

FLORIDA JOURNAL OF INTERNATIONAL LAW

UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW

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ARTICLE

A REVIEW OF INTERNATIONAL SURROGACY
ARRANGEMENTS FROM PRIVATE INTERNATIONAL
LAW PERSPECTIVE AND CHINA'S POLICY RESPONSE

Ying Ying Wu

NOTES

LOOK WHAT YOU MADE ME DO: THE IMPACT
OF TAYLOR SWIFT'S RE-RECORDING PROJECT
ON THE GLOBAL COPYRIGHT INDUSTRY

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ALTERNATIVE SENTENCING FOR FEMALE
OFFENDERS

Wilson Z. Liu

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A REVIEW OF INTERNATIONAL
SURROGACY ARRANGEMENTS FROM A PRIVATE
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RESPONSE

*YingYing Wu**

Abstract

Surrogacy has risen on a global scale due to the development of medical technology. International surrogacy is intensive as a result of forum shopping out of the variety of national policies on surrogacy and laws on legal parentage, resulting in some private international law issues. For instance, the complexity of parentage in many international surrogacy cases in recent years often leads to parentless surrogate born children. To that end, the Hague Conference on Private International Law has been working on this affair in order to protect children and women in international surrogacy from a private international law perspective.

In light of the abolition of one-child policy in China, demand for international surrogacy among Chinese citizens has increased, especially in families that only have one child and would like to bear a second one but where advanced childbearing age is worrisome. Meanwhile, highly educated women are likely to have children at an advanced age. Hence, the need for surrogacy has arisen. However, current policies and law in China prohibit surrogacy, resulting in a domestic black market and sought after international surrogacy. This Article seeks to survey the efforts of the Hague Conference on Private International Law in this regard, as well as legal and judicial practice in China by examining law and cases in detail to forecast China’s response in the future in terms of policy making and law making domestically and its position towards international agreements on legal parentage and international surrogacy arrangements.

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INTRODUCTION

Surrogacy has long been on the rise around the world.¹ On one hand, infertility becomes more common in modern societies, along with diversity of family forms, including same-sex marriage and the need to have genetically related children. On the other hand, the latest development in artificial reproduction has made medical miracles possible.² Surrogacy in this Article refers to the case where an embryo is

1. Myranda Chancey, *Who is the Mommy? Surrogacy Reform is Spreading in the Rich World*, THE ECONOMIST (Jan. 31, 2021), <https://www.economist.com/international/2021/01/31/surrogacy-reform-is-spreading-in-the-rich-world> [https://perma.cc/JL3U-92KF].

2. See Nicole F. Bromfield & Karen Smith Rotabi, *Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations*, 1 GLOB. SOC. WELFARE 123–35 (2014).

implanted into the womb of a surrogate mother after in vitro fertilization using artificial reproduction technology. The fertilized egg may come from the sperm and egg of the intended parents;³ or the sperm may come from one of the intended parents, in combination with the egg from a third party or from a surrogate mother; or the egg may come from one of the intended parents and the sperm comes from a third party. Hence, the surrogate born child is genetically linked to at least one of the intended parents. Given that different nations have a variety of policies and substantive laws on surrogacy, international surrogacy has been on the rise in recent years.⁴ Hopeful parents tend to circumvent domestic prohibitions and travel overseas to states that allow commercial surrogacy.⁵ In addition, considering the technology, cost, immigration policy and other factors, it is no surprise that parents in China choose to go abroad for surrogacy.

Legal issues arising out of international surrogacy are mainly due to the fact that nations have different substantive laws regarding topics such as parentage, nationality, adoption, and same-sex marriage. The applicable laws to determine legal parentage also differ depending on the state's cultural, political, and social environment.⁶ Therefore, international surrogacy causes practical problems. First, it is difficult to determine and recognize the legal parentage of children born to surrogates, rendering the child parentless in many cases. For example, a judgment on the legal parentage or birth certificate issued by the state in which the child is born may not be recognized by the state of the intended parents, which may be denied for reasons such as jurisdiction, applicable law, or public policy exceptions. Second, children born out of surrogacy may be stateless. For example, France and Switzerland refuse to issue passports and grant nationality for their overseas surrogate born children since nationality is solely determined on the basis of legal parentage, which is difficult to determine. Third, the rights and interests of surrogate born children, surrogate mothers and intended parents are far from well protected. For example, surrogate born children may be abandoned. Among all the problems identified, it is most important to confirm the legal parentage of children born out of surrogacy to the extent that the

3. "Intended parents" refers to the couple who entrust a surrogate mother to give birth to a child. They are also referred as the "commissioning parents."

4. Hague Conf. on Priv. Int'l L. [hereinafter HCCH], *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, at 15, Prel. Doc. No. 3C (Mar. 2014), <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf> [<https://perma.cc/P772-9P6L>].

5. *As Demand for Surrogacy Soars, More Countries are Trying to Ban it*, THE ECONOMIST (May 13, 2017), <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it> [<https://perma.cc/S45H-7QLY>].

6. HCCH, Prel. Doc. No. 3C (Mar. 2014), *supra* note 4, at 5–25.

nationality and protection of rights of relevant parties all depend on the issue of legal parentage.⁷

Keeping in mind that the issue of legal parentage of children born out of surrogacy is the primary problem needing to be solved, the international community has explored the following solutions. The first approach, the diplomatic approach, however, has encountered some difficulties in practice. In some cases, children born through surrogacy are allowed to return to the nation of the intended parents through diplomatic approaches to reach consensus that children's rights should be protected, and also to avoid publicity in coverage of international surrogacy. This is usually done by issuing visas or passports or travel certificates under the table. The case-by-case diplomatic approaches, however, do not have clear guidelines, resulting in large differences among cases. Additionally, the number of cases that could be handled through diplomatic channels is limited. Furthermore, it is not clear whether these cases are dealt with in accordance with domestic laws since no explicit laws are provided.⁸

The second approach is to make use of the other existing conventions, such as the 1993 Hague Convention on Intercountry Adoption. However, it does not work well either. Although the intended parents are able to bring the surrogate born children home through the intercountry adoption channel and legally become the parents of the child, the adoption procedure is much more complex. The intended parents may then give up on adopting the child after its birth, leaving the child abandoned and parentless. In addition, in a surrogacy scenario, the surrogate mother has to give her consent to forfeit rights and obligations over the child to the intended parents *prior* to the birth of the child, while the Hague Convention on International Adoption requires the consent of the mother to be given *after* the birth of the child.⁹ That makes intercountry adoption conventions hard to utilize.

The third way is to conclude new international legal documents, but this is far more difficult. First of all, it is largely impossible to unify substantive law among nations in determining the legal parentage, which is under the discretion of each state in the context of its social values and the like.¹⁰ Besides, it is impossible to formulate a unified substantive law to regulate surrogacy given that surrogacy is prohibited in some states

7. *Id.* at 51–54.

8. *Id.* at 49.

9. HCCH, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, at 22, Prel. Doc. No. 11 (Mar. 2011), <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf> [https://perma.cc/24WZ-5YJS].

10. HCCH, *The Desirability and Feasibility of Future Work on the Parentage/Surrogacy Project*, at 16–18, Prel. Doc. No. 3B (Mar. 2014), <https://assets.hcch.net/docs/6403eddb-3b47-4680-ba4a-3fe3e11c0557.pdf> [https://perma.cc/9PBE-2WMC].

while others legitimize it.¹¹ Last, it might be possible to conclude international instruments on private international law (PIL) issues in order to solve the problem of limping parentage.¹² The necessity and feasibility of concluding conventions on PIL related to the confirmation of legal parentage, an international arrangement on jurisdiction in cases of legal parentage, an international arrangement on applicable laws in cases of legal parentage, and an international arrangement on recognition in cases of legal parentage has been explored by the Parentage/Surrogacy Project in the Hague Conference on Private International Law.

I. EVOLUTION OF THE PARENTAGE PROJECT IN HCCH

A. *Initial Focus on “Recognition” Regime*

The Hague Conference on Private International Law (HCCH) authorized its Permanent Bureau to work on the Hague Parentage/Surrogacy Project in 2011. The Permanent Bureau has produced a number of reports. In 2015, the Council on General Affairs and Policy (CGAP) of the HCCH decided to establish an Experts’ Group composed of representatives from member states. The Experts’ Group has held meetings since 2016.¹³

The desirability and feasibility of three possible legal documents of private international law, an international arrangement on jurisdiction in cases of legal parentage, an international arrangement on applicable laws in cases of legal parentage, and an international arrangement on recognition in cases of legal parentage, varies. It is agreed by the Experts’ Group that a legal document of private international law limited to the “recognition regime” would be more conducive to solving the problem, which is the confirmation of legal parentage of children born out of surrogacy. Therefore, the Experts’ Group has focused on proposing two instruments, (i) a general private international law instrument on the recognition of foreign judicial decisions on legal parentage (herein referred to as the Convention), and (ii) a separate protocol on the recognition of foreign judicial decisions on legal parentage rendered as a result of international surrogacy arrangements (ISAs) (hereinafter referred to as the Protocol). Hence, the Experts’ Group agreed initially on the principle of mutual recognition.

11. *Id.*

12. See Katarina Trimmings & Paul Reid Beaumont, *International Surrogacy Arrangements: An Urgent Need for Regulation at the International Level*, 7 J. PRIV. INT’L L. 627–47 (2011).

13. See *The Parentage/Surrogacy Project*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> [<https://perma.cc/TF/A4-C88V>].

This focus is justified because the “recognition regime” avoids the issue of making uniform private international law on jurisdiction and application of law. Moreover, in the stage of recognition where judges are presented with the issue of deciding whether or not to recognize foreign judgments, the application of public policy to refuse recognition of foreign judgments is relatively limited. For instance, judges may refuse to recognize foreign judgments on legal parentage based on the public policy of the state where the judgment is sought to be recognized. This is less likely in practice than at the stage of application of law where judges determining the issue of legal parentage may refuse to apply foreign law that legitimizes commercial surrogacy on the ground that the foreign law contravenes the public policy of the state where the judge sits because the domestic law prohibits surrogacy.¹⁴ Therefore, the Experts’ Group has been primarily working on an international arrangement on private international law relating to recognition of foreign judgments on legal parentage at the very beginning.

In terms of what is to be recognized, it is interesting to learn that the focus at the very beginning is on the problem of international surrogacy through which a child born runs the risk of being parentless. It is the legal parentage of surrogate born children that is to be recognized. However, with further research done, the Experts’ Group has shifted to the recognition of legal parentage regardless of the way the child is born. That is, the recognition of foreign judicial decisions on legal parentage in general. This legal solution goes much further. What is more interesting, an instrument on recognition of legal parentage in general is much more feasible than an instrument on recognition of legal parentage of children born out of surrogacy, which encounters intense debate. To that end, the relationship between the draft instruments (a general private international law convention on legal parentage and a separate protocol on legal parentage established as a result of international surrogacy arrangements) is important. In principle, the Group favored an approach whereby states could choose to become a party to both instruments or only one of them.¹⁵ This Article next provides a summary of issues from the least controversial to the most controversial issues.

14. HCCH, *Background Note for the Meeting of the Experts’ Group on the Parentage/Surrogacy Project*, Annex 1, (Jan. 2016), <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf> [<https://perma.cc/KBG6-WP7F>].

15. HCCH, *Report of the Experts’ Group on the Parentage/Surrogacy Project*, at 6, Prel. Doc. No. 2B (Feb. 2019), <https://assets.hcch.net/docs/55032fc1-bec1-476b-8933-865d6ce106c2.pdf> [<https://perma.cc/965Y-2SAL>].

1. The Least Controversial Issues: Objective and Scope of Future International Instruments

The Experts' Group broadly agreed that out of the need to avoid limping legal parentage, the main objectives of the future international instruments (the Convention and the Protocol) would be to provide predictability, certainty, and continuity of legal parentage for all individuals concerned and take into account their respective rights.¹⁶ The instruments should not be understood as supporting or opposing surrogacy. Member states are free to make policies and laws to regulate international surrogacy.¹⁷

In terms of the scope of the future instruments, the issues excluded are custody, inheritance, nationality, and other matters covered by the existing Hague conventions, such as the 1993 HCCH Intercountry Adoption Convention, which should not be undermined by any future instrument. The issues excluded are to be governed by domestic laws of states. Given the overarching aims of the instruments, most Experts agreed that it would be appropriate to include domestic adoptions within its scope. The Group agreed, however, that recognition of domestic adoptions raises many important issues and challenges, such as distinguishing between domestic adoptions and intercountry adoptions.¹⁸

2. The Moderately Controversial Issues: Recognition of Foreign Judgments and Documentation on Legal Parentage

In a normal case, a judicial decision is issued by State A confirming the legal parentage of a child born out of surrogacy in State A. State B is presented with the question of whether or not to recognize the foreign judicial decision on legal parentage when the child concerned is brought by its intended parents back to State B where the parents reside. It is the same case in the absence of a judicial decision as there is normally foreign documentation, such as a birth certificate, recording parentage of the child. The Experts' Group made significant progress in developing draft provisions for a possible future Convention dealing with the recognition of foreign judicial decisions as well as documentation on legal parentage.

16. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, at 1, Prel. Doc. No. 2 (Nov. 2019), <https://assets.hcch.net/docs/d435cffc-65ce-4047-b603-ff63ed20591c.pdf> [<https://perma.cc/VPQ7-HXBQ>].

17. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, at 4, Prel. Doc. No. 2 (Feb. 2018), <https://assets.hcch.net/docs/75f52918-063d-4232-81c7-ca7cd37e5af6.pdf> [<https://perma.cc/65VK-VYAS>].

18. *Id.* at 3. See Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption art. 17, May 29, 1993, 114 Stat. 825.

a. Foreign Judgments on Legal Parentage

One of the moderately controversial issues is provision for a general PIL instrument on the recognition of foreign judicial decisions on legal parentage. The discussion primarily focuses on two issues. One is the indirect grounds of jurisdiction, and the other is the grounds for refusal.

The Experts' Group agreed that the recognition regime should occur by operation of law and be subject to the satisfaction of certain indirect grounds of jurisdiction in the state where the judgment was issued. The Experts' Group explored a number of possible connecting factors and their advantages and disadvantages respectively, and generally preferred multiple, alternative bases of indirect jurisdiction with sufficient proximity between the subject matter and the state of judgment. The Group agreed on the following alternative indirect grounds of jurisdiction that would have to be fulfilled at the time when proceedings were initiated: (a) the place of the child's habitual residence; or (b) the place of the respondent's habitual residence. The Group agreed that grounds for indirect jurisdiction relating to party autonomy (i.e., choice of court and submission to the jurisdiction of the court) should not be included in light of the subject matter of the proceedings concerning legal parentage.¹⁹

In terms of grounds for refusal, the majority of the Experts' Group agreed that recognition of foreign judicial decisions on legal parentage made without conducting substantive review should also be subject to certain conditions, the absence of which could constitute refusal of recognition. In other words, a court may refuse to recognize a foreign judgment on the grounds that (i) the procedure was unfair where the respondent did not have proper notice of the proceedings and an opportunity to be heard; (ii) where there are inconsistent judgments or parallel proceedings; or (iii) violation of public policy.²⁰ Experts also agreed that fraud should be addressed, but there was discussion as to whether such a ground for refusal should go beyond fraud in connection with a matter of procedure. As for the public policy ground, the Experts' Group agreed that the expression of public policy shall be consistent with that of the existing Hague Convention's position on public policy, which requires it be "manifestly contrary to its public policy, taking into account the best interests of the child."²¹ The public policy justification does not apply if it leaves the child parentless.²²

19. HCCH, Prel. Doc. No. 2 (Nov. 2019), *supra* note 16, at 2–3.

20. *Id.* at 3.

21. *Id.* at 1; Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, *supra* note 18, at art. 24.

22. HCCH, Prel. Doc. No. 2 (Feb. 2018), *supra* note 17, at 4.

b. Foreign Public Documentation Recording Legal Parentage

The majority of the Experts' Group considered that the recognition of foreign public documents recording legal paternity was largely different from the recognition of foreign judicial decisions on legal parentage. Here, "recognition of foreign public documents recording legal parentage" refers to recognition of the legal effect of legal parentage as recorded in foreign public documentation, rather than the matter of formal validity or authenticity of foreign public documents.

It is noted that the nature and content of birth certificates varies widely across states. First, many foreign public documents only records facts rather than the legal parentage. For instance, a birth certificate may only record the name of the mother who delivers the child, leaving the column for the name of the father blank. Second, a birth certificate may be regarded as a public document or merely a document arising from a civil relationship depending on the state's policy. Third, states' practices regarding the perception of birth certificates issued by foreign states vary significantly with some states treating foreign birth certificates as evidence of proving certain facts while other foreign birth certificates are treated as evidence of proving legal conclusions, or even as the legal conclusion itself.

The Experts' Group discussed the following three ways to recognize foreign birth certificates. The first approach is laws of uniform application. This approach would help ensure the continuity of legal parentage cross-border in the absence of a foreign judgment on legal parentage (i.e., where legal parentage is established by operation of law or following the act of an individual). However, this approach is practically difficult considering it requires unification of applicable laws across states. Even if it worked with proposed provisions like "legal parentage is to be determined by the law of the state where the court sits," divergence exists regarding rules on direct jurisdiction. The second approach treats a foreign birth certificate as rebuttable evidence of paternity. Most states have already practiced this. Some of the experts believed that uniform rules on formal validity, bi-lingual forms could be developed to enhance the circulation of birth certificates. Nevertheless, this approach does not guarantee continuity of legal parentage given that foreign birth certificates are merely regarded as rebuttable evidence of proving a fact, which is also already the practice of many states. The third approach is direct recognition of the validity of parentage recorded on foreign birth certificates through an international convention. While this approach is efficient, it would require an international authority to issue a uniform international birth certificate, which would be recognized directly by all member states. Difficulties come along with the

establishment of an international body charged with the authority to issue a uniform international birth certificate.²³

With the progress made following the discussion on applicable legal rules, two options have been put on the table for further discussion. One option is the recognition of foreign public documents recording legal parentage as long as the state of origin has jurisdiction and the applicable rules of law are complied with. This approach actually utilizes direct jurisdiction rules and applicable rules of law. The effect of recognition is that public documents presented in the requesting state shall be given the same effects or the most comparable effects that they have in the state of origin. The other option is a rule on the presumption of validity of legal parentage recorded in a public document issued by a designated competent authority. In other words, where a public document recording the legal parentage of a child has been issued by a competent authority of a contracting state, the legal parentage recorded therein shall be presumed to have been validly established until the contrary is established.

