normal objects. In other words, it is desirable for courts to apply the principle of *lex originis* instead of *lex rei sitae* in choosing governing law.¹⁰⁵ Furthermore, when proving the ownership of a cultural property, it is also desirable to make a defendant prove legitimate acquisition of cultural properties within certain categories. Applying that suggestion to lawsuits presents challenges.¹⁰⁶

¹⁰⁵ It is remarkable that Belgium adopted in the Codification of Private International Law of July 27, 2004, a modified *lex originis* rule regarding recovery of the illegally removed cultural patrimony. See Fincham, *supra* note 97 at 147.

¹⁰⁶ For example, these two problems might actually be difficult to solve: a concrete criterion for deciding on the country of origin of a cultural property and a concrete criterion to determine which cultural property can be accepted for shifting the burden of proof.

Nevertheless, if a court acknowledges the peculiarity of cultural properties and adopts that suggestion, international disputes over the restitution of illicitly exported cultural properties could be solved more smoothly.

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THE PRUDENTIAL CARVE-OUT CLAUSE: IS RISK THE NEW CORRUPT MORAL?

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This Article presents the first analysis of the WTO panel report in Argentina – Measures Relating to Trade in Goods and Services, the first decision interpreting one of the most controversial clauses in the General Agreement on Trade in Services – the prudential carve-out clause. Prudential carve-out clause has been a matter of controversy ever since the Uruguay Round of Negotiations, when the text was adopted, and remains a matter of debate decades after. The panel report in Argentina – Measures Relating to Trade in Goods and Services, issued in September of 2015, clarified that national measures violating free trade commitments need not be “prudential” and only the reasons for those measures must. However, the panel’s interpretation of the word “prudential” as “preventative” or “precautionary” raises questions. Panel’s interpretation left this word essentially powerless.

This Article takes on the task of interpreting the prudential carve-out clause following relatively more of a mechanical framework utilized by the Appellate Body in United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services. The Appellate Body in that case used Vienna Convention’s rules of treaty interpretation. Following Vienna Convention tools of treaty interpretation, this Article proposes that “prudential,” while remaining vague, conveys some sort of a reasonableness standard. After the recent international financial crisis, as countries increasingly engage in regulations of the financial services sector, challenges to such regulations are becoming more likely. Therefore, a close examination of the prudential-carve out clause may help the regulators, potential challengers, and WTO dispute settlement bodies better understand what may or may not be a permissible regulation affecting the international supply of financial services.

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I. INTRODUCTION

Horace (65-8 B.C.), the Roman lyric poet, in *Odes* says: “The sea brought contact with strangers who could disrupt domestic life by exposing citizens to the bad manners and corrupt morals of barbarians.”¹

The Great Financial Crisis, which officially started in December of 2007, affected virtually all countries around the globe.² The collapse in international trade due to the Financial Crisis was “exceptional by historical standards.”³ There are many arguments about what caused or contributed to the Financial Crisis. Certainly it is difficult to point to one or several causes in a complex world of voluminous interconnected economic transactions. If the task is to avoid a financial crisis, one will inevitably be required to consider the past causes. However, if one accepts that financial crises are inevitable because of many causes, then the task becomes how to contain a potential future crisis—instead of trying to avoid it. If one of the aspirations and objectives for promoting liberalized international trade is world peace—countries depending on each other through trade are less likely to be involved in direct conflicts—such dependency has its downside when one economic sector of one country collapses and pulls various world economies into a downward-spiral. It is no secret that a closed, isolated economy would be immune to international economic crises, but that economy will forgo all of the benefits of liberalized trade during times of prosperity.

¹ DOUGLAS A. IRWIN, *AGAINST THE TIDE* 12 (1996).

² BUSINESS CYCLE DATING COMMITTEE, NATIONAL BUREAU OF ECONOMIC RESEARCH, *DETERMINATION OF DECEMBER 2007 PEAK IN ECONOMIC ACTIVITY* 2 (2008).

³ Andrei A. Levchenko, Logan T. Lewis & Linda L. Tesar, Nat'l Bureau of Econ. Research, *The Collapse of International Trade During the 2008-2009 Crisis* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 16006, 2010) (“Relative to economic activity, the drop in trade is an order of magnitude larger than what was observed in the previous postwar recessions, with the exception of 2001. The collapse appears to be broad-based across trading partners: trade with virtually all parts of the world fell by double digits.”).

Although the days of Horace are long gone and trade may no longer expose citizens to “bad manners and corrupt morals,” trade in financial services may expose them to financial risks. The question then becomes how a country would reap the benefits of liberalized international trade and protect its citizens from the risk of potential financial crises. While countries may attempt reducing toxic risk exposure in the area of financial services, such attempts may violate various World Trade Organization (“WTO”) commitments. However, the General Agreement on Trade in Services (“GATS”) provides an avenue for countries to claim an exception under the prudential carve-out clause. This exception has been long subject to controversy ever since the negotiations on the text began, because negotiators attempted to strike the right balance between free trade and the national right to regulate—an issue that remains unresolved.

Part II of this Article will introduce the historical development of the GATS to show the complexity of the negotiations.

Part III will introduce the GATS structure and summarize some of its parts to give relevant general background information. Part II will point out some of the other GATS exceptions because the reasoning for those exceptions will be useful for limiting the scope of the prudential carve-out clause, as discussed in Part V.

Part IV will introduce the prudential carve-out clause and summarize a recent WTO panel report that interpreted parts of the clause for the first time, adopting a three-prong legal standard. One of the prongs of the legal standard is a requirement that measures must be “prudential,” meaning “preventative” or “precautionary,” as interpreted by the panel.

Part V will analyze the panel report and argue that panel’s interpretation of “prudential” is overly broad in some sense and could lead to absurd regulations. To do so, Part V will follow previous WTO Appellate Body decisions which utilized treaty interpretation rules of the *Vienna Convention*. This Part will propose that “prudential” should have some determination of reasonableness which the panel report did not require. Further, Part V will argue that

the broad scope of the prudential carve-out clause is narrowed by the existence of other exceptions in the GATS.

Part VI will conclude.

II. GATS HISTORICAL DEVELOPMENT

The original General Agreement on Tariffs and Trade (“GATT”) was drafted in the Second World War’s aftermath by delegates of many countries during 1946-47 and signed on 30 October 1947.⁴ For almost a half-century since GATT entered into force in 1948, it did not get much attention from international diplomats and lawyers, except for international trade enthusiasts, because the main focus of the times was the Cold War.⁵ However, GATT eventually led to the birth of the World Trade Organization (“WTO”) in 1995.⁶ The Agreement Establishing the World Trade Organization (“WTO Agreement”) contains four Annexes, the first item in the Annexes (Annex 1A) is “GATT 1947”—now known as “GATT 1994.”⁷ GATT essentially governs trade in goods,⁸ while the General Agreement on Trade in Services, Annex 1B to the WTO Agreement, deals with services.⁹ While GATT existed for over a half-century, GATS is relatively a new agreement. Services were not always conceived as being internationally tradeable. This conceptual shift about services occurred in the early 1970s and mid-1980s—from services as non-tradeable to services as tradeable.¹⁰ Business pressure was one variable which caused the conceptual change among countries towards the idea that services could be traded internationally by private enterprises.¹¹ For example, the American

⁴ RAJ BHALA, *INTERNATIONAL TRADE LAW* 5-7 (3d ed. 2007).

⁵ *Id.* at 7.

⁶ *Id.* at 8.

⁷ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

⁸ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁹ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

¹⁰ BHALA, *supra* note 4, at 1541-42.

¹¹ *Id.* at 1542.

financial service sector (e.g., American Insurance Group (AIG), American Express, Bank of America, Citibank, Goldman Sachs, J.P. Morgan, and Merrill Lynch) saw expansion opportunities to countries with emerging middle classes and began lobbying for removal of trade barriers with respect to services.¹²

GATS was a product of complex 1986-93 Uruguay Round of negotiations and was not finalized until 1994.¹³ GATS negotiations were described as “sector-by-sector—tortuous, inch-by-inch, as it were.”¹⁴ One factor contributing to the difficulties encountered during negotiations was that because of the way services are traded, GATS trade liberalization provisions had to extend further into post-border measures when compared to GATT provisions.¹⁵ Another contributing factor to the complexity was how commitments under GATS were made.¹⁶ GATS commitments are generally classified into general and specific, where specific commitments apply only to specific service sectors and sub-sectors to which a WTO member (“Member”) has committed to; moreover, the specific sectors and sub-sectors are further narrowed by one or more of four modes of supplies through which that service may be supplied.¹⁷ Even after the Uruguay Round was completed and the basic GATS text was finalized, significant trade liberalization commitments were made through Members’ schedules of specific commitments.¹⁸

Negotiations for market access commitments in the area of financial services were extended to June 30, 1995 and later extended

¹² *Id.* at 1542-43 (“No GATT contracting party wanted services trade liberalization on the agenda of any new round of multilateral trade negotiation more than the U.S.”).

¹³ *Id.* at 1539.

¹⁴ BHALA, *supra* note 4, at 1549.

¹⁵ *Id.* at 1541 (“In general, trade in services involves much more behind-the-border regulation than does trade in goods.”).

¹⁶ *Id.* at 1539.

¹⁷ *See id.* at 1578-91.

¹⁸ *See id.* at 1540 (citing WTO, *Second Protocol to the General Agreement on Trade in Services*, S/L/11 (July 24, 1995); WTO, *Third Protocol to the General Agreement on Trade in Services*, S/L/12 (July 24, 1995); WTO, *Fourth Protocol to the General Agreement on Trade in Services*, S/L/20 (Apr. 30, 1996); WTO, *Fifth Protocol to the General Agreement on Trade in Services*, S/L/45 (Dec. 3, 1997)).

by another month.¹⁹ Negotiations took place in the middle of the Asian economic crisis which could have been used by countries such as Indonesia, Korea, Malaysia, Philippines, and Thailand as an excuse not to liberalize the trade in financial services.²⁰ However, instead the Asian leaders agreed that Newly Industrialized Countries and Least Developed Countries would benefit from liberalization perhaps because it would permit cheaper financial capital flow into the markets of those countries.²¹ Then on December 12, 1997 an agreement on financial services commitments was made which covers a substantial portion of trade in banking, securities, insurance and financial information.²²

III. GATS SUMMARY

GATS is composed of the Preamble, six separate parts to the Agreement, and followed by Annexes. One of these Annexes is the Annex on Financial Services. Part I of the GATS deals with the scope by, *inter alia*, defining trade in services through modes of supply.²³ Part II relates to general commitments.²⁴ Part III relates to specific commitments.²⁵ Part IV covers negotiations, schedules of specific commitments, and modifications of those schedules.²⁶ Part V contains institutional provisions such as the dispute settlement and enforcement.²⁷ Part VI mainly contains definitions and states that the Annexes are an integral part of the agreement.²⁸ Without going into all of the GATS details, few segments of it are important for purposes of this Article: the Preamble, four modes of supply, general commitments, specific commitments, exceptions from commitments, and dispute settlement.

¹⁹ BHALA, *supra* note 4, at 1581.

²⁰ *Id.* at 1581-82.

²¹ *Id.* at 1582.

²² *Id.* at 1581.

²³ GATS, *supra* note 9, art. I.2.

²⁴ *See generally id.* art. II-XV.

²⁵ *See generally id.* art. XVI-XVIII.

²⁶ *See generally id.* art. XIX-XXI.

²⁷ *See generally id.* art. XXII-XVI.

²⁸ *See generally id.* art. XXVII-XXVII.

A. GATS Preamble

The Preamble to GATS recognizes seven important objectives and considerations: (1) importance of trade in services for the growth and development of world economy, (2) economic growth through expansion of trade under the conditions of transparency and progressive liberalization, (3) liberalization through successive rounds of multilateral negotiations aimed at promoting the interests of all participants while giving due respect to national policy objectives, (4) recognizing the general right of Members to regulate, and more specifically, introduce regulation on the supply of services within their territories in order to meet national policy objectives, (5) development of developing countries, (6) facilitate increasing participation of developing countries in trade in services, (7) special economic situation and economic development of least-developed countries.²⁹

B. Four Modes of Supply

Trade in services is defined in an unusual way. Instead of saying what trade in services is, GATS defines the trade in services through how the supply of service is performed. There are four ways in which a service can be supplied—the four modes of supply: (1) “from the territory of one Member, into the territory of any other Member,” i.e. cross-border supply, for example providing customer services from one country to the customers of a company in another country; (2) “in the territory of one Member to the service consumer of any other Member,” i.e. consumption abroad, for example a tourist consuming the services of a guide abroad, (3) “by a service supplier of one Member, through commercial presence in the territory of any other Member,” i.e. commercial presence, for example a branch operating abroad that provides banking services to consumers abroad, (4) “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other

²⁹ See GATS, *supra* note 9, Preamble; *cf.* BHALA, *supra* note 4, at 1569 (In an attempt to avoid overlapping statements, objectives are stated and organized in a different manner in this Article.).

Member,” i.e. temporary movement of natural persons, for example a visiting professor teaching abroad.³⁰

C. General Commitments

Commitments under GATS are categorized into general and specific.³¹ General commitments are the minimum obligations that apply across the board to all sectors and sub-sectors of supplied services.³² General commitments in GATS Part II are: the Most Favored Nation treatment (“MFN”) under Article II, and Transparency under Article III of GATS.³³ MFN treatment requires any treatment which a Member accords to like services and service supplies of any other country to be immediately and unconditionally accorded to the other Members’ service suppliers.³⁴ In other words, when two countries liberalize trade among each other and one of them is a Member, any favorable treatment related to service supply granted by the Member is automatically multilateralized for all Members.³⁵ Finally, Article III contains transparency commitments related to “all relevant measures of general application which pertain to or affect the operation of [GATS].”³⁶

D. Specific Commitments

Specific commitments in GATS Part III cover mainly two topics: National Treatment and Market Access.³⁷ According to GATS Part III, a Member may make market access and/or national treatment commitments in specific sectors (sub-sectors or sub-sub-sectors) of supplied services; moreover, a Member can also specify

³⁰ GATS, *supra* note 9, art. I; *see also* BHALA, *supra* note 4, at 1546-48.

³¹ *See* GATS, *supra* note 9, Table of Contents.

³² *See* GATS, *supra* note 9, art. II.1, III.1; *see also* BHALA, *supra* note 4, at 1578.

³³ GATS, *supra* note 9, art. II, III.

³⁴ *See* GATS, *supra* note 9, art. II; *see also* BHALA, *supra* note 4, at 1579-82.

³⁵ *See* GATS, *supra* note 9, art. II; *see also* BHALA, *supra* note 4, at 1562-63.

³⁶ GATS, *supra* note 9, art. III.

³⁷ *See id.* art. XVI, XVII.

the mode(s) of supply to which such commitment(s) are applicable to.³⁸

Once a Member makes specific market-access commitment(s), unless the specific commitment(s) provide otherwise, Member may not impose: (1) “limitations on the number of service suppliers,” (2) “limitations on the total value of service transactions or assets,” (3) “limitations on total number of service operations or on the total quantity of service output,” (4) “limitations on the total number of natural persons that may be employed,” (5) measures that restrict or require a particular form of legal entity organization, (f) limitations on foreign shareholding percentage or total value of foreign investment.³⁹

Once a Member makes specific national treatment commitment(s), unless the specific commitment(s) provide otherwise, the Member must “accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.”⁴⁰

E. Exceptions

GATS provides many exceptions from general and specific commitments. The applicability of the prudential carve-out clause may depend on the reasoning of those exceptions, as discussed in Part V(A)(2), and at this point it is sufficient to be generally aware of the existence of those exceptions. Some of those exceptions include: economic integration agreements, labor market integration agreements, balance of payment safeguards, MFN exemptions, government procurement, providing advantages to adjacent countries, emergency safeguard measures, essential security interest, disclosure of information contrary to public interest, movement of

³⁸ *Id.* art. XVI.1, XVII.1; *see also* BHALA, *supra* note 4, at 1585.

³⁹ GATS, *supra* note 9, art. XVI.2.

⁴⁰ *Id.* art. XVII.1.

natural persons, administration of domestic regulations, and general exceptions.⁴¹

For example GATS Article XIV, General Exceptions provides five types of measures which a Member may implement that are exempted from the Member's general or specific commitments.⁴² Of the five categories of measures, three of the categories require measures to be "necessary."⁴³ For example, subparagraph (c) in part permits implementation of measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . relating to . . . the prevention of deceptive and fraudulent practices. . . ."⁴⁴ In other words, if a Member is implementing a law or a regulation related to prevention of deceptive and fraudulent practices, and that law or regulation is not inconsistent with Member's commitments under the Agreement, any measures that are *necessary* to the implementation of such law or regulation are also exempted from the Agreement—even if those necessary measures are inconsistent with the Agreement.⁴⁵ Additionally, such measure(s) will not be exempted if arbitrary or discriminatory without legitimate justification(s).⁴⁶

While the scope of each of these exceptions may be a topic for a separate article, it may be consequential on the ultimate determination of whether the prudential carve-out clause applies.

⁴¹ See generally *id.* art. II.2, II.3, V, VI, X, XII-XIV bis, Annex on Article II Exemptions.

⁴² *Id.* art. XIV.

⁴³ *Id.* art. XIV.(a)-(c).

⁴⁴ *Id.* art. XIV.(c).

⁴⁵ See *id.*; see generally Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶300-27, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S. – Gambling and Betting Services*].

⁴⁶ See GATS, *supra* note 9, art. XIV; see also *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 339-51.

IV. ANNEX ON FINANCIAL SERVICES: PRUDENTIAL CARVE-OUT
CLAUSE

Trade in the financial service sector is also governed by the Annex on Financial Services (the “Annex”).⁴⁷ The tension between trade liberalization commitments and nations’ sovereignty presents itself in the prudential carve-out clause contained in the Annex. Prudential carve-out clause provides an exception from general and specific GATS commitments:

Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement.⁴⁸

This text in the GATS has attracted much attention. Many have claimed that the prudential exception was not clear and clarification was necessary, sometimes attempting to provide clarification.⁴⁹ Also, there has been some confusion about whether

⁴⁷ GATS, *supra* note 9, Annex on Financial Services.

⁴⁸ *Id.*

⁴⁹ See generally *Communication From Barbados: Unintended Consequences of Remedial Measures taken to correct the Global Financial Crisis: Possible Implications for WTO Compliance*, COMMITTEE ON TRADE IN FINANCIAL SERVICES, ¶¶ 11, 23, JOB/SERV/38, (Feb. 18, 2011), <https://www.coc.org/files/BarbadosSubmission.pdf> (“It would seem that the wording of paragraph 2 of the GATS Annex on Financial Services may need to be amended.”); Roger Kampf, *Liberalisation of Financial Services in the GATS and Domestic Regulation*, 3 INT. TRADE L. & REG. 155 (1997) (“The scope of this exemption to basic GATS principles is not well defined. It can therefore be expected that measures taken under this provision will be the subject of controversial interpretation in the future, possibly in the context of dispute settlement procedures.”); Juan A. Marchetti & Petros C. Mavroidis, *What Are the Main Challenges for the GATS Framework? Don’t Talk About Revolution*, 3 EUR. BUS. ORG. L.

the measure or the reason for that measure must be prudential in order to qualify as an exception under the clause.⁵⁰ Some have stated that further clarification was necessary with respect to the apparent contradiction between the first and the second sentences, sometimes calling the clause a “self-cancelling loophole.”⁵¹ Others expressed concerns that the exception will be used for disguised protectionist measures.⁵² Some predicted that the issue will eventually appear in

REV. 511 (2004) (“Examples of provisions the scope of which is unclear include: the scope of the so-called ‘prudential carve-out.’”); Dominique Servais & Julie Dutry, *GATS 2000: High Stakes for the Financial Services Sector?*, 6 INT. BUS. L. J. 653, (1993) (“[T]he clause is interpreted differently according to the country.”); Mamiko Yokoi-Arai, *GATS’ Prudential Carve Out in Financial Services and Its Relation with Prudential Regulation*, 57 INT. COMP. L. Q. 613 (2008) (“The difficulty of the prudential carve out is that while the uncertainty caused by its text is clear, there has not been any indication or the urgent need to revise it.”); Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT. L. 15 (2006) (“[T]he financial services accord requires market liberalization and national treatment, but permits countries to engage in valid ‘prudential measures’ that would otherwise be inconsistent with the agreement; the scope of such prudential measures is likely to be circumscribed by adherence to the Basel standards.”) (citation omitted); Gretchen Morgenson, *Barriers to Change, From Wall St. and Geneva*, N.Y. Times, Mar. 17, 2012, http://www.nytimes.com/2012/03/18/business/wto-and-barriers-to-financial-change.html?_r=0 (“Last October, Ecuador asked that the W.T.O. review financial rules so that the country could preserve its ability to create regulations that ensure ‘the integrity and stability of the financial system.’”).