3. The Most Controversial Issues: Protocol on International Surrogacy Arrangements

Most experts agree that when it comes to parenthood, the problem lies in international surrogacy. The most controversial issues come with recognition of judgments and public documentation on legal parentage in ISAs. If a convention were to exclude international surrogacy, such a convention would not address the most pressing issues of the moment. Some experts suggested that special provisions for international surrogacy be developed as an additional protocol to the Convention.²⁴ Member states may choose to “include” or “exclude” the rules governing international surrogacy by choosing whether to accept these additional protocols through the “accession mechanism” or the “withdrawal mechanism.”²⁵

As for recognition of foreign judgments on legal parentage in ISA cases by operation of law, the Experts’ Group considered possible criteria for the recognition of judgments on legal parentage in ISA cases. In this regard, many experts re-emphasized the central importance of including minimum standards or safeguards to protect the rights and welfare of the parties involved and, in particular, the best interests of the child.²⁶ Safeguards discussed include: (i) the free and informed consent of the surrogate mother throughout the ISA; (ii) the preservation of information

23. *Id.* at 5.

24. HCCH, Prel. Doc. No. 2B (Feb. 2019), *supra* note 15, at 5.

25. See Accession, *Glossary of terms relating to Treaty actions*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml [https://perma.cc/7UAQ-JK78].

26. HCCH, Prel. Doc. No. 2 (Feb. 2018), *supra* note 17, at 8.

concerning the child's origins; (iii) to what extent the Protocol should address or limit the involvement of intermediaries in ISAs; (iv) provision on the identification, authorization, and supervision of intermediaries; (v) minimum standards concerning the eligibility and suitability of the surrogate mother, and the eligibility and suitability of the intended parents; and (vi) prevention of the abduction, sale of, or traffic in women and children in the context of ISAs, taking into account the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of May 20, 2000. It should be kept in mind that the more safeguards relating to surrogacy, the international law goes to regulate surrogacy substantively, which falls primarily within national jurisdiction.

Two approaches for safeguards were discussed. One is an *a posteriori* approach, where safeguards are required to be met post-birth of the child in an ISA, and the other is an *a priori* approach, where safeguards are to be met prior to the birth of the child. The former is preferred. In the framework of an *a posteriori* approach, discussions concern whether safeguards are included in the Protocol as general obligations, or as conditions for recognition, or rather as grounds for non-recognition. A few experts were of the view that multiple conditions for recognition may undermine the overarching aims of the Protocol, in particular because failure to satisfy a condition would result in non-recognition of the child's legal parentage pursuant to the Protocol, leaving the child with limping legal parentage. It was suggested that it may be more feasible to structure some of the proposed safeguards as grounds for non-recognition and/or general obligations, rather than as conditions for recognition.²⁷

In addition to that, the Group discussed the possibility of certification (for example, by way of a model form) to verify that conditions or safeguards under the Protocol have been met. Certification should include confirmation that ISAs were permitted under the law of the state of origin at the time the ISA was entered into and executed. However, experts had differing views on who should be competent to provide such certification in the ISA state of origin.²⁸ The Group also discussed how the Protocol could also be applied to legal parentage when it is not established by a judgment. There was general support in the Group for exploring how a certification mechanism might operate in the absence of a judgment.²⁹

B. *Later Focus on PIL Issues Surrounding Legal Parentage*

The focus of the Experts' Group moved to PIL issues surrounding legal parentage in general (draft private international law convention on

27. HCCH, Prel. Doc. No. 2 (Nov. 2019), *supra* note 16, at 6.

28. *Id.* at 5.

29. *Id.* at 6.

legal parentage) at a later stage of the Hague Project on Parentage/Surrogacy.

Some experts noted that direct grounds of jurisdiction would further increase legal certainty and reduce the risk of conflicting judgments on legal parentage, and believed it would be helpful to give further consideration to such grounds in conjunction with the PIL techniques. If direct grounds of jurisdiction could be agreed upon, experts noted that it would be helpful to have an applicable rule of law stating which law authorities should apply in exercising their jurisdiction under the Convention. This also ensures that the diverse substantive rules of states on legal parentage are respected. To that end, a chapter on applicable laws in the general PIL convention on legal parentage was discussed.³⁰

The Experts' Group discussed the feasibility and necessity of the following mechanisms. First, the same conflict of laws rules (rules of applicable law) are applied to determine the legal parentage, regardless of the method and event through which the legal parent-child relationship is established. Second, the Experts' Group believed that it is certain to regard the state of birth as an objective connection point. Third, if the child's state of birth is not the parent's habitual residence, an alternative connection point, namely the law of the state of habitual residence of the person who gave birth, can be considered. Fourth—in exceptional cases—the legal parentage is established by behavior or by a court decision after the child's birth, and the law of the child's habitual residence shall apply and the child's best interest principle shall be applied.³¹

II. CHINA'S DOMESTIC LAW AND POLICIES ON SURROGACY

A. *China's Policies and Law on Domestic Surrogacy*

By reviewing law and practice in China, it is apparent that China's attitude towards surrogacy is negative. First, medical institutions and their staff are prohibited from carrying out surrogacy surgeries. According to Articles 2, 3, and 12 of the Measures on the Management of Human Assisted Reproductive Technology (hereinafter referred to as "the Measures") issued by the Ministry of Health in 2001, medical institutions and their personnel shall not carry out surrogacy, or they will be subject to administrative and criminal sanctions.³² Therefore, it is

30. *Id.* at 4.

31. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, Annex I, at 3–4, Prel. Doc. No. 2A (Oct. 2020), <https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf> [<https://perma.cc/3XZ6-2JVM>].

32. Renlei Fuzhu Shengzhi Jishu Guanli Banfa (人类辅助生殖技术管理办法) [Measures on the Management of Human Assisted Reproductive Technology] (promulgated by Ministry of

illegal for medical institutions and personnel with medical qualifications to carry out surrogacy. Besides this, any person or clinic without medical certificates that conduct surrogacy will be liable and punished for the illegal unauthorized practice of medicine.

The Measures are enforced rigorously against soaring surrogacy in the black market. The National Health and Family Planning Commission along with twelve other departments³³ set up a national leading group and office for the special action against surrogacy. A special campaign against surrogacy was carried out nationwide in 2015. The campaign (i) investigated medical institutions and medical staff that conduct surrogacy; (ii) investigated social intermediary agencies that carry out surrogacy; (iii) cleaned up and investigated the internet, TV broadcasting, newspapers, and magazines that advertise surrogacy promotion and services; and (iv) supervised the application of human assisted reproductive technology services and the circulation and sales of medical devices and drugs.³⁴

The nationwide campaign ended up with lots of cases, and one typical case, among them, is the illegal surrogacy in Wuhan, Hubei Province. In July 2014, the media reported the rampant underground “surrogacy” activities in Wuhan. The Hubei Provincial Health and Family Planning Commission formed a joint investigation team destroying large dens of surrogacy workshops. The investigation found that Wuhan 672 Hospital leased its departments and clinics to Wuhan Zhongtuo Hesheng Medical Investment Co., Ltd. to illegally carry out surrogacy and physical examination activities for surrogate mothers. The punishment imposed was closure of the laboratories carrying out surrogacy, and seizing 771 frozen embryos and 167 frozen sperm among other items. The Hubei Provincial Health and Family Planning Commission gave the hospital an additional administrative penalty, confiscating illegal income of 380,000 RMB, revoking their medical license, and disciplining hospital leaders.

Health, Feb. 20, 2001, effective Aug. 1, 2001) ST. COUNCIL GAZ., 2002, https://www.gov.cn/gongbao/content/2002/content_61906.htm [<https://perma.cc/F2ZX-SNQB>] [hereinafter Measures].

33. The other twelve departments are the General Office of the National Health and Family Planning Commission, the General Office of the Central Propaganda Department, the Secretary Office of the Central Comprehensive Management Office, the Secretariat of the Central Cyberspace Administration of China, the General Office of the Ministry of Industry and Information Technology, the General Office of the Ministry of Public Security, the General Office of the Ministry of Civil Affairs, the General Office of the State Administration for Industry and Commerce, the General Office of the Food and Drug Administration, the Office of the State Administration of Traditional Chinese Medicine, the Army Family Planning Leading Group Office, and the Ministry of Health, Logistics Department, and Armed Police Force.

34. Notice of the General Office of the National Health and Family Planning Commission, the General Office of the Central Propaganda Department, the Secretary Office of the Central Comprehensive Management Office, et al., No. [2015]22 (Apr. 3, 2015) (on the issuance of the work plan for the special action against surrogacy).

The seven medical staff involved in the case were administratively penalized by revoking their practice certificates.³⁵

Surrogacy contracts between individual parties (i.e., between the surrogate mother and intended parents) are also not protected by law and are non-enforceable in China. Neither party of a surrogacy contract will be protected in the event a dispute arises out of the surrogacy contract. Looking at Article 2 of the Measures, which stipulates that “these Measures shall apply to all kinds of medical institutions that carry out human assisted reproductive technology,” it could be asserted that current regulations are only applicable to medical institutions. The flip side of this is that the Measures do not prohibit individuals from becoming surrogate mothers or intended parents.

Nonetheless, Article 8 of the Civil Code provides that “no person of the civil law may violate the law, or offend public order or good morals.”³⁶ In terms of the law, it refers to laws made by the legislative branch. The Measures are enacted by the Ministry of Health, and hence are governmental rules, specifically ministerial rules, rather than legislative law. Article 143 of the Civil Code provides that “[a] juridical act satisfying all of the following conditions shall be valid, the third condition is that ‘It neither violates the imperative provisions of laws and administrative regulations, nor is contrary to public order and good morals.’”³⁷ Administrative regulations refer to regulations promulgated by the State Council. The Measures are not administrative regulations.

To that end, there is concern about whether surrogacy contracts are contrary to public order and good morals. In interpreting “public order and good morals,” classification of potential violations of public order and good morals is preferred, which contains, but is not limited to: (i) endangering the national political, economic, fiscal, taxation, financial, and public security order; (ii) endangering family relations; (iii)

35. *Guojia Weisheng Jiankang Weiyuanhui Gongbu Daji Feifa Xingyi Zhuanxiang Xingdong Gongbu 12 Qi Dianxing Anli Zhi Ba : Hubeisheng Wuhanshi Feifa Daiyun An (国家卫生健康委员会公布打击非法行医专项行动公布12起典型案例之八：湖北省武汉市非法代孕案)* [The National Health Commission announced a special campaign to combat illegal medical practice, announcing 12 typical cases, including the eighth: the illegal surrogacy case in Wuhan, Hubei Province], PKULAW, <https://www.pkulaw.com/pfn/a25051f3312b07f3fc86755cfd5648039519f8f0e4fc65b7bdfb.html> [https://perma.cc/RP94-EMYA]; *Jinyibu Zhengdun Yiliao Zhixu Daji Feifa Xingyi Zhuanxiang Xingdong Dianxing Anli (进一步整顿医疗秩序打击非法行医专项行动典型案例)* [Typical cases of the special campaign to further rectify medical order and crack down on illegal medical practice], HUBEI PROVINCIAL HEALTH DEV. SERV. CTR. (Jan. 4, 2015), https://wjw.hubei.gov.cn/hbwsjd/xwzx/szgz/202009/t20200905_2888404.shtml [https://perma.cc/JJ9R-6ADG].

36. 中华人民共和国民法典 (zhonghuarenmingongheguo minfadian) [Civil Code of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., May 28, 2020, effective Jan. 1, 2021), art. 8, 2020 Special Issue STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 2 [hereinafter PRC Civil Code].

37. *Id.* art 143.

violations of sexual ethics; (iv) violations of human rights and human dignity; (v) constraints on a free economy; (vi) violations of fair competition; (vii) violations of consumers protections; and (viii) violations of labor protections.³⁸ Surrogacy is highly relevant to the matter of marriage, family, ethics, etc. Commercial surrogacy faces opposition on ethical grounds and concerns about protecting traditional family modes and marriage. Hence, surrogacy contracts might be deemed contrary to public order and good morals in China for endangering family relations. Paragraph 2 of Article 153 of the Civil Code stipulates the consequence of contravening public order and good morals is that “[a] juridical act contrary to public order and good morals shall be void.”³⁹ Therefore, surrogacy contracts between individuals are void in a sense for being contrary to public order and good morals.

It is largely the same for surrogacy contracts between intermediate agencies and intended parents or surrogate mothers. Article 1009 of the Civil Code provides that “engaging in medical and scientific research activities related to human genes, human embryos, etc., shall abide by laws, administrative regulations and relevant state regulations, shall not endanger human health, violate ethics and morals, and shall not harm public interests.”⁴⁰ It obligates medical activities to abide by ethics and morals and not endanger public interests. The Civil Code is created by the legislative branch, and hence qualifies as the law. According to Article 8 of the Civil Code, mentioned above, “[t]he parties to civil legal relations shall not conduct civil activities in violation of *the law*,” and Article 143 of the Civil Code provides that “[a] juridical act satisfying all of the following conditions shall be valid, the third condition is that ‘It neither violates the *imperative provisions of laws*’”⁴¹ Imperative provisions of law refers to mandatory obligations that cannot be altered or escaped in a sense that the obligations must be abided by. We can tell from the provision of Article 1009 of the Civil Code that says, “engaging in medical activities shall not endanger,” where the use of “shall” indicates a mandatory obligation. In light of ethics and morals and public interests that may be involved in surrogacy contracts between intermediate agencies and intended parents, such surrogacy contracts are likely to be invalid. This is confirmed in the case of *Sun v. Sears International Consultation Co. Ltd.*, where the court of Guangdong Province held that the surrogacy contract between the parties was invalid concerning the provision of surrogacy service by Sears International

38. *Id.* art. 153.

39. *Id.*

40. *Id.* art. 1009

41. *Id.* art. 143 (emphasis added).

Consultation Co. Ltd. (which was the intermediate agency) to Ms. Sun.⁴² Nevertheless, the intermediate agency was compensated for reasonable costs and expenses occurred since both parties had fault in concluding the contract with the knowledge that the contract was against public interests and in violation of several laws and regulations.⁴³ Their compensation resulted from the application of the equitable principle that no one shall benefit from undue conduct.

Third, the legal parent-child relationship and the rights enjoyed by surrogate born children are not affected by the illegality of surrogacy in China. The separation of issues of legal parentage from that of the legality of surrogacy is not designed to encourage or legalize surrogacy but rather to protect the rights and interests of children. Given that surrogacy is prohibited in China in general by Article 1009 of the Civil Code as well as the Measures for Managing Human Assisted Reproductive Technology, which prohibits clinics and medical professionals from carrying out surrogacy, it cannot be referred to as a legal basis for the determination of legal status of children born out of surrogacy.

Last, laws and regulations in China do not have explicit provisions for the determination of legal parentage of children born out of surrogacy. In general, the provisions concerning Marriage and Family Law in the Civil Code do not have specific provisions for identifying legal parentage at all. In fact, the normal means is to identify the woman who gives birth to the child as its mother. With respect to the legal father, the man married to the woman who gives birth to the child, will be presumed as the legal father of the child.⁴⁴ The other way to identify the legal father is based on a biological connection proven by evidence.⁴⁵

In contrast, the answers regarding legal parentage are not clear cut in cases of surrogacy and can even contradict one another. There are several scenarios involving surrogacy: Scenario A is where the sperm is from the intended father, the egg is from a third party, and a surrogate mother gives birth to the child; Scenario B is where the sperm is from the intended father, the egg is from the intended mother, and a surrogate mother gives

42. Sun v. Sears International Consultation Co. Ltd., 粤03民终9212号民事判决书 (yue 03 min zhong 9212 hao minshi panjueshu) [Civil Judgment Civil Judgment Case No. Yue 03 Min Zhong 9212] (Guangdong Interm. People's Ct., 2018) (China).

43. *Id.*

44. Chen v. Luo, Stepmother Obtained Custody over Surrogate Born Children, Civil Judgment Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56 (Shanghai Interm. People's Ct., 2015) (China).

45. PRC Civil Code, *supra* note 36, art. 1073; Zuigaorenminfayuan Guanyu Shiyong 《Zhonghuarenmingongheguo Minfadian》 Hunyinjiating Bian De Jieshi (Yi) (最高人民法院关于适用《中华人民共和国民法典》婚姻家庭编的解释(一)) [Interpretation of the Supreme People's Court on the Application of the Marriage and Family Section of the Civil Code of the People's Republic of China, Judicial Interpretation No. 1] (Promulgated by the Judicial Comm. Sup. People's Ct., Dec. 29, 2020, effective Jan. 1, 2021) (China).

birth to the child; Scenario C is where the sperm is from the intended father, the egg is from the surrogate mother, and a surrogate mother gives birth to the child; and Scenario D is where the sperm is from a third party, the egg is from the intended mother, and a surrogate mother gives birth to the child.

In practice, Scenario A has been the subject of judicial decisions. In the *Stepmother Obtained Custody over Surrogate Born Children* case, the Shanghai court ruled on China's first surrogacy case in 2015,⁴⁶ which was also mentioned by the Supreme People's Court in its 2017 working report.⁴⁷ The case concerns whether the intended mother is the legal parent of children born out of surrogacy. In 2010, the infertile Ms. Chen and her husband, Mr. Luo, bought eggs and gave birth to twins through surrogacy. Her husband died of a serious illness, and the grandparents asked for custody of the children. The two parties disputed over the determination of the legal status of the children born by surrogacy, and whether Ms. Chen established a fictitious parental relationship with the two children and had custody of the children. The Shanghai No. 1 Intermediate People's Court, considering the best interests of the children and the fact that the children had lived with Ms. Chen for years, even after her husband died, held that Ms. Chen and the children had formed a stepparent-child relationship. The case aroused heated debate because the surrogacy involved in the case not only related to legal issues about parentage, but also involves ethics, morality and statutory law. To some extent, the court's reasoning reflects China's attitude towards surrogacy.

The court held that the children born by Mr. Luo and other women through surrogacy after Ms. Chen and Mr. Luo were married are children born out of wedlock of Mr. Luo. The children then lived with the couple for nearly three years after their birth. After the death of Mr. Luo, the children lived with Ms. Chen for another two years. Ms. Chen and the children formed a stepparent-child relationship because they lived together for almost five years. Considering the principle of the best interests of the child, Ms. Chen's acquisition of guardianship is also more conducive to the welfare of the children compared to the request of the grandparents for custody. However, the court did not confirm a de facto adoption out of the concern that if de facto adoption was to be recognized in this case, it would legitimize the implicit transfer of legal parentage from the surrogate mother to the intended mother, thus acquiescing to surrogacy, which is prohibited by law and policies in China.⁴⁸

In a nutshell, the judicial decision is guided by policies against surrogacy in the absence of explicit provisions in law. The principle of protecting children's rights and interests is operative throughout judicial

46. *Chen v. Luo*, Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56.

47. Zhou Qiang, WORK REPORT OF SUPREME PEOPLE'S COURT (2017).

48. *Chen*, Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56.

decisions in determining legal parentage of children born out of surrogacy. The judge handling the case stated that no matter how the illegal surrogacy is denied or condemned, the children born out of the surrogacy should be treated the same as normal children, and their legitimate rights and interests should be protected by law.⁴⁹ Therefore, regardless of whether it is a child born in wedlock or out of wedlock, whether to biological parents or through artificial reproduction, including surrogacy, the same protections should be afforded.

However, the other case concerning Scenario A was decided quite differently by the Guangdong Court. In the case of *Ms. Zhang v. Mr. Li Claiming for Custody*, Ms. Zhang brought the case in Beijing Court for seeking custody over a baby against Mr. Li.⁵⁰ Mr. Li claimed that Ms. Zhang was the surrogate mother and had no biological connection with the child since the child was born out of surrogacy in Thailand with sperm from Mr. Li and an egg from a third party. This case thus concerned whether biological connection as a basis for legal parentage or the birthing relationship would prevail. In the end, the court held that Mr. Li is the biological father of the child while Ms. Zhang is not the biological mother of the child. Based on the fact that the child was raised by Mr. Li for several months after its birth. The court, therefore, dismissed Ms. Zhang's claim for custody over the child. As for the surrogacy, the court held that no evidence showed there was surrogacy.⁵¹ It can be inferred that a biological connection is preferred over the fact of giving birth although this case denied the existence of the surrogacy arrangement based on insufficient evidence. In addition, the United Nations Convention on the Rights of the Child was mentioned in the case of *Ms. Zhang v. Mr. Li Claiming for Custody* in that Article 3 of that Convention confirmed the legal principle of best interests of the child, and China, as a negotiating party and contracting party, is obligated to apply the principle in its legislation and judicial practice, including in the determination of legal parentage by courts which are obligated to protect the best interest of the child.⁵²

The two cases contradict one another to the extent that the Shanghai Court recognized the woman who gives birth to the child as the mother while the Guangdong Court focused on biological connection and held that the alleged surrogate mother is not biologically connected to the child. Nevertheless, the two cases share commonalities in that the principle of protecting children's best interests is emphasized and

49. *Id.*

50. Zhang v. Li, Civil Judgment (Guangdong Interm. People's Ct., 2019) (China).

51. *Id.* See also Min Liu, 代孕妈妈起诉争夺抚养权, 法院这么判! [The Surrogate Mother Sued for Custody, and the Court Ruled Like This!], Baidu (Mar. 19, 2022), <https://baijiahao.baidu.com/s?id=1727735756108045651> [<https://perma.cc/FQJ6-XJN3>].

52. *Id.*; see also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

extensively applied in determining custody. Additionally, both courts tried working around the issue of surrogacy—the Shanghai Court fell short of talking about confirmation of legal parentage in cases of surrogacy and the Guangdong Court denied the existence of any surrogacy.

While no judicial decisions have been made in Scenarios of B, C, or D, the key points from judicial decisions related to Scenario A may be applicable to the other Scenarios by analogy. In Scenarios B, C, and D, courts are likely to identify the surrogate mother as the legal mother on the basis of the doctrine in China that the woman who gives birth to the child is regarded as the legal mother unless there is contrary evidence showing that no biological connection exists between this woman and the child.⁵³ Then, the legal father is the sperm provider. The intended mother, whether or not providing eggs, may be identified as a stepmother based on the fact of upbringing. However, at the time when the child is born, and during the period prior to the birth of the child, the intended mother cannot claim any legal right over the child given that she did not carry the child. To that end, intended parents are not likely to be legal parents of surrogate born children as they expect. In practice, the absence of provisions of law relating to legal parentage of children born out of surrogacy creates uncertainty for identification of legal parentage.

B. *China's Policies and Law on International Surrogacy*

There are many more Chinese couples seeking surrogacy overseas as intended parents where commercial surrogacy is permitted. In one case, for instance, a Chinese couple who stored their embryos in a hospital died. The parents of the deceased couple asked the Intermediate People's Court of Wuxi to grant them the right to dispose of their deceased children's embryos. The request was granted. However, the hospital where the embryos were stored only allowed the transfer of the embryos to a medical institution. As no Chinese institution would accept the transfer of the embryos to its facilities, the four parents requested that the embryos be transferred to a clinic in Laos. They then hired a commercial surrogacy agency to have the embryos implanted into a surrogate mother in Laos. The surrogate mother gave birth to the child in December, 2017 in China. It is not clear how the child is registered in China, or who his legal parents are.⁵⁴

In such international surrogacy, various legal issues arise. Could the child born out of international surrogacy obtain a birth certificate issued

53. Chunyan Ding, *Surrogacy Litigation in China and Beyond*, 2 J.L. & BIOSCIENCES 33, 47 (2015).

54. Jiangsu Wuxi Yixing Lengdong Peitai Jiufen An (江苏无锡宜兴冷冻胚胎纠纷案) [Shen Xinnan and Shao Yumei v. Liu Jinfa and Hu Xinxiang], Case No. Xi Min Zhong Zi No. 01235 (Wuxi Interm. People's Court of Jiangsu Province, Sept. 17, 2014) (China).

by a competent Chinese authority? Could the child concerned be household-registered in China in terms of “Hukou,” which is similar to a social security card in the United States? Could the child concerned get Chinese nationality? What about the legal parentage of the child concerned? Will a judicial decision by foreign courts in states where a child is born out of surrogacy be recognized by Chinese authorities? Will the birth certificate or documentation recording legal parentage issued by overseas authorities where the child is born out of surrogacy be recognized by Chinese authorities? The answers are not clear cut from analyzing current Chinese law and policies.

1. Birth Certificate, Household Register, Nationality and Legal Parentage

With respect to the issue of whether the child born out of surrogacy overseas could obtain a birth certificate issued by a competent Chinese authority, Article 23 of the Law of the People’s Republic of China on Maternal and Infant Health Care provides that “medical and health institutions and professionals engaged in traditional birth attendance shall, in accordance with the directives issued by the administrative department of public health under the State Council, issue uniform medical birth certificates for newborn babies.”⁵⁵ However, the abovementioned provision applies within the borders of China. In other words, children born overseas rather than in the territory of China cannot obtain a medical birth certificate issued by a competent Chinese authority.

With respect to the issue of whether the child born out of surrogacy overseas could be household-registered in China, it is important to explain what household registration is. Household registration is a little bit like obtaining a social security card in the United States. However, there are many more differences. A household registration, normally referred to as Hukou, officially identifies a person as a permanent resident of an area and contains identification information such as their name, parents, spouse, and date of birth. Hukou is related to education, medical service, and housing in a sense. For instance, in Beijing, you cannot be enrolled in public schools or even buy a house in Beijing if you are not household registered in Beijing.⁵⁶ Although Chinese household registration authorities have the power to register babies born out of

55. Zhonghuarenmingongheguo Muying Baojianfa (2017 Xiuzheng) (中华人民共和国母婴保健法(2017修正)) [Maternal and Infant Healthcare Law of the People’s Republic of China (2017 amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 1994, amended Aug. 27, 2009, amended Nov. 4, 2017, effective Nov. 5, 2017), art. 23, CLI.1.304342 (PKULaw).

56. Kam Wing Chan, *The Household Registration System and Migrant Labor in China: Notes on a Debate*, 36 POPULATION DEV. REV. 357, 358–59 (2016).

surrogacy overseas, one prerequisite for registration is that legal parentage is already clear since registration of Hukou is based on the family unit and the household registration is issued per family—including all births, deaths, marriages, divorces, and moves of all members in the family. The child born out of surrogacy overseas could not be household registered if it is not clear who its legal parents are.

With respect to the issue of whether the child born out of surrogacy overseas could obtain Chinese nationality, according to Article 5 of Nationality Law of the People’s Republic of China, “[a] person, born in a foreign nation, whose parents are both Chinese citizens are able to have Chinese nationality. However, a person whose parents are both Chinese citizens and have settled abroad and who has acquired foreign nationality at birth shall not have Chinese nationality.”⁵⁷ However, this provision applies only if legal parentage is already clear. In other words, legal parentage of the child born out of surrogacy is a prerequisite issue for acquiring nationality.

It turns out the confirmation of legal parentage of the child born out of international surrogacy is a prerequisite for many issues, such as nationality. To the extent cases involving international surrogacy in relation to legal parentage are brought before courts in China, there are two matters that need to be addressed.

The first thing that judges face with the abovementioned cases present with is the issue of jurisdiction. In cases where Chinese intended parents bring lawsuits against the surrogate mother who is a resident of a foreign state, Article 23 of the Civil Procedure Law of the People’s Republic of China is applicable given the international factors in these cases. Article 23 provides,

civil lawsuits described below shall be under the jurisdiction of the people’s court of the place where the plaintiff has his domicile; if the place of the plaintiff’s domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people’s court of the place of the plaintiff’s habitual residence:

(1) those concerning personal status brought against persons not residing within the territory of the People’s Republic of China; . . .⁵⁸

57. Zhonghuarenmingongheguo Guojifa (中华人民共和国国籍法) [Nationality Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 10, 1980, effective Sept. 10, 1980), art. 5, CLI.1.796 (PKULaw).

58. Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (2021 xiuzheng) (中华人民共和国民事诉讼法(2021修正)) [Civil Procedure Law of the People’s Republic of China (2021 Amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, amended

To that end, it is the Chinese court where Chinese intended parents reside that has jurisdiction over cases in which Chinese intended parents bring a lawsuit against the foreign surrogate mother. In cases where the foreign surrogate mother brings a lawsuit against Chinese intended parents, Article 22 of the Civil Procedure Law applies. Article 22 stipulates,

[a] civil lawsuit brought against a citizen shall be under the jurisdiction of the people's court of the place where the defendant has his domicile; if the place of the defendant's domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people's court of the place of his habitual residence.⁵⁹

It can be concluded that in cases where the foreign surrogate mother brings a lawsuit against Chinese intended parents, it is the Chinese court of the place where the Chinese intended parents reside that has jurisdiction. Thus, courts in China have jurisdiction over actions brought against Chinese intended parents by the foreign surrogate mother challenging the legal parentage of the child born out of surrogacy. What if the foreign surrogate mother brings a lawsuit in a foreign state against Chinese intended parents? In that case, the issue of recognition of foreign judicial decisions regarding legal parentage of children born out of surrogacy arises. It concerns the competition of jurisdiction as well.⁶⁰

The second matter is the court's choice of law. Given that the confirmation of legal parentage of the child born out of surrogacy involves international factors, Chinese conflict of laws rules are applicable in order to figure out which state's law is applicable and then the legal parentage would be determined according to the law of that state. According to Articles 2, 5, and 25 of the Law of the People's Republic of China on the Application of Laws on Foreign-Related Civil Relations, there are two possible outcomes after the Chinese court applies Chinese conflict of laws rules.⁶¹ One outcome is that the Chinese court will apply the foreign law (the law of the state where the child concerned is born or the law of the state where the foreign surrogate mother resides). The other outcome is that the Chinese court will apply Chinese law instead of foreign law on the ground that the application of foreign law will impair the social value and public interests of China if the state where the child concerned is born out of surrogacy, as well as the state where

Dec. 24, 2021, effective Jan. 1, 2022), art. 23, 2022 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 355 (China).

59. *Id.*, art. 22

60. See analysis in Section II(B)(2) below for further discussion of this issue.

61. Zhonghuarenmingongheguo Shewai Minshi Guanxi Falü Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on the Application of Laws on Foreign-Related Civil Relations] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective April 1, 2011), arts. 2, 5, 25, CLI .1.139684 (PKULaw).

the foreign surrogate mother resides, legitimizes commercial surrogacy. In cases where substantive Chinese law is applied, the analysis is similar to in section A above.

2. Does China Recognize Foreign Judgments on Legal Parentage?

When it comes to the issue of whether Chinese courts will recognize foreign judicial decisions on legal parentage, we may refer to Articles 281 and 268 of the Civil Procedure Law of the People's Republic of China which provides that a foreign judicial decision may be recognized provided it "does not contradict the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and social and public interest of the country."⁶² Such a foreign judgment may confirm the legal parentage as follows: (a) the surrogate mother and her husband are legal parents of the child born out of surrogacy; (b) the intended parents are the legal parents of the child born out of surrogacy, and it may be the case that the intended parents are a same sex couple; or (c) the surrogate mother and the genetically related intended father (sperm provider) are the legal parents of the child concerned.

In the above mentioned scenarios, after review by Chinese courts in accordance with international treaties concluded or acceded to by China or in accordance with the principle of reciprocity, foreign judgments falling within category (c) are likely to be recognized by Chinese courts since it is much more in line with current judicial practice in China. In the case of foreign judgments falling within category (b), Chinese courts may not recognize such foreign judgments on legal parentage based on public interests, particularly considering that confirmation of intended parents as legal parents of children born out of surrogacy is an indirect way to legitimize surrogacy and same-sex marriage. As for foreign judgments under category (a), whether Chinese courts will recognize it has not been decided yet. However, according to the principle that the woman who gives birth to the child is regarded as the legal mother of the child, and her husband is presumed to be the legal father of the child, it is believed that Chinese courts may recognize a foreign judgment in category (a) unless there is evidence to the contrary.

3. Does China Recognize Foreign Documentation on Legal Parentage?

The question of whether China recognizes foreign documentation of legal parentage is in fact a question of whether China directly recognizes the legal parentage as recorded in the document. Foreign documentation is normally issued by administrative staff of a state. The typical example of foreign documentation on legal parentage is a birth certificate. What is recorded on the birth certificate or other document issued by a foreign

62. Civil Procedure Law of the People's Republic of China, *supra* note 58, arts. 281–82.

state could be: (a) the surrogate mother is recorded as the legal mother and her husband is presumed as the legal father; (b) the intended parents are recorded as legal parents of the child, and the intended parents may be a same-sex couple; (c) or the surrogate mother is recorded as the legal mother and the intended father is recorded as the legal father.

It is not clear whether a birth certificate is regarded as evidence to prove the fact of legal parentage or as a legal conclusion since there is no explicit law in this regard in China. If a birth certificate was to be regarded as evidence for the purpose of proving the fact, there is no need for China to formally recognize the birth certificate issued by a foreign state. Chinese courts may come to a different legal conclusion on legal parentage based on evidence contrary to what is recorded in the birth certificate issued by the foreign state. If a birth certificate was to be regarded as a legal conclusion on legal parentage, there are normally two kinds of treatment accorded to the birth certificate. One is the recognition approach and the other is the conflict of laws approach. The former approach refers to the legal parentage recorded in the birth certificate being directly recognized by a foreign state while the latter approach applies the foreign state's conflict of laws rules to determine legal parentage. Given that there are no explicit laws specifying which approach is to be adopted, the practice in China is less likely to adopt the recognition approach.

In addition, if surrogacy is carried out in China and the surrogate mother is the legal mother of the child concerned, the intended parents risk committing smuggling for taking the child across the border of China according to China's Criminal Law.⁶³

III. IMPLICATIONS FOR CHINA AND PREDICTION OF ITS POLICY RESPONSE

A. *How Will China Deal with Surrogacy Legislatively and Judicially?*

In terms of domestic legislation on surrogacy, current laws and regulations in this regard are actually two operative pieces of law. One is the Measures on the Management of Human Assisted Reproductive Technology, which is government rules on regulating medical practice that prohibit medical staff and institutions from carrying out surrogacy. The Measures were adopted in 2001.⁶⁴ The other piece is in the Civil Code of the People's Republic of China, which came into effect in 2020. It is a codification of civil law including contracts, family law, marriage

63. Zhonghuarenmingongheguo Xingfa (2020 xiuzheng) (中华人民共和国刑法(2020修正)) [Criminal Law of the People's Republic of China (2020 amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended Dec. 26, 2020, effective Mar. 1, 2021), arts. 262, 322, 2021 Special Issue STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1 (China).

64. See Measures, *supra* note 32.

law, inherent law, torts, etc. Nothing in the Civil Code addresses surrogacy except for one provision, which is Article 1009 of the Civil Code providing that “medical and scientific research activity related to human genes, embryos, or the like shall be done in accordance with the relevant provisions of laws, administrative regulations, and the regulations of the State, and may not endanger human health, offend ethics and morals, or harm public interests.”⁶⁵ However, the provision doesn’t explicitly prohibit surrogacy. This provision only regulates medical activities to the extent of abiding by existing rules, or alternatively not endangering ethics, morals, or public interests. In application of Article 1009 of the Civil Code, the relevant rules to abide by include the Measures enacted in 2001 since no new rules regarding surrogacy have been promulgated since.

A question may be raised as to why surrogacy was not addressed in the Civil Code of 2020 since it was a good opportunity to enact new provisions and rules in times of codification. In addition to that, no new rules regarding surrogacy have come from the State Council or ministries. The absence of new rules in laws, regulations, and government rules is more obscured in contrast to the campaign against surrogacy starting in 2015 in response to the surge of surrogacy in the black market. The underlying reason may also aid in predicting China’s domestic legislation regarding surrogacy in the coming years. In other words, China is unlikely to enact laws to explicitly prohibit surrogacy in the coming years due to four factors.

The first factor is the controversy around surrogacy. Surrogacy concerns the value of people, the morals of society, the needs of families, and the advance of medical technology. Too much controversy will arise in the debate of justification and legalization of surrogacy. Obstacles will also arise if there is a clear-cut prohibition of surrogacy in law in China. The second factor is the large need for surrogacy in China currently and in the future. In particular, China has abolished the one-child policy, allowing a family to have two children, and encouraging two or more children for one family, taking into account the aging society. The problem of an aging population is a large concern for China in the coming decades. However, couples are reluctant to have children nowadays due to reasons such as the cost of raising a child, limited time for childcare activities, etc. Among these reasons, the age of parents also makes it much more difficult for families to have second or third children. In addition to that, many women find that bearing a child by conception adversely affects their career advancement, and hence would like to look for surrogates.

65. PRC Civil Code, *supra* note 36, art. 1009.

The third factor is the international trends. Globally, many states allow commercial surrogacy, and international instruments will be negotiated in relation to surrogacy. Relatedly, the last factor is that leaving room for discretion is preferred in terms of policy cost. Although the legislation and judicial practice in other states are not authoritative in China, and international instruments on surrogacy are never meant to encourage or oppose surrogacy, it is a good idea to leave domestic legislation open and blank in this regard, leaving room for future policy developments. On one hand, the enforcement of relevant rules combating surrogacy is rigorously underway currently. Enforcing current government rules is a good approach to combat surrogacy and even going beyond that. The black market for surrogacy is always there. It is easy to find advertisements for surrogacy posted on the walls of toilets in hospitals. The cleaning staff are required to wash off these advertisements. However, the advertisements are too many to be cleaned up altogether. The black market of surrogacy is rampant, but it fluctuates depending on the rigor of enforcement. The demand for surrogacy will hesitate if confronted with a rigorous campaign against surrogacy. On the other hand, if law enforcement is not strict, the black market will prevail, and the phenomenon of surrogacy will be widespread. To that end, the bid demand for surrogacy will be met to a certain extent and hence alleviate the social anxiety of low birth rates. It makes sense that China prefers discretion embedded in government in combating surrogacy.