⁵⁰ E.g., Roger Kampf, *Liberalisation of Financial Services in the GATS and Domestic Regulation*, 3 INT. TRADE L. & REG. 155, 158 (1997); G-20 Pittsburgh Summit, Special Pittsburgh G-20 Report from Public Citizen’s Global Trade Watch, *No Meaningful Safeguards for Prudential Measures in World Trade Organization’s Financial Service Deregulation Agreements*, at 10-17 (Sept. 2009).

⁵¹ G-20 Pittsburgh Summit, Special Pittsburgh G-20 Report from Public Citizen’s Global Trade Watch, *No Meaningful Safeguards for Prudential Measures in World Trade Organization’s Financial Service Deregulation Agreements*, at 3-5 (Sept. 2009); see also Communication from Barbados, *supra* note 49, ¶ 11; Alan Alexandroff et al., *Global Trade Watch on the Prudential Carve Out*, International Economic Law and Policy Blog (Dec. 12, 2015, 11:57 PM), <http://worldtradelaw.typepad.com/ielpblog/2010/05/global-trade-watch-on-the-prudential-carve-out.html>.

⁵² E.g., Dominique Servais & Julie Dutry, *GATS 2000: High Stakes for the Financial Services Sector?*, 6 INT. BUS. L. J. 653, 664-65 (1993) (“It is often propounded that there is a real risk of the prudential clause being used by some countries as an mechanism to justify the upholding of certain regulations that aim, under the prudential veil, to protect the local financial industry by either refusing,

front of a WTO panel.⁵³ While others stated that the “confrontational approach” within the dispute settlement system [was] unlikely.⁵⁴ In any event, the importance of this clause has not been overstated. “After a decision is rendered, the losing nation will see how much (or how little) sovereignty has been transferred to the WTO.”⁵⁵ Such a decision was rendered on September 30, 2015 by a WTO panel.

A. Argentina – Measures Relating to Trade in Goods and Services:
Report of the Panel

On September 30, 2015 a WTO panel for the first time addressed the prudential carve-out clause in *Argentina – Measures Relating to Trade in Goods and Services* (the “Panel Report”).⁵⁶

In the Panel Report, *inter alia*, Argentina claimed that the prudential exception in paragraph 2(a) of the Annex applied to measures 5 (requirements for market access related to reinsurance services) and 6 (requirements for access to the Argentina’s capital market) implemented by Argentina.⁵⁷ Measure 5 essentially banned

or limiting, access to their market.”); Roger Kampf, *Liberalisation of Financial Services in the GATS and Domestic Regulation*, 3 INT. TRADE L. & REG. 155, 161 (1997) (“Individual countries could, for example, attempt to cover discriminatory treatment under the prudential carve-out.”).

⁵³ Duncan Alford, *International Financial System Risks: A Current Assessment*, 1 J. INT. BANKING L. & REG. 40 (2005) (“The operation of this prudential supervision ‘carve out’ and the trade liberalisation [sic] provisions of the Financial Services Agreement will undoubtedly come before the WTO dispute resolution mechanism in the near future.”); Roger Kampf, *Liberalisation of Financial Services in the GATS and Domestic Regulation*, 3 INT. TRADE L. & REG. 155, 158 (1997) (“It can [] be expected that measures taken under this provision will be the subject of controversial interpretation in the future, possibly in the context of dispute settlement procedures.”).

⁵⁴ Mamiko Yokoi-Arai, *GATS’ Prudential Carve Out in Financial Services and Its Relation with Prudential Regulation*, 57 INT. COMP. L. Q. 613, 640 (2008) (“The community of international financial regulators is close-knit, and such a confrontational approach [bringing dispute within WTO dispute settlement system] does not seem likely.”)

⁵⁵ Duncan Alford, *International Financial System Risks: A Current Assessment*, 1 J. INT. BANKING L. & REG. 40, 41 (2005).

⁵⁶ Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R (Sept. 30, 2015).

⁵⁷ *Id.* ¶¶ 7.781, 7.808, WT/DS453/R (Sept. 30, 2015).

the supply of reinsurance services from countries not cooperating for purposes of tax transparency and the global fight against money laundering and terrorist financing according to the criteria defined by the Financial Action Task Force.⁵⁸ Measure 6 banned stock market intermediaries from transacting (e.g. public offering of negotiable securities, forward contracts, futures or options of any nature or other financial instruments or products) with persons from non-cooperative countries.⁵⁹ A country was to be considered “cooperative” if it: (i) “[had] signed with Argentina a tax information exchange agreement or an international double taxation convention with a broad information exchange clause, provided that the information [was] effectively exchanged; or (ii) [had] initiated with Argentina the negotiations necessary for concluding such an agreement and/ or convention.”⁶⁰ Under measures 5 and 6 Argentina imposed different requirements on service suppliers depending on whether they were established and registered in cooperative or non-cooperative countries.⁶¹

Panama argued against the applicability of the prudential carve-out clause.⁶² Although the panel ultimately found for Panama on this issue, Panama appealed the report to the Appellate Body arguing that the panel erred, *inter alia*, in not limiting the scope of the prudential carve-out clause to “domestic” regulations.⁶³ Argentina also appealed the Panel Report arguing, contrary to the panel’s finding, that the services provided from cooperative and non-cooperative countries were not “like” services.⁶⁴ While the Panel Report is pending an appeal, the Dispute Settlement Body (“DSB”) will not be able to adopt the Panel Report.⁶⁵ The Appellate Body report, once issued, will be automatically adopted, receiving legal

⁵⁸ See *id.* ¶¶ 2.23–2.34.

⁵⁹ See *id.* ¶¶ 2.35–2.36.

⁶⁰ *Id.* ¶¶ 7.907 [footnote omitted].

⁶¹ *Id.* ¶ 7.907.

⁶² *Id.* ¶¶ 7.793–7.807.

⁶³ See Notification of an Appeal by Panama, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/7 (Oct. 30, 2015).

⁶⁴ See Notification of Another Appeal by Argentina, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/8 (Nov. 30, 2015).

⁶⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 16, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

force, unless the DSB decides by unanimous consensus not to adopt the report.⁶⁶ Customarily when DSB adopts a panel report, it is adopted “as modified by the Appellate Body”;⁶⁷ thus, ultimately DSB may adopt the Appellate Body’s findings of law which were directly appealed. Appellate Body may even modify rulings on issues that were not directly appealed if the modification was necessary for ruling on the issues appealed.

The Panel Report provided important guidance and if adopted by the DSB will serve as persuasive authority for the development of the international trade law as the meaning of the clause and its practical application became especially important in the context of post-recession regulations. The Panel Report adopted a three-prong legal standard under which the measure qualifying for the prudential exception must: (1) affect the supply of financial services, (2) be taken *for prudential reasons*, (3) and not be used as means of avoiding the Country-Member’s commitments or obligations.⁶⁸ Consequently the Panel Report applied the adopted standard to the measures implemented by Argentina, as discussed in subsection (4).

1. *The Scope of the Annex: Measures Affecting the Supply of Financial Services.* - The Panel Report found that the provision represents an exception; therefore, the burden of proof lies with the responding party to demonstrate that its measures are covered under the provision.⁶⁹ As a preliminary matter, the panel report considered paragraph 1(a) as context for the interpretation of paragraph 2(a) of the Annex—the prudential carve-out clause; thus, it found that the party claiming the exception must demonstrate that the measure in question is a measure “affecting the supply of financial services.”⁷⁰

⁶⁶ *Id.* art. 17.

⁶⁷ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 257, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *EC – Bananas III*].

⁶⁸ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶¶ 7.851, 7.796 (Although the parties did not appeal any of the three prongs of the adopted legal standard, Panama appealed arguing that there is a fourth prong requirement in the Annex that the measure must be “domestic.”)

⁶⁹ *Id.* ¶ 7.816.

⁷⁰ *Id.* ¶ 7.822 (citation omitted).

Having previously found that the measures in question were “affecting trade in services” and were in violation of the GATS, the Panel Report stated that if a measure *affects trade* in services under Article I:1, it must be considered to be a measure *affecting the supply* of services.⁷¹ In other words, the panel report equated the words *trade* and *supply*, perhaps because Article I:2 of the GATS states that “[f]or purposes of this Agreement, trade in services is defined as the supply of a service. . . .”⁷²

To sum it up, if a measure affects trade in services and violates the GATS, then the prudential exception may apply if the services *affected* by that measure are *financial*. According to the panel report *affecting* has a broader meaning than “regulating” or “governing.”⁷³ As to what services are considered *financial*, the Panel Report stated that “paragraph 5 of the Annex on Financial Services defines the concept of a ‘financial service’ as ‘any service of a financial nature offered by a financial service supplier of a Member’ . . . [and] all the services subsequently listed in paragraph 5 of the Annex are services of ‘a financial nature.’”⁷⁴

2. *Measures Taken “for Prudential Reasons.”* - The Panel Report took on the task of determining which measures are “for prudential reasons” by: (a) distinguishing that the *reason* for the measure must be prudential—not the measure itself, (b) analyzing the term “prudential reasons,” and (c) analyzing the word “for” separately.⁷⁵

⁷¹ *Id.* ¶ 7.851.

⁷² GATS, *supra* note 9, art. I.2.

⁷³ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.854 (quoting *EC – Bananas III*, *supra* note 67, ¶ 220) (“The ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on,’ which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term ‘affecting’ in the context of Article III of the GATT 1947 is wider in scope than such terms as ‘regulating’ or ‘governing.’”)

⁷⁴ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.857.

⁷⁵ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶¶ 7.859-63.

a. *Reasons must be prudential.* - Panel Report found that the *reasons* for the measure must be prudential.⁷⁶ Although Panama observed that other paragraphs in the Annex (paragraphs 3 and 4) refer to “prudential measures” and “prudential issues” and argued that the key term is the word “prudential”—not the “reasons,”⁷⁷ the Panel Report emphasized that the text speaks of the *reasons* being prudential and not the *measures*.⁷⁸ Moreover, the Panel Report stated that a contrary interpretation “would not give any meaning to the term ‘reasons’ used in that provision.”⁷⁹ Finding that there is no other reason why to use the terms (prudential reasons and prudential measures) interchangeably, the panel held that the textual term—prudential reasons—should be used instead.⁸⁰

b. *Prudential means “preventative” or “precautionary.”* - Next the Panel Report consulted dictionary definitions of “*motivos coutelares*” (prudential reasons) and held that the ordinary meaning of “prudential” is “preventative” or “precautionary.”⁸¹ The Panel Report looked into the Spanish Royal Academy’s dictionary and found that “*motivo*” (motive) means “that which moves or has efficacy or power to move; moving cause or reason for something” and “*coutelar*” (prudential)—“preventative, precautionary; said of a measure or rule intended to prevent a particular outcome or guard against that which might impede it.”⁸² Also, the Panel Report considered English and French dictionary definitions of equally authentic versions of the provision.⁸³ The Panel Report looked into the *Shorter Oxford Dictionary* and found that the word “prudential” is defined as “[o]f, involving or characterized by prudence; exercising prudence, esp. in business affairs.”⁸⁴ The Panel Report looked into the Le Petit Robert dictionary, but did not find a definition for “prudential,” instead the

⁷⁶ *Id.* ¶ 7.863.

⁷⁷ *Id.* ¶ 7.860 (footnote omitted).

⁷⁸ *Id.* ¶ 7.861.

⁷⁹ *Id.* ¶ 7.862.

⁸⁰ *See id.* ¶¶ 7.859-63.

⁸¹ *See id.* ¶ 7.865.

⁸² *Id.* (quoting DICCIONARIO DE LA LENGUA ESPAÑOLA (23rd ed. 2014)).

⁸³ *See Argentina – Measures Relating to Trade in Goods and Services, supra note 56, ¶ 7.866.*

⁸⁴ *Id.* (quoting SHORTER OXFORD ENGLISH DICTIONARY (6th ed. 2007)).

report looked into the word “prudence” which was defined as “[a]ttitude of a person who, reflecting on the significance and consequences of his acts, takes steps to avoid mistakes and possible mishaps, and refrains from anything that might be a source of harm.”⁸⁵ Panama, Argentina, and third parties such as United States and Brazil agreed with the definition of “preventative” or “precautionary,” except Panama applied it to the word “measures” and further defined “precautionary” differently.⁸⁶

The Panel Report found support in the context of the clause which provides a non-exhaustive list of prudential reasons: “the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier” or “to ensure the integrity and stability of the financial system.”⁸⁷ According to the panel, these are examples of precautionary reasons.⁸⁸ Then, the panel basically recognized that “preventative” or “precautionary” are also vague words and stated that the meaning and importance attached to prudential reasons may vary over time; however, such vagueness—according to the panel—is appropriate, because “WTO Members should have sufficient freedom to define the prudential reasons that underpin their measures, in accordance with their own scales of values.”⁸⁹ The panel found support in policy objectives identified in previous panel reports and stated that Country-Members, “in applying concepts equally important for society, such as those covered by Article XX for the GATT 1994 [general

⁸⁵ *Id.* (quoting DICTIONNAIRE DE LA LANGUE FRANÇAISE (2000)).

⁸⁶ *See Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶¶ 7.797, 7.867 (citing Third Party Written Submission of the United States, *Argentina – Measures Relating to Trade in Goods and Services*, at 7 n.13, WT/DS/453, (June 4, 2014), *available at* <https://ustr.gov/sites/default/files/US%203rd%20Pty%20Sub%20Fin.pdf>) (citation omitted).

⁸⁷ *See Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.866; *see also* GATS, *supra* note 9, Annex on Financial Services, § 2(a).

⁸⁸ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56 ¶ 7.868

⁸⁹ *Id.* ¶ 7.871.

exceptions], are entitled to determine the level of protection they consider appropriate.”⁹⁰

The panel also found that the broad interpretation of the word “prudential” “corresponds to the object and purpose of the GATS, as set out in its own preamble, which recognizes ‘the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives.’”⁹¹ The Panel Report concluded its analysis of the word “prudential” by stating that a broad interpretation is “consistent with the concerns of the international community regarding the nature and impact of the financial risks and the consequent need to preserve sufficient flexibility when determining the prudential reasons to which the regulation should respond.”⁹²

c. *Measures taken “for” prudential reasons require a “rational relationship” between the measure and its prudential objective.* - Before interpreting what “for” means, the Panel Report compared the prudential exception provision to the general exceptions of Articles XIV of the GATS and XX of the GATT 1994 and found that the prudential exception provision does not require the measures to be “necessary.”⁹³ Therefore, the prudential exception provision does not require measures to be the least trade-restrictive means for achieving the stated objective.⁹⁴

The panel began the interpretation of the word “for” by looking at its ordinary meaning.⁹⁵ It looked into dictionaries in Spanish, English and French and found that the meaning similarly

⁹⁰ *Id.* ¶ 7.870 (citing Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 176, WT/DS161/AB/R, WT/DS169/AB/R, (Dec. 11, 2000); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 168, WT/DS135/AB/R, (Mar. 12, 2011)) (citation omitted).

⁹¹ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.872 (quoting GATS, *supra* note 9, Preamble).

⁹² *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.875.

⁹³ *Id.* ¶ 7.884.

⁹⁴ *Id.* (footnote omitted) (Note that in the Panel Report used the words “objective” and “reason” interchangeably.).

⁹⁵ *Id.* ¶ 7.886.

denotes a causation.⁹⁶ Therefore, “[a] measure taken ‘for’ prudential reasons would [] be a measure with prudential cause.”⁹⁷ Then essentially the panel held that for a measure to be taken “for” prudential reasons, there must “be a rational relationship of cause and effect between the measure and the reason for it” in fact.⁹⁸ “[A] central aspect of the rational relationship of cause and effect is the adequacy of the measure to the prudential reason, that is to say, whether the measure, through its design, structure and architecture, contributes to achieving the desired effect.”⁹⁹

3. *The Meaning of the Second Sentence of the Prudential Carve-out Clause Remains Uninterpreted.* - The panel refused to interpret the meaning of the “[measures] shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement,” because it had already found that the prudential exception did not cover the measures in question under the second prong of the legal test.¹⁰⁰

4. *Panel Report’s Application of the Three-prong Legal Standard to Argentina’s Measures.* - The Panel Report applied this three-prong standard to Argentina’s measures 5 and 6 and found that the measures were not taken for prudential reasons.¹⁰¹ Argentina’s measure 5 placed certain requirements on “non-cooperative” country service suppliers before they could gain access to the Argentine reinsurance service market.¹⁰² Measure 6 prohibited certain stock market transactions with entities from “non-cooperative” countries.¹⁰³

The Panel Report agreed that the reasons identified by Argentina with respect to measure 5 were prudential, namely “to protect the insured, to ensure the solvency of insurers and reinsurers, and to avoid the possible systemic risk of the insolvency and failure

⁹⁶ *Id.* ¶ 7.887 (citations omitted).

⁹⁷ *Id.* ¶ 7.888.

⁹⁸ *Id.* ¶ 7.889.

⁹⁹ *Id.* ¶ 7.911.

¹⁰⁰ *Id.* ¶ 7.945.

¹⁰¹ *See id.* ¶¶ 7.906-7.920, 7.939-7.944.

¹⁰² *See* discussion *supra* pp. 12-13.

¹⁰³ *See id.*

of direct insurance companies.”¹⁰⁴ The Panel Report found that requesting relevant information from the regulatory authorities of other jurisdictions is part of those identified reasons.¹⁰⁵

The panel found the main issue in the conditions under which a country was to be considered “cooperative.”¹⁰⁶ More specifically, one way a country could be considered cooperative was if it had “initiated with Argentina the negotiations necessary for concluding [an agreement with tax information exchange or an international double taxation convention with a broad information exchange clause] and/or convention.”¹⁰⁷ The panel stated that this criteria does not provide a “formal mechanism for the effective exchange of information between Argentina and the country with which it [was] negotiating.”¹⁰⁸ In other words, mere negotiations did not provide substantive information exchange.

There was another problem with the criteria under which a country could be designated as “cooperative.” Argentina published the list of cooperative countries only once, at the beginning of every year, so countries that began negotiations after the list was published would have no access to the Argentine service market until the following year.¹⁰⁹ In this instance, Panama was on the January 2014 list, because it had begun negotiations in November of 2013, but other countries that began negotiations in 2014 were not on the list yet, although they were in the same situation as Panama—merely negotiating.¹¹⁰ Hence, the panel held that the entire measure did not have a “rational relationship of cause and effect with the identified prudential reasons,” because granting “cooperative” status without

¹⁰⁴ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.904.

¹⁰⁵ *Id.* ¶ 7.910 (“In our view, having adequate and timely information concerning the foreign reinsurance company is fundamental for the purpose of anticipating crises or systemic risks which, as we have seen, could be incubating in an imperceptible manner over time and suddenly erupt.”).

¹⁰⁶ *Id.* ¶ 7.913.

¹⁰⁷ *Id.* ¶ 7.912 (footnote omitted).

¹⁰⁸ *Id.* ¶ 7.916.

¹⁰⁹ *See id.* ¶ 7.918.

¹¹⁰ *See id.*

actual information exchange did not bear such relationship with the stated prudential reason.¹¹¹

With respect to measure 6, the Panel Report found several reasons identified by Argentina to be prudential: “strengthen[ing] the mechanisms for protecting and preventing abuses against small investors, within the framework of the protective function of consumer law”¹¹²; “ensur[ing] the full effectiveness of the principles of investor protection, fairness, efficiency, transparency, non-fragmentation and reduction of systemic risk”;¹¹³ and “prevention of money laundering and terrorist financing,” which in turn strengthen the integrity and stability of the financial system.¹¹⁴ However, the panel found that there was no rational relationship of cause and effect with the identified prudential reasons, because measure 6, similar to measure 5, exempted service suppliers from “cooperative” countries that did not actually exchange any information.¹¹⁵

V. ANALYZING THE PANEL REPORT

Even if the Appellate Body renders a decision without significant modifications and DSB adopts the Panel Report, the legal standard to be used in future disputes is still be open to arguments.¹¹⁶ “In the 1996 Japan Alcoholic Beverages case, . . . [t]he Appellate Body concluded adopted panel reports are not binding in a strict sense in a subsequent case, even if the subsequent case involves the same parties and basically the same facts.”¹¹⁷ Article IX:2 of the WTO Agreement provides the exclusive authority to adopt

¹¹¹ *See id.* ¶¶ 7.919-7.920.

¹¹² *Id.* ¶ 7.932.

¹¹³ *Id.* ¶ 7.933.

¹¹⁴ *Id.* ¶¶ 7.934-7.935 (footnotes omitted).

¹¹⁵ *Id.* ¶¶ 7.939-7.944.

¹¹⁶ *See* discussion *supra* pp. 13-14.

¹¹⁷ BHALA, *supra* note 4, at 19; *see also* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, pp. 12-13, WT/DS8/AB/R, WT/DS10/ AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Japan – Alcoholic Beverages II*] (“Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.”).

interpretations of the Multilateral Trade Agreements—in this case GATS—to the Ministerial Conference and the General Council.¹¹⁸ “The fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.”¹¹⁹ Nonetheless, the Appellate Body stated that “panel reports are important part of the GATT *acquis*” and create “legitimate expectation among WTO Members”; thus, “should be taken into account where they are relevant to any dispute.”¹²⁰

The following sections will: (A) analyze the interpretation of “for prudential reasons,” and (B) briefly discuss the second sentence of the prudential carve-out clause.

A. Interpretation of “for Prudential Reasons”

Interpretation of the prudential carve-out clause involves a multi-layered inquiry. The Appellate Body’s framework for interpreting GATS provisions provides a valuable foundation for analyzing the Panel Report.¹²¹ Under Article 3.2 of the DSU, Country-Members recognized that the WTO dispute settlement system may clarify provisions of covered agreements in “accordance with customary rules of interpretation of public international law.”¹²² Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”) are well settled in WTO case law to be such customary rules.¹²³ Interpreting “measures taken for prudential

¹¹⁸ Marrakesh Agreement, *supra* note 7, art IX.2.

¹¹⁹ *Japan – Alcoholic Beverages II*, *supra* note 117, at 13.

¹²⁰ *Id.* at 14.

¹²¹ See generally *U.S. – Gambling and Betting Services*, *supra* note 45 (The report provides a step-by-step framework for treaty interpretation according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties.).

¹²² DSU, *supra* note 65, art. 3.2.

¹²³ See *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 159 (“[T]he task of interpreting any other treaty text[] involves identifying the common intention of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention.”); see also Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶¶ 61-62, WT/DS213/AB/R (Nov. 28, 2002); Appellate Body Report, *United States –*

reasons,” as discussed below, requires looking into: (1) ordinary meaning, (2) context, (3) object and purpose, (4) other things taken into account with the context, and (5) supplementary means of interpretation.¹²⁴ However, “it should be kept in mind that treaty interpretation is an integrated operation, where interpretive rules or principles must be applied as connected and mutually reinforcing components of a holistic exercise.”¹²⁵

1. *Ordinary Meaning.* - First, analyzing under Article 31 of the Vienna Convention, the ordinary meaning of “prudential” is vague. “Article 31(1) of the Vienna Convention requires a treaty to be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’”¹²⁶ Identifying the ordinary meaning of a term may begin with dictionary definitions; however, the Appellate Body in Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 300-27, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S. – Gambling and Betting Services*], made a reservation for using dictionary definitions alone, because such approach is too mechanical.¹²⁷ According to the Appellate Body, if in abstract the range of definitions of the word may include the definitions of the contestant parties, then the next proper step is to inquire into which one of the definitions is properly attributable to the party-respondent.¹²⁸

The Panel Report determined the ordinary meaning of “prudential” mainly from Spanish and French dictionaries.¹²⁹ Although the Panel Report defined the word “prudential” as “preventative” or “precautionary,” this does not really clarify what reasons may or may not be justified, because virtually any reason for a measure can be stated in terms of being “preventative” or “precautionary.” Consider a measure implemented for the reason of

Continued Existence and application of Zeroing Methodology, ¶ 267, WT/DS350/AB/R (Feb. 4, 2009) [hereinafter *U.S. – Continued Zeroing*].

¹²⁴ See *U.S. – Gambling and Betting Services*, *supra* note 45.

¹²⁵ *U.S. – Continued Zeroing*, *supra* note 123, ¶ 268.

¹²⁶ *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 164.

¹²⁷ *U.S. – Gambling and Betting Services*, *supra* note 45, ¶¶ 164-66.

¹²⁸ *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 167.

¹²⁹ See discussion *supra* Part III.A.2.ii.

aiding a quick recovery of financial institutions after an economic recession: Is not that reason preventing a slow or no recovery? Thus, virtually any reason may be “preventative.”

Further, according to the Panel Report, if “prudential” means preventative, and the text states “measures for prudential reasons” are basically exempted, then what will give the panel authority to not exempt *any* absurd preventative reasons a country will claim? Consider a Country-Member claiming that the prudential reason for a measure is to “prevent” all left-handed people from making any financial investments. According to the current interpretation of “prudential” as “preventative” or “precautionary,” such a measure would qualify for the exception. It may seem at first that such a measure would not qualify under the exception, because there would be no rational relationship of cause and effect,¹³⁰ but such a relationship will need to exist only between the actual measure and the *stated* reason for it, and the stated reason is preventing left-handed people making certain investments. Under the present definition of “prudential” as “preventative” or “precautionary” coupled with the fact that any measure may be stated in terms of preventing some event, the current interpretation of the word “prudential” means virtually *any* reason, including absurd “preventative” reasons. Because the word “prudential” practically loses its meaning, and “the Appellate Body has stated that ‘interpretation must give meaning and effect to all the terms of a treaty,’”¹³¹ a careful interpretation of the word “prudential” is still required.

Dictionaries do not clarify the word. The Oxford English Dictionary defines “prudential” as “of, belonging to, or of the nature of prudence; involving prudence, characterized or prescribed by forethought and careful deliberations” or as “matters that fall within the scope or province of prudence.”¹³² The Oxford English

¹³⁰ See discussion *supra* Part III.A.2.iii.

¹³¹ See *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.840 (quoting Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, p. 23, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US – Gasoline*]; see also Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 271, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2006) [hereinafter *US Offset Act*].

¹³² 12 THE OXFORD ENGLISH DICTIONARY 729 (2nd ed. 1991).

Dictionary defines “prudence” as “ability to discern the most suitable, politic, or profitable course of action, esp. as regards conduct; practical wisdom, discretion,” or “wisdom; knowledge of or skill in a matter.”¹³³ The Shorter Oxford Dictionary defines “prudential” as “of involving, or characterized by prudence; exercising prudence, esp. in business affairs” and defines “prudence” as “the quality of being prudent” or as “wisdom; knowledge of or skill in a matter;” or “foresight; providence.”¹³⁴ It also defines “prudent” as “characterized by or proceeding from care in following the most politic and profitable course; having or showing sound judgment in practical affairs; circumspect, sensible” or as “wise, discerning, sapient.”¹³⁵ Merriam-Webster’s Collegiate Dictionary defines “prudential” as “of, relating to, or proceeding from prudence” or as “exercising prudence.”¹³⁶ Merriam-Webster’s Collegiate Dictionary defines “prudence” as “the ability to govern and discipline oneself by the use of reason,” or as “sagacity or shrewdness in the management of affairs,” or as “skill and good judgment in the use of resources,” or as “caution or circumspection as to danger or risk.”¹³⁷

As you can see from the English dictionary definitions, as opposed to French and Spanish as found by the Panel Report, “prudential” may have meanings different from “preventative” or “precautionary.” According to the dictionaries, a “prudential” reason, among the meaning adopted by the panel, may mean a reason “prescribed by forethought and careful deliberations” or a reason “involving, or characterized by quality of being wise” or a reason “of involving the quality of having or showing sound judgment” or a reason “relating to or proceeding from the ability to govern and discipline oneself by the use of reason or by skill and good judgment in the use of resources.” All these definitions encompass a requirement that whatever must be “prudential” must in some sense be well thought of, be wise, show sound judgment, or be reasonable.

¹³³ *Id.* at 728-29.

¹³⁴ 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2396 (1st ed. 1993).

¹³⁵ *Id.*

¹³⁶ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1002 (11th ed. 2005).

¹³⁷ *Id.*

Thus, a closer look into the context in which the word “prudential” was used is required.

2. *Context.* - After inquiring into the ordinary meaning of the text, if a definitive conclusion cannot be reached, the next step is to inquire into the context in which the relevant terms are situated pursuant to Article 31(2) of the Vienna Convention.¹³⁸ Article 31 paragraph 2 of the Vienna Convention also provides for documents in addition to the text of the treaty which may be considered as context.¹³⁹ “Documents can be characterized as context only where there is sufficient evidence of their constituting an ‘agreement relating to the treaty’ between the parties or of their ‘accept[ance by the parties] as an instrument related to the treaty.’”¹⁴⁰ Thus, context documents may comprise of the entire GATS Agreement, including its preamble and annexes, schedules of specific commitments of the respondent-party, provisions of covered agreements other than GATS, and GATS schedules of other Members.¹⁴¹ When inquiring into context documents, the Appellate Body first examined “the immediate context in which the relevant entry [was] found.”¹⁴² Second, the Appellate Body examined “the context provided by the structure of the GATS itself.”¹⁴³ Third, the Appellate Body looked “beyond the GATS to other covered agreements” where it also considered other Member’s Schedules.¹⁴⁴

Here the main word under scrutiny—prudential—is an adjective, which within the most immediate textual context of the word qualifies another word—reasons.¹⁴⁵ To support the panel’s finding, the most important context to be considered in treaty interpretation is the textual context in which the word was used.¹⁴⁶ In

¹³⁸ U.S. – *Gambling and Betting Services*, *supra* note 45, ¶ 168; *see also* U.S. – *Continued Zeroing*, *supra* note 123, ¶ 268.

¹³⁹ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 33 [hereinafter *Vienna Convention*].

¹⁴⁰ U.S. – *Gambling and Betting Services*, *supra* note 45, ¶ 175.

¹⁴¹ *See id.* ¶¶ 178-187.

¹⁴² *Id.* ¶ 179.

¹⁴³ *Id.* ¶ 180.

¹⁴⁴ *Id.* ¶ 181.

¹⁴⁵ *See* discussion *supra* Part III.A.2.i.

¹⁴⁶ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998) (“A treaty

this case it is not the *measure* itself that must be prudential—but the *reasons* for that measure.¹⁴⁷ Although a prudential measure and a measure implemented for prudential reason are not mutually exclusive, and in most cases the two will likely overlap, this textual distinction may be material to the ultimate determination of what measures may be permissible under the prudential carve-out clause.¹⁴⁸ Oversimplifying the complexity of financial regulations, consider that it will be a relatively simpler task for a WTO panel to analyze whether the reasons for the measure are *prudential* versus whether the measure itself is *prudential*. It is easier to find consensus on what is a *prudential* reason versus what measures may be implemented for those reasons, because for every prudential reason there are likely to be multiple *prudential* measures that could be implemented. In other words, a *prudential measure* requirement would give less discretion to the sovereign Country-Member as to what measures to implement, while under the *prudential reason* requirement a Country-Member will be able to exercise more discretion as to what measures to implement.

Looking at the context of the entire first sentence of the prudential carve-out clause, the prudential carve-out provision provides concrete examples of prudential reasons: “protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.”¹⁴⁹ Thus, for example, a prudential reason may be the protection of the depositors. In this example whether a particular measure does or does not protect the depositors at this point seems to be irrelevant. The Panel Report inquired into the genuineness of that prudential reason—a fact

interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought.”); *see also* *Japan – Alcoholic Beverages II*, *supra* note 117, p. 12 (“Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretive process: interpretation must be based above all upon the text of the treaty.”) (internal quotations omitted).

¹⁴⁷ *See* discussion *supra* Part III.A.2.i.

¹⁴⁸ *See* *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.831 (“The meaning of the two expressions cannot be the same and, in our opinion, this is an important aspect to be borne in mind when interpreting this provision.”).

¹⁴⁹ GATS, *supra* note 9, Annex on Financial Services, art. 2.a.

intensive inquiry—when analyzing the “for” element in the phrase “for prudential reasons.”¹⁵⁰ Although the Panel Report found that “prudential” means “precautionary” or “preventative” by pointing out that the prudential reasons listed in the text are all examples of “precautionary” or “preventative,”¹⁵¹ those reasons are not any more “precautionary” as they are “wise” or “reasonable.” The list of examples in the provision supports virtually all of the definitions of “prudential” stated in the dictionaries.¹⁵² Nonetheless, the non-exhaustive list of “prudential” reasons indicates an intention to leave the definition of “prudential” broader than just the examples in the list.¹⁵³

Looking into the broader context [the entire GATS Agreement] may be more helpful from the perspective of identifying what are *not* “prudential reasons”, rather than what are. If another part of the GATS already provides an exception for some measure(s), the reason for providing that exception effectively cannot be a “prudential” reason for purposes of the prudential exception provision, because otherwise the former exception provision would be reduced to “redundancy” or “inutility.”¹⁵⁴ The prudential exception provision may not serve as a catch-all provision to encompass those measures which fail under some element of one of the other exceptions. For example, economic integration agreements are an exception.¹⁵⁵ The reason for exempting integration agreements from GATS commitments is that those agreements liberalize trade between at least some countries, and some liberalization is better than none.¹⁵⁶ Therefore, a reason for the prudential measure under the

¹⁵⁰ See discussion *supra* Part III.A.2.iii.

¹⁵¹ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶¶ 7.868-7.869.

¹⁵² See discussion *supra* Part IV.A.1.

¹⁵³ *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶¶ 7.869-7.871.

¹⁵⁴ See *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.840 (citing *US – Gasoline*, *supra* note 130, p. 23) (footnotes omitted); see also *US Offset Act*, *supra* note 131, ¶ 271; *Japan – Alcoholic Beverages II*, *supra* note 117, p. 12.

¹⁵⁵ See generally GATS, *supra* note 9, art. V.

¹⁵⁶ *Cf.* GATS, *supra* note 9, art. V.4. (To qualify for the exception an integration agreement, “[it] shall be designed to facilitate trade between the parties

prudential carve-out clause may not be to liberalize local trade between some countries or preventing regional market barriers, because such a scenario is already covered. Similarly, a Country-Member should not be able to claim that the reason for the measure is to address the “serious balance-of-payment and external financial difficulty or threat thereof,” because such a reason is already covered by Article XII of the GATS.¹⁵⁷ Otherwise, for example, a Country-Member could implement a *discriminatory* measure aimed to prevent a threat of a balance-of-payment difficulty, which is prohibited under Article XII(2)(a), so long as such discriminatory measure would be “for prudential reasons”—preventing the threat of a balance-of-payment crisis. To be clear, a Member is free to claim exceptions under various provisions of GATS simultaneously; however, under the prudential carve-out clause analysis, as a matter of law, some reasons should not be considered prudential—reasons that already prompted negotiators to create specific exceptions in other GATS provisions.

Finally, Members’ Schedules attached to the GATS may also serve as context for treaty interpretation purposes.¹⁵⁸ For example, if a Member’s Schedule provides an interpretation of what may be a “prudential reason” for the purposes of the prudential exception provision, then such interpretation will be used by the panels and the Appellate Body as context for treaty interpretation. In the present case, Argentina’s Schedule did not contain any reference to the prudential carve-out clause.¹⁵⁹

3. *Object and Purpose.* - When no clear meaning could have been discerned, the Appellate Body in *U.S. – Gambling and Betting Services* turned to the object and purpose of the GATS for further guidance.¹⁶⁰ When considering the Preamble to the GATS, which is context, to discern the object and purpose of the prudential provision, the Panel Report emphasized “the right of the Members to

to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services . . .”).

¹⁵⁷ See generally GATS, *supra* note 9, art. XII.

¹⁵⁸ *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 181.

¹⁵⁹ *Argentina – Schedule of Specific Commitments*, GATS/SC/4 (Apr. 15, 1994).

¹⁶⁰ *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 187.

regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives.”¹⁶¹ The panel emphasized this objective to give Country-Members broad discretion in identifying what is and what is not prudential.¹⁶² However, there must be some limits on such discretion; otherwise, the prudential carve-out clause will render the entire GATS meaningless with respect to financial services.

GATS has other objects and purposes which weight against the “right of the Members to regulate.” GATS Preamble recognizes “the growing importance of trade in services for the growth and development of the world economy,” and aims “to establish . . . rules for trade in services with a view to the expansion of such trade under conditions of . . . progressive liberalization. . . .”¹⁶³ Therefore, as much as the object and purpose of the prudential exception provision may be to recognize national policy objectives, it is also not to permit too broad of an exception, because progressive liberalization and expansion of trade in services are also GATS objectives. Consequently, if the claimed prudential reason for the measure does not go against the objective of liberalized trade, then the object and purpose of the preamble that recognizes the national policy objective should prevail and provide broader discretion to the implementing Country-Member. And inversely, if the prudential reason is facially trade restrictive, then the free-trade objective should be weighed against the national policy objective.

4. *Other Things Taken into Account Together with the Context.* – Pursuant to the third paragraph of Article 31 of the *Vienna Convention* the Appellate Body in *U.S. – Gambling and Betting Services* continued its analysis by taking into account any “**subsequent practice** establishing the agreement of the parties regarding the interpretation of the treaty.”¹⁶⁴ Although not examined by the Appellate Body in the

¹⁶¹ See *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.872.

¹⁶² See *id.* at ¶¶ 7.870-7.873.

¹⁶³ GATS *supra* note 9, Preamble.

¹⁶⁴ *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 190 (emphasis added); see also *id.* at ¶¶ 191-192 (“[I]n order for ‘practice’ within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or

U.S. – Gambling and Betting Services, Article 31 paragraph 3 also requires to take into account with the context “[a]ny **subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions” and “[a]ny **relevant rules of international law** applicable in the relations between the parties.”¹⁶⁵ Moreover, the fourth paragraph of the Article 31 requires giving a **special meaning** to a term “if it is established that the parties so intended.”¹⁶⁶

There is no identifiable subsequent practice between the WTO Members which could constitute an “agreement” to be used in interpreting the prudential exception clause.¹⁶⁷ Nor there is any special meaning that can be discerned from the text, other than “prudential” has an “intrinsically evolutionary nature,” because the list of prudential reasons in the prudential exception provision was written as non-exhaustive.¹⁶⁸

As part of the relevant rules of international law, the Panel Report emphasized that in the past the Appellate Body “in applying concepts equally important for society, such as those covered by Article XX of the GATT 1994 [general exceptions], [Country-Members] are entitled to determine the level of protection they consider appropriate.”¹⁶⁹ Thus, in interpreting ambiguous or vague terms or words such as “prudential,” the tendency should favor

pronouncements must imply *agreement* on the interpretation of the relevant provision.”) (original emphasis) (citing *Japan – Alcoholic Beverages II*, *supra* note 117, p. 13); *Japan – Alcoholic Beverages II*, *supra* note 117, p. 14 (Appellate Body found that panel reports adopted by the GATT contracting parties do not constitute subsequent practice within the meaning of Article 31(3)(b) of the *Vienna Convention*).

¹⁶⁵ *Vienna Convention*, *supra* note 139, art. 31.3 (emphasis added).

¹⁶⁶ *Id.* at art. 31.4.

¹⁶⁷ Perhaps Country-Members may be able to use integration agreements or international cooperative enforcement agreements to affect the meaning and the interpretation of the prudential exception clause.

¹⁶⁸ See generally *Argentina – Measures Relating to Trade in Goods and Services*, *supra* note 56, ¶ 7.873 (citations omitted).

¹⁶⁹ *Id.* at ¶ 7.870 (citing Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 176, WT/DS161/AB/R, WT/DS169/AB/R).

giving the Country-Members deference to determine their reasons as they consider appropriate.

5. *Supplementary Means of Interpretation.* - Finally, when the above steps led to an ambiguous interpretation, the Appellate Body *U.S. – Gambling and Betting Services* turned to the supplementary means of interpretation.¹⁷⁰ Supplementary means of interpretation include “the preparatory work of the treaty and the circumstances of its conclusion.”¹⁷¹ This is where documents that did not meet the requirements to be considered as context, may nonetheless be used in treaty interpretation as preparatory work.¹⁷² Thus far in the analysis, the meaning of “prudential” remains unsatisfying. However, from considering other things with the context, it is evident that the word may have been left vague intentionally to give greater deference to the Country-Members to determine their level of protection. Nonetheless, the context of other provisions of the GATS showed some reasons that may not be prudential for purposes of the prudential exception provision.¹⁷³ Thus, supplementary means of interpretation are important for either confirming that the vagueness of the word was intentional or to clarify what “prudential reasons” mean.

First, all negotiations after the adoption of the Annex on the Financial Services related to clarifying the meaning of the prudential exception clause, such as the seven times the Committee on Trade in Financial Services debated on the prudential exception provision, are irrelevant and do not constitute supplementary means of interpretation, because they were not “preparatory work.”¹⁷⁴ Work in preparation of the Annex on the Financial Services began when the Working Group on Financial Service including Insurance was formed in June of 1990.¹⁷⁵ The Working Group held four official meetings,

¹⁷⁰ See, e.g., *U.S. – Gambling and Betting Services*, *supra* note 45, ¶¶ 195, 236, 248.

¹⁷¹ *Vienna Convention*, *supra* note 139, art. 32.

¹⁷² See, e.g., *U.S. – Gambling and Betting Services*, *supra* note 45, ¶ 197.

¹⁷³ See discussion *supra* Part IV.A.2.

¹⁷⁴ The seven meeting reports of the Committee on Trade in Services can be found by WTO document numbers S/FIN/M/25 to 31.