In terms of judicial practice, it is predicable that more and more cases relating to surrogacy will come out of China in the coming years. First, judges are likely to declare surrogacy contracts between surrogate mothers and intended parents as well as surrogacy contracts between intermediate agencies and intended parents/surrogate mothers to be void and non-enforceable. Second, judges are likely to solve the legal problem, such as legal parentage and custody, by working around the issue of surrogacy. Instead, relying on other legal techniques, such as a stepmother and child relationship. For instance, in the case of *Stepmother Obtained Custody over Surrogate Born Children*, the Shanghai Court recognized Ms. Chen as a stepmother based on the fact of living with the children together for years rather than explicitly recognizing her as the intended mother for the surrogate born children.⁶⁶ Third, judges are likely to grant custody to the intended parent who has a biological connection with the surrogate born child, rather than the surrogate mother who has no biological connection with the surrogate born child. In the case of *Ms. Zhang v. Mr. Li*, the Guangdong Court implicitly denied the legal parentage of a surrogate mother by only focusing on biological

66. *Chen v. Luo, Stepmother Obtained Custody over Surrogate Born Children*, Civil Judgment Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56 (Shanghai Intern. People's Ct., 2015) (China).

connection and denying the sufficiency of evidence proving the existence of surrogacy.⁶⁷ Combing the two cases, it could be determined that the outcome of the cases actually confirms legal parentage of the intended parents and denies legal parentage of the surrogate mother. Fourth, judges tend to utilize the principle of best interests of the children. That is another way judges affirm intended parents as legal parents without directly recognizing the legality of surrogacy. Judges in the two cases above both talked about this principle and refer to the United Nations Convention on the Rights of the Child.⁶⁸ It is clear that this principle works as the most important thing in determining custody and legal parentage. It could be predicted that this principle will always work in this way throughout surrogacy cases in the future. The principle of the best interests of the children is a general principle without specific rules and guidelines in its application. To that end, judges have significant discretion in the application of this principle. It is also one reason that judges are in favor of this principle.

B. *Will China Join Relevant International Agreements?*

Will China join the future International Agreement on Legal Parentage and International Surrogacy Arrangement and if so, how? In light of discussion by the Experts' Group of the Hague Conference on Private International Law, there is no problem achieving consensus for the objective and scope for future international agreements. China, in the meantime, agrees that any future instruments which include coverage of ISAs should not be understood as an endorsement of the practice of surrogacy but rather as a mechanism for practically addressing limping parentage resulting from ISAs, as well as enabling states to better protect the human rights of all those involved in the cross-border arrangement. The adoption of any instrument would not be intended to encourage states to introduce surrogacy as a permitted practice. However, the scope of future instruments including domestic adoptions may raise difficulty for China as well. Domestic adoption is a quite independent sector in China.⁶⁹

With respect to mutual recognition of foreign judicial decisions relating to legal parentage. The future international agreement considers the following indirect grounds of jurisdiction: (a) the child's habitual residence; and (b) the respondent's habitual residence.⁷⁰ The consideration of the "child's habitual residence" is in accordance with the

67. Zhang v. Li, Civil Judgment (Guangdong Interm. People's Ct., 2019) (China).

68. *Id.* See also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

69. See generally Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 L. & Soc'y REV. 379 (2002) (discussing Chinese conception of adoption and the applicable laws in China).

70. See *supra* note 19 and accompanying text.

principle of the best interests of the child, and the consideration of the “respondent’s habitual residence” is a common practice of all states, including China, with respect to a lawsuit. Given that the civil procedural law in China stipulates the domicile or habitual residence of the respondent is the domain, or that of the plaintiff in situations where the respondent is neither domiciled nor habitually residing in China,⁷¹ China is less likely to oppose to the factor of the respondent’s habitual residence as an indirect ground of jurisdiction. The omission of domicile is not of significance since the practice in China tends to put emphasis on habitual residence rather than domicile.⁷² Furthermore, multiple jurisdictional bases rather than a single one is more likely to be accepted in China. In terms of grounds for refusal, such as the ground of procedural defects is of no concern. As for the ground of public policy, China is in favor of it. It leaves discretion and room for Chinese courts to refuse to recognize foreign judgments on legal parentage on the ground of public policy in situations where, for instance, intended parents determined as legal parents of the surrogate born child are of the same sex, given that China is far from being open to same-sex marriage.

With respect to mutual recognition of foreign documents recording legal parentage, there is possibility for China to accept the option of a combined approach—that is, a rule on the presumption of validity of legal parentage recorded in a foreign public document issued by a designated competent authority. In other words, a public document regarded as a legal conclusion with presumptive effect. Although current laws in China do not explicitly stipulate whether a foreign official document or a birth certificate is regarded as evidence to prove a fact, or to prove a legal conclusion, or as a legal conclusion by itself, it is practical to designate a domestic competent authority to issue birth certificates or international birth certificates in accordance with requirements provided in the future international agreement. In addition, China has the discretion of refusing to recognize the public documentation based on public policy grounds. This option doesn’t concern unifying direct jurisdiction and applicable law rules, making it easy for China to accept.

Concerning the ISAs Protocol with regard to safeguards in ISAs, it should be kept in mind that the more safeguards relating to surrogacy, the further it goes to regulate surrogacy substantively, which falls primarily within national jurisdiction. In light of China’s current position against surrogacy, safeguards in ISAs in international instruments are disguised unification of substantive law rules on surrogacy, and in other words, legalization of surrogacy. For instance, the true consent of the surrogate

71. Civil Procedure Law of the People’s Republic of China, *supra* note 58, arts. 281–82. Civil Procedure Law of the People’s Republic of China, *supra* note 58, arts. 22–23.

72. Qisheng He, *Reconstruction of “Lex Personalis” in China*, 62 INT’L & COMP. L.Q. 137, 138 (2013).

mother, the rights of all parties to be informed, the health standards required to become a surrogate mother, the rights and interests of the child concerned, the prevention of child abuse by the intended parents, the qualifications and conduct code of the intermediary, etc. These safeguards actually touch the area of regulation of surrogacy. Moreover, given that the primary objective of the Hague project is to ensure the predictability of legal paternity of children across borders, safeguards are of lesser priority. To that end, China is more likely to hesitate in accepting the ISAs Protocol in light of these safeguard provisions with the concern that current domestic substantive rules on surrogacy will not be respected.

In terms of direct jurisdiction and applicable rules of law in the draft conventions, to the extent that the state the child was born in or the state of habitual residence of the person who gives birth is likely to be the connecting factor for direct jurisdiction, China will provide thoughts on these provisions. In light of the Hague Convention on Choice of Court Agreements, which is about allowing individuals to choose the court they prefer, permitting forum selection clauses in international commercial transactions, and signed by China in 2017, there are no obstacles preventing China from ratifying the Convention.⁷³ China, nowadays, tends to be open to jurisdictional issues, including choice of courts. Hence, there is room for China to accept jurisdictional rules. To the extent that the state of the child born or the state of habitual residence of the person who gives birth is likely to be the connecting factor for the applicable rule of law, China may make reservations in this regard. This is due to the fact that the application of conflict of laws rules, such as applying the law of the state of the child born or the state of habitual residence of the person who gives birth, will substantively affect the outcome of legal parentage. In addition, China has not signed any international agreements concerning unification of applicable law rules. Making reservations is a reasonable and acceptable choice for China.

In addition to the above legal analysis of specific rules in future international instruments, there are factors that will be taken into account by China in determining whether or not to join a future international instrument on legal parentage and an ISAs Protocol. One is the economic factor. In light of the surge in surrogacy as well as international surrogacy arrangements, and we have analyzed why China is less likely to enact laws to explicitly prohibit surrogacy in the coming years, China has two options domestically. One is to strictly combat surrogacy and enforce current policies, and the other is to legalize surrogacy and make regulations for surrogacy. The latter is less likely. However, signing

73. Wei Cai & Jonathan Kolieb, *Between National Interests and Global Business: China's Possible Reservations to the Hague Convention on Choice of Court Agreements*, 11 J. OF INT'L DISP. SETTLEMENT, 295, 295 (2020).

international instruments concerning legal parentage except for ISAs, is not much of an obstacle for China since China may choose to accede to the international agreement on legal parentage in general, without accepting an ISAs Protocol immediately. The other factor is a political factor given that China is a party to the Convention on the Rights of the Child and China is determined to protect children's rights and interests. Joining an international agreement on legal parentage in general so as to avoid limp parentage, contributes to compliance with the Convention on the Rights of the Child. China has the willingness to make contributions in this regard.

CONCLUSION

Advances in science and technology and different policies in different countries have given rise to modern transnational surrogacy. However, it has led to many legal problems, especially the uncertainty of legal parentage for surrogate born children. The international community is trying various solutions, including diplomatic approaches, the use of existing conventions, the unification of the substantive law on the confirmation of legal parent-child relationship and the substantive law on surrogacy, etc., but they all encounter difficulties. The Hague Conference on Private International Law invited experts from around the world to study the issue and work towards draft conventions. In the present, it is considered feasible to formulate international agreements on general legal parentage and a protocol on ISAs with mutual recognition of foreign judicial decisions on legal parentage and foreign public documentation recording legal parentage as well as rules on jurisdiction and applicable law.⁷⁴ Based on China's anti-surrogacy policy, relevant legislation and judicial practice analyzed in detail, as well as prediction of its domestic legislation, and judicial practice in favor of surrogacy in the coming years, China is more likely to accept the international agreement on general legal parentage with reservations on applicable law rules, and maintain hesitance regarding a protocol on ISAs.

74. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, at 1, Prel. Doc. No. 2 (Nov. 2019), <https://assets.hcch.net/docs/d435cffc-65ce-4047-b603-ff63ed20591c.pdf> [<https://perma.cc/5TWA-6CU9>].

LOOK WHAT YOU MADE ME DO: THE IMPACT OF TAYLOR SWIFT'S RE-RECORDING PROJECT ON THE GLOBAL COPYRIGHT INDUSTRY

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Abstract

Taylor Swift redefined the relationship between artists and their labels. Although there has been discussion about the impact of these new recordings on Swift's personal catalog, there has been no analysis of how Swift's action will impact the global copyright industry. Taylor Swift is viewed as a trailblazer by many in the music industry. This is because many artists have rerecorded or remastered their original works out of spite,¹ but only one other major artist even attempted to complete a rehaul of their entire discography. In the digital age of master recordings, Swift's impact has far-reaching effects. This Note examines the history of re-recordings and remastering, as well as an analysis of the potential impact of Swift's groundbreaking actions, in three common law jurisdictions: Australia, the United Kingdom, and the United States of America.²

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1. *Def Leppard Re-Recording 'Forgeries' of Old Hits*, ROLLING STONE (July 3, 2012), <https://www.rollingstone.com/music/music-news/def-leppard-re-recording-forgeries-of-old-hits-247079/> [<https://perma.cc/HGM4-J5LF>]; Wenn, *Hucknall Launches New Legal Battle With Record Label*, CONTACT MUSIC (Apr. 4, 2009), https://www.contactmusic.com/simply-red/news/hucknall-launches-new-legal-battle-with-record-label_1099717 [<https://perma.cc/BT5Q-4HFR>]; Christie Eliezer, *13 great feuds between artists and record companies*, INDUS. OBSERVER (Mar. 16, 2020), <https://theindustryobserver.thebrag.com/13-great-feuds-between-artists-and-record-companies/> [<https://perma.cc/KF6D-6Q9V>]; Mark Tavern, *For the (re-)record: Here's what you need to know about re-recording restrictions*, SYNCHTANK (Aug. 6, 2019), <https://www.synchtank.com/blog/for-the-re-record-heres-what-you-need-to-know-about-re-recording-restrictions/> [<https://perma.cc/E9NU-S4EF>].

2. It is important to note that much information in agreements between artists and their labels, and with labels and other entities are usually highly confidential. This Note attempts to dive into what information has been released to the public and academia—either through leaked contracts, statements by artists and record labels, or other sources. Dylan Smith, *Artist Rights Alliance calls out 'secret' publisher, streaming service deals*, DIGIT. MUSIC NEWS (Aug. 31, 2020), <https://www.digitalmusicnews.com/2020/08/31/artist-rights-alliance-secretive-agreements/> [<https://perma.cc/P4BC-PPC2>].

This Note attempts to take a one-dimensional view of the issues plaguing artists in the recording industry by examining things from Ms. Swift's unique perspective. Because she is both the performing artist and songwriter for her entire discography, the process for her to manage copyrights is much more streamlined. Accordingly, when referencing other artists in the Anglosphere, I have done my best to only refer to performing artists who are also songwriters. Because of this, there are times that I use "music publisher" and "record label" interchangeably—these are two distinct entities. However, it appears that Ms. Swift's deal with Republic Records (owned by Universal Music Group) is all-encompassing, so the distinction does not matter for the sake of this analysis.

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I.	LONG STORY SHORT: WHAT IS A MASTER RECORDING AND WHY DO MASTER RECORDINGS MATTER?	

To understand the importance of owning the master recording of a song, it is imperative to understand the concept of royalties in the music industry. In the music industry, everything revolves around royalties.³ The largest source of an artist's income is derived from the act of publishing music.⁴ An artist can generate revenue from four sources: mechanical royalties, public performance royalties, synchronization

3. RON SOBEL & DICK WEISSMAN, MUSIC PUBLISHING: THE ROADMAP TO ROYALTIES (2008).

4. *Id.*

royalties, and print music royalties.⁵ In addition to the four streams of revenue, a song's copyright is composed of master rights and publishing rights.⁶ The technical term of a master recording right is the song's "musical composition."⁷ A copyright of a song's musical composition establishes an underlying copyright to the lyrics and musical/instrumental work.⁸ By copyrighting the musical composition of a song, the copyright-holder has the exclusive right to make copies, prepare derivative works, sell or distribute copies, and perform or display the work publicly.⁹

The other half of a song's copyright is the sound recording.¹⁰ Essentially, a sound recording is any shared format of the song—such as an MP3, vinyl record, audio cassette, CD, etc. (however, this excludes recordings of a song in movies¹¹).¹² If a label wanted to produce and sell CDs of a song, the label must own (or have permission to use) the song's sound recording rights *and* the musical composition rights (i.e., master rights).¹³

Both the sound recording and musical composition copyrights are related to a physical copy of the song.¹⁴ In addition to the tangible

5. Rory PQ, *How music royalties work in the music industry*, ICON COLLECTIVE COLL. OF MUSIC (2020), <https://iconcollective.edu/how-music-royalties-work/> [<https://perma.cc/PD5U-QD2U>].

6. *Id.*

7. *Id.*

8. U.S. COPYRIGHT OFF., CIR. 50 COPYRIGHT REGISTRATION FOR MUSICAL COMPOSITIONS (2021), <https://www.copyright.gov/circs/circ50.pdf> [<https://perma.cc/EVS2-VVAH>].

9. Copyright Act of 1976, 17 U.S.C. § 106.

10. *Id.* § 101 (“Sound recordings’ are works that result from the fixation of a series of musical, spoken; or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”).

11. To play a sound recording of a copyrighted musical work, movie producers must acquire the “synchronization rights” from the holder of the copyright. *See Synchronization Rights*, USLEGAL, <https://entertainmentlaw.uslegal.com/music-industry/synchronization-rights/> [<https://perma.cc/HNL5-WD4Z>]. These synchronization rights are relevant to Ms. Swift's legal posture due to her recent musical appearances in the *Spirit Untamed* trailer where “Wildest Dreams (Taylor's Version)” was featured, and in *DC League of Super Pets* where “Bad Blood (Taylor's Version)” and “Message in a Bottle (Taylor's Version)” were both featured. SPIRIT UNTAMED (DreamWorks Animation 2021); TAYLOR SWIFT, WILDEST DREAMS (TAYLOR'S VERSION) (Republic Records 2021); DC LEAGUE OF SUPER PETS (Warner Animation Group 2022); TAYLOR SWIFT, BAD BLOOD (TAYLOR'S VERSION) (Republic Records 2022); TAYLOR SWIFT, MESSAGE IN A BOTTLE (TAYLOR'S VERSION) (Republic Records 2021). In 2022, Ms. Swift also released a song for the film adaptation of *Where the Crawdads Sing*, “Carolina.” WHERE THE CRAWDADS SING (Sony 2022).

12. U.S. COPYRIGHT OFF., CIR. 56 COPYRIGHT REGISTRATION FOR SOUND RECORDINGS (2021).

13. Kristin Vartan, *Breaking Down the Legal Terms in Taylor Swift's Music Ownership Dispute*, ENT. WKLY. (Nov. 15, 2019), <https://ew.com/music/2019/11/15/taylor-swift-song-ownership-legal-terms/> [<https://perma.cc/39HN-JQWG>].

14. *See* PQ, *supra* note 5.

elements of a song, there also exists the non-tangible, creative publishing rights of a song.¹⁵ Oftentimes, the music publishing rights of a song are split 50-50¹⁶ between the songwriter and the publisher/label.¹⁷ This 50-50 split is referred to as the “writer’s share” and the “publisher’s share.”¹⁸ Although most contracts between artists and labels are seldom made public, it is generally accepted that full publishing rights revert back to the songwriter after an “album cycle,” which is usually three to five years after the album is released.¹⁹ The restrictions exist for a multitude of reasons: (1) it is a risk mitigation tactic for a record label/music publisher that takes a chance on up-and-coming artists;²⁰ (2) the restrictions prevent a label from competing with other labels that may attempt to sign one of its current artist;²¹ and (3) it is a form of payment to the label—the artist exchanges the rights to their music for “recording, promotion and other expenditures” that a budding artist may not be able to afford.²² Oftentimes, the songwriter and the publisher have the option to renew the terms of the agreement, which would typically result in more favorable revenue shares in favor of the songwriter. It is important to note that every contract is different, but these standards are generally accepted in the music industry and by copyright law.²³

15. See SOBEL & WEISSMAN, *supra* note 3.

16. Lisa A. Alter, *Protecting Your Musical Copyrights*, ALTER, KENDRICK & BARON (2012), <https://akbllp.com/wp-content/uploads/Protecting-Your-Musical-Copyrights.pdf> [<https://perma.cc/Y353-GT85>].

17. There is a substantial difference between the role of music publishers and that of record labels. These differences are most prominent when the songwriter is a different person than the performing artist. Because Ms. Swift has written (or co-written) all of the music she performs, this analysis can be substantially simplified by ignoring the difference. For a more in-depth comparison and contrast of publishers and labels see DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* (2019). See also Claudius du Plooy, *A guide to music publishers vs. record companies*, DU PLOOY L. (July 6, 2021), <https://www.duplooylaw.com/a-guide-to-music-publishers-vs-record-companies> [<https://perma.cc/SY9U-6QXD>].