¹⁷⁵ PANAGIOTIS DELIMATIS & NILS HERGER, *FINANCIAL REGULATION AT THE CROSSROADS*, 280 (2011).

and among other issues, discussed the text of the prudential exception provision.¹⁷⁶

During the first meeting the Chairman of the Working Group offered five different approaches for the prudential carve-out clause, the first four ranging from narrow to broad in scope: (1) an exception only to a qualified national treatment provision, (2) permitting all “reasonable” prudential and fiduciary measures, (3) variation of first and second options with enumerated examples of permissible measures, (4) unqualified right to claim the exception, and (5) defining precise permissible measures to reduce legal uncertainties.¹⁷⁷ After the discussion on the topic was concluded, the Chairman stated that it was not possible to draw a preliminary conclusion as to which approach to use and that, in his opinion, there should be “wide room for flexibility in order to allow for the necessary prudential organizational measures.”¹⁷⁸ After the first meeting of the Working Group three formal proposals regarding the prudential-carve out clause were circulated on behalf of: the European Communities, United States, and Malaysia.¹⁷⁹

The proposal from the European Communities was circulated before the second meeting of the working group which excepted “reasonable measures to safeguard the integrity of the financial system, provided that these measures are not applied in a

¹⁷⁶ The reports of the meetings can be found in WTO documents MTN.GNS/FIN 1 to 4.

¹⁷⁷ Working Group on Financial Service Including Insurance, *Note on the Meeting of 11-13 June 1990*, ¶ 78, MTN.GNS/FIN/1 (July 5, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92100236.pdf.

¹⁷⁸ *Id.* at ¶ 95.

¹⁷⁹ See DELIMATIS & HERGER, *supra* note 175, at 280 (citing Working Group on Financial Service Including Insurance, *Communication from the European Communities*, MTN.GNS/FIN/W/1 (July 10, 1990); Working Group on Financial Service Including Insurance, *Communication from the United States*, MTN.GNS/FIN/W/2, (July 12, 1990); Working Group on Financial Service Including Insurance, *Communication of the Delegation of Malaysia*, MTN.GNS/FIN/W/3 (Sept. 12, 1990)).

manner which would constitute a means of *arbitrary* or *unjustifiable discrimination*.”¹⁸⁰

The proposal from the United States was also circulated before the second meeting which called for “a provision which permits a Party to take *reasonable* actions *necessary* for *prudential* reasons, for the protection of investors and depositors, or for the protection of persons to whom a fiduciary duty is owed by a financial service provider.”¹⁸¹ Additionally, United States had introduced an informal paper titled “Provisions regarding financial services” according to which “all of the proposed provisions were subject to article 9 that stated that nothing in this agreement shall prevent a party from taking *reasonable* actions *necessary* for prudential reasons.”¹⁸² During the second meeting the representative of the United States stated that “[r]easons other than prudential ones . . . most often represent the kind of reasons that the agreement would seek to curtail.”¹⁸³ With respect to proposed article 9, which included the words “reasonable” and “necessary,” Switzerland expressed that it “might require further specification to increase its juridical clarity.”¹⁸⁴

The proposal from Malaysia, submitted before the third meeting, had a section titled “Domestic regulation (prudential regulation).”¹⁸⁵ Under this section the prudential carve-out clause

¹⁸⁰ Working Group on Financial Service Including Insurance, *Communication from the European Communities*, art. 13.1, MTN.GNS/FIN/W/1 (July 10, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92100245.pdf (emphasis added).

¹⁸¹ Working Group on Financial Service Including Insurance, *Communication from the United States*, p. 2, MTN.GNS/FIN/W/2, (July 12, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92100258.pdf (emphasis added).

¹⁸² Working Group on Financial Service Including Insurance, *Note on the Meeting of 12-13 July 1990*, ¶ 46, MTN/GNS/FIN/2 (Aug. 10, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92110082.pdf (emphasis added) [hereinafter *Second Meeting*] (The informal paper could not be located.).

¹⁸³ *Second Meeting*, *supra* note 182, ¶ 37.

¹⁸⁴ *Second Meeting*, *supra* note 182, ¶ 56.

¹⁸⁵ Working Group on Financial Service Including Insurance, *Communication of the Delegation of Malaysia*, p.6, MTN.GNS/FIN/W/3 (Sept. 12, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92110111.pdf [hereinafter *Communication from Malaysia*] (Malaysian proposal was made on behalf

would have the broadest scope of the three formal propositions at the time:

Compliance of the MFTS [Multilateral Framework on Trade in Services] and sectoral annotations on financial services should not impinge on a supervisory authority's right to: (a) Exercise *adequate* and *proper* supervision over the foreign financial institutions operating in its country; (b) Implement rules and regulations to ensure that foreign financial institutions maintain *sound* and *prudent* practices and policies; (c) Take *necessary* action for the *protection* of depositors and investors; and (d) Allow flexibility to governments to impose measures for maintenance of *stability in the financial system*.¹⁸⁶

During the third meeting of the Working Group, when discussing this proposal, the representative of Japan stated that the concept of prudential measures might differ from country to country.¹⁸⁷

After these three meetings and three proposals, the Chairman of the Ad Hoc Working Group to the Group of Negotiations on Services proposed the following change:

The "measures" referred to in Article XIV:1 [General Exceptions] of the Agreement shall include *reasonable* measures taken for *prudential* reasons to assure the protection of investors, depositors, policyholders or persons to whom a fiduciary duty is owed by a

South East Asian Central Banks [SEACEN] Countries of Indonesia, Malaysia, Thailand, Nepal, Sri Lanka, Korea, the Philippines, Singapore and Myanmar.).

¹⁸⁶ *Id.* at 6-7.

¹⁸⁷ Working Group on Financial Service Including Insurance, *Note on the Meeting of 13-15 September 1990*, ¶ 22, MTN/GNS/FIN/3 (Oct. 16, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92110180.pdf [hereinafter *Third Meeting*].

financial service provider, or to ensure the integrity and stability of a party's financial system.¹⁸⁸

By the end of 1990 at the Ministerial Conference held in Brussels, two versions of an annex on financial services were proposed.¹⁸⁹ The prudential carve-out clause of the version submitted by Canada, Japan, Sweden and Switzerland was identical to the Ad Hoc Working Groups Chairman's proposal quoted above.¹⁹⁰ The second proposal made on behalf of the SEACEN Countries contained similar language with two key differences with respect to the prudential carve-out clause: first, the word "reasonable" was omitted, and second, measures for prudential reasons were not subject to the dispute settlement.¹⁹¹

The negotiations work on the future Annex on Financial Services continued through 1991 under the auspices of the Group of Negotiations in Services.¹⁹² Canada, Japan, Sweden, and Switzerland presented an addendum to their proposal at the Ministerial Conference in Brussels which added:

[M]easures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable (a) *restriction* on the provision of financial services by financial service providers of another Party or (b) *discrimination* between domestic and foreign financial service providers or between countries.¹⁹³

¹⁸⁸ *Report by the Chairman of the Sectoral Ad Hoc Working Group to the GNS*, p. 10, MTN.GNS/W/110 (Nov. 6, 1990) [emphasis added], available at https://www.wto.org/gatt_docs/English/SULPDF/92110245.pdf.

¹⁸⁹ DELIMATIS & HERGER, *supra* note 175, at 281 [footnote omitted].

¹⁹⁰ See Trade Negotiations Committee, *Communication from Canada, Japan, Sweden and Switzerland*, MTN.TNC/W/50 (Dec. 2, 1990), https://www.wto.org/gatt_docs/English/SULPDF/92120056.pdf.

¹⁹¹ See Trade Negotiations Committee, *Communication from Malaysia*, p. 2, MTN.TNC/W/52 (Dec. 4, 1990), <https://docs.wto.org/gattdocs/q/.%5CUR%5CTNC%5CW52>.

¹⁹² DELIMATIS & HERGER, *supra* note 175, at 282.

¹⁹³ Trade Negotiations Committee, *Communication from Canada, Japan, Sweden and Switzerland*, p. 4, MTN/TNC/W/50/Add.2 (Oct. 15, 1991),

Based on these submitted proposals, negotiations led to the current text of the prudential carve-out clause.¹⁹⁴

Comparison of the negotiated and final versions of the text and comments made by the negotiators provides guidance for the interpretation of the clause. First, the negotiators considered the option for defining or listing all prudential actions which would be permitted, but did not. Instead the clause is written in terms of prudential reasons; thus, leaving greater deference to the Country-Members in implementing measures. This confirms the finding in the Panel Report that the reasons must be prudential and not the measures.

Second, the comparison of the latest two formal proposals shows that there was likely a compromise among countries whose positions were to have: a “reasonable” measures requirement, exclude from the exception particular ways in which measures could be applied—which is most similar to the second sentence of the current text, and to make the prudential carve-out clause subject to the WTO dispute settlement process.

However, none of these observations speak directly as to what “prudential” means. There was one comment that may help understanding what “prudential” reasons are: “Reasons other than prudential ones . . . most often represent the kind of reasons that the agreement would seek to curtail.”¹⁹⁵ Also, negotiators did not consider using the word “safeguard” which is the more common word used throughout the WTO Agreements used for identifying “preventative” measures.

B. Second Sentence of the Prudential Carve-out Clause

If the measure falls within the scope of the Annex, the Country-Member identifies a reason that is prudential, and the

<https://docs.wto.org/gattdocs/q/.%5CUR%5CTNC%5CW50A2.PDF> [emphasis added].

¹⁹⁴ See generally DELIMATSI & HERGER, *supra* note 175, at 282 (“Formal records contain very little – if any – information about the negotiations that followed these submissions.”).

¹⁹⁵ *Second Meeting*, *supra* note 182, ¶ 37.

measure was implemented “for” that reason, as analyzed by the panel report, can anything else hinder the application of the prudential exception provision? The answer “No” would render the second sentence of the provision meaningless; thus, the answer is necessarily “Yes, because of the second sentence of the provision.” Basically, the second sentence would disqualify an otherwise qualified exception. The Panel Report did not attempt to interpret the second sentence of the clause which states: “Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement.”¹⁹⁶ The first part of the sentence necessarily presumes that there may be measures for prudential reasons conforming to the agreement, which may be permitted to be used as means of avoiding the Member’s commitments. The second part’s “means of avoiding” is what future WTO panels or the Appellate Body may need to interpret.

Recall that a proposal of a provision with a sentence similar to the final text appeared as:

[M]easures shall not be applied in a manner which would constitute a *means of arbitrary or unjustifiable (a) restriction* on the provision of financial services by financial service providers of another Party or (b) *discrimination* between domestic and foreign financial service providers or between countries.¹⁹⁷

If a panel finds that “means of avoiding” requires determining the intentions of a Member in order to weed out disguised discriminatory measures, then such intent may be discerned from the objective structure of the regulatory measure.¹⁹⁸

¹⁹⁶ GATS, *supra* note 9, *Annex on Financial Services*, § 2.a.

¹⁹⁷ See *Communication from Canada, Japan, Sweden and Switzerland*, *supra* note 193; see also discussion *supra* Part IV.A.5.

¹⁹⁸ See, e.g., *Japan – Alcoholic Beverages II*, *supra* note 117.

VI. CONCLUSION

In summary, to answer the question of what is and what is not a prudential reason, generally a fact intensive multi-layered inquiry is required. Dictionary definitions are vague and do not provide any definitions for “prudential” that are any more helpful than if the drafters would write “measures for *good* reasons.” Context of the clause is very helpful in providing two main categories of reasons that are prudential: (1) “protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier”, and (2) “to ensure the integrity and stability of the financial system.”¹⁹⁹ Further, context of the entire GATS Agreement shows that a “prudential” reason cannot be: “any” reason, because that would render the word “prudential” meaningless; merely “preventative” or “precautionary” reason, because all and any reasons either prevent or are precautionary against some event; and any of the reasons that have specific exemption provisions in the GATS, because that would render those exemption provisions meaningless. Moreover, negotiators did not consider using the term “safeguarding reasons,” utilizing the commonly used word “safeguard” to convey something “preventative” or “precautionary” as used throughout various WTO agreements; thus, another reason to conclude that “prudential” does not mean “preventative” or “precautionary.”

Two main objects and purposes of WTO agreements related to this provision are: recognition of national policy objectives and progressive liberalization of international trade. If a reason for a measure does not go against the objective of liberalized trade in services or goods, then the remaining object and purpose to be considered is the national policy objective, providing broader discretion to the implementing Country-Member.

The current interpretation of the prudential carve-out clause in the Panel Report gives more discretion to Country-Members, as some have anticipated, by finding that reasons and not measures must be prudential. However, such discretion is not unqualified even under the current interpretation. If the “reasonableness” requirement

¹⁹⁹ See GATS, *supra* note 9, Annex on Financial Services, § 2.

was negotiated away during the Uruguay Round, and in return the clause was made subject to the WTO dispute settlement process, ironically, “rationality” made its way back into the text through panel’s interpretation of the word “for” when it was left to, as critics would say, the “runaway jurists.”

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**ADDRESSING THE PROBLEM OF
IMPLEMENTING THE HAGUE
ABDUCTION CONVENTION ON THE
CIVIL ASPECTS OF INTERNATIONAL
CHILD ABDUCTION BETWEEN THE U.S.
AND MEXICO**

Breanna Atwood

I. INTRODUCTION

In August 2007, seventeen-month-old¹ Andrew was abducted to Mexico from his hometown of Milwaukee, Wisconsin.² At the time of his abduction, Andrew's parents were involved in divorce proceedings and had a temporary custody agreement granting

¹ Sources differ as to whether Andrew was seventeen or nineteen months old at the time of his abduction. *Compare* Trevor Richardson, *My Journey Continues* (Mar. 1, 2008), http://mexicoabduction.blogspot.com/2008_03_01_archive.html (Trevor's blog stating that Andrew was seventeen months old at the time of his abduction), *with* Trevor Richardson, *Bring Andrew Home-Int'l Child Abduction to Mexico*, YOUTUBE (Sep. 7, 2010) [hereinafter *Bring Andrew Home*], https://www.youtube.com/watch?v=BL_SJ1CVOdM (A news segment posted on Trevor's YouTube channel stating that Andrew was nineteen months old).

² *Felony Warrant For Mother Who Abducted Her Child, Andrew Richardson, In The Summer Of 2007*, MISSING & UNIDENTIFIED PEOPLE: LETS FIND THEM (Nov. 27, 2012), <http://letsfindthem.wordpress.com/2012/11/27/unsolved-felony-warrant-for-mother-who-abduction-her-child-andrew-richardson-in-the-summer-of-2007/>.

Andrew's father, Trevor, visitation.³ When Trevor arrived at Andrew's daycare to pick him up, he was informed that his son had not shown up for a week.⁴ Andrew was soon found in Querétaro, Mexico, living with his mother, Mariana,⁵ a Mexican national.⁶ Mariana was charged in the U.S. with two felonies for abduction,⁷ and Trevor was granted sole legal custody of Andrew.⁸ Upon arriving in Mexico, however, Mariana had told authorities that she fled the U.S. because Trevor was abusive to her and Andrew.⁹ Although the U.S. determined these allegations were false,¹⁰ Trevor remains unable to secure the return of his son to the U.S. in accordance with his custody rights.¹¹

Sadly, Andrew and Trevor's story is not uncommon. Each year, more than one thousand international parental child abductions from the U.S. to other countries are reported.¹² Since 2006, Congress has reported that this number has "increased substantially,"¹³ since advancements in international transportation and communication have resulted in an increase in travel and immigration.¹⁴ In fact, it is estimated that more than 11,000 American children¹⁵ currently live

³ Trevor Richardson, *History*, BRING ANDREW HOME, http://www.bringandrewhome.com/andrew_feb_7_002.htm (last visited Jan. 25, 2014).

⁴ *Id.*

⁵ *Id.*

⁶ *Bring Andrew Home*, *supra* note 1.

⁷ *Id.*

⁸ *My Journey Continues*, *supra* note 1.

⁹ *Bring Andrew Home*, *supra* note 1.

¹⁰ *Id.*

¹¹ *My Journey Continues*, *supra* note 1.

¹² H.R. 3212, 113th Cong. (1st Sess. 2013), *available at* <http://beta.congress.gov/bill/113th/house-bill/3212/text>.

¹³ H.R. 1951, 113th Cong. (1st Sess. 2013), *available at* <http://beta.congress.gov/bill/113th/house-bill/1951/text>; *see also* H.R. 3240, 111th Cong. (1st Sess. 2009), *available at* <http://thomas.loc.gov/cgi-bin/query/F?c111:1:./temp/~c111TqDdHb:e1569>: (stating that the number of international parental child abductions increased by sixty percent from 2006 to 2008, and by forty percent in 2008 alone).

¹⁴ Priscilla Steward, *Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of Int'l Child Abduction*, 21 FORDHAM INT'L L.J. 308, 315 (1997).

abroad as a result of international parental child abduction.¹⁶ Statistically, only half of these children will be returned to the U.S.¹⁷

International parental child abduction frequently causes severe psychological and emotional damage to both the child and left-behind parent.¹⁸ Often, the child is taken from a stable, healthy environment, and relocated to an unfamiliar environment in which he or she must meet new people, learn a new language, and understand and assimilate into a different culture.¹⁹ Worse still, taking parents sometimes force their children to alter their appearance or change their name,²⁰ and may tell their children the left-behind parent is dead, does not want them, or is not trying to get them back.²¹ Abducted children often experience “anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, and fearfulness,” and these problems may persist through adulthood.²²

¹⁵ Another source estimated that there are more than 200,000 cases of international child abduction per year, which would significantly increase the number of American children who are believed to be living abroad as a result of international parental child abduction. *A Parent's Worst Nightmare: The Heartbreak of Int'l Child Abduction: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 110 (2004) (statement of the Hon. Dennis DeConcini, Chairman of the Board, National Center for Missing & Exploited Children), available at http://commdocs.house.gov/committees/intlrel/hfa94505.000/hfa94505_of.htm.

¹⁶ Michael Walsh & Susan Savard, *Int'l Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 29 (2006).

¹⁷ H.R. 3212, *supra* note 12.

¹⁸ U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int'l Child Abduction* 10 (Apr. 2010) [hereinafter *2010 Compliance Report*], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2010ComplianceReport.pdf>.

¹⁹ Caitlin Bannon, *The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Mechanisms to Address Noncompliance*, 31 B.C. THIRD WORLD L.J. 129, 134 (2011).

²⁰ U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int'l Child Abduction* 7 (Apr. 2009) [hereinafter *2009 Compliance Report*], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2009HagueAbductionConventionComplianceReport.pdf>.

²¹ *Id.*

Similarly, left-behind parents frequently experience psychological, emotional, and financial problems while attempting to secure the return of their children.²³ Left-behind parents often feel “helplessness and the sense they do not know where to start in the process of recovering their child.”²⁴ A lack of financial resources exacerbates these emotions, since the left-behind parent may be restricted in traveling abroad, retaining an attorney, hiring translators and interpreters, and proceeding with the case.²⁵

The Hague Convention on the Civil Aspects of International Child Abduction (the “Hague Convention” or the “Convention”) was enacted to ensure that victims of international parental child abduction are returned to their custodial parent.²⁶ The text of the Convention, however, does not set forth standards or procedures to implement the Convention.²⁷ Consequently, many countries have failed to comply because of internal difficulties with enforcement.²⁸

This comment will examine the problem of noncompliance, with a focus on children abducted between the U.S. and Mexico. Part II provides a general overview of the Convention and examines its objectives and operation between contracting states. Part III assesses the problems of the Convention, particularly its lack of an enforcement mechanism. Part IV describes the differences between the U.S. and Mexico’s legal systems, with an emphasis on custody rights. Part V explains the history of the Convention in the U.S. and Mexico, focuses on each country’s compliance efforts, and provides an overview of recent compliance efforts in Latin America. Finally, Part VI explores potential solutions for addressing noncompliance, including creating Hague Convention courts and providing adequate resources to left-behind parents and Central Authorities.

²² *Id.*

²³ 2010 Compliance Report, *supra* note 18, at 11.

²⁴ 2009 Compliance Report, *supra* note 20, at 7.

²⁵ *Id.*

²⁶ The Convention on the Civil Aspects of Int’l Child Abduction, *opened for signature* Oct. 25, 1980, 1343 U.N.T.S. 98 [hereinafter Abduction Convention], *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

²⁷ Elisa Perez-Vera, Hague Conf. on Private Int’l Law, Explanatory Report 430 (1981) [hereinafter Perez-Vera Report], *available at* <http://www.hcch.net/upload/expl28.pdf>.

²⁸ Bannon, *supra* note 19, at 153.

II. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

On October 24, 1980, twenty-nine Member States of the Hague Conference unanimously adopted the Convention, which was signed the following day.²⁹ Currently, more than eighty countries are party to the Convention, including the U.S. and Mexico.³⁰ The Convention's primary goal is for countries to work together to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of habitual residence"³¹.³² The Convention also seeks to ensure that rights of custody and access are returned to the "status quo" that existed before the child was abducted.³³ Finally, the Convention seeks to deter abducting parents from engaging in international forum shopping to find a country in which they believe they can obtain a favorable custody agreement.³⁴

A. Objectives of the Hague Convention

The Hague Convention states two primary objectives:³⁵ (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State,"³⁶ and (2) "to ensure that rights of

²⁹ Perez-Vera Report, *supra* note 27, at 426.