18. Henry Schoonmaker, *Song Royalty Ownership: Writers vs Publishers Share*, SONGTRUST (Feb. 16, 2023), <https://blog.songtrust.com/songwriting-royalties-explained-writers-vs-publishers-share> [<https://perma.cc/H3NV-3G89>].

19. Tavern, *supra* note 1.

20. Joe Coscarelli, *Taylor Swift Says She Will Rerecord Her Old Music. Here’s How.*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/arts/music/taylor-swift-rerecord-albums.html> [<https://perma.cc/YLG3-JHB7>].

21. *Id.*

22. *Id.*

23. Glenn Peoples, *Where’s the Fire? Apple Music’s Leaked Contract Is Pretty Standard*, BILLBOARD (June 11, 2015), <https://www.billboard.com/articles/business/6597719/wheres-the-fire-apple-musics-leaked-contract-is-pretty-standard> [<https://perma.cc/AU9A-66Y8>]; Pavle Marinkovic, *Kanye West Leaked His Contracts—What Can We Learn From It*, MEDIUM (Jan. 13, 2012), <https://medium.com/music-voices/kanye-west-leaked-his-contracts-what-can-we-learn-from-it-5bba2156871c> [<https://perma.cc/32SE-H7M5>].

A prime example of this arrangement can be seen in Ms. Swift's first songwriting agreement with Sony/ATV. In 2004, at fifteen years old, Ms. Swift signed a deal with music publisher Sony/ATV²⁴ that transferred an undivided 90% interest "in and to all the musical works" she created under the agreement to Sony/ATV in exchange for a \$50,000 payment.²⁵ This "undivided 90%" was *exclusive* of the "writer's share," which means that the agreement granted Sony/ATV an overall 45% stake in the songs included in the agreement.²⁶ Most of these songs were published in her eponymous "Taylor Swift" album or the unreleased "Beautiful Eyes" track list.²⁷ Because Ms. Swift was an "up-and-coming" fifteen-year-old artist, her first agreement was for a one-year term, renewable for two additional one-year terms.²⁸ Ms. Swift was only in business with Sony/ATV for one year before leaving to pursue a larger deal after being "discovered" by Scott Borchetta at the Bluebird Cafe in Nashville, Tennessee.²⁹ This meeting led to the now infamous agreement between Ms. Swift and Mr. Borchetta resulting in a thirteen-year agreement between the two parties.³⁰

Lastly, it is of note that if a music publisher or record label holds the master recording to an artist's work, the publisher/label would *not* want the artist to have the ability to re-record their music.³¹ Labels and publishers invest substantial sums of money into artists, which is viewed as a risky investment because it is impossible to determine how successful an artist might be.³² To protect this investment, in exchange for fronting the cost of demo recordings, marketing, booking venues, and the up-front signing fee³³ the publisher/label will retain the right to a

24. *Songwriter Taylor Swift Signs Publishing Deal With Sony/ATV*, BMI (May 12, 2005), <http://www.bmi.com/news/entry/234444> [<https://perma.cc/TR25-22S9>].

25. Complaint, Exhibits at 12–29, *Dymtrow v. Swift*, No. 1:07-cv-11277, 2007 WL 4840150 (S.D.N.Y.) (Trial Pleading).

26. As stated throughout this discussion, these agreements are incredibly difficult to locate. Ms. Swift's first "Exclusive Songwriter Agreement" was made public during a dispute between one of Ms. Swift's former representatives and her parents, *id.*

27. Complaint, Exhibits, *supra* note 25, at 30.

28. *Id.* at 13–14.

29. Mickey Rapkin, *Oral history of Nashville's bluebird cafe: Taylor Swift, Maren Morris, Dierks Bentley; More on the legendary venue*, BILLBOARD (2017), www.billboard.com/articles/columns/country/7880979/the-bluebird-cafe-taylor-swift-dierks-bentley-oral-history [<https://perma.cc/898P-48TH>].

30. Brittany Spanos, *Taylor Swift signs with Republic Records and UMG, her first new home in 13 years*, ROLLING STONE (2018), www.rollingstone.com/music/music-news/taylor-swift-record-deal-republic-records-umg-757711 [<https://perma.cc/ME2G-ATDB>].

31. See Schoonmaker, *supra* note 18.

32. *Id.*

33. For example, the \$50,000 in Ms. Swift's 2004 contract with Sony. Complaint, Exhibits, *supra* note 25, at 14.

certain percentage of royalties *and* the master recordings.³⁴ It is simple economics that if an artist has a dispute with the publisher and decides to re-record their music, the value of the publisher's investment will substantially lose value.³⁵ The artist would take away the publisher's competitive advantage: owning the only version of a song.³⁶ However, in the modern music industry, it would be borderline unconscionable to prevent an artist from regaining the rights to their own works, so most contracts merely prohibit re-recording works for "often the greater of five years from delivery or three years from the end of the contract's term."³⁷ In the case of Ms. Swift, during a 2019 appearance on *Good Morning America*, she mentioned that her specific contract allowed "starting November 2020 . . . [she could] record albums one through five³⁸ all over again."³⁹ Moreover, because Ms. Swift is listed as a songwriter for her entire catalog, she is legally able to re-record her songs after the November 2020 moratorium expired.⁴⁰

II. WELCOME TO NEW YORK: HOW THE UNITED KINGDOM AND AUSTRALIA FOLLOW A SIMILAR COPYRIGHT ORGANIZATION SCHEME AS THE UNITED STATES

In the United Kingdom, artists and labels also must register their respective musical composition and sound recording rights.⁴¹ The legal implication of the master rights and publishing rights are very similar to the process in the United States.⁴² Australia does not have a registration system for copyright—music is automatically protected by the (Australian) Copyright Act.⁴³ For musical works in Australia, lyrics to a song are considered "literary works" and the recording of the musical work is a "sound recording."⁴⁴ For musical works in Australia, the rights to each and every song is often split between four entities: the composer

34. *Id.* at 14–16.

35. *Id.*

36. *Id.*

37. *Id.*

38. Ms. Swift was referring to her first five studio albums: "Taylor Swift," "Fearless," "Speak Now," "Red," and "1989."

39. Alter, *supra* note 16.

40. *Id.*

41. *What Constitutes a Song? Copyright Works in a Song*, COPYRIGHTUSER <https://www.copyrightuser.org/create/creative-process/going-for-a-song-track-3> [<https://perma.cc/RY9H-T85T>].

42. *Id.*

43. *About Copyright*, COPYRIGHT AGENCY (2021), <https://www.copyright.com.au/about-copyright/> [<https://perma.cc/L4VM-Q7Q4>].

44. *Musical Works*, THE UNIV. OF MELBOURNE, <https://copyright.unimelb.edu.au/information/what-is-copyright/musical-works> [<https://perma.cc/9LD9-GQMT>].

of the music, the lyricist, the performing artist, and the publisher/recorder (i.e., record label).⁴⁵

It is also of importance that the United States, United Kingdom, and Australia are all party to a multitude of international treaties that require reciprocity of copyright protection and protection of domestically copyrighted materials.⁴⁶ The United Kingdom is a party to the following agreements: Berne (Paris) Dec. 5, 1887; Bilateral July 1, 1891; Universal Copyright Convention Geneva Sept. 27, 1957; Phonograms Apr. 18, 1973; Universal Copyright Convention Paris July 10, 1974; World Trade Organization Jan. 1, 1995; World Intellectual Property Organization Mar. 14, 2010; WPPT Mar. 14, 2010; and VIP Jan. 1, 2021.⁴⁷

Australia is also a party to the following agreements: Bilateral Mar. 15, 1918; Berne (Paris) Apr. 14, 1928; Universal Copyright Convention Geneva May 1, 1969; Phonograms June 22, 1974; Universal Copyright Convention Paris Feb. 29, 1978; Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite Oct. 26, 1990; World Trade Organization Jan. 1, 1995; FTA Jan. 1, 2005; World Intellectual Property Organization July 26, 2007; WPPT July 26, 2007; and VIP Sept. 30, 2016.⁴⁸

The United States is a signatory to all of the above listed agreements. Although each convention or treaty plays a different role in the implementation and enforcement of copyright protections, they all boil down to reciprocity of protection of copyrighted materials.⁴⁹

Across all three countries, it is very common for various copyrights to be divided between different parties.⁵⁰ When different profit-seeking entities control the same work, it is easy to see how some “delicate” issues may arise.

III. THIS IS WHY WE CAN’T HAVE NICE THINGS . . . TAYLOR SWIFT’S LABEL DISPUTE

Taylor Swift signed with Big Machine Records in 2005 and recorded her first six studio albums with the label.⁵¹ Taylor Swift released her

45. *Copyright FAQs*, MUSIC RTS. AUSTL., www.musicrights.com.au/antipiracy/what-is-copyright [<https://perma.cc/4PWW-T8TA>].

46. U.S. COPYRIGHT OFF., CIR. 38A INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES (2022), <https://www.copyright.gov/circs/circ38a.pdf> [<https://perma.cc/KHS3-TZNG>].

47. *Id.*

48. *Id.*

49. *Id.*

50. *About Copyright*, *supra* note 43 (in Australia, this divestment is automatic); *What Constitutes a Song? Copyright Works in a Song*, *supra* note 41; PQ, *supra* note 5.

51. Alter, *supra* note 16.

eponymous album in 2006, “Fearless” in 2008, “Speak Now” in 2010, “Red” in 2012, “1989” in 2014, and “Reputation” in 2017.⁵²

After a series of negotiations with Big Machine Records and other record labels, largely revolving around ownership of master recordings and the distribution of shares of Spotify, Swift left Big Machine Records in November 2018.⁵³ Swift signed with Republic Records and Universal Music Group.⁵⁴ Swift stated that she wanted to own the masters to her work and Universal would allow her to do so.⁵⁵ From all reports in the media, it appeared that the relationship between Ms. Swift and Big Machine Records ended in an amicable manner.⁵⁶ However, the entire dynamic shifted when Ms. Swift’s catalog was unexpectedly sold to Scooter Braun and the Carlyle Group/Ithaca Holdings.⁵⁷ In a June 30, 2019 statement via Tumblr, Ms. Swift explained,

[w]hen I left my masters in Scott [Borchetta]’s hands, I made peace with the fact that eventually he would sell them. Never in my worst nightmares did I imagine the buyer would be Scooter.⁵⁸ Any time Scott Borchetta has heard the words ‘Scooter Braun’ escape my lips, it was when I was either crying or trying not to. He knew what he was doing; they both did.⁵⁹

52. *Discography: Taylor Swift*, ALLMUSIC, <https://www.allmusic.com/artist/taylor-swift-mn0000472102/discography> [https://perma.cc/4TH2-KB55].

53. Laura Snapes, *Taylor Swift leaves lifelong label to sign with Universal Music Group*, THE GUARDIAN (Nov. 19, 2018), <https://www.theguardian.com/music/2018/nov/19/taylor-swift-leaves-lifelong-label-to-sign-with-universal-music-group> [https://perma.cc/89F6-RQDJ]. The issues raised by Swift regarding Spotify and other music streaming services are worthy of its own note.

54. *Id.*

55. *Id.*

56. *Id.*

57. Taylor Swift, TUMBLR (June 30, 2019), <https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my> [https://perma.cc/NR5L-535W]; Lucas Shaw, *The End of Taylor Swift’s \$300 Million Fight With Scooter Braun*, BLOOMBERG (Nov. 22, 2020), <https://www.bloomberg.com/news/newsletters/2020-11-22/the-end-of-taylor-swift-s-300-million-fight-with-scooter-braun> [https://perma.cc/35NE-FBGU].

58. Going forward, when referencing the buyer of Ms. Swift’s master recordings in 2019, I will blanketly refer to “Scooter.” Of note is that Scooter sold Ms. Swift’s masters to an investment fund in November 2020 for between 300 and 450 million USD. Scooter Braun no longer owns Ms. Swift’s master recordings. Shirley Halperin, *Scooter Braun sells Taylor Swift’s big machine masters for big payday*, VARIETY (2020), <https://variety.com/2020/music/news/scooter-braun-sells-taylor-swift-big-machine-masters-1234832080/> [https://perma.cc/S642-MXQ4].

59. *Id.*

Ms. Swift's emotional plea to the internet was because she had previously been harassed by Scooter Braun and his affiliates.⁶⁰ This behavior went so far as producing a music video which had a nude model appear to be Ms. Swift sharing a bed with Kanye West.⁶¹

Ms. Swift wanted a chance to own her entire catalog.⁶² In the same post, Ms. Swift said that she "pleaded for a chance to own [her] work. Instead [she] was given an opportunity to sign back up to Big Machine Records and 'earn' one album back at a time, one for every new one [she] turned in."⁶³ According to Ms. Swift, the ability to own her master recordings was what drove her to choose a new home for her work.⁶⁴ Ms. Swift was able to leave Big Machine Records and re-record her albums because the exclusivity clause that Ms. Swift signed thirteen years prior was drafted in a way that would allow her to re-record previously recorded works five years after release.⁶⁵ Thus, even though Ms. Swift does not own the master recordings to her first six studio albums, she is free to re-record the entire albums five years after their first release.⁶⁶ Because the label that she currently works with allows her to retain her master recordings, for each album that she re-records, she will retain the "Taylor's Version" master recording.⁶⁷ As of the time of this writing, all six of the albums that were previously held by Big Machine Records are eligible for re-recording.

IV. WE ARE NEVER EVER GETTING BACK TOGETHER: BRITISH AND AUSTRALIAN ARTISTS WHO TRIED TO FREE THEIR MASTERS FROM LABELS

Ms. Swift was not the first artist to try to overcome the balance of power tilted strong towards her record label. In the United States, United Kingdom, and Australia, there have been several artists who had a dispute with either their record label or music publisher and chose to re-record part of their catalog.

60. Lisette Voytko, *Here's why Taylor Swift Hates Scooter Braun so Much*, FORBES (July 1, 2019), <https://www.forbes.com/sites/lisettevoytko/2019/07/01/heres-why-taylor-swift-hates-scooter-braun-so-much/?sh=2c1e858e2084> [<https://perma.cc/ZZT2-6Y7E>].

61. *Id.* See also Emily Tribulski, *Look What You Made Her Do: How Swift, Streaming, and Social Media Can Increase Artists' Bargaining Power*, 19 DUKE L. & TECH. REV. 91 (2021) (explaining how the music industry superstars are altering bargaining power through social media).

62. Tribulski, *supra* note 61.

63. Taylor Swift, TUMBLR (June 30, 2019), <https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my> [<https://perma.cc/EXK8-NDSB>].

64. *Id.*

65. Tribulski, *supra* note 61.

66. *Id.*

67. Swift, *supra* note 63.

Most notable by U.S. standards is Def Leppard. Def Leppard is an English-American rock band that was started in 1977, most known for their hit songs “Pour Some Sugar on Me,” “Hysteria,” and “Rock of Ages.”⁶⁸ In 2010, due to the changing dynamic of music consumption, Def Leppard’s label proposed a new deal that would compensate the band for streaming revenues.⁶⁹ Two weeks after the band accepted a favorable deal, Def Leppard front man, Joe Elliott, said that a representative from Universal rescinded the offer and proposed a substantially smaller compensation package. Instead of accepting the offer, the band decided to re-record two of their biggest hits, “Pour Some Sugar on Me” and “Rock of Ages,” so they could have complete control over the digital distribution of their work. The band claimed that Universal was not going to fairly compensate them for their work as the offer by Universal would pay the band a fraction of what similar volume of physical sales would net. Def Leppard’s deal with Universal was set in a way that Universal had no authority to distribute any of the band’s music without the band’s consent.⁷⁰ Thus, the band decided to record “forgeries” or re-recordings of their original works so that they could have complete control of the master recordings.⁷¹ While this was mainly seen as a fun project, with the band recording a few additional songs, their main goal was to send a message to Universal that they wanted fair compensation for streaming revenues.⁷² Not until 2018 did Def Leppard work out a deal with Universal to allow their catalog to be published on online streaming platforms.⁷³

In the United Kingdom, Simply Red is a British soul and pop band that worked with London based record label EastWest.⁷⁴ The band was represented by EastWest near the peak of its career.⁷⁵ After the label

68. *Def Leppard LEP History (a timeline of events)*, DEF LEPPARD TOUR HIST., <http://www.deflepparduk.com/lephistory.html> [<https://perma.cc/6LF5-LWSL>]; *One Giant Leppard*, NZ HERALD (2020), https://www.nzherald.co.nz/entertainment/one-giant-leppard/IHGMRPQ3SKGT5SCA5A52UF7UI/?c_id=264&objectid=10539947&pnum=0 [<https://perma.cc/5ZW3-YX6H>].

69. *Def Leppard Settle Dispute with Universal, put catalogue up for streaming, downloading*, THE MUSIC NETWORK (2018), <https://themusicnetwork.com/def-leppard-settle-dispute-with-universal-put-catalogue-up-for-streaming-downloading/> [<https://perma.cc/ZX73-HLMW>]; *supra* ROLLING STONE, note 1.

70. See sources cited *supra* note 68.

71. *Def Leppard recording ‘forgeries’ of old songs*, BBC NEWS (2012), <https://www.bbc.com/news/entertainment-arts-18691487> [<https://perma.cc/J5L7-JZB4>].

72. *Id.*

73. *Def Leppard break digital deadlock as entire catalogue goes online*, MUSICALLY, <https://musically.com/2018/01/19/def-leppard-break-digital-deadlock-entire-catalogue-goes-online/> [<https://perma.cc/4247-KKE8>].

74. *Simply Red*, DISCOGS, <https://www.discogs.com/artist/6518-Simply-Red> [<https://perma.cc/7XLL-8NRG>].

75. *Simply Red*, *supra* note 74.

released an unauthorized greatest hits album in 1996, tensions between the band and label were reaching a boiling point.⁷⁶ After the contract between the band and the label expired in 2000, Simply Red member Mick Hucknall expressed his disdain for EastWest and the music industry in general.⁷⁷ He explained that it was unconscionable for an artist to be required to pay for recording and marketing costs but not have their master recordings revert to the artist at the expiration of the agreement.⁷⁸ Instead of signing with a new label in 2000, the band decided to create their own record with hopes of a 400% increase in royalties.⁷⁹ Additionally, by releasing future records in-house, Simply Red would be able to retain the master recordings to all future works.⁸⁰

Even Australian artists have experienced the importance of an artist controlling their master recordings. The Scientists formed in Perth but signed on for a European tour without informing their Australian record label.⁸¹ Uncorroborated reports explain that an executive from the Au Go Go label flew from Melbourne to London in 1984 to try to get the physical master recordings back from the band.⁸² When the trip proved to be in vain, Au Go Go decided to release a remixed album called “Atom Bomb Baby” without the band’s consent.⁸³ Au Go Go released this unauthorized album because the band decided to stay in the United Kingdom and work with a different label.⁸⁴

V. BETTER THAN REVENGE: HOW PRINCE TRIED TO BEAT HIS LABEL

Prior to Ms. Swift’s battle with Big Machine, the most famous dispute between a record label and artist was that of Prince. As one of the most renowned musical artists of the late 20th century, Prince’s dispute with his label, Warner Bros., appeared to be highly consequential to the music industry.⁸⁵ During the 1990s, Prince was seen as a trailblazer who was not afraid to shed light on the extortionate treatment of artists by their

76. *Id.*; *U.S. Anonymity Puzzles British Headliners Simply Red*, CHI. TRIB. (1992), <https://www.chicagotribune.com/news/ct-xpm-1992-06-18-9202240122-story.html> [<https://perma.cc/34AG-YB8P>].