³⁰ *Members of the Organisation*, HAGUE CONF. ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24 (last visited Jan. 26, 2014), *now available at* http://www.hcch.net/index_en.php?act=states.listing.

³¹ Neither the Hague Convention nor ICARA define a child's state of habitual residence. In *Abbott*, however, the Supreme Court explained that a child's state of habitual residence is "fixed by the custody arrangement," so the child should be returned to the country of his or her custodial parent. *Abbott v. Abbott*, 560 U.S. 1, 33 (2010).

³² Abduction Convention, *supra* note 26, at Preamble.

³³ Perez-Vera Report, *supra* note 27, at 429.

³⁴ *Id.*; Walsh & Savard, *supra* note 16, at 30.

³⁵ Both of the Convention's objectives assume that the return of the child to the state of habitual residence is in his or her best interest. Although the Convention does not explicitly refer to the child's best interest, contracting states consider them to be of utmost importance when determining custody and access rights. Perez-Vera Report, *supra* note 27, at 431.

custody and access under the law of one Contracting State are effectively represented in the other Contracting States.”³⁷ A taking parent’s duty to return a child is triggered only when the child’s removal or retention is deemed wrongful under the Convention.³⁸ Removal or retention is considered wrongful where it is (1) in breach of custody rights in the state in which the child was habitually resident immediately prior to his or her removal or retention, and (2) when the left-behind parent was actually exercising those custody rights at the time of the removal or retention.³⁹

The Convention defines custody rights as “relating to the care of . . . the child and, in particular, the right to determine the child’s place of residence.”⁴⁰ Custody rights differ from access rights, which are the “rights to take a child for a limited period of time to a place other than the child’s habitual residence.”⁴¹ Custody rights may arise by law, or by a judicial or administrative decision or agreement that has legal effect under the law of the child’s state of habitual residence.⁴²

B. The Role of the Central Authority

To execute the mandates of the Hague Convention, contracting states are required to assign a Central Authority.⁴³ The primary role of the Central Authority is to return abducted children by encouraging cooperation between officials in each state and among other contracting states.⁴⁴ In addition, Central Authorities must assist in locating the child, attempt to facilitate a voluntary return of the child, and, if necessary, initiate legal proceedings for the

³⁶ A contracting state is “any country which is a party to the Convention.” 22 C.F.R. § 94.1 (2013).

³⁷ Abduction Convention, *supra* note 26, at art. 1.

³⁸ Perez-Vera Report, *supra* note 27, at 444.

³⁹ Abduction Convention, *supra* note 26, at art. 3.

⁴⁰ *Id.* at art. 5(a).

⁴¹ *Id.* at art. 5(b).

⁴² *Id.* at art. 3.

⁴³ *Id.* at art. 6.

⁴⁴ Abduction Convention, *supra* note 26, at art. 7.

child's return.⁴⁵ In the U.S., the designated Central Authority is the Office of Children's Issues within the U.S. Department of State.⁴⁶ In Mexico, the Central Authority is the Secretaría de Relaciones Exteriores.⁴⁷

C. Filing a Hague Convention Application

For assistance in returning an abducted child, left-behind parents who believe their child has been wrongfully removed or retained must apply to a Central Authority.⁴⁸ The Central Authority then must act "without delay" to transmit the application to its pertinent counterpart Central Authority,⁴⁹ which must "take[] all appropriate measures" to locate the child and secure his or her prompt return.⁵⁰

A left-behind parent must satisfy three threshold requirements before filing a valid Hague Convention application. First, the child's country of habitual residence and country of abduction must both be signatories to the Convention.⁵¹ Second, the child must have been removed from the state of habitual residence in breach of custody or access rights authorized in that state.⁵² Third, the child must be younger than sixteen years of age.⁵³ Even if the child is abducted or an application for the child's return is initiated

⁴⁵ *Id.*; *Outline: Hague Child Abduction Convention*, HAGUE CONF. ON PRIVATE INT'L LAW (July 2012), <http://www.hcch.net/upload/outline28e.pdf>.

⁴⁶ *Authorities*, HAGUE CONF. ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=authorities.details&aid=133 (last visited Jan. 26, 2014).

⁴⁷ *Int'l Parental Child Abduction*, U.S. DEP'T OF STATE, <http://travel.state.gov/content/childabduction/english/country/mexico.html> (last visited Jan. 26, 2014).

⁴⁸ Abduction Convention, *supra* note 26, at art. 8; Perez-Vera Report, *supra* note 27, at 455 (stating that the applicant may apply to whichever Central Authority it deems most appropriate).

⁴⁹ Abduction Convention, *supra* note 26, at art. 9.

⁵⁰ *Id.* at art. 10.

⁵¹ *Id.* at art. 35.

⁵² *Id.* at art. 3.

⁵³ *Id.* at art. 4.

before the child turns sixteen years old, the Convention ceases to apply as soon as the child reaches this age.⁵⁴

If all three requirements are satisfied and the child is successfully located, the appropriate Central Authority must assist the left-behind parent to initiate court proceedings in the country in which the child is located.⁵⁵ In these proceedings, the court should not consider the merits of the underlying custody dispute.⁵⁶ Instead, the court's sole focus is to determine whether the child was wrongfully removed according to custody rights in the child's state of habitual residence and to return those children it determines to have been wrongfully removed.⁵⁷ If the parents desire to modify their custody agreement, they must contact the appropriate authorities in the child's state of habitual residence once the child has been returned.⁵⁸

D. Defenses to the Hague Convention

To protect the child's best interests, the Hague Convention does not require the prompt return of abducted children under five circumstances.⁵⁹ First, there is no obligation to return a child if more than one year has elapsed from when the child was wrongfully removed or retained to when the left-behind parent made a request for the child's return, as long as the child has settled in to his or her new environment.⁶⁰ Second, there is no duty to return a child if the parent with custodial rights was not exercising those rights at the time of the child's removal or retention.⁶¹ Third, if the left-behind parent consented or acquiesced in the child's removal or retention, the

⁵⁴ Abduction Convention, *supra* note 26, at art. 4.

⁵⁵ Perez-Vera Report, *supra* note 27, at 455.

⁵⁶ Abduction Convention, *supra* note 26, at art. 16-19.

⁵⁷ Perez-Vera Report, *supra* note 27, at 429.

⁵⁸ *Id.* at 430.

⁵⁹ The first three defenses listed must be proved by a preponderance of the evidence, and the last two must be proved by clear and convincing evidence. *Nat'l Report Int'l Child Custody*, U.S. DEP'T OF STATE, http://travel.state.gov/content/dam/childabduction/International_Child_Abduction_Remedies_Act.pdf (last visited Sept. 14, 2015).

⁶⁰ Abduction Convention, *supra* note 26, at art. 12.

⁶¹ *Id.* at art. 13(a).

taking parent is not required to return the child.⁶² Fourth, there is no obligation to return a child if the abducting country determines that doing so would pose a “grave risk” or place the child in an otherwise “intolerable situation.”⁶³ Finally, a taking parent is not required to return a child if doing so would go against the requesting state’s fundamental principles relating to the protection of human rights and fundamental freedoms.⁶⁴

III. PROBLEMS OF THE HAGUE CONVENTION

Prior to the Hague Convention, a left-behind parent would have little to no legal remedy to ensure his or her child’s rightful return.⁶⁵ The Department of State could not enforce an American custody agreement outside of the U.S.,⁶⁶ since custody rights authorized in the U.S. could not be enforced in other countries.⁶⁷ In addition, courts in the U.S. were reluctant to enforce a left-behind parent’s custody rights, since the abducted child was no longer located within the U.S.⁶⁸

The Convention has not achieved its laudable goals. The Convention was designed to ensure that wrongfully removed children would be returned in accordance with custody rights ordered in the child’s state of habitual residence (and effectively return the situation

⁶² *Id.*

⁶³ *Id.* at art. 13(b).

⁶⁴ *Id.* at art. 20.

⁶⁵ Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in Int’l Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3325, 3332-33 (2009); *see also* Susan Mackie, *Procedural Problems in the Adjudication of Int’l Parental child Abduction Cases*, 10 *TEMP. INT’L & COMP. L.J.* 445, 448 (1996) (stating that before the Convention, taking parents would obtain a favorable custody agreement in the abducting country, precluding the left-behind parent from establishing his or her custody rights).

⁶⁶ *Int’l Child Abduction*, U.S. DEP’T OF STATE (Jan. 1995), *available at* <http://dosfan.lib.uic.edu/ERC/population/children/9501.html>.

⁶⁷ Vivatvaraphol, *supra* note 65, at 3332.

⁶⁸ *Id.*

to the “status quo”⁶⁹); however, the Convention is not performing as it was originally intended.⁷⁰

The Convention’s primary issue is that its text does not contain an enforcement mechanism for “ensuring that Contracting States fulfill their obligations or for dealing with those Contracting States that fail to do so.”⁷¹ As a result, enforcement of the Convention hinges solely on the cooperation and willingness of contracting states.⁷² If contracting states do not comply, there are no consequences or repercussions.⁷³ Left-behind parents report that even when their children are abducted to countries that are signatories to the Convention, most of these countries “routinely reject the responsibility that comes with participation in [the Convention]” and the U.S. “fail[s] to respond to their pleas for help.”⁷⁴

As a result of the lack of an enforcement mechanism, numerous parties to the Convention are considered noncompliant.⁷⁵ The International Child Abduction Remedies Act (ICARA),⁷⁶ enacted in the U.S. to enforce the Convention, requires the Department of State to release an annual compliance report.⁷⁷ Reports include detailed country-by-country international child abduction statistics, summaries of unresolved cases, address issues contracting states are having with compliance, and describe efforts to encourage parties to the Convention to use nongovernmental organizations to assist left-behind parents seeking the return of their children.⁷⁸ Compliance

⁶⁹ Perez-Vera Report, *supra* note 27, at 429.

⁷⁰ Bannon, *supra* note 19, at 153.

⁷¹ *Id.*

⁷² *Id.* (quoting Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on Int’l Child Abduction* 242 (P.B. Carter ed., 1999)).

⁷³ *Id.*

⁷⁴ H.R. Con. Res. 293, 106th Cong. (2000).

⁷⁵ Bannon, *supra* note 19, at 153.

⁷⁶ *See* discussion *infra*, at Part V.B.

⁷⁷ 42 U.S.C. § 11611(a) (1988).

⁷⁸ *Id.*

reports also list all countries the Department of State determines are having difficulties enforcing the Convention.⁷⁹

When evaluating a contracting state's compliance, the Department of State evaluates three areas: Central Authority performance, judicial performance, and law enforcement performance.⁸⁰ First, the Department of State evaluates how quickly a country's Central Authority processes Convention applications, its willingness to help left-behind parents find competent legal assistance, and its responsiveness to inquiries made by the U.S. Central Authority (USCA) and left-behind parents.⁸¹ Next, the Department evaluates judicial performance, including how quickly the country's courts process Convention applications and appeals, whether the courts correctly apply the Convention's legal procedures, and how effective courts are in enforcing decisions.⁸² Finally, the Department reviews law enforcement performance by examining whether law enforcement officials are successful in expeditiously locating abducted children and taking parents, and enforcing court orders issued under the Convention.⁸³

Based on contracting states' performance, they may be labeled by the Department of State as either "Countries Not Compliant with the Convention" or "Countries Demonstrating Patterns of Noncompliance with the Convention."⁸⁴ A "Country Not Compliant with the Convention" designation signals the country is not competent in all performance areas.⁸⁵ A "Country Demonstrating Patterns of Noncompliance" designation indicates the country is not competent in one or two of the three performance

⁷⁹ *Id.*

⁸⁰ 2009 *Compliance Report*, *supra* note 20, at 6.

⁸¹ *Id.* at 12.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ U.S. Dep't of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int'l Child Abduction* 6 (Apr. 2008) [hereinafter *2008 Compliance Report*], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2008HagueAbductionConventionComplianceReport.pdf>.

⁸⁵ *Id.*

areas.⁸⁶ Mexico has earned both of these designations in recent years.⁸⁷ In addition, a country is considered compliant if it is competent in all three areas, although the Department of State considers even one unresolved case to possibly “reflect broader problems of concern with the country’s compliance.”⁸⁸

IV. DIFFERENCES IN LEGAL SYSTEMS BETWEEN MEXICO AND THE U.S.

Mexico and the U.S. possess different legal systems, and different philosophies regarding custody and parental rights.⁸⁹ In deciding Hague Convention return cases, the law of the child’s state of habitual residence governs the validity of the claim.⁹⁰ This law must be construed broadly to “embrac[e] both written and customary rules of law⁹¹ . . . and the interpretations placed upon them by case-law.”⁹² This has led to misunderstandings in enforcing custody agreements, and makes it difficult for the U.S. and Mexico to uniformly enforce the Hague Convention. Ultimately, this conflict contributes to the Department of State’s determination that Mexico is noncompliant.⁹³

⁸⁶ *Id.*

⁸⁷ See U.S. Dep’t of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int’l Child Abduction* 15 (Apr. 2007) [hereinafter *2007 Compliance Report*], available at http://travel.state.gov/content/dam/childabduction/complianceReports/2007child_abduction_Compliance_Report.pdf; *2008 Compliance Report*, *supra* note 83, at 16; *2009 Compliance Report*, *supra* note 20, at 21; *2010 Compliance Report*, *supra* note 18, at 22.

⁸⁸ *2010 Compliance Report*, *supra* note 18, at 15.

⁸⁹ Mexico’s legal system derives from civil law, so judges look primarily at the Code when deciding legal issues. The U.S.’ legal system derives from common law, so judges decide legal issues based on statutes and precedent. Antoinette Sedillo Lopez, *U.S./Mexico Cross-Border Child Abduction – the Need for Cooperation*, 29 N.M. L. REV. 289, 294 (1999).

⁹⁰ Perez-Vera Report, *supra* note 27, at 445.

⁹¹ An example of a customary rule of law is the concept of patria potestas in Mexico. See discussion *infra*, at Part IV.A.

⁹² Perez-Vera Report, *supra* note 27, at 445.

⁹³ *2010 Compliance Report*, *supra* note 18, at 22.

A. Custody Rights in Mexico

In Mexico, the concept of *patria potestad*,⁹⁴ translated to parental authority, is applied to the legal relationship between children and their parents.⁹⁵ Exercising parental authority involves a duty of care and custody to the minor child.⁹⁶ As Mexican courts apply this concept, custody of a child involves special care, attention, and love.⁹⁷ Further, “[c]ustody cannot be understood separately from the physical supervision of the children, because that connection is a means to protect them, raise them . . . and provide for them.”⁹⁸ Parental authority is distinct from the physical custody of a child or an arrangement of visitation rights, however, because parental authority is inherent in the relationship between children and their parents.⁹⁹

Historically, parental authority referred to paternal power, so “a father had a near absolute right to his children, whom he viewed as chattel.”¹⁰⁰ This natural right was viewed as so strong that courts were virtually “powerless” to interfere.¹⁰¹ Over time, however, Mexican courts began to subordinate the concept of parental authority to the best interests of the child.¹⁰²

Today, parental authority in Mexico is largely governed by the Civil Code,¹⁰³ and “has evolved from an *absolute* power into a *legal* power.”¹⁰⁴ Parental authority has slowly transformed into a joint

⁹⁴ “Patria potestad” is Spanish for “parental authority.” Patricia Begné, *Symposium on Comparative Custody Law: North American Parental Authority and Child Custody in Mexico*, 39 FAM. L.Q. 527, 527 (2005).

⁹⁵ *Id.*

⁹⁶ *Id.* at 533.

⁹⁷ *Id.* at 534.

⁹⁸ *Id.*

⁹⁹ Whallon v. Lynn, 230 F.3d 450, 453 (1st Cir. 2000).

¹⁰⁰ Kathryn Mercer, *A Content Analysis of Judicial Decision-Making – How Judges use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 14 (1998).

¹⁰¹ *Id.*

¹⁰² *Id.* at 16.

¹⁰³ JOSÉ ANTONIO MÁRQUEZ GONZÁLEZ, FAMILY LAW IN MEXICO 80 (Kluwer Law Int’l 2011).

¹⁰⁴ Begné, *supra* note 94, at 528.

responsibility between the father and mother.¹⁰⁵ In divorce cases, both parents continue to exercise parental authority over the child,¹⁰⁶ unless this authority is legally terminated.¹⁰⁷ Since Mexican family law courts are instructed to consider the best interests of the child in deciding custody arrangements,¹⁰⁸ children are commonly placed with their mothers following a divorce.¹⁰⁹ Only one to five of every one hundred fathers are awarded custody of their children.¹¹⁰ In fact, mothers are automatically awarded custody of children under age seven (and sometimes up to age twelve, depending on the state), unless the father proves that the mother poses a significant danger to the child's development.¹¹¹

B. Custody Rights in the U.S.

Similar to Mexico, the U.S. historically awarded custody rights to fathers, since children were considered the father's property.¹¹² In the eighteenth and nineteenth centuries, states increasingly awarded custody based on the best interests of the child.¹¹³ As a result, mothers were often awarded custody of their children, especially in the case of young children.¹¹⁴

Recently, the "maternal presumption" has lessened, and the legislature considers joint custody and uses a primary caretaker standard to determine the child's best interests.¹¹⁵ Joint custody assumes that allowing a child to maintain relationships with both

¹⁰⁵ Sedillo Lopez, *supra* note 89, at 297.

¹⁰⁶ *Id.*

¹⁰⁷ Allison Maxim, *Int'l Parental Child Abduction: Essential Principles of the Hague Convention*, 69 APR BENCH & B. MINN. 18, 20 (Apr. 2012).

¹⁰⁸ Begné, *supra* note 94, at 539.

¹⁰⁹ Sedillo Lopez, *supra* note 89, at 298.

¹¹⁰ Aline Juárez Nieto, *Patria Potestad, Donde la Biología Juega en Contra de los Varones*, CNN MEXICO (July 11, 2012, 3:32 PM), <http://mexico.cnn.com/salud/2012/07/11/patria-potestad-donde-la-biologia-juega-en-contra-de-los-varones>.

¹¹¹ C.C.D.F. art. 282, § VI.

¹¹² Mercer, *supra* note 100, at 16.

¹¹³ *Id.* at 17-18.

¹¹⁴ *Id.* at 26.

¹¹⁵ MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE U.S. 129 (1994).

parents is in the child's best interests.¹¹⁶ The primary caretaker standard presumes that it is in the child's best interest to live with whichever parent has provided continuous care.¹¹⁷ Despite movements toward these new standards, mothers are still awarded custody of their children more frequently than fathers.¹¹⁸ For example, in 2012, only 18.3 percent of custodial parents were fathers.¹¹⁹

V. HISTORY OF THE HAGUE CONVENTION BETWEEN THE U.S. AND MEXICO

Mexico is the most popular destination for children abducted from the U.S., and vice versa.¹²⁰ For example, in 2009, the USCA was involved with 558 cases in which American children were abducted to Mexico.¹²¹ Japan had the second largest number of active cases with thirty-eight.¹²² This phenomenon likely results from Mexico's proximity to, and historical and cultural connections with, the U.S.¹²³ Today, there are roughly 11.7 million individuals living in the U.S. who were born in Mexico, and Mexico-U.S. migration is the largest bi-national migration flow in the world.¹²⁴

¹¹⁶ J. SHOSHANNA EHRLICH, FAMILY LAW FOR PARALEGALS 211 (4th ed. 1008).

¹¹⁷ Mercer, *supra* note 100, at 47.

¹¹⁸ Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2011*, U.S. CENSUS BUREAU (Oct. 2013), available at <http://www.census.gov/prod/2013pubs/p60-246.pdf>.

¹¹⁹ *Id.*

¹²⁰ Sedillo Lopez, *supra* note 89, at 290.

¹²¹ Ernie Allen, President & CEO, Nat'l Ctr. for Missing & Exploited Children, Speech to the Amber Alert S. Border Initiative: Child Abductions: Globally, Nationally and Along the U.S./Mexico Border (Aug. 31, 2009) (transcript available at http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=4108).

¹²² *Id.*

¹²³ Sedillo Lopez, *supra* note 89, at 289.

¹²⁴ Marc R. Rosenblum, William A. Kandel, Clare Ribando Seelke & Ruth Ellen Wasem, *Mexican Migration to the U.S.: Policy and Trends*, CONG. RESEARCH SERV. (June 7, 2012), available at <http://www.fas.org/sgp/crs/row/R42560.pdf>.

A. Mexico's Compliance with the Hague Convention

In recent years, the Department of State has found that Mexico has struggled to fulfill its obligations under the Hague Convention.¹²⁵ For three consecutive years, Mexico was designated as a country exhibiting “patterns of noncompliance” because the Mexican Central Authority (MCA) was ineffective at locating abducted children and taking parents within Mexico.¹²⁶ For example, in 2009, there were forty-seven cases of children abducted from the U.S. to Mexico, and the children were only located in thirteen of these cases.¹²⁷

In 2010, Mexico was labeled as “not compliant.”¹²⁸ The USCA reported it “experienced serious difficulties” working with the MCA, causing left-behind parents to endure “costly inconvenience” and “significant delays” in processing return applications.¹²⁹ For example, the USCA requested the MCA’s assistance in locating children involved in thirty-eight unresolved cases that had been pending for more than eighteen months, but the MCA failed to locate them “[i]n many of the cases.”¹³⁰

Three factors contribute to Mexico’s difficulties enforcing the Hague Convention. First, Mexico has not enacted legislation, like ICARA in the U.S., to effectively implement the Convention.¹³¹ Instead, this responsibility is reserved to the states.¹³² As a result, Congress unanimously adopted a resolution urging Mexico and other noncompliant countries “to ensure their compliance with the Hague

¹²⁵ See 2007 *Compliance Report*, *supra* note 87, at 15; 2008 *Compliance Report*, *supra* note 84, at 16; 2009 *Compliance Report*, *supra* note 20, at 21; 2010 *Compliance Report*, *supra* note 18, at 22.

¹²⁶ See 2007 *Compliance Report*, *supra* note 87, at 15; 2008 *Compliance Report*, *supra* note 84, at 16; 2009 *Compliance Report*, *supra* note 20, at 21.

¹²⁷ 2009 *Compliance Report*, *supra* note 20, at 21.

¹²⁸ 2010 *Compliance Report*, *supra* note 18, at 22.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Reyna Aurora Martínez López, *The Experience of Mexico on Int'l Child Abduction* (last visited Feb. 1, 2014), available at <http://www.auswaertiges-amt.de/cae/servlet/contentblob/482364/publicationFile/4325/RedeLopez.pdf>.

¹³² *Id.*

Convention by enacting effective implementing legislation and educating their judicial and law enforcement authorities.”¹³³ Mexico, however, continues to enforce the Convention according to independent state law.¹³⁴

Second, Mexico does not have sufficient resources to locate abducted children and taking parents, or to educate officials and judges about the Convention’s procedures.¹³⁵ For example, some Mexican judges continue to adjudicate cases arising under the Convention based on procedures found in state civil codes¹³⁶ and the merits of the underlying custody dispute, which is inconsistent with the Convention.¹³⁷ Instead, judges are supposed to assume the existing custody agreement from the child’s state of habitual residence is valid, and must return the child based on this agreement.¹³⁸ Recently, Congress encouraged Mexico and other noncompliant countries to “further educate its central authority and local law enforcement authorities regarding the Hague Convention . . . and the need for immediate action when a parent of an abducted child seeks their assistance.”¹³⁹

Third, taking parents may file an “*amparo*,” a special appeal in which the taking parent claims that the government has violated a constitutional right.¹⁴⁰ When an *amparo* is filed, the case is put on hold until a ruling on the *amparo* has been made.¹⁴¹ A ruling on an *amparo* may be appealed multiple times, resulting in costly delays to the left-behind parent.¹⁴²

¹³³ S. Con. Res. 98, 106th Cong. (2000) (enacted).

¹³⁴ Martínez López, *supra* note 131.

¹³⁵ 2010 *Compliance Report*, *supra* note 18, at 22-23.

¹³⁶ *Id.* at 23.

¹³⁷ U.S. Dep’t of State, *Report on Compliance with the Hague Convention on the Civil Aspects of Int’l Child Abduction* 5 (Apr. 2011) [hereinafter 2011 *Compliance Report*], available at <http://travel.state.gov/content/dam/childabduction/complianceReports/2011HagueComplianceReport.pdf>.

¹³⁸ Perez-Vera Report, *supra* note 27, at 430.

¹³⁹ S. Con. Res. 98, 106th Cong. (2000) (enacted).

¹⁴⁰ 2011 *Compliance Report*, *supra* note 137, at 5.

¹⁴¹ *Id.*

¹⁴² 2009 *Compliance Report*, *supra* note 20, at 21.

In an attempt to solve these problems, in 2008, the U.S. Embassy in Mexico City began working with the MCA “to persuade the Mexican branch of Interpol to apply more resources and effort to locate abducted children, and to educate the judiciary in an effort to increase understanding of the Convention.”¹⁴³ Further, the MCA began working with the Agencia Federal de Investigación (AFI) in an effort to more efficiently locate abducted children.¹⁴⁴ Finally, the MCA has also claimed that it has undertaken legislative initiatives to restrict the use of *amparos* in Hague return cases.¹⁴⁵

For the past three years, the Department of State has noted the MCA has made significant improvements in its enforcement of the Convention.¹⁴⁶ Unfortunately, the MCA and Mexican law enforcement continue to experience difficulties locating abducted children because of inadequate staffing and other resources.¹⁴⁷ Mexican courts are also exceptionally slow in processing Hague return applications,¹⁴⁸ and judges continue to adjudicate Hague return cases inconsistently.¹⁴⁹ As a result, the number of unresolved return applications is increasing.¹⁵⁰

B. The U.S.’ Compliance with the Hague Convention

Congress enacted ICARA to give effect to the Hague Convention in the U.S.¹⁵¹ The Act gives the Convention the force of law in the U.S., and imposes consequences, such as contempt, if the Convention is not complied with.¹⁵² ICARA and the Convention

¹⁴³ *Id.*

¹⁴⁴ 2011 Compliance Report, *supra* note 137, at 5.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 2010 Compliance Report, *supra* note 18, at 23.

¹⁴⁸ *Id.* at 22.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ See generally 2011 Compliance Report, *supra* note 137.

¹⁵¹ Formerly 42 U.S.C. § 11601(b)(1) (1988), now 22 U.S.C.A. § 9001 (b)(1) (2015).

¹⁵² Laura McCue, *Left Behind: The Failure of the U.S. to Fight for the Return of Victims of Int’l Child Abduction*, 28 SUFFOLK TRANSNAT’L L. REV. 85, 95 (2004).

serve “to deter international child abduction and to provide a mechanism for the prompt return of abducted children.”¹⁵³

Parts of ICARA, however, hinder operation of the Convention. For example, ICARA grants state and federal courts concurrent jurisdiction over all claims arising under the Convention.¹⁵⁴ It is recommended that Hague Convention return cases be filed in federal court because “[f]ederal judges are considered . . . better equipped to [rule according to the Convention] as opposed to state court judges, who are accustomed to making best interests of the child determinations and who may be more inclined to do so in Hague Convention cases.”¹⁵⁵ Consequently, a left-behind parent may engage in forum-shopping to obtain the most favorable venue to pursue his or her Hague return case, resulting in additional costs and delays.¹⁵⁶

The Department of States’ three most recent compliance reports do not include statistics analyzing the U.S.’ handling of incoming Hague Convention cases.¹⁵⁷ Nonetheless, in 2009, there were 324 newly filed Convention applications involving 454 children that were abducted into the U.S.¹⁵⁸ Of these 454 children, the U.S. only returned 154 of them to their country of habitual residence.¹⁵⁹ 120 of these children were abducted from Mexico, and only fifty-three were returned.¹⁶⁰ Although the U.S. does not evaluate its own

¹⁵³ Judge Veronica Torrez, Cheryl Coleman & Tina Burseson, *The International Abduction of International Children: Conflicts of Laws, Federal Statutes, and Judicial Interpretation of the Hague Convention on the Civil Aspects of International Child Abduction*, 5 WHITTIER J. CHILD & FAM. ADVOC. 7, 30 (2005).

¹⁵⁴ 22 U.S.C.A. § 9001 (b)(4) (2015).

¹⁵⁵ Kilpatrick Townsend, *Litigating Int’l Child Abduction Cases Under the Hague Convention*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN 69 (2012), available at http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf.

¹⁵⁶ Linda Silberman, *Patching Up the Abduction Convention: A Call for a New Int’l Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT’L L.J. 41, 57-58 (2003).

¹⁵⁷ See generally 2009 Compliance Report, *supra* note 20; 2010 Compliance Report, *supra* note 18; 2011 Compliance Report, *supra* note 137.

¹⁵⁸ 2010 Compliance Report, *supra* note 18, at 6.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 15.

performance, these numbers suggest that, despite ICARA, the U.S. also experiences difficulties enforcing the Convention.

C. Latin American Efforts to Promote Compliance with the Hague Convention

In 2004, judges and Central Authorities from seventeen Latin American countries, Spain, and the U.S. met to discuss ways to improve regional operation of the Hague Convention.¹⁶¹ Officials concluded that cooperation with the Convention would require “[r]egular international meetings and contacts among Judges and Central Authorities for the purpose of exchanging information, ideas and good practice.”¹⁶² At follow-up meetings, officials recommended and developed “regional model law of procedure” to “facilitate national implementation of the [Convention].”¹⁶³

In 2011, officials from Latin American countries and organizations, Spain, and the U.S. met “to discuss how to improve, among the countries represented, the operation of the [Convention] . . . and to provide information on the implementation of the [Convention].”¹⁶⁴ The meeting proposed to develop a “practical handbook” to assist judges in Hague proceedings, recommended limiting grounds for appeals to streamline proceedings, and emphasized the importance of communication between Central Authorities and judges.¹⁶⁵ In theory, educating all

¹⁶¹ *The Latin American Judges’ Seminar on the 1980 Hague Convention on the Civil Aspects of Int’l Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW, available at <http://www.hcch.net/upload/monterrey2.pdf> (last visited Feb. 2, 2014).

¹⁶² Officials also made other conclusions and recommendations, including establishing national training programs from judges, central authority, personnel, and attorneys. *Id.*

¹⁶³ *Conclusions and Recommendations of the Inter-American Expert Meeting on Int’l Child Abduction*, HAGUE CONF. ON PRIVATE INT’L LAW (Nov. 10, 2006), available at http://www.hcch.net/upload/concl_iin_e.pdf.

¹⁶⁴ *Mexico Inter-American Meeting*, HAGUE CONF. ON PRIVATE INT’L LAW (Feb. 25, 2011), available at http://www.hcch.net/index_en.php?act=events.details&year=2011&varevent=217.

¹⁶⁵ *Int’l Child Protection Conferences and Seminars*, HAGUE CONF. ON PRIVATE INT’L LAW, available at

judges in every contracting state and encouraging communication between Central Authorities is a viable solution. Streamlining these efforts and providing resources to facilitate the return of children will best serve the Convention's goals.

VI. SOLUTIONS FOR ADDRESSING NONCOMPLIANCE BETWEEN THE U.S. AND MEXICO

Compliance with the Hague Convention is critical for protecting abducted children.¹⁶⁶ The Convention is often considered a “one-way street” for Americans.¹⁶⁷ Left-behind parents from noncompliant countries benefit from the “almost certain” guarantee that children abducted into the U.S. will be returned, while American parents lack these same guarantees.¹⁶⁸ In truth, the U.S. also has a meager track record for returning children. Consequently, the Convention remains an empty promise for many left-behind parents. The U.S. and Mexico (and other contracting states) must ensure that abducted children are promptly returned to their custodial parent.

A. Educating Judges About Hague Return Cases

Despite efforts to educate judges about Hague return cases, these cases are often decided inconsistently within a country and between countries.¹⁶⁹ Judges are told to rule based on a broad interpretation of law, which includes the customary laws of the child's state of habitual residence.¹⁷⁰ Many judges also determine

http://www.hcch.net/upload/newsletter/nl2012tome18e_p25.pdf (last visited Feb. 2, 2014).

¹⁶⁶ 2010 Compliance Report, *supra* note 18, at 10.

¹⁶⁷ Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125, 135 (2000).

¹⁶⁸ *Id.* at 129.

¹⁶⁹ Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1057 (2005).

¹⁷⁰ Perez-Vera Report, *supra* note 26, at 445.

family law issues according to the best interests of the child, but this may be inconsistent with the existing custody agreement.¹⁷¹

Educating each judge in the U.S. and Mexico about the Hague Convention is a daunting task, particularly because many of these judges will never be assigned a Hague return case. Ideally, providing a dedicated group of judges or courts would alleviate the problems associated with an inconsistent judiciary. In the U.S., Congress may use its Article I powers “[t]o constitute tribunals inferior to the Supreme Court.”¹⁷² In Mexico, each state’s Congress has the power to create federal administrative courts.¹⁷³ A court dedicated to Hague return cases would allow judges to become intimately familiar with the Convention and case law from other countries.¹⁷⁴ As a result, Hague Convention return cases would be adjudicated consistently with the objectives of the Convention.

B. Providing Adequate Financial Resources to Left-Behind Parents

The U.S. does not provide adequate resources to left-behind parents. The U.S. made a reservation¹⁷⁵ to Article 26 of the Hague Convention. Although making a reservation to Article 26 has not posed significant problems to other countries, it is a major source of delays in the U.S.¹⁷⁶ The U.S. places the burden of paying for legal proceedings and attorneys solely on the left-behind parent, unless

¹⁷¹ Silberman, *supra* note 168, at 1057.

¹⁷² Two examples of Article I courts are the Court of Appeals for Veterans’ Claims and the Court of Appeals for the Armed Forces. U.S. CONST. art. I, § 8, cl. 9.

¹⁷³ Ana Elena Fierro & Adriana García, *Design Matters: The Case of Mexican Admin. Courts*, CIDE (Dec. 2010), available at <http://www.libreriacide.com/librospdf/DTEJ-48.pdf>.

¹⁷⁴ The International Child Abduction Database (INCADAT) was established in 1999 “to promote mutual understanding, consistent interpretation and thereby the effective operation of the [H] Convention.” INCADAT allows judges (and others) to search for judicial decisions handed down in other countries to examine legal analysis and holdings. INCADAT, <http://www.incadat.com/index.cfm?act=text.text&lng=1> (last visited Feb. 1, 2014).

¹⁷⁵ Article 42 allows countries to make a reservation to Article 26 of the Convention. Abduction Convention, *supra* note 26, at Art. 42.

¹⁷⁶ Mackie, *supra* note 65, at 454-55.

these costs are covered by legal aid or assumed by pro bono attorneys.¹⁷⁷ The legal aid system in the U.S., however, is underfunded,¹⁷⁸ and the availability of pro bono attorneys is decreasing, especially for family law-related claims.¹⁷⁹

The expenses of a Hague Convention return case extend beyond the legal proceedings.¹⁸⁰ Despite the U.S. legal aid system's lack of funds, the U.S. should be required to assist indigent left-behind parents in these proceedings, since this benefits the abducted child and minimizes the time the child spends in an unfamiliar environment. The United Kingdom, for example, has been successful in requiring its legal aid system to cover all legal costs to the extent it can bear.¹⁸¹ The U.S. could also require taking parents to cover the left-behind parents' legal expenses, but this may not be feasible depending on the taking parent's financial situation.

C. Providing Adequate Resources to Central Authorities

Mexico does not provide adequate resources to the MCA to locate abducted children and taking parents.¹⁸² Although the MCA works with Interpol and AFI, the Authority still lacks the manpower and funds necessary to be effective, especially when the left-behind parent does not know the child's exact location.¹⁸³ Mexico's lack of resources makes cooperation with the U.S. paramount.

The USCA should limit using its resources to educate Mexican judges, the MCA, and law enforcement on Hague return cases. Although the Department of State has noted recent improvements,¹⁸⁴ the bulk of the MCA's problems no longer result

¹⁷⁷ Abduction Convention, *supra* note 26, at Art. 26.

¹⁷⁸ Mackie, *supra* note 65, at 455.

¹⁷⁹ *Id.* at 458.

¹⁸⁰ For example, left-behind parents often must pay to locate the child, travel to the country the child is located in, and travel home. The left-behind parent may also miss work, and the taking parent may stop making child support or alimony payments. Mackie, *supra* note 65, at 457.

¹⁸¹ *Id.* at 456.

¹⁸² 2010 Compliance Report, *supra* note 18, at 23.

¹⁸³ *Id.*

¹⁸⁴ 2011 Compliance Report, *supra* note 137, at 5.

from a lack of information. Instead, the USCA should expend its resources in the form of manpower to assist the MCA and Mexican law enforcement in locating abducted children in Mexico.

VII. CONCLUSION

The Hague Convention lacks an enforcement mechanism to ensure that abducted children are promptly returned. In many countries, the Convention is an empty promise for left-behind parents. Although the U.S. enacted ICARA to implement the Convention, the U.S. has an unacceptable track record in returning abducted children. The U.S. and Mexico must work together to ensure that children are promptly located and returned. Consequently, the U.S. and Mexico should create courts with judges dedicated to Hague Convention return cases to ensure consistency and accuracy in decisions. The U.S. must provide financial assistance to left-behind parents, and Mexico and the U.S. must provide resources to the MCA to locate abducted children and taking parents. Under the current framework, the Convention fails to protect thousands of children and families every year. We can do better. Our children deserve better.

**NATIONAL TREASURE: A SURVEY OF
THE CURRENT INTERNATIONAL LAW
REGIME FOR UNDERWATER CULTURAL
HERITAGE**

Christian Hoefly

I. INTRODUCTION

The *SS Gairsoppa* was doomed when the vessel left Calcutta, India in December of 1940 and sailed in the treacherous Atlantic Seas during World War II.¹ Unknown to the sailors navigating the vessel on that day, the salvage of the sunken ship in 2011 would set precedent to navigate the equally unforgiving waters of maritime salvage law. Amongst a virtual sea of conflicting international common law principles, international conventions, and national laws, the salvage of the *SS Gairsoppa* provides a model for contracted historical salvage for other states to follow.

Odyssey Marine Exploration, Inc. (“Odyssey”), a Florida-based salvage firm well-experienced in salvage operations and salvage litigations, conducted the salvage of the *SS Gairsoppa*. Working cooperatively with the United Kingdom government, Odyssey entered into a contracted salvage of the *SS Gairsoppa* that ensured salvage of the vessel, and established clear ownership rights of the salvaged property. Contracting historical salvage not only promotes the exploration and recovery of sunken vessels and artifacts by providing clear economic incentives for governments and salvors alike, but

¹ *SS Gairsoppa Historical Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/ssgairsoppahistoricaloverview.php> (last visited Oct. 21, 2013) [hereinafter *SS Gairsoppa Historical Overview*].

equally serves to minimize the litigation risk associated with historical salvages.

This article surveys the current international salvage law regimes, and analyzes the economic incentives provided by the current laws. Part II traces the history of the *SS Gairsoppa* and chronicles the service of the vessel, its eventual sinking, and the contracted salvage agreement that led to the vessel's recovery. Part III details the applicable laws governing international historic salvages including traditional international law, and international treaties. Part III also analyzes the economic incentives of the current legal regime. Part IV discusses the alternative of contracted historical salvage operations and the advantages, both legal and economic, for states to enter into contracted salvage.

II. FROM BATTLE TO RESURRECTION

The *SS Gairsoppa* was one of many vessels sunk in the Atlantic during World War II, but it could reshape more than just the ocean floor. The vessel transported an extraordinary amount of silver on its final journey, and the vessel's salvage now provides a path for many states to follow in recovering their lost treasures. This section details the life of the *SS Gairsoppa* to provide insight into the ship's interaction with international law. The section also provides an overview of the contracted salvage that should serve as a model for other states with historic shipwrecks.

A. Life of the *SS Gairsoppa*

The *SS Gairsoppa* began its career for the British India Steam Navigation Company Ltd. in 1919 as a commercial vessel.² British India Steam Navigation Company finished construction of the

² *Id.*

vessel.³ The vessel sailed the commercial waters of China, Australia, India, and East Africa for the next twenty years.⁴

In the years leading up to the Second World War, the U.K. Director of Sea Transport of the Admiralty approached the British India Steam Navigation Company attempting to enlist passenger ships to join the British Fleet.⁵ The *SS Gairsoppa* was in war service by 1940, along with all 103 British India Company ships.⁶ By the end of the war, fifty-one of these 103 ships were destroyed.⁷

The *SS Gairsoppa's* final voyage started in Calcutta, India in December 1940, where the vessel was loaded with what was thought to be £500,000⁸(about \$1,980,200)⁹ of silver ingots along with tons of other general cargo.¹⁰ The *Gairsoppa* joined the merchant convoy SL 64 off the coast of West Africa, and headed to Liverpool.¹¹ The convoy slowed to 8 knots (9.2 mph)¹² due to the poor condition of the ships, and was unable to connect with escort warships as the convoy entered dangerous Atlantic waters off of the western coast of Africa.¹³ Matters became bleaker as the *Gairsoppa* reached northern

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Lloyd's of London Press, LLOYD'S WAR LOSSES: THE SECOND WORLD WAR, 190, (Sep. 3, 1939 - Aug. 14, 1945, vol. 1).

⁹ See *Tables of Historical Exchange Rates to the United States Dollar*, WIKIPEDIA,

http://en.wikipedia.org/wiki/Tables_of_historical_exchange_rates_to_the_United_States_dollar (last visited Oct. 21, 2013) (which provides the historical exchange rate of the pound to dollar in 1940. \$1,980,200 1940 dollars would be worth approximately \$33,080,231.10 today based on an inflation estimate provided by the Bureau of Labor Statistics available at http://www.bls.gov/data/inflation_calculator.htm).