77. Wenn, *Simply Red Singer Attacks Music Industry*, CONTACTMUSIC (2015), <https://www.contactmusic.com/mick-hucknall/news/simply-red-singer-attacks-music-industry> [<https://perma.cc/KCK5-GLEN>].

78. *Id.*

79. *Id.*

80. *Id.*

81. Eliezer, *supra* note 1; *Scientists - Atom Bomb Baby*, DISCOGS (1985), <https://www.discogs.com/release/2186574-Scientists-Atom-Bomb-Baby>.

82. *See Scientists*, *supra* note 81.

83. *Id.*

84. *Id.*

85. Ben Sisario, *How Prince Rebelled Against the Music Industry*, N.Y. TIMES (Apr. 22, 2016), <https://www.nytimes.com/2016/04/22/arts/music/prince-a-hit-maker-and-master-of-his-own-music.html> [<https://perma.cc/3C4K-NUZ5>].

labels and producers.⁸⁶ Prince also substantially limited the streaming of his music beyond traditional CD/vinyl/cassette sales—not only was it impossible to find his music on Spotify and YouTube, but he also protected his music from other “jukebox” streaming services (like Pandora).⁸⁷ Jimmy Jam reported to the *New York Times* that Prince’s impact on the modern music industry is far-reaching—from Kanye selectively listing his music on specific streaming platforms to Taylor Swift completely removing her catalogue from Spotify⁸⁸ due to under-compensation of artists—Prince walked so that these artists could run.⁸⁹

Prince had several disputes with Warner Bros. throughout his career, but the most relevant to this analysis revolved around control and ownership of the master recordings of his songs.⁹⁰ In 1999, Prince released a new version of his “1999” album to create a new master recording because Warner Bros. had also released a new version of the album in the same year.⁹¹

What was arguably Prince’s main contention with Warner Bros. was the fact that the label maintained ownership of his master recordings even after the label recouped all the expenses of production of the album.⁹² In 1993, Prince changed his name to the “Love Symbol” or “The Artist Formerly Known as Prince”⁹³ because Warner Bros. trademarked the name “Prince” and used it for promotional materials—by changing his name to an unpronounceable symbol, The Artist hoped that the record contract would become unenforceable.⁹⁴

Unfortunately for Prince, he was never successful in getting other artists to support his endeavors to shift the power balance away from

86. *Id.*

87. *Id.*

88. Taylor Swift removed her entire music catalogue from Spotify the night before the release of her fifth studio album, “1989.” Jack Linshi, *Here’s Why Taylor Swift Pulled Her Music From Spotify*, TIME (2014), <https://time.com/3554468/why-taylor-swift-spotify> [<https://perma.cc/HE6Y-UN8P>]; Tribulski, *supra* note 61.

89. Linshi, *supra* note 88.

90. *Prince to re-record his old Warner Bros. Albums, Taps Outside Producers for New Project*, MTV (1999), <https://www.mtv.com/news/nc52iu/prince-to-re-record-his-old-warner-bros-albums-taps-outside-producers-for-new-project> [<https://perma.cc/6J97-PHUH>].

91. *Id.*

92. Melinda Newman, *Inside Prince’s Career-Long Battle to Master His Artistic Destiny*, BILLBOARD (Apr. 28, 2016), <https://www.billboard.com/music/features/prince-battle-to-control-career-artist-rights-7348551/> [<https://perma.cc/88XD-F6KM>].

93. For simplicity’s sake, I will refer to “The Artist Formerly Known as Prince” as Prince throughout this Note. After his deal with Warner Bros. expired, “The Artist” reverted his name back to “Prince.”

94. Jessica Lussenhop, *Why did Prince change his name to a symbol?*, BBC NEWS (2016), <https://www.bbc.com/news/magazine-36107590> [<https://perma.cc/9DC8-ECGA>].

labels and towards artists.⁹⁵ This did not stop Prince from pushing innovation and seeking just compensation—in 1997, Prince funded an album through the early equivalent of crowdfunding.⁹⁶ In the end, Prince’s main goal was to own his master recordings so that he could control his music’s distribution and sales.⁹⁷

VI. EVERYTHING HAS CHANGED: HOW TAYLOR SWIFT HAS RESHAPED THE GLOBAL COPYRIGHT INDUSTRY

Ms. Swift’s project has substantially reshaped the copyright industry, not only in the United States, but also in the United Kingdom and Australia.

To understand the impact Ms. Swift has had on the copyright industry, a simple analogy will help. The legal ownership in a completed song is quite complex, so it will help to imagine a bundle of sticks (like is discussed in most 1L property courses). A completed song is composed of several individual sticks—each stick represents rights granted under Title 17 of the United States Code and other pertinent regulations.⁹⁸ To simplify this analogy, this analysis will solely focus on artists, like Ms. Swift, who are both the songwriter and the performer of the work.

95. *The Artist asks Madonna for help in label dispute*, MTV (1999), <https://www.mtv.com/news/j3gtm1/the-artist-asks-madonna-for-help-in-label-dispute> [<https://perma.cc/7PZL-7YUH>]; Newman, *supra* note 92.

96. Newman, *supra* note 92.

97. *Id.*

98. U.S. COPYRIGHT OFF., CIR. 50 COPYRIGHT REGISTRATION FOR MUSICAL COMPOSITIONS (2021), <https://www.copyright.gov/circs/circ50.pdf> [<https://perma.cc/8SE7-VVBE>].

98. Copyright Act of 1976, 17 U.S.C. § 101.

Table 1⁹⁹

Step/Sticks	Task/Rights
Step One	Writing the Song
Step Two	Recording the Song
Step Three	Providing the Song to the Record Label
Step Four	Distribution: (1) public performance, (2) synchronization with video (movies), (3) radio broadcasting, (4) internet radio, (5) streaming services, (6) future music broadcasting technology

For each row in the table, the songwriter/performing artist must give away a stick to another entity. When the performing artist is the songwriter, they own all of the sticks/rights to their song. However, if the artist wants to make money on the song or wants to perform it, they must work with record companies and music labels in order to actually distribute their music. This means that the artist must assign their first stick to the record label.

In Ms. Swift's case, this was not the transfer of just one stick, instead, it was a significant transfer of multiple sticks. Not only was Ms. Swift not able to re-record her music prior to 2019 (because she was still under the terms of her agreement with Big Machine Records), but she also assigned the interest in all of her first six albums to Big Machine Records.¹⁰⁰ This means that they could theoretically release any album to which they own the sticks, which Big Machine Records actually did in 2020.¹⁰¹

99. This is a very simplified version of the songwriting and publication process which assumes that the songwriter is also the performer. I have also left out various music rights groups (ASCAP and BMR) and the U.S. Copyright Office. U.S. COPYRIGHT OFF., CIR. 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS (2021), <https://www.copyright.gov/circs/circ56.pdf> [<https://perma.cc/3MLJ-JFX3>]; PASSMAN, *supra* note 17. See also du Plooy, *supra* note 17.

100. Travis M. Andrews, *Can Taylor Swift really rerecord her entire music catalogue*, WASH. POST (Aug. 22, 2019, 7:44 PM), <https://www.washingtonpost.com/arts-entertainment/2019/08/22/can-taylor-swift-really-rerecord-her-entire-music-catalogue/> [<https://perma.cc/LC H2-C63J>].

101. Dylan Smith, *Taylor Swift Surprised to Find Out She's Released a New Album*, DIGIT. MUSIC NEWS (Apr. 23, 2020), <https://www.digitalmusicnews.com/2020/04/23/taylor-swift-surprised-to-find-out-about-new-album/> [<https://perma.cc/SG2N-7MWR>].

VII. SAFE & SOUND: THE TAYLOR SWIFT IMPACT

The music industry landscape has shifted significantly since Prince's 1997 effort to direct market music to fans.¹⁰² Instead of having to use phone books and mailers to reach the target market, artists now have the limitless access of numerous social media websites and applications that allow them to speak directly to millions of people across the planet. Not only do artists have the limitless potential of social media at their fingertips, they can also easily see where other artists have tried and succeeded. For instance, Donald Passman's book, *All You Need to Know About the Music Business*, breaks down the steps for an up-and-coming artist to start a career in the music industry.¹⁰³

Ms. Swift has also given a voice to artists that have no voice when negotiating with labels or streaming services. Not only did the removal of her work from Spotify trigger the platform to recalculate its payment policy, but she also withdrew her work from Apple Music when the platform stated it would not compensate artists for streams by listeners in their "three-month free trial" period.¹⁰⁴

Regarding Spotify, after leaving on the eve of the release of her "1989" album, Ms. Swift remained absent from the streaming platform for about three years.¹⁰⁵ When Ms. Swift removed her work from Spotify, artists were not getting compensated at a "fair" rate when "free users" of the app would stream the music.¹⁰⁶ Moreover, free users would not be able to play songs in the order they appear in albums, and songs by one artist may be associated with other artists.¹⁰⁷ Importantly, when artists released new albums, they were not compensated on a comparable level to physical album sales when free-users streamed their new music.¹⁰⁸ In 2017, Spotify finally agreed to change its platform.¹⁰⁹ Not only did Spotify increase revenue paid to artists, but artists were also given the

102. See *supra* note 98.

103. See sources cited *supra* note 17.

104. Hugh McIntyre, *Taylor Swift's Letter to Apple: Stern, Polite, and Necessary*, FORBES (June 21, 2015), <https://www.forbes.com/sites/hughmcintyre/2015/06/21/taylor-swifts-letter-to-apple-stern-polite-and-necessary/> [<https://perma.cc/4EB3-E3PJ>].

105. Micah Singleton, *The armistice between Taylor Swift and Spotify is good for everyone*, THE VERGE (June 9, 2017, 11:19 AM EDT), <https://www.theverge.com/2017/6/9/15766804/taylor-swift-spotify-streaming-umg-catalog> [<https://perma.cc/WJ7M-GY53>].

106. *Id.*

107. *How does Spotify's algorithm work? Streaming hacks for musicians*, DITTO MUSIC DISTRIB. (2022), <https://dittomusic.com/en/blog/how-does-spotifys-algorithm-work-streaming-hacks-for-musicians/> [<https://perma.cc/69MT-DFCB>].

108. See sources cited *supra* note 17.

109. *Id.*; *What is a Spotify Windowing? – MusicDigi Support*, MUSICDIGI, <https://musicdigi.zendesk.com/hc/en-us/articles/360001369694-What-is-a-Spotify-Windowing-> [<https://perma.cc/CU79-A5RZ>].

option to “window” their releases.¹¹⁰ Windowing means that an artist can make a new album available to premium users two weeks before the release to the entire platform—allowing artists to get a substantially higher payout per stream than they would otherwise.¹¹¹ Moreover, this would drive free users to either pay for a subscription or buy physical copies of the albums.

Regarding Apple Music’s refusal to pay artists for streams generated by users in a free trial, Taylor Swift’s notable absence forced Apple Music to change its business model.¹¹² One of the reasons for Ms. Swift’s absence from Apple Music was the fact that artists were not paid for free-trial streamers. Ms. Swift said¹¹³ that “three months is a long time to go unpaid, and it is unfair to work for nothing We don’t ask you for free iPhones. Please don’t ask us to provide you with our music for no compensation.”¹¹⁴ On the same day that she posted the letter, an Apple Vice President responded to Ms. Swift’s post via Twitter stating that Apple would “pay artist (sic) for streaming, even during the customer’s free trial period” and that Apple “hear[s] you @taylorswift13 and indie artists.”¹¹⁵

Ms. Swift has significantly shifted the balance of power to a more fair and equitable relationship between artists, publishers, and streaming platforms. This power shift has been felt beyond just the United States. Recently, British singer, Adele, released a new album and wanted each song to be listened to in the order listed on the track list.¹¹⁶ Adele was able to work with Spotify so that the default button on albums would be “Play” as opposed to “Shuffle.”¹¹⁷

Australian musician and journalist, Elish Gilligan, described Ms. Swift’s project as a “significant reclamation of power by an artist who

110. MUSICDIGI, *supra* note 109.

111. *Id.*

112. Chris Welch, *Apple now says it will pay artists during Apple Music free trial*, THE VERGE (June 21, 2015), <https://www.theverge.com/2015/6/21/8822369/apple-will-pay-artists-during-apple-music-trial> [<https://perma.cc/PKC5-KBVU>].

113. Swift’s initial Tumblr post has been deleted, but Stereogum cached a copy of it in an analysis, *see* source cited *infra* note 118.

114. Peter Helman, *Read Taylor Swift’s Open Letter to Apple Music*, STEREOGUM (2015), <https://www.stereogum.com/1810310/read-taylor-swifts-open-letter-to-apple-music/news/> [<https://perma.cc/HX3F-5UYZ>].

115. Eddie Cue (@cue), TWITTER (June 21, 2015, 11:29 PM), <https://twitter.com/cue/status/612824775220555776?s=20&t=S2D-kxptl-COQcao4b57Dw> [<https://perma.cc/S4GZ-N7AE>]; *see* Welch, *supra* note 112.

116. Adele (@Adele), TWITTER (Nov. 20, 2021, 10:23 PM), <https://twitter.com/Adele/status/1462260324485242881> [<https://perma.cc/JHD6-7FNG>].

117. Mitchell Peters, *Adele Asked Spotify to Remove Shuffle Button From ‘30,’ Streaming Service Listened: ‘Anything For You’*, BILLBOARD (Nov. 21, 2021), <https://www.billboard.com/music/music-news/adele-spotify-removes-shuffle-30-ablum-1235000853/> [<https://perma.cc/Q5UK-HMNW>].

understands the might of her audience within an industry that consistently devalues and demeans artists”¹¹⁸ In Australia, artists and audiences are finally understanding the importance of an artist owning the rights to their master recordings.¹¹⁹ This is important because Elish Gilligan described the music industry in Australia as plagued with mistreatment of artists and that no artist is immune from such negative treatment by the industry.¹²⁰ Because artists transfer the ownership of their masters to the publishers, Australian artists can feel powerless to stand up against underpayment or other negative treatment.¹²¹

VIII. CHANGE: HOW TAYLOR SWIFT’S NEW RECORD DEAL CHANGED THE GLOBAL COPYRIGHT COMMUNITY

When Ms. Swift signed with Universal Music Group in 2018, she did so with a major request: that Universal *must* provide all artists under its label a portion of prospective Spotify sales on a “non-recoupable basis.”¹²² Because Universal owned equity in Spotify, if Universal were to ever sell its shares—it must pay *all* artists under its umbrella a portion of the sales, regardless of their financial standing with Universal.¹²³

Not only have artists experienced benefits from Ms. Swift’s tactful negotiations, but artists have also been taking notes on Ms. Swift’s tumultuous battle with Scooter Braun and Big Machine Records. When rising teen star Olivia Rodrigo signed a deal with Interscope/Geffen, she made sure to pursue a label that guaranteed her the right to retain her master recordings.¹²⁴ In an interview with “The Guardian,” Rodrigo explicitly referenced Ms. Swift as inspiration for pursuing her master recordings.¹²⁵

Likewise, British singer-songwriter Rita Ora signed a new deal with German multinational media company Bertelsmann after landing an agreement that would allow Ora to retain ownership of all her future

118. Eilish Gilligan, *Taylor Swift’s Re-Recordings Expose the Music Industry’s Chokehold on Intellectual Property*, REFINERY29 (last updated Nov. 10, 2021, 11:48 PM), <https://www.refinery29.com/en-au/2021/11/10747599/taylor-swift-taylors-version> [https://perma.cc/KRF4-2Y8L].

119. *Id.*

120. *Id.*

121. *Id.*

122. Amy X. Wang, *Taylor Swift’s New Record Deal Affects Thousands of Other Musicians*, ROLLING STONE (Nov. 19, 2018, 4:56 PM), <https://www.rollingstone.com/music/music-news/taylor-swift-universal-republic-deal-spotify-758102/> [https://perma.cc/P789-GDSZ].

123. As of 2018, Universal’s stake in Spotify was worth one billion USD. *Id.*

124. Laura Snapes, *Olivia Rodrigo: ‘I’m a teenage girl. I feel heartbreak and longing really intensely’*, THE GUARDIAN (May 7, 2021), <https://www.theguardian.com/music/2021/may/07/olivia-rodrigo-im-a-teenage-girl-i-feel-heartbreak-and-longing-really-intensely> (last visited Sept. 1, 2022).

125. *Id.*

master recordings.¹²⁶ Ms. Swift's public feud with Scooter Braun has transcended national borders and is impacting music deals from New York to Berlin.

Likewise, even up-and-coming artists in Australia are faced with overly powerful music executives that are dictating their creativity and ownership rights. Ms. Swift's public dispute has given these artists hope, and more importantly, knowledge on how to confront labels and publishers.

IX. SO IT GOES: THE ETERNAL BATTLE BETWEEN POPSTARS AND THEIR PUBLISHERS/LABELS

In studying the history of relationships between artists and their labels/publishers, these relationships have always been strained. The labels and publishers want to protect their initial investments through seemingly unconscionable revenue splits or transference of music publication rights (*vis-à-vis* master recordings). The turbulent relationship between artists and their publishers/labels is not consigned solely to the United States—artists across the Anglosphere have battled with their publishers/labels to retain ownership of their master recordings.

It is important to note that Ms. Swift is not the progenitor of the movement for artists to own their master recordings. Other artists have had disputes with their publishers, but they failed to make any meaningful progress. They may have re-recorded their own music, but only one artist attempted an undertaking as zealous as Ms. Swift's: Prince.

There is a lot of overlap between both Ms. Swift and Prince's strategy to fight back for control of their master recordings. Interestingly, Prince's late-1990s attempt to direct-market to consumers seems to be Ms. Swift's greatest strength in her remarkable battle with Big Machine Records. Instead of having to cold-call consumers like Prince, Ms. Swift's gargantuan social media presence has allowed her to give Prince's strategy a modern-day application. Just as Prince published a cry for help soliciting Madonna's aid in fighting oppressive labels, Ms. Swift has used Instagram, Tumblr, Twitter, and the talk-show circuit to spread awareness of how she was mistreated by Scooter Braun. Next, both artists were very public in chastising the owner of their master recordings.