¹⁰ *SS Gairsoppa*, CONVOY WEB, http://www.convoyweb.org.uk/sl/mem/64_1.htm (last visited Oct. 21, 2013).

¹¹ *SS Gairsoppa Historical Overview*, *supra* note 1.

¹² See *Calculator and Unit Converter*, GOOGLE, https://www.google.com/search?q=8+knots+to+mph&rlz=1C1CHFX_enUS519US519&coq=8+knots+to+mph&aqs=chrome..69i57j0.6016j0j7&sourceid=chrome&espv=210&es_sm=93&ie=UTF-8 (last viewed Oct. 21, 2013).

¹³ *SS Gairsoppa Historical Overview*, *supra* note 1.

latitudes. The vessel lost touch with the convoy due to high wind speeds, ocean swells, and insufficient fuel.¹⁴

On February 17, 1941, German Captain Ernst Mengersen's U-boat, which was responsible for sinking over 70,000 tons of cargo during the war, torpedoed the *Gairsoppa*.¹⁵ The torpedo triggered an explosion which destroyed communications, and with no distress call sent, the *Gairsoppa* sank into the North Atlantic and became a grave for all the men on board except for one.¹⁶

B. Contract for Salvage

The British House of Commons originally tendered the salvage of the *Gairsoppa* in 1989 after adopting a policy of publically offering salvage contracts for government-owned wrecks and cargoes.¹⁷ The policy attempted to obtain the best return on investment for the taxpayers financing the salvages, but failed to receive adequate interest.¹⁸ The initial tendering only received one bid from Deepwater Recovery and Exploration, which was not pursued.¹⁹

The salvage was revisited in January of 2010, when the United Kingdom Government Department for Transport awarded the salvage contract to Odyssey.²⁰ The competitive process used blind bids received by the Government to establish how much of the known, insured silver would be retained by the salvage companies as

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Parliamentary Business – Publications & Records: Written Answers November 15, 1989 Column 257*, PARLIAMENT.UK, <http://www.publications.parliament.uk/pa/cm198889/cmhansrd/1989-11-15/Writtens-2.html> (last visited Oct. 22, 2013).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *UK Government Awards Exclusive Salvage Contract to Odyssey Marine Exploration for Recovery of SS Gairsoppa Silver Cargo*, ODYSSEY MARINE EXPLORATION, <http://shipwreck.net/pr195.php> (last visited Oct. 17, 2013) [hereinafter *Exclusive Salvage Contract*].

compensation.²¹ The Government received three bids, and accepted Odyssey's bid.²²

The contract for the salvage was based on "standard commercial practices," and called for:

Odyssey [to] assume the risk, expense, and responsibility for the search, cargo recovery, documentation, and marketing of the cargo. If the salvage is successful, Odyssey will be compensated with a salvage award which consists of a majority of the net value of the recovered cargo after deduction of expenses of search and salvage.²³

The contract allowed Odyssey to retain 80% of the salvaged silver's value after recouping exploration costs.²⁴ Simply put, the United Kingdom would subtract the exploration cost from the total value of the salvaged silver, and then retain only 20% of that figure. This contract was extremely lucrative for Odyssey; based on the estimated value of the insured silver, Odyssey stood to earn forty-five million dollars.

Odyssey expected the exploration to take ninety days,²⁵ but it proved more difficult when the *Gairsoppa* was not found within the original search location.²⁶ Odyssey located the *Gairsoppa* in 2011²⁷ approximately 4700 meters (approximately three miles) below sea level in international waters nearly 300 miles off the coast of

²¹ *Id.*

²² *Parliamentary Business – Publications & Records: Written Answers October 31, 2011 Column 419W*, PARLIAMENT.UK, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111031/text/111031w0002.htm> (last visited Oct. 22, 2013).

²³ *Exclusive Salvage Contract*, *supra* note 20.

²⁴ *SS Gairsoppa Operational Overview*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/ssgairsoppaoperationaloverview.php> (last visited Oct. 17, 2013) [hereinafter *SS Gairsoppa Operational Overview*].

²⁵ *Exclusive Salvage Contract*, *supra* note 20.

²⁶ *SS Gairsoppa Operational Overview*, *supra* note 24.

²⁷ Kerry Sanders & Lauren Sullivan, *\$77M Sunken Treasure Found at Bottom of Atlantic*, TODAY NEWS, (July 23, 2013, 11:48 AM), <http://www.today.com/news/77m-sunken-treasure-found-bottom-atlantic-6C10714149>.

Ireland.²⁸ While finding the vessel was a major hurdle, it did not ensure that the precious silver cargo would be located.²⁹ In fact, Odyssey did not recover the first bar of silver until the following year, on July 18, 2012.³⁰ The summer 2012 operations yielded 1,218 bars of silver (approximately 48 tons); the summer 2013 operations yielded an additional 1,574 bars (approximately 61 tons).³¹ In total, the salvage operation recovered 99% of the insured silver aboard the *Gairsoppa*, which amounted to 110 tons of silver (approximately 3.2 million troy ounces).³²

Odyssey turned over the salvaged silver to JBR Recovery Limited, a leading European broker, for sale.³³ The estimated value was seventy-seven million dollars, and the cost of exploration was twenty million dollars.³⁴ Out of the fifty-seven million dollar net total, Odyssey will receive about 45.6 million dollars and the United Kingdom will receive the remaining 11.4 million dollars worth of silver.

III. COMPARISON OF CONTROLLING LAW

A. Traditional Maritime Law of Salvage and Finds

International common law tradition maintains two controlling doctrines that concern historic shipwreck salvage: salvage law and the law of finds. Salvaging a historic shipwreck, or any vessel in distress, requires technical expertise to conquer the high level of risk and danger involved.³⁵ Generally, the primary motivation of salvage operations is the compensation received for the task, which normally

²⁸ *SS Gairsoppa Operational Overview*, *supra* note 24.

²⁹ Sanders, *supra* note 27.

³⁰ *SS Gairsoppa Operational Overview*, *supra* note 24.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Sanders, *supra* note 27.

³⁵ CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE, 307-08 (2010) [hereinafter International Law].

is a percentage of the salvaged property's value.³⁶ The common law of salvage incentivizes individuals to assume the risk associated with the operations in order to rescue ships, their cargo, and their sailors.³⁷

Salvage law applies to ships that have been abandoned, derelict, or shipwrecked.³⁸ Salvage operations must demonstrate four conditions: (1) the property must be in marine peril;³⁹ (2) the salvor must attempt the operation voluntarily; (3) the operation must be in the interest of the owner; and (4) the salvor must be at least partially successful in recovering the property.⁴⁰ While the salvor may be completely or partially motivated by the salvage reward, the salvor may not be under any duty to rescue the salvage vessel.⁴¹

Under salvage law, it is presumed that the owner has not abandoned his interest in the vessel or its cargo.⁴² Without abandonment, the salvor cannot gain title over the recovered property and is only entitled to the salvage reward.⁴³ To receive the salvage reward, the salvor must file a motion with the controlling admiralty/maritime court.⁴⁴ Most often the reward is a percentage basis of the property recovered. The percentage awarded varies depending on the salvage operation's level of risk, cost, and skill.⁴⁵ If the owner refuses or is unable to pay the reward, the salvor can receive a maritime lien on the property.⁴⁶

On the other hand, if the vessel or property is abandoned, the law of finds controls.⁴⁷ A majority of historic shipwrecks are

³⁶ *Id.*

³⁷ *Id.* at 288.

³⁸ *Id.* at 300.

³⁹ The term "marine peril" is ordinarily understood to mean that a vessel is at risk of sinking, losing its cargo, or otherwise in danger from rough seas or other forces which might compromise its seaworthiness. International Law, *supra* note 35, at 300.

⁴⁰ *Id.*

⁴¹ *Id.* at 304.

⁴² *Id.* at 309.

⁴³ *Id.*

⁴⁴ International Law, *supra* note 35, at 307.

⁴⁵ *Id.* at 309.

⁴⁶ *Id.* at 311-12.

⁴⁷ *Id.* at 310.

presumed abandoned.⁴⁸ A key exception of sovereign immunity applies to vessels like warships.⁴⁹ The law of finds allows for the salvor to retain full title over the salvaged property.⁵⁰ The salvor is entitled to the property based on the assumption that “the property involved either was never owned or was abandoned.”⁵¹

Courts decide whether salvage law or the law of finds applies.⁵² The determination is fact specific, but courts tend to apply the law of finds to historic shipwrecks.⁵³ This tendency results from the fact that the majority of wrecks go unsalvaged for decades if not centuries, regardless of the owners actual intent to abandon the wreck.⁵⁴

B. International Salvage Law Conventions

1. *United Nations Convention on the Law of the Sea*. - The United Nations Convention on the Law of the Sea (“UNCLOS”)⁵⁵ aimed at addressing navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed, passage of ships, conservation and management of living marine resources, protection of the marine environment, a marine research regime, and setting a binding procedure for dispute settlement between States.⁵⁶ UNCLOS addresses historical shipwrecks in articles 149 and 303.⁵⁷ It is not

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 (1982) [hereinafter UNCLOS] art. 42(5), 236 (recognizing that sovereign vessels like warships are entitled to immunity from the conventions laws, this is a traditional principle of international law).

⁵⁰ *Id.* at 310.

⁵¹ Valentina Sara Wadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT’L L. 853, 870 (2009) (citing *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981)).

⁵² Wadi, *supra* note 51, at 870 - 71.

⁵³ *Id.* at 871.

⁵⁴ *Id.*

⁵⁵ UNCLOS, *supra* note 49.

⁵⁶ *The United Nations Convention on the Law of the Sea (A historical perspective)*, OCEANS & LAW OF THE SEA UNITED NATIONS, http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm (last visited Oct. 23, 2013) [hereinafter *UNCLOS Historical Perspective*].

⁵⁷ UNCLOS, *supra* note 49, at art. 149, 303.

surprising given the major concerns of UNCLOS that the Convention only tangentially addresses historical shipwrecks. However, these articles do represent substantive international law that has been applied to historical salvage sites.⁵⁸

Article 149 is included within Part XI of UNCLOS titled “The Area,”⁵⁹ and primarily addresses the deep-sea mining rights in customary international waters.⁶⁰ The article reads:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.⁶¹

The article encompasses historical shipwrecks without mentioning the term in its broad phrase “all objects of an archaeological and historical nature.” Many commenters have criticized the language as over-inclusive, and a “political tactic” by states that wished to advance the recognition of general cultural heritage rights.⁶² Regardless of the reason for the article’s inclusion, subsequent interpretations have yielded disparate meanings.

One of the main issues left unresolved by Article 149 is how to “preserve[] or dispose[] of” historical objects.⁶³ The ambiguity of the phrase and lack of clarification leaves salvors no clear guidance. Preserving an object has been interpreted as meaning both leaving

⁵⁸ Craig Forest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L. J. 347, 368 (2009).

⁵⁹ UNCLOS, *supra* note 49, at Part XI.

⁶⁰ *See generally id.* at Part XI (which details, through the multiple articles in the section, the duties owed to States concerning resources in the area. The convention defines “area” to mean “the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction” in article 1).

⁶¹ *Id.* at art. 149.

⁶² Anastasia Strati, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA 310 (1995).

⁶³ Forest, *supra* note 58, at 369.

the item “*in situ*,”⁶⁴ and, conversely, placing the object in a museum for display.⁶⁵

Another issue with interpreting the article is what “preferential rights” should be given to which State.⁶⁶ UNCLOS refers to rights of “State or country of origin,” as well as, “State of cultural origin” and “State of historical and archaeological origin.”⁶⁷ While analogous in many situations, UNCLOS never explicitly defines the terms. Further, UNCLOS’s negotiations used the terms as synonyms, but all were left in the article, implying differing meanings to the terms.⁶⁸

Article 303 furthers the protections for underwater cultural heritage and is included in Part XVI of UNCLOS titled “General Provisions,”⁶⁹ and Part XVI addresses general rights applicable to all zones discussed in UNCLOS. Article 303 provides:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules

⁶⁴ *In situ* is a Latin phrase meaning in the natural or original position or place. In situ Definition, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/insitu> (last visited Nov. 19, 2013). In the context of the Convention, it refers to leaving a shipwreck in its present resting place on the ocean floor.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ UNCLOS, *supra* note 49, at art. 149.

⁶⁸ Forest, *supra* note 58, at 369.

⁶⁹ UNCLOS, *supra* note 49, at art. 303, Part XVI.

of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.⁷⁰

At first glance, Article 303 seems to restate the general duty of the State “to protect objects of an archaeological and historical nature found at sea.”⁷¹ Article 303, Sections 2 and 3 set the controlling law for historical salvage. Under Article 303(2), States with any historical wrecks found within the contiguous zone have full jurisdictional control over the salvage.⁷² In Article 303(3), UNCLOS seems to concede that traditional laws of salvage apply.⁷³ UNCLOS did not intend this to be the case, as demonstrated by the language of 303(4). The Article carves out a provision to “harmonize the rules of the law of the sea” with the “emerging law of archaeology and cultural heritage.”⁷⁴ This exception to Article 303’s applicability paved the way for both the International Maritime Organization (“IMO”), 1989 International Convention on Salvage Law, and the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), Underwater Cultural Heritage Convention (“UCH”), which are comprehensive conventions on historical salvage law.⁷⁵

UNCLOS was never intended to be controlling law for historical salvages, and Articles 149 and 303 are unsurprisingly vague.⁷⁶ However, the treaty is substantive international law and created a clear carve out for controlling salvage law treaties.

2. *IMO 1989 International Convention on Salvage Law*. - The main purpose of general salvage law is to “encourag[e] the rescue of

⁷⁰ UNCLOS, *supra* note 49, at art. 303.

⁷¹ *Id.*

⁷² *Id.*; *see also* UNCLOS, *supra* note 49, at art. 33 (contiguous zone can extend twenty-four miles from the state’s coastal baselines that determine its territorial sea).

⁷³ UNCLOS, *supra* note 49, at art. 303.

⁷⁴ Forest, *supra* note 58, at 370.

⁷⁵ *Id.*

⁷⁶ *Id.*

endangered property at sea, and, importantly, protect[] the marine environment from pollution [of] ships.”⁷⁷ In 1989, the IMO passed a comprehensive convention to update international salvage law.⁷⁸ The IMO convention replaced the law of salvage adopted in Brussels 1910, which centered around the “no cure, no pay”⁷⁹ principle.⁸⁰ The IMO convention incentivizes environmental protection during salvage where the “no cure, no pay” regime did not, by providing a “special compensation” award for minimizing damage to the environment.⁸¹

The IMO convention does not define “vessel” to include or exclude historical shipwrecks, but historic shipwrecks and their cargo are included within its definition of “property.”⁸² The definition is broad and applies to “any property in danger” that is “not permanently and intentionally attached to the shoreline and includes freight at risk.”⁸³

While not apparent from the text’s plain meaning, the expansive definition of property was understood by the drafters to include historical salvage. During the negotiations surrounding the convention, the German diplomat attempted to introduce an amendment that would have directly addressed sunken ships.⁸⁴ Conversely, the Argentinean diplomat proposed an amendment that

⁷⁷ *Id.*

⁷⁸ International Convention on Salvage, Apr. 4, 1989, 1953 U.N.T.S. 165 (1989) [hereinafter IMO].

⁷⁹ “No cure, no pay” is a principle that requires a “useful result” for a salvage award; in the absence of a useful result, there is no payment. A “useful result” is when property of value is saved. Property includes the vessel, cargo, or life. See Nicholas J. Gaskell, *The 1989 Salvage Convention and the Lloyd’s Open Form (LOF) Salvage Agreement 1990*, 16 TUL. MAR. L.J. 1, 49-50 (1991).

⁸⁰ *International Convention on Salvage*, INT’L MAR. ORG., <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Salvage.aspx> (last visited Oct. 24, 2013).

⁸¹ *Id.*

⁸² IMO, *supra* note 78, at art. 1 (The convention defines vessel to mean: any ship or craft, or any structure capable of navigation; and defines property to mean: any property not permanently and intentionally attached to the shoreline and includes freight at risk).

⁸³ IMO, *supra* note 78, at art. 1.

⁸⁴ Gaskell, *supra* note 79, at 35 (1991).

would have excluded sunken vessels from the convention.⁸⁵ Without the adoption of either amendment, historical shipwrecks or any sunken vessel became property under Article 1(c).⁸⁶ Further, Article 30(1)(d) permits States to exempt “maritime cultural property of prehistoric, archaeological or historic interest” from the convention’s provisions.⁸⁷ The reservation’s implication is clear: if member States do not explicitly state the convention does not apply to its historical sunken shipwrecks, then the convention will apply to any salvage operations on these wrecks.⁸⁸

Before the IMO convention came into force, U.S. courts often held general maritime salvage law applied to historic shipwrecks.⁸⁹ The distinction between general maritime law and the IMO convention is important because general maritime law does not apply to abandoned shipwrecks.⁹⁰ Prior to the IMO convention, abandoned shipwrecks were controlled by the “harsh, primitive, and inflexible” common law of finds, which expressed “the ancient and honorable principle of ‘finders, keepers.’”⁹¹ The IMO convention makes no distinctions for “abandoned” property. Thus, the law of finds never applies in jurisdictions employing the IMO convention.⁹² Without the exclusion, the application of the IMO to historic shipwrecks falls well within the requirements of “any property in

⁸⁵ *Id.* at 35-36.

⁸⁶ *Id.* at 36-37.

⁸⁷ IMO, *supra* note 78, at art. 30; Martin Davies, *Whatever Happened to the Salvage Convention 1989?*, 39 J. MAR. L. & COM. 463, 483 (2008).

⁸⁸ Davies, *supra* note 87, at 483.

⁸⁹ See *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); and *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing vessel*, 549 F.Supp. 540 (S.D. Fla. 1982) (holding that historical vessels being salvaged are governed by the “general maritime law of salvage applied to the retrieval of property from shipwrecks”).

⁹⁰ Davies, *supra* note 87, at 483.

⁹¹ An abandoned shipwreck is any wreck that has not been salvaged within a certain common law period of time. The time period ranges depending on the jurisdiction of the wreck and any controlling national or international laws. See *Hener v. U.S.*, 525 F.Supp. 350, 356 (S.D.N.Y. 1981) (holding general maritime salvage law was “harsh, primitive and inflexible”); *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) (holding the basic operating values of common salvage law to be “finders, keepers”).

⁹² Davies, *supra* note 87, at 483.

danger” that is “not permanently and intentionally attached to the shoreline and includes freight at risk.”⁹³

Due to its language, the IMO convention includes historic salvage operations; the application of the IMO convention to historic vessels poses problems. Even if courts would favor the application of the IMO convention over the common law of finds, the purpose of the IMO convention is to provide the salvor with payment from the owner of the salvaged property.⁹⁴ Without knowledge of the owner of the historic shipwreck, the IMO convention does not provide clear authority on ownership of the property.⁹⁵ The IMO convention in Article 12(1) provides that a successful salvage operation “give[s] the right to reward,”⁹⁶ but the IMO convention does not detail the procedure to follow if the owner is unknown. The IMO convention does not state the reward must be monetary, and one could argue that payment could be the salvaged property, but there is no clear authority to establish that argument.⁹⁷

While the IMO convention does not provide clear international law for historic shipwrecks, it does provide differing incentives from UNCLOS. The IMO convention introduced major reform to international salvage law, especially considering the incentives for protection of the marine environment.⁹⁸ Due to the problematic language of the IMO convention regarding historic vessels, it has not seen widespread adoption by States as governing law for historic wrecks.⁹⁹

3. *UNESCO UCH Convention*. - The thirty-first United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) adopted the Convention on the Protection of the Underwater Cultural Heritage¹⁰⁰ (“UCH Convention”) in November

⁹³ IMO, *supra* note 78, at art. 1.

⁹⁴ Davies, *supra* note 87, at 484.

⁹⁵ *Id.*

⁹⁶ IMO, *supra* note 78, at art. 12(1).

⁹⁷ Davies, *supra* note 87, at 484.

⁹⁸ Forest, *supra* note 58, at 371.

⁹⁹ *Id.*

¹⁰⁰ Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, UNESCO Doc.31C/Resolution 24 (2002) [hereinafter “UCH Convention”].

2001.¹⁰¹ The UCH Convention attempts to provide protection to States with underwater cultural heritage (“UCH”)¹⁰² by clarifying the ambiguity surrounding the legal status of historic shipwrecks.¹⁰³ The protection, preservation, and proper display of UCH advance UNESCO’s core value of educating the world public.¹⁰⁴

The UCH Convention built upon UNCLOS to develop a comprehensive convention to govern historic shipwreck salvage and protection.¹⁰⁵ The UCH Convention began as an International Law Association’s (“ILA”)¹⁰⁶ draft convention in 1994.¹⁰⁷ The draft convention included an annex, which set out the benchmark standards for underwater archaeology, and prohibited the commercialization of historic shipwreck salvage operations.¹⁰⁸ The draft convention went as far as to prohibit the application of salvage law to historic shipwrecks.¹⁰⁹ The draft convention was submitted to UNESCO for adoption, where the inclusion of salvage law and non-commercialization clauses were heavily debated.¹¹⁰

The preamble of the UCH Convention explicitly acknowledges “the importance of underwater cultural heritage as an

¹⁰¹ *Protecting Underwater Heritage From Treasure Hunters*, UNESCO GENERAL CONFERENCE, http://www.unesco.org/confgen/press_rel/291001_subaqua.shtml (last visited Oct. 17, 2013) [hereinafter “*Protecting UCH*”].

¹⁰² UCH is a term created by the drafters of the Convention. Generally, under the Convention, UCH “encompasses all traces of human existence that lie or were lying under water and have a cultural or historical character.” *Safeguarding the Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/unesco/themes/underwater-cultural-heritage/> (last visited Oct. 17, 2012).

¹⁰³ *Protecting UCH*, *supra* note 101.

¹⁰⁴ *About the Convention on the Protection of the Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/> (last visited Nov. 18, 2011) [hereinafter “*About UCH*”].

¹⁰⁵ Forest, *supra* note 58, at 372.

¹⁰⁶ Founded in 1873, the International Law Association is a private non-governmental organization of persons interested in international law. *About Us*, INTERNATIONAL LAW ASSOCIATION, http://www.ila-hq.org/en/about_us/index.cfm (last visited Nov. 17, 2013).

¹⁰⁷ Forest, *supra* note 58, at 372.

¹⁰⁸ *Id.* at 373.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

integral part of the cultural heritage of humanity” and admits the UCH is “deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage.”¹¹¹ Further, “the public’s right to enjoy the educational and recreational benefits of responsible nonintrusive access to *in situ* underwater cultural heritage” was a major factor.¹¹² Lastly, the UCH Convention expresses concern with the current legal framework of historic salvage by acknowledging “the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice.”¹¹³

Opposition to UCH convention’s application of salvage law to historic shipwrecks is best summarized by the commentary to the ILA draft convention¹¹⁴:

[T]he law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is. . . The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.¹¹⁵

¹¹¹ UCH Convention, *supra* note 100, at 1.

¹¹² UCH Convention, *supra* note 100, at 1.

¹¹³ *Id.*

¹¹⁴ Forest, *supra* note 58, at 373.

¹¹⁵ *Id.*, citing Patrick J. O’Keefe & James A.R. Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 OCEAN DEV. & INT’L L. 391, 404 (1994).

This argument is reiterated by many commenters¹¹⁶ and was stated multiple times in the negotiations of the convention.¹¹⁷ The UCH convention codifies this argument in “Article 4 – Relationship to law of salvage and law of finds”¹¹⁸ stating that “activity relating to [UCH] shall not be subject to the law of finds.”¹¹⁹

The broad prohibition against salvage law application is subject to an exception. The exception stems from developed States expressing concerns over the limiting of sovereign power of States to engage in commercial and cultural transactions.¹²⁰ Salvage law can be applied when “authorized by the competent authorities” to the extent salvage law conforms to the UCH Convention and “ensures [the] recovery of the [UCH] achieves its maximum protection.”¹²¹

¹¹⁶ See Forest, *supra* note 58, at 373; O’Keefe, *supra* note 116, at 404; Strati, *supra* note 63 at 300; Luigi Migliorino, *In Situ Protection of the Underwater Cultural Heritage Under International Treaties and National Legislation*, 10 INT’L J. MARINE & COASTAL L. 486 (1995); Janet Blake, *The Protection of the Underwater Cultural Heritage*, 45 INT’L & COMP. L.Q. 819-43 (1996); Bruce E. Alexander, *Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations*, 20 J. MAR. L. & COM. 7-8 (1989).

¹¹⁷ Forest, *supra* note 58, at 373, *citing* Roberta Garabello, *The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage*, in *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, 89, 123-3, (Roberta Garabello & Tullio Scovazzi eds., 2003).

¹¹⁸ Article 4 reads:

“Relationship to law of salvage and law of finds

Any activity relating to underwater cultural heritage to which this Convention applies

shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorized by the competent authorities, and
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”

UCH Convention, *supra* note 100, at art. 4.

¹¹⁹ UCH Convention, *supra* note 100, at art. 4.

¹²⁰ Garabello, *supra* note 117, at 123-25.

¹²¹ UCH Convention, *supra* note 100, at art. 4.

The prohibition against applying salvage law to UCH supports the UCH Convention's main purpose of banning commercial exploitation of UCH.¹²² The Annex of the UCH Convention describes commercial exploitation as “fundamentally incompatible with the protection and proper management of underwater cultural heritage.”¹²³ The Annex allows for the recovery and deposition of UCH by “professional archaeological services” for the purpose of a “research project.”¹²⁴ Further, the UCH convention states that *in situ* preservation is the preferred option when a historical shipwreck is discovered.¹²⁵ *In situ* not only preserves archaeological investigation that can occur before the site is disturbed,¹²⁶ but also serves to freeze commercial incentives for salvage. Commercial salvors often seek items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.¹²⁷

The scope and jurisdiction of the UCH Convention are quite broad. The definition of UCH, according to the convention, includes “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years.”¹²⁸ Hundred-year-old, historic shipwrecks are included in this definition.¹²⁹ The jurisdiction of the UCH convention is slightly more limited than UNCLOS or the IMO convention. The jurisdiction extends to all international waters, which are also controlled by UNCLOS or the IMO convention, but allows coastal States complete

¹²² *Id.* at art. 2(7).

¹²³ *Id.* at Annex, I. General Principles, R. 2.

¹²⁴ *Id.*

¹²⁵ *Id.* at art. 2 para. 5.

¹²⁶ Forest, *supra* note 58, at 368.

¹²⁷ Jeremy Neil, Note & Case Comment, *Sifting Through the Wreckage: An Analysis and Proposed Resolution Concerning the Disposition of Historic Shipwrecks Located in International Waters*, 55 N.Y.L. SCH. L. REV. 895, 911 (2010/2011).

¹²⁸ UCH Convention, *supra* note 100, at art. 1 para. 1(a).

¹²⁹ The definition continues to outline specific items intended to fall under the UCH Convention's protection: “vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context.” UCH Convention, *supra* note 100, at 1 para. 1(a)(ii).

sovereignty within territorial waters as outlined by UNCLOS or the IMO convention.¹³⁰

C. Economic Incentives

1. *United Nations Convention on the Law of the Sea*. - The main problem plaguing the development of salvage law is the struggle between providing economic incentives to motivate would-be salvors, and preserving the archeological value of historic shipwrecks.¹³¹ UNCLOS, in broad terms, imposes duties on would-be salvors to “protect objects of an archaeological and historical nature,”¹³² and gain the approval of the “coastal State” for removal of objects.¹³³ Even within the comprehensive framework of UNCLOS, salvors must remain cognizant of the interaction of traditional salvage law and the law of finds.¹³⁴ Due to the lack of treaty language regarding historic shipwrecks, UNCLOS’s economic incentives flow from traditional salvage law and, more importantly, the law of finds.¹³⁵ The law of finds allows for full possession of the wreck once the salvager makes an affirmative effort to take possession of the wreck.¹³⁶

While providing salvors with title to salvaged objects, the law of finds provides limited economic incentives.¹³⁷ The incentive to salvage historic shipwrecks under UNCLOS and the law of finds is limited to the estimated value of items aboard the vessels, but this fails to recognize any intrinsic value of the wrecks.¹³⁸ The majority of national governments and archaeologists expressly disfavor the application of the law of finds, and salvage law, generally, to historic shipwrecks.¹³⁹ The disfavor stems from the law’s nature to overlook

¹³⁰ UCH Convention, *supra* note 100, at art. 7, para. 1.

¹³¹ Paul Hallwood & Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. LEGAL STUD. 285, 295 (2006).

¹³² UNCLOS, *supra* note 49, at art. 303(1) (emphasis added).

¹³³ *Id.* at art. 303(2).

¹³⁴ *Id.* at art. 303(3).

¹³⁵ Hallwood, *supra* note 131, at 295, 293.

¹³⁶ *Id.* at 293.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Neil, *supra* note 127, at 904.

the archaeological value contained in the shipwreck and surrounding area.¹⁴⁰ It is not unusual for salvors of historic shipwrecks to be referred to as pirates, looters, and thieves for their role in removing artifacts from sites merely for profit without regard for their historic significance.¹⁴¹

The primary economic driver for the salvage of historic shipwrecks under UNCLOS is the value of items aboard the vessels due to the law of finds providing title.¹⁴² Salvors under UNCLOS must “protect” the items they salvage from historic shipwrecks.¹⁴³ However, many archaeologists would argue that removing items from their current location on the seafloor is not protecting them.¹⁴⁴ The fact that the items are submerged, and removed from the presence of oxygen slows the deterioration process.¹⁴⁵ Even the most careful salvages disturb the delicate ecosystems of historic shipwreck sites and threaten the site’s archaeological value.¹⁴⁶

On the other hand salvors argue that without the salvage of historic shipwrecks, sites offer little value and are in danger of complete destruction from other human activity and natural disasters.¹⁴⁷ Salvors defend their position by stating that human actions, like fishing trawlers and plastic waste,¹⁴⁸ combined with natural disasters, like hurricanes and earthquakes, effectively destroy the archaeological content of these sites and cause the loss of

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., David J. Bederman, *The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal*, 30 J. MAR. L. & COM. 331, 343 (observing that the International Law Association views salvors as “looters” and “destroyers of our past”).

¹⁴² Hallwood, *supra* note 131, at 295, 293.

¹⁴³ UNCLOS, *supra* note 49, at art. 303(1).

¹⁴⁴ Ole Varmer, *The Case Against the “Salvage” of Cultural Heritage*, 30 J. MAR. L. & COM. 279, 280 (1999).

¹⁴⁵ Varmer, *supra* note 144, at 280.

¹⁴⁶ *Id.* at 280-81.

¹⁴⁷ Neil, *supra* note 127, at 905.

¹⁴⁸ Cahal Milmo, *Why is There a Storm Brewing Over the Right to Plunder Shipwrecks?*, THE INDEPENDENT (UK), June 9, 2009, <http://www.independent.co.uk/news/world/politics/why-is-there-a-storm-brewing-over-the-right-to-plunder-shipwrecks-1700207.html>.

countless artifacts.¹⁴⁹ Further, many commercial salvage companies employ a team of archaeologists to maintain high compliance standards during the salvage.¹⁵⁰ For example, Odyssey employs a team of archaeologists whose goals are to maintain compliance with community standards, preserve the history associated with recovered cultural relics, and fully document all artifacts that are recovered before they are passed on to museums and collectors.¹⁵¹

2. *IMO 1989 International Convention on Salvage Law.* - As discussed above, the IMO convention was not explicitly written to control the salvage of historic shipwrecks. However, the UCH convention excludes any sunken vessels less than one hundred years old.¹⁵² This carves out an area of historic vessels that have been on the seafloor for less than one hundred years. This means that the recovery of vessels from WWII is not controlled by the UCH convention, but instead by the IMO convention. The incentives to salvage these vessels, like the *SS Gairsoppa*, operate similar to restitution.¹⁵³

Restitution operates under the assumption that a person enriched by the actions of another should be liable to pay for the enrichment.¹⁵⁴ This restitutionary payment is the driver for the salvage reward recognized under the IMO convention, in that the salvage must have a “useful result”¹⁵⁵ to be entitled to the reward.¹⁵⁶ Additionally, the restitutionary value of the reward is enhanced by several other motivators. Courts routinely increase the salvage

¹⁴⁹ Chris Southerly et al., N.C. OFFICE OF STATE ARCHEOLOGY, FALL 2006 RECOVERY PLAN FOR NORTH CAROLINA ARCHAEOLOGY SHIPWRECK SITE 31CR314, 1 (2006).

¹⁵⁰ See, e.g., *A Commitment to Archaeology*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/archaeology.php> (last visited Dec. 24, 2013) (provides the specific steps Odyssey undertakes to protect the artifacts it recovers).

¹⁵¹ *Id.*

¹⁵² UCH Convention, *supra* note 100, at art. 1 para. 1(a).

¹⁵³ See Catherine Swan, *The Restitutionary and Economic Analyses of Salvage Law*, 23 A & NZ MAR. L. J. 99, 104-06 (2008) (details the history of salvage law and its shared restitutionary goals).

¹⁵⁴ Swan, *supra* note 153, at 105-06.

¹⁵⁵ See *supra* note 79 (defines a “useful result” to be when property of value is saved. Property includes the vessel, cargo, or life.)

¹⁵⁶ Swan, *supra* note 153, at 106.

rewards for maintaining salvage vessels on standby,¹⁵⁷ and successfully protecting the environment.¹⁵⁸

The IMO convention's salvage rewards differ from a purely restitutionary reward for services rendered.¹⁵⁹ The reward serves three main purposes: compensation for the work done, reimbursement for the expenses incurred, and a reward to promote the public policy of salvage.¹⁶⁰ The reward's purpose does not align with a restitutionary model, and is quite often a purely discretionary amount determined by the court.¹⁶¹

The salvage reward can also be compared to a model of contingent payment.¹⁶² The contingent model, elaborated on by William Landes and Judge Richard Posner, predates the adoption of the IMO convention. The model states that as the probability for successful recovery increases, the ensuing reward should decrease.¹⁶³ This is reflected in the criteria used to determine the salvage rewards listed in Article 13 of the IMO convention.¹⁶⁴ As the degree of success rises in the salvage, the weight of the factors decreases, and so does the salvage reward. Thus, while the IMO convention's salvage reward is primarily a restitutionary payment on its face, the factors used to determine the reward align with a contingent payment model.

¹⁵⁷ *Id.*

¹⁵⁸ IMO, *supra* note 78.

¹⁵⁹ Swan, *supra* note 153, at 106.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² William M. Landes & Richard A. Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers', 7 J. L. STUD. 83, 100-103 (1978).

¹⁶³ Landes, *supra* note 162, at 101.

¹⁶⁴ IMO, *supra* note 78, at art. 13 (the criteria include the salvaged value of the vessel and other property, the skill and efforts of the salvors in preventing or minimizing damage to the environment, the measure of success obtained by the salvor, the nature and degree of the danger, the skill and efforts of the salvors in salvaging the vessel, other property and life, the time used and expenses and losses incurred by the salvors, the risk of liability and other risks run by the salvors or their equipment, the promptness of the services rendered, the availability and use of vessels or other equipment intended for salvage operations, and finally, the state of readiness and efficiency of the salvor's equipment and the value thereof).

The contingent payment model is reinforced by the “special compensation”¹⁶⁵ given to salvors that protect the environment in their salvage operations. The reward serves to promote environmental protection in salvage operations, measures that were routinely overlooked by previous regimes.¹⁶⁶ This type of payment does not fit into a restitutionary model, and instead serves to promote public policy, in accordance with a contingent fee model.¹⁶⁷ The payment reflects the balancing of proper economic incentives against the increased cost of preventing environment damage during salvage operations.¹⁶⁸

3. *UNESCO UCH Convention.* - The UCH convention features an almost complete lack of economic incentives. Unlike the salvage title gained under traditional maritime law and UNCLOS, or the salvage reward given under the IMO convention, the UCH convention’s main provisions serve to ban the “commercial exploitation”¹⁶⁹ of historic shipwrecks. According to the convention, the “commercial exploitation” of UCH is “deeply concerning” especially considering the sale, acquisition or barter of UCH.¹⁷⁰ By declining to provide economic incentives for historic salvage, the UCH seemingly abridges any reason to independently conduct these types of operations.

The adoption of the UCH convention did not stop the search for and salvage of historic vessels, but simply shifted the cost burden from commercial salvors to the States’ with UCH sites.¹⁷¹ The UCH convention requires that state parties “cooperate in the protection of underwater cultural heritage,”¹⁷² “preserve underwater cultural

¹⁶⁵ IMO, *supra* note 78, at art. 14 (“special compensation” is provided when a salvage is carried out in such a way to protect the environment. The compensation is equal 30% of the expenses incurred by the salvor).

¹⁶⁶ Forest, *supra* note 58, at 371.

¹⁶⁷ Swan, *supra* note 153, at 109.

¹⁶⁸ *Id.*

¹⁶⁹ UCH Convention, *supra* note 100, at art. 2(7).

¹⁷⁰ *Id.* at 1. (“Deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage.”)

¹⁷¹ Neil, *supra* note 127, at 911.

¹⁷² UCH Convention, *supra* note 100, at art. 2(2)

heritage for the benefit of humanity,”¹⁷³ and “take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage.”¹⁷⁴ These requirements assume States will regulate and control the historic salvage market. Further, with the elimination of independent economic incentives, the States now face the burden of motivating commercial salvage companies to find and recover historic shipwrecks.

The State controlled salvage market has seen a number of such arrangements.¹⁷⁵ Interstate agreements have been reached over the *CSS Alabama* (France and United States), *HMS Birkenhead* (United Kingdom and South Africa), *HMS Erebus* (United Kingdom and Canada), *HMS Terror* (United Kingdom and Canada), *Estonia* (Estonia, Finland, and Sweden), and the most notable historic salvage, *Titanic* (United States, United Kingdom, Canada, and France).¹⁷⁶ Odyssey has entered into several salvage agreements with the United Kingdom which include the *SS Gairsoppa*, *SS Mantola*, *HMS Victory*, and *HMS Sussex*.¹⁷⁷ These agreements will undoubtedly continue to increase as the market for commercial salvage adjusts.

IV. RECOMMENDATION FOR COUNTRIES WITH HISTORICAL SALVAGE SITES

The contracted salvage of the *SS Gairsoppa* should serve as a model for states with historic shipwrecks. States with known sites or states aware of vessels lost at sea should seek to enter into contracted agreements for the exploration and salvage of these vessels. By contracting the salvage of these vessels, states maintain significant control over their cultural heritage while promoting the necessary economic incentives for salvage operations. As outlined in the UCH convention, these historic shipwrecks contain valuable insight into historically significant events, as well as extraordinarily valuable

¹⁷³ *Id.*

¹⁷⁴ *Id.*; Neil, *supra* note 127, at 911.

¹⁷⁵ Hallwood, *supra* note 131, at 296.

¹⁷⁶ *Id.*

¹⁷⁷ *Shipwrecks*, ODYSSEY MARINE EXPLORATION, <http://www.shipwreck.net/shipwrecks.php> (last visited Dec. 24, 2013).

metals and precious stones. The international legal regime shifted the burden of incentivizing historic salvage to the state. Demonstrated by the agreements between Odyssey and the United Kingdom, contracted salvage motivates commercial salvage companies to undertake these operations while protecting the archaeological value of the sites.

The terms of the agreement need to be carefully considered in order to properly protect the interests of both the country and the commercial salvage company.¹⁷⁸ The agreements should call for a project plan that details the complete operation. The plan should provide the government with detailed information of equipment, people, techniques, and conservation methods to be used. The agreement should detail the period for acceptance of the plan, and any needed termination terms. Following approval, the commercial salvage company should post a deposit sufficient to cover governmental expenses to serve as collateral in case of insufficient performance of the agreement. Additionally, the government may want to include a term detailing how monitoring of the operation will be accomplished, whether by government officials or company certified reports.

The most important terms of the agreement are the compensation parameters. As in the *SS Gairsoppa's* salvage, a profit sharing model should be employed. By sharing a percentage of overall profits, the government incentivizes the commercial salvage company to maximize gain during the operation. The agreement should detail the exact percentages, as well as the calculations to determine the profit.

Additionally, contracted salvage avoids the uncertainty that litigation involves. By having the state and salvage company negotiate for their interest, contracted salvage can find the optimal solution; whereas, litigation often falls short. Litigation involves uncertainty in

¹⁷⁸ My recommendation is modeled after the successful agreements utilized by the United Kingdom and Odyssey; *See* Partnering Agreement Memorandum Concerning the Shipwreck of the HMS Sussex, Between the Government of the United Kingdom of Great Britain & Northern Ireland & Odyssey Marine Exploration, Inc. (Sept. 27, 2002), available at <http://shipwreck.net/pam> (last visited Jan. 2, 2014).

the controlling law, substantial legal fees, delayed timing to reach a decision, and unforeseeable results. Contracted salvage streamlines the process by establishing a binding agreement for the interested parties, and mitigates the litigation uncertainty. Salvage contracts normally include dispute resolution terms. The terms often include arbitration clauses that completely remove litigation risk.

States employing contracted salvage recognize the need to provide adequate economic incentives for salvage operations while protecting their UCH. These agreements foster commercial salvage companies' participation, while safeguarding the archaeological interests in historic shipwrecks. Contracted historic salvage therefore provides states with preferable results when the current international regime obfuscates desired outcomes.