As early as 1995, Prince would write "SLAVE" in all capital letters on his face when performing concerts.¹²⁷ Prince did this to bring awareness to the public and to his fans that he had no creative control of

126. Mark Savage, *Rita Ora signs record deal that lets her own her masters*, BBC NEWS (2022), <https://www.bbc.com/news/entertainment-arts-60246112> [<https://perma.cc/C2TC-6JU4>].

127. Brianna Holt, *Prince's Emancipation: The Significance of His 19th Album*, COMPLEX (June 19, 2020), <https://www.complex.com/pigeons-and-planes/2020/06/prince-emancipation> [<https://perma.cc/UD3J-6HAR>].

his work and did not own his master recordings.¹²⁸ In his words, “if I can’t do what I want to do, what am I?”¹²⁹ Similar to Prince’s public performances with “SLAVE” on his face, Ms. Swift delivered a similar message during her performance at the 2019 American Music Awards (AMAs).¹³⁰ Ms. Swift was attending the AMAs to accept the award for Artist of the Decade and wanted to perform songs in her back-catalog to honor the songs that led to the award.¹³¹ In the week leading up to the awards show, it was unknown whether she would be legally permitted to perform the songs publicly, due to the recent purchase of her master recordings by Scooter Braun.¹³² Although she was allowed to perform the songs, she made a statement in her performance.¹³³ Similar to Prince, Ms. Swift donned a large white shirt with the name of the six albums owned by Scooter Braun.¹³⁴ She opened the performance with a rendition of her song, “The Man” from her “Lover” album, which says “And I’m so sick of them coming at me again. ‘Cause if I was a man, then I’d be the man.”¹³⁵ This performance was seen as a direct attack on Scooter Braun and the music industry in general.¹³⁶

X. END GAME: THE IMPACT ON THE ANGLOSPHERE

Ms. Swift’s impact can be seen across the Anglosphere—from popstars in the United States to up-and-coming ones in Melbourne, Australia, artists are fighting for more control of their works. In the new digital age of direct marketing to consumers, Ms. Swift has taken Prince’s nearly three-decade old strategy and revolutionized it into a battle cry. Unlike Prince, modern artists have the ability to directly market their music and their struggles to consumers. Additionally, with the rise of streaming platforms, consumers are able to cherry-pick individual songs or albums to listen to without the commitment of buying an album or waiting on MTV to air their favorite artist. Ms. Swift has shown that even the smallest artist has the power to profit off of their work by sparking the power of the fan.

Needless to say, “everything has changed.”

128. *Id.*

129. *Id.*

130. Angela Stefano, *Of course Taylor Swift’s 2019 AMAs dress shirt was a statement!*, THE BOOT (2019), <https://theboot.com/taylor-swift-amas-outfit-albums-shirt/> [<https://perma.cc/U36T-AAAK>].

131. Patrick Ryan, *Taylor Swift takes subtle jabs at former record label in triumphant American Music Awards return*, USA TODAY (Nov. 25, 2019), <https://www.usatoday.com/story/entertainment/music/2019/11/25/taylor-swift-american-music-awards-speech-performance-amas/4293911002/> [<https://perma.cc/3XNH-6BHC>].

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

LETTING TIME SERVE YOU: BOOT CAMPS AND
ALTERNATIVE SENTENCING FOR FEMALE OFFENDERS

Wilson Z. Liu

Abstract

Across multiple American presidential administrations, the United States has made its discontent with the dispute resolution bodies of the World Trade Organization known. The actions of the United States initiated a crisis of confidence in the World Trade Organization. This Note examines that crisis and posits what comes next for the World Trade Organization and the resolution of international trade disputes in general.

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I.	INTRODUCTION: WHAT IS THE WTO? HOW DOES IT FUNCTION AND WHY IS IT IMPORTANT?	

The World Trade Organization (WTO) is an international organization that seeks to promote free trade and eliminate trade barriers across the world.¹ The organization was created in 1994 by the Marrakesh Agreement, and it has been one of the most influential and powerful international organizations in the past three decades.² As of today, the WTO has 164 members, representing over 98% of global trade.³

The WTO's power mainly comes from three relatively unique designs of its structure: First, the WTO uses a single-undertaking approach. Members cannot agree to just part of the agreement, they must agree to the agreement or annex entirely for the agreement and annex to take effect.⁴ Second, the establishment of the Dispute Settlement Body (DSB) with a permanent Appellate Body brought consistency and expertise to the interpretation of the General Agreement on Tariffs and Trade (GATT), the governing law of the WTO.⁵ Third, the WTO adopted a reverse-consensus rule on the decision issued by the DSB, this means unless all WTO members choose to *reject* the report (including the winning party), the report by either the Panel or the Appellate Body would be adopted, thus becoming binding.⁶ The design gave the DSB and the Appellate Body a considerable amount of authority, and the Appellate Body is consistently referred to as the “jewel in the crown” for its importance in the DSB.⁷

The Appellate Body consists of seven members, and each member serves a four-year term, with the possibility of reappointment for another term. Each member must be a “person[] of recognized authority, with

1. *Overview*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm [<https://perma.cc/KB4M-A953>]

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Cosette D. Creamer, *From the WTO's Crown Jewel To Its Crown Of Thorns*, 113 AM. J. INT'L L. UNBOUND 51, 51 (2019); Imogen Saunders, *Populism, Backlash and the Ongoing Use of the World Trade Organization Dispute Settlement System: State Responses to the Appellate Body Crisis*, 35 MD. J. INT'L L. 172, 172 (2020).

demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally.”⁸

II. THE DISPUTE SETTLEMENT PROCESS

The Dispute Settlement Process can be summarized into three steps, starting with formal consultation requested by any member against another member.

1. Consultation

The Party requesting consultation is labeled as the complaining party or the complainer, and the party responding is labeled as the respondent. Any member of WTO can bring a case against another party, even if the complainer’s interest was not harmed. The consultation period lasts sixty days, and in this period, parties would try to negotiate to reach a positive resolution.⁹

2. Panel

If the dispute cannot be resolved over the consultation period, the complaining party can submit a request in writing for a dispute Panel, the Panel, normally composed of three people, will effectively act as the judge of this dispute. (WTO dispute Panel is not a standing body; it would only be created when needed)¹⁰

- a. Written Submission and Oral Arguments by parties.
- b. Issuance of an interim report.
- c. Parties can submit written comments on the interim report.
- d. Issuance of the final report

3. Appellate Body

After the Panel issued its final report, the parties may choose to appeal. The WTO Appellate Body will hear the appeal. The Appellate Body is a standing body with seven members, serving four-year terms with the option to be reappointed one time. The Appellate Body’s decision is final, but it lacks remand authority, so if it decides it lacks the necessary fact to conclude, it will simply state it is “unable to complete legal analysis”, and the case ends there.¹¹

8. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 17, 1867 U.N.T.S. 3 (1995).

9. *Id.* at 17.2.

10. *Id.* at 17.3.

11. Saunders, *supra* note 7, at 172; Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 17, 1867 U.N.T.S. 3 (1995).

III. CURRENT CRISIS

A. *Historical Problem with the DSB and the Appellate Body*

Over the past two decades, members have had problems and complaints about the DSB and the Appellate Body, for example, the Panel and the Appellate Body's significant delay in the delivery of the rulings,¹² and disagreement with the legal reasoning of individual rulings.¹³ However, the DSB and the Appellate Body have been fairly successful in adjudicating disputes between members, the compliance rate of the DSB ruling has been high at about 90% as of 2017,¹⁴ and countries have rarely challenged the overall authority and legitimacy of the DSB.¹⁵

B. *The Unprecedented Challenge*

The real challenge and crisis started in 2016 with the Obama Administration blocking two appointments of Appellate Body judges,¹⁶ and this marked the first time the United States blocked the appointment of a *foreign* Appellate Body judge.¹⁷ The Trump Administration pushed this to an extreme. Starting in June 2017, the United States has adopted a policy to deliberately block the appointment and reappointment of Appellate Body judges.¹⁸ At midnight of December 10, 2019, the Appellate Body was completely paralyzed as it finally fell below the mandatory number of judges to adjudicate any appeal,¹⁹ and the fall of the Appellate Body marked the incapacitation of the entire DSB,²⁰ as the DSB lost the ability to issue binding rulings and reports that were almost impossible to reject due to the reverse-consensus model. A member can simply appeal an unfavorable Panel ruling into "limbo," as the paralyzed Appellate Body cannot hear the case.²¹ Members could of course agree with each other to not appeal the ruling of a panel, however, neither the WTO nor any member could compel others to act this way.²² Indeed, as multiple commentators pointed out, the DSB and the Appellate Body are facing "unprecedented challenges."²³

12. Saunders, *supra* note 7, at 173.

13. Creamer, *supra* note 7, at 52–53.

14. *Dispute settlement*, WORLD TRADE ORG., https://www.Wto.Org/English/TheWto_E/Minist_E/Mc11_E/Briefing_Notes_E/Bfdispu_E.Htm [<https://perma.cc/645G-TSNQ>].

15. See Creamer, *supra* note 7, at 52–53.

16. Saunders, *supra* note 7, at 175.

17. *Id.*

18. *Id.*

19. *Id.* at 176.

20. *Id.* at 174.

21. *Id.* at 182.

22. *Id.* at 174.

23. Creamer, *supra* note 7, at 51; Saunders, *supra* note 7, at 174.

IV. U.S. ALLEGATION

Starting in the Obama Administration, the United States showed its impatience and disapproval of the DSB and the Appellate Body by blocking the appointment of two Appellate Body judges.²⁴ After the Appellate Body ruled against the United States regarding its interpretation of “zeroing” in its antidumping duty and subsidies to State-Owned Enterprise in a countervailing duty,²⁵ the United States decided to attack the system by issuing a series of statements accusing the Appellate Body of engaging in inappropriate behavior.²⁶ In February 2020, the United States Trade Representative (USTR) issued a lengthy report on the issue and the accusation can be summarized into three major ones:

The *Report* levels three major charges: (1) the Appellate Body ignores or violates numerous procedural rules and deadlines in dispute settlement; (2) the Appellate Body engages in “making law,” issuing rulings that are not to be found in the body of WTO agreements; and (3) the Appellate Body has issued numerous rulings invalidating U.S. domestic trade remedy laws that are essential to U.S. interests. The *Report* contends that the Appellate Body was never intended to serve as a supreme court of international trade, and that, under the Agreement Establishing the WTO, Article IX.2, only the Ministerial Conference and the General Council may adopt interpretations of WTO agreements.²⁷

This allegation has received bipartisan support,²⁸ and the United States has generally taken a negative view of the entire WTO DSB over the past few years.²⁹ In a joint letter to Katherine Tai, the USTR of the Biden Administration, three Senators, Marco Rubio, Tom Cotton, and Chuck Grassley stated that:

The United States has blocked new members to the appellate body since 2011, when the Obama Administration blocked an appointment, citing the WTO’s failure to protect American interests. The Trump Administration followed this tradition. This rare bipartisan agreement was the result of a clear and consistent pattern of the WTO intentionally undermining American sovereignty while enriching the

24. See Saunders, *supra* note 7, at 175.

25. Thomas J. Schoenbaum, *The Biden Administration’s Trade Policy: Promise and Reality*, 24 GER. L.J. 102, 115 (2023).

26. *Id.*

27. *Id.*

28. See *id.* at 115; Saunders, *supra* note 7, at 186; José E. Alvarez, *Biden’s International Law Restoration*, 53 N.Y.U. J. INT’L L. & POL. 523, 542 (2021).

29. *Id.*

Chinese Communist Party (CCP). Restoring the Appellate Body would only harm the United States and give international bureaucrats and members of the CCP more influence over U.S. trade policy.”³⁰

V. U.S. MOTIVE

A. *Concerns of Judicial Activism by an Overpowered Appellate Body*

So exactly how did the United States get to such an extreme and unprecedented position on the organization that it once created and led? The concerns and objections leading to the final outbreak have long been identified by members: due to the complexity of the GATT and WTO, members often found themselves failing to collectively govern the organization,³¹ Under the traditional separation of power setting, the judiciary is subject to the constraint of legislative veto and overriding. The legislature could use legislation to fix any judicial interpretation with unintended or undesired consequences.³² This safety net not only constrains the judiciary from judicial activism but also increases the legitimacy and members’ trust in the judiciary.

Even though the WTO does have such mechanisms, due to the single-undertaking approach discussed above, it is extremely difficult to pass any amendments and new agreements to correct unintended judicial interpretation.³³ Ever since the 1994 Uruguay Round, which established the WTO, there has been no successful negotiation for the past three decades. The last attempt was the Doha Round, which started in 2001 and lasted an incredible fourteen years, yet no consensus was reached, and the negotiation essentially failed.³⁴ This reality gave the Appellate Body tremendous, even concerning power to interpret and apply the governing law. Even though previous interpretations are not binding precedents in DSB, both the Panel and the Appellate Body would usually follow their previous reasoning.³⁵

This setting, while concerning, is a “necessary evil,” given the difficulty to pass new amendments and agreements, the Appellate Body must fill the gap, clear any ambiguity, and accommodate unforeseen

30. Letter from Tom Cotton, U.S. Senator; Charles Grassley, U.S. Senator; and Marco Rubio, U.S. Senator; to Katherine Tai, United States Trade Representative (Aug. 29, 2022), https://www.grassley.senate.gov/imo/media/doc/grassley_cotton_rubio_to_ustr_-_wto.pdf [<https://perma.cc/V2PT-VT5U>].

31. Creamer, *supra* note 7, at 52.

32. *Id.* at 53.

33. *Id.*

34. Michael Forman, *We Are at the End of the Line on the Doha Round of Trade Talks*, FIN. TIMES (Dec. 13, 2015), <http://www.ft.com/cms/s/0/4ccf5356-9eaa-11e5-8ce1-f6219b685d74.html> [<https://perma.cc/9SR4-W3SG>]; Schoenbaum, *supra* note 25, at 115.

35. Saunders, *supra* note 7, at 173.

developments of the modern world.³⁶ WTO members also recognized both sides of the controversy, and as discussed above, they rarely challenge the overall legitimacy of the system.³⁷

B. *Reform or Destruction?*

Then why, suddenly, did the United States take such an extreme approach when the problems with the Appellate Body have long been identified and debated? One explanation, as some commentators argued, could be the frustration has built up to the point where the United States just cannot stand it anymore, and decided to take this extreme approach to force some changes in the system,³⁸ however, this explanation is not convincing, a more convincing argument would be the Trump Administration acted in a such extreme way to achieve its political agenda for the following reasons:

First, the Trump Administration's attacks were not limited to the DSB and the Appellate Body, even though the Trade War with China caught the most attention internationally, the Trump Administration launched an unprecedented attack on international trade by imposing a tariff on not just China but a lot of its allies including EC, South Korea, Japan, and Canada under The Trade Expansion Act Section 232.³⁹ The "America First" and Protectionism policy is exactly contrary to the very fundamental objective of WTO.

Second, instead of reforming the system, the Trump Administration simply killed it.⁴⁰ The Trump Administration never presented the DSB with any conditions for removing its block of Appellate Body appointment, nor did it cooperate with any of the members to change the system.⁴¹ A lot of scholars and commentators argued that the United States is simply not interested in reforming the system, but in completely incapacitating it.⁴²

Indeed, Skepticism of the true U.S. motive was very common, scholars and commentators repetitively argued that the unprecedented challenge upon DSB and the Appellate Body was caused by the political motive to strengthen the Protectionism policy rather than reforming the Appellate Body and strengthening globalization and international trade.⁴³

36. Creamer, *supra* note 7, at 53.

37. *Id.*

38. *Id.* at 55.

39. Kristen Hopewell, *Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 AM. J. INT'L L. UNBOUND 58, 60 (2022).

40. Rachel Brewster, *Analyzing the Trump Administration's International Trade Strategy*, 42 FORDHAM INT'L L.J. 1419, 1426 (2019).

41. *Id.*

42. Saunders, *supra* note 7, at 181; Brewster, *supra* note 40, at 1426; Creamer, *supra* note 7, at 55; Alvarez, *supra* note 28, at 544.

43. See sources cited *supra* note 42.

C. *The Disappointment of the Biden Administration*

After President Biden assumed office in 2021, the hope was that the Biden Administration would quickly reverse the Trump Administration's Protectionism and restore international trade, and propose a solution to the current Appellate Body Crisis,⁴⁴ as Biden committed to multilateralism and international cooperation during his campaign.⁴⁵

However, people with this hope were quickly disappointed by the Biden Administration. Even though the Biden Administration reversed some of the Trump Administration's foreign policy like its position on climate change, the Trump Administration's trade policy, tariff, and position on WTO DSB and Appellate Body were almost untouched by the Biden Administration.⁴⁶

Instead, the Biden Administration implicitly approved the Trump Administration's trade policy. The Biden Administration "lavishly appraised USMCA,"⁴⁷ Kathrine Tai, The Biden Administration's USTR, called USMCA a "premier bipartisan accomplishment."⁴⁸ The USMCA is the replacement for NAFTA, and it was negotiated by the Trump Administration to help American businesses and to achieve the "America First" agenda.⁴⁹ The Biden Administration is also not interested in Free Trade Agreement negotiation, as Biden announced in one of the interviews after he was elected as president, he is "not going to enter any new trade agreement until we have made major investments here at home and in our workers."⁵⁰

Furthermore, the Biden Administration's "Buy American" policy is simply a more emphasized "America First" on trade and protectionism.⁵¹ "Buy American" starts with the order that federal government entities purchase American products.⁵² The Buy American Act (BAA) generally requires federal entities to purchase articles manufactured in the United States unless the head of the department determines that their cost is unreasonable. The BAA outlined various tests to determine the origin of a product. One of the most important tests applied to manufactured

44. Alvarez, *supra* note 28, at 544; Hopewell, *supra* note 39, at 60.

45. Alvarez, *supra* note 28, at 544; Hopewell, *supra* note 39, at 60.

46. Schoenbaum, *supra* note 25, at 104.

47. *Id.* at 116.

48. *Remarks of Ambassador Katherine Tai Opening the First USMCA Free Trade Commission*, OFF. OF THE U.S. TRADE REPRESENTATIVE (May 18, 2021), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/may/remarks-ambassador-katherine-tai-opening-first-usmca-free-trade-commission> [<https://perma.cc/ZG32-UMYJ>].

49. Schoenbaum, *supra* note 25, at 116.

50. Thomas J. Schoenbaum, *Bidenomics Versus Maganomics on Trade Law: Pick Your Poison*, WASH. INT'L TRADE J. (Mar. 31, 2024), <https://www.wita.org/atp-research/bidenomics-maganomics/> [<https://perma.cc/T976-V38A>].

51. Schoenbaum, *supra* note 25, at 107, 124.

52. *See* Exec. Order No. 14005, 86 Fed. Reg. 7475 (Jan. 25, 2021).

products is the domestic content test. The domestic content test states that for a manufactured product to be considered of American origin, the product must be manufactured in the U.S. and the cost of its components mined, produced, or manufactured in the U.S. must exceed 50% of the cost of all its components.⁵³ Biden issued an executive order increasing the domestic content requirement from 50% to 75% , and still higher minimums are applied to iron and steel end products. The executive order also increases the price preferences for domestic end products and construction materials. If a domestic end-product is not the lowest price for a government contract, a factor of 20 to 30% must be added to the price of the foreign low offer to evaluate the relative competitiveness of the offers.⁵⁴

The Biden Administration’s “Buy American” policy is a key aspect of a new American industrial policy enacted by Congress in the form of four laws that subsidize key sectors of the U.S. economy. The American Rescue Plan Act (2021), the Infrastructure and Jobs Act (2021), the Inflation Reduction Act (2022), and the Chips Act (2022) provided a total of about \$1.87 trillion in subsidies to various sectors. These laws coupled with new “Buy American” standards constitute a venture into protectionism and away from free trade ideals.

The failure to restore international trade order by the Biden Administration is certainly contrary to a lot of people’s anticipation.⁵⁵ This somewhat surprising outcome can be understood by the Biden Administration’s political priority during this unique time. So far, COVID-19 pandemic covered the entire term of the Biden Administration, the economic crisis caused by the pandemic is disastrous, to say the least. Under a difficult economic environment, countries tend to shrink into protectionism to appease worried and angry voters. Free trade promotes overall economic efficiency with dispersed benefits to the public, making it hardly noticeable. In contrast, protectionism concentrates the benefit on specific groups at the cost of all consumers, giving the political leader a strong incentive to utilize it to appease a group of beneficiaries.

VI. OTHER COUNTRIES’ RESPONSE

A. *Objection and Disapproval of the United States Approach*

As discussed above, a lot of WTO members shared the same concerns for a long time,⁵⁶ and a lot of them have issued public statements to

53. 48 C.F.R. § 25.101(a) (2023).

54. Federal Acquisition Regulation, 87 Fed. Reg. 12780, 12791 (Mar. 4, 2022) (to be codified at 48 C.F.R. pt. 1).

55. See generally Alvarez, *supra* note 28, at 523.

56. See Saunders, *supra* note 7, at 175.

express their dissatisfaction with the DSB and Appellate Body,⁵⁷ however, members rarely challenge and backlash against the system's overall legitimacy, and certainly no member has ever tried to incapacitate the system completely.⁵⁸ Most of the members are rather reform-minded than destruction-minded as evidenced by their response to the current crisis.

No countries have voiced support publicly for the United States,⁵⁹ to the contrary, most members directly expressed their disapproval and objection to the U.S. blockade. In June 2019, a proposal supported by ninety-one WTO members including major players like China, EU, Russia, and South Korea was presented the proposal called for reviving the selection and appointment of Appellate Body judges.⁶⁰ In the WTO Dispute Settlement Body meeting on October 2019, a similar report with 115 sponsors was circulated and discussed.⁶¹ During the meeting, the Representative of Qatar iterated that the status quo is “deeply concerning,”⁶² and a functioning Appellate Body is essential to the WTO.⁶³ Numerous other countries delivered statements to support Qatar's contention and invited members that have not sponsored the proposal to endorse the proposal.⁶⁴

B. *The MPIA and the Lonely United States*

Despite the malfunctioning of the Appellate Body, members still utilize the DSB to resolve disputes.⁶⁵ A dozen of countries have brought forty-one cases since 2019 (ironically, the United States is one of them).⁶⁶ In 2019, the EU, Canada, and Norway agreed to an alternative appeal process,⁶⁷ under the agreement, members would still use the DSB at the consultation and panel stage. In a joint statement made by Canada and the EU, parties identified their intention to preserve the functionality of the DSB.

57. Creamer, *supra* note 7, at 52.

58. *Id.*

59. Saunders, *supra* note 7, at 180.

60. *Id.*; Dispute Settlement Body, *Appellate Body Appointments*, WTO Doc. WT/DSB/W/609/Rev.15 (adopted Dec. 6, 2019).

61. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 15 August 2019*, WTO Doc. WT/DSB/M/433 (adopted Oct. 29, 2019).

62. *Id.* at 10.3.

63. *Id.* at 10.3, 10.10.

64. *Id.* at 10.11, 10.16–10.30.

65. Saunders, *supra* note 7, at 181–82.

66. Chronological list of disputes cases, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm [<https://perma.cc/4X46-F7E2>]

67. Imogen Saunders, *Populism, Backlash and the Ongoing Use of the World Trade Organization Dispute Settlement System: State Responses to the Appellate Body Crisis*, 35 MD. J. INT'L L. 172, 185–86 (2020).

Following the successful EU-Canada Summit on July 17–18, 2019, leaders from the EU and Canada reaffirmed a shared commitment to the rules-based international order and to preserve and safeguard a functioning World Trade Organization (WTO) dispute settlement system.⁶⁸

To further expand the three-country agreement, the EU coordinated with fifteen other countries and started the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).⁶⁹ In the joint statements of all participants, the arrangement was intended to:

[I]n the interim, to put in place contingency measures based on Article 25 of the DSU to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports, and thereby to preserve their rights and obligations under the WTO Agreement.⁷⁰

The number of participants in the MPIA keep increasing since its establishment. As of March 2023, with the addition of Japan,⁷¹ 53 out of 164 WTO members are part of the MPIA, including major players like the EU, China, Canada, Australia, and Japan.⁷² To the United States' disappointment, after receiving negative feedback from the initial attempts to resolve the problem, the rest of the world is open to alternative solutions and it seems to not feel the urgency to bring the United States back into the conversation.

The United States currently found itself in an awkward situation, as the global leader in international order and trade, it found itself in a position with no ally probably for the first time in many years, with the growing influence and participants of the MIPA, it could well be the case in near future that the United States is completely isolated.

68. Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement (July 25, 2019), https://policy.trade.ec.europa.eu/news/joint-statement-eu-and-canada-interim-appeal-arbitration-arrangement-2019-07-25_en [<https://perma.cc/B5ZR-4MN8>].

69. WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020).

70. *Id.*

71. Cabinet Understanding regarding Participation in the MPIA (Multi-Party Interim Appeal Arbitration Arrangement) (Mar. 10, 2023), https://www.mofa.go.jp/press/release/press6e_000447.html [<https://perma.cc/8JN3-37CL>].

72. Multi-Party Interim Appeal Arbitration Arrangement (MPIA), https://wtoplurilaterals.info/plural_initiative/the-mpia/ [<https://perma.cc/26ED-ALFP>].

VII. FUTURE OF THE DSB AND THE APPELLATE BODY

A. *Lack of Motive and Interest to Restore the Functionality of the DSB by the U.S.*

As argued above, the United States' decision to block and paralyze the DSB and the Appellate Body was driven by political motivation rather than the intention to reform the system.⁷³ The United States would have no interest in lifting its blockage any time soon due to a few reasons.

First, currently, there are dozens of WTO complaints against the United States since the Trump Administration's international trade policy was implemented,⁷⁴ some of them already resulted in unfavorable rulings to the United States,⁷⁵ while others are highly suspicious in terms of compliance with WTO obligations. Reviving the Appellate Body means the United States would be forced to face those unfavorable rulings and extended challenges to the United States' international trade policy.

Second, the United States has very little use of the WTO at this stage as the free trade negotiations are very low on the priority list for the Biden Administration.⁷⁶ Under the current Protectionism trade policy, the United States would hardly have any use of a platform that promotes something completely contrary.⁷⁷ WTO established the rule of law principle of international trade in the past three decades,⁷⁸ however, the United States has abandoned this principle that was established once by itself.⁷⁹ The Trump Administration returned to an anarchical practice of international trade order by using coercive power in trade.⁸⁰ In other words, the United States retracted from the governance of rule of law and chose to do whatever would please the voters in the short run. Trade policy was weaponized by the Trump Administration to achieve its desired diplomatic outcome and appease the sectors that receive the concentrated benefit of Protectionism at the cost of the general public. This is evident using Section 301—which enables it to unilaterally take retaliatory action against any country deemed to “unjustifiably” restrict or burden U.S. commerce—as a cornerstone of its trade strategy.⁸¹ As discussed above, this policy spreads far beyond just China; China simply

73. See discussion in Section V(B) *supra*.

74. Follow disputes and create alerts, https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm [https://perma.cc/G4WR-8VNQ].

75. *Id.*

76. Schoenbaum, *supra* note 25, at 116.

77. *Id.* at 123.

78. Kristen Hopewell, *Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 AM. J. INT'L. L. UNBOUND 58, 59 (2022).

79. *Id.*

80. *Id.*

81. *Id.*

happens to be one of the countries that runs afoul of the United States' political agenda.⁸²

Third, the United States has taken a more hostile view toward China⁸³ and Russia⁸⁴ by banning the former and sanctioning the latter.⁸⁵ The Trump Administration mainly used tariffs in its trade war against China, and a lot of those tariffs are still in place.⁸⁶ In the meanwhile, the Biden Administration mainly countered by matching the subsidy⁸⁷ and prohibiting the exportation of certain productions to China. All policies mentioned above would raise some serious WTO obligation compliance questions. Therefore, it is in the United States' best interest to keep the Appellate Body in its current paralyzed state.⁸⁸ China also adopted a similar viewpoint and approach on international trade.⁸⁹ Even though President Xi does not have to think about reelection, over the past few years, China has exercised coercive economic power on trade to "punish" other countries for actions that China is not a fan of. For example, China blocked imports of Canadian pork, beef, soybeans, and canola—and arbitrarily imprisoned two Canadian citizens—in retaliation for the country's participation in the extradition of a Huawei executive to face fraud charges in the United States. Beijing's trade restrictions cost Canada \$4 billion in lost exports.⁹⁰ China has similarly blocked imports from Australia in retaliation for its calls for an independent inquiry into the origins of the COVID-19 pandemic as well as Canberra's complaints about Chinese Communist Party interference in Australia's domestic politics.⁹¹ As Australia's largest trading partner, and the destination for nearly 40% of its exports, China's import curbs—which target an extraordinarily broad list of agricultural and mining products—are intended to inflict maximum economic pain on Australia's core export sectors.⁹² Against the Chinese practice of weaponizing trade, the United States found itself in a difficult spot to untie its hands even if it wants to do so.

Fourth, the bipartisan consensus further entrenches the United States' position. As discussed above, in the U.S., there is bipartisan support for

82. See discussion in Section V(B) *supra*.

83. José E. Alvarez, *Biden's International Law Restoration*, 53 N.Y.U. J. INT'L L. & POL. 523, 538–39 (2021).

84. Schoenbaum, *supra* note 25, at 123.

85. *Id.* at 119–23.

86. *Id.* at 104; Kristen Hopewell, *Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 AM. J. INT'L L. UNBOUND 58, 59 (2022).

87. Schoenbaum, *supra* note 25, at 119–21.

88. *Id.* at 104.

89. Hopewell, *supra* note 39, at 61.

90. *Id.*

91. *Id.*

92. *Id.*

the blockage against the DSB and the Appellate Body,⁹³ and this makes it very hard for the U.S. to abandon its current position, even if a new president is elected in 2024. Both parties now are leaning more and more toward populist practice, and reverting Protectionism would require a lot of political capital and run the risk of popular backlash. The Biden Administration demonstrated this perfectly by keeping the Trump Administration’s trade policy in place and adding its own to gain further popular support.

Figure 1: Poll of What Americans Believe is the Most Important Problem for the U.S. Today⁹⁴

What do you think is the most important problem facing the country today?							
Recent trend							
	Feb-2023	Jan-2023	Nov/Dec-2022	Oct-2022	Sep-2022	Aug-2022	Jul-2022
	%	%	%	%	%	%	%
ECONOMIC PROBLEMS (NET)	35	34	40	46	38	37	35
High cost of living/inflation	13	15	16	20	17	18	17
Economy in general	13	10	16	18	12	14	12
Federal budget deficit/Federal debt	3	3	2	2	1	1	1
Gap between rich and poor	2	2	2	2	2	1	1
Unemployment/Jobs	1	2	1	2	2	2	1
Wage issues	1	1	*	1	1	*	1
Lack of money	1	1	2	1	2	1	1
Taxes	1	1	1	1	1	1	*
Fuel/Oil prices	*	1	2	2	3	3	5
Foreign Trade/Trade deficit	*	*	--	--	*	--	*
Recession	*	*	1	*	*	1	*
Corporate corruption	--	*	--	*	*	*	1

Finally, the matter lacks popular support or even awareness. As we can see from Figure 1, Americans are more caught up in domestic affairs rather than foreign trade, “Foreign Trade/Trade Deficit” received an insignificant number of votes in the past six months.

Overall, the hope that the United States would lift the block on its own would be misplaced,⁹⁵ the status quo fits the United States’ current interest in foreign policy,⁹⁶ and any change would only result in an additional burden with no benefit to the United States. Any move to revert to the current approach would be unpopular to both parties, and there won’t be any popular support from the public.

93. See Schoenbaum, *supra* note 25, at 123.

94. *Most Important Problem*, GALLUP, <https://news.gallup.com/poll/1675/most-important-problem.aspx> [<https://perma.cc/AJ4P-JV22>].

95. See Schoenbaum, *supra* note 25, at 123.

96. *Id.* at 123–24.

VIII. POSSIBLE EFFECT ON THE UNITED STATES AND FUTURE GLOBAL TRADE ORDER

A. *The Continuation of Protectionism and Blockage Could Isolate the United States from its Allies and the Rest of the World*

The adoption of Protectionism makes WTO relatively useless for the United States contemporarily, however, this would not be the long-term solution for economic prosperity. As proven by history and economists, free trade fosters efficiency and economic improvement. Once the pandemic cleared and the economy is back on track, it would likely be in the U.S.'s best interest to reopen its border, but the world might not wait for that.

As discussed above, WTO members are open to and have acted to circumvent the United States to preserve the DSB.⁹⁷ The United States has effectively abandoned its leadership in international trade,⁹⁸ a position that it has held ever since WWII by hurting its major trade partners and long-term allies.⁹⁹

The ignorance of the WTO and the lack of a Free Trade Agreement means the United States is offered no preference or protection in international trade. Currently, U.S. exporters presently have preferential access only to markets that constitute 9% of global GDP. By comparison, Canada maintains preferential access to 57% of global export markets; Mexico has access to 56%; Japan has access to 31%; and the EU has access to 20%.¹⁰⁰

Additionally, the withdrawal from Free Trade Agreements like Trans-Pacific Partnership (TPP), which is now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) hurt the United States as it gave its allies no incentives to address American interests internationally.¹⁰¹ The support from these countries is important for the United States to achieve its foreign policy objective, namely promoting Chinese reform in areas like IP and SOEs.¹⁰² Ironically, while the United States wages its trade war with China, it has abandoned its closest allies.¹⁰³ Despite the U.S. preoccupation with China's industrial policy and its interventionist state, it has largely turned a blind eye to its

97. See sources cited *supra* notes 58–64 and accompanying text.

98. See Schoenbaum, *supra* note 25, at 103.

99. Hopewell, *supra* note 39, at 61.

100. Guy Erb & Scott Sommers, *Biden's Trade Policy and Free Trade Areas*, WASH. INT'L TRADE ASS'N BLOG (June 5, 2021), <https://www.wita.org/blogs/bidens-trade-policy/> [<https://perma.cc/XZ6C-SV4U>].

101. Brewster, *supra* note 40, at 1428–29.

102. *Id.*

103. Hopewell, *supra* note 39, at 61.

economic coercion and the effects on U.S. allies.¹⁰⁴ And, indeed, rather than helping to defend its allies from Chinese trade aggression, the United States has done just the opposite: America's closest allies—including the European Union, Japan, South Korea, Canada, and Australia—have been among the primary targets of its own trade aggression.¹⁰⁵

Of course, the United States can utilize its superior economic power to coerce countries into favorable deals, as it did with USMCA,¹⁰⁶ but this would just further decrease the leadership and legitimacy of the United States and encourage countries to seek other options.

B. *The United States Have Opened Pandora's Box*

The United States is setting a terrible precedent by blocking the appointment of Appellate Body judges. Any member can block the consensus for appointing or re-appointing an Appellate Body member.¹⁰⁷ If the precedent set here is followed, the damage could be tremendous,¹⁰⁸ even possibly forcing members to modify the rules, which is something that has never happened.¹⁰⁹

The arbitrary application of Section 232 and Section 301 to impose tariffs is also concerning,¹¹⁰ the broad national security claim would raise a serious question about the legitimacy of the claims and deter foreign investment.¹¹¹

Additionally, the practice of Protectionism and arbitrary tariff won't benefit the United States all that much even in a short year, it is a double-edged sword. Paralyzing the WTO and imposing arbitrary tariffs expose the United States from retaliation by the rest of the world, without the rule of law protection, countries can freely retaliate against the United States. For example, Canada implemented retaliatory tariffs on U.S. imports. The value of the Canadian tariffs was set to match the value of the U.S. tariffs dollar-for-dollar and cover 299 U.S. goods, including steel, aluminum, and a variety of other products, including inflatable boats, yogurt, whiskies, candles, and sleeping bags before the tariffs were lifted on May 20, 2019.¹¹² The Trump Administration eventually lifted the tariff in 2019, not only did this round of tariffs fail to achieve its purpose, it injured the relationship between the United States and one of

104. *Id.*

105. *Id.*

106. *See* Schoenbaum, *supra* note 25.

107. Brewster, *supra* note 40, at 1427.

108. *Id.*

109. *Id.* at 1428.

110. *See* Schoenbaum, *supra* note 25.

111. *Id.*

112. Ana Swanson, *Trump Lifts Metal Tariffs and Delays Auto Levies, Limiting Global Trade Fight*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/us/politics/china-auto-tariffs-donald-trump.html> [<https://perma.cc/PPL5-BL5M>].

its neighbors and long-term ally. The disturbance of rule of law international trade and arbitrary imposing tariff is needlessly weakening support for the United States push against its rival like China and Russia by outraging trading allies who could provide useful support for United States pressure.¹¹³

IX. CONCLUSION

The crisis caused by the United States on the DSB and the Appellate Body is nowhere near a clear solution; however, we are getting some clues out of the change of administrations and the response by other members. The historical record suggests that crises can operate as a turning point, opening up possibilities for dramatic reforms and changes.¹¹⁴ Despite being motivated by political agenda, the crisis perhaps could lead to significant reform of the WTO DSB, which has been proven less effective than anticipated.

113. Brewster, *supra* note 40, at 1426.

114. Hopewell, *supra* note 39, at 62.

