

## UNITED STATES-MEXICAN RELATIONS—1981 CONVENTION FOR RECOVERY AND RETURN OF STOLEN VEHICLES AND AIRCRAFT—AGREEMENT REPLACES 1936 CONVENTION AND CLARIFIES PROCESS FOR RECOVERY OF STOLEN VEHICLES

Smuggling across the United States-Mexican border<sup>1</sup> causes significant economic and political disturbances.<sup>2</sup> One element of particular concern is the theft and embezzlement of vehicles and aircraft.<sup>3</sup> The annual volume of such traffic into Mexico has been

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<sup>1</sup> For a discussion of this ongoing problem along the United States-Mexican border, see Flawn, *A Regional Perspective*, in U.S. POLICIES TOWARD MEXICO 35 (R. Erb & S. Ross ed. 1979); Staley, *Law Enforcement and the Border*, in UNITED STATES RELATIONS WITH MEXICO 113-16 (R. Erb & S. Ross ed. 1981).

<sup>2</sup> See Flawn, *supra* note 1, at 35; Staley, *supra* note 1, at 113-16. According to former Mexican President Portillo, the growing problems of border smuggling are "just as serious or even more serious" than the flow of illegal immigrants or other problems facing the two countries. *Washington Post*, Feb. 13, 1979, at A3, col. 1. Estimates of its economic impact vary from Flawn's \$250 million to Portillo's \$1 billion. *Id.*; Flawn, *supra* note 1, at 35.

<sup>3</sup> The problem of stolen airplanes and automobiles is particularly burdensome for a variety of reasons. First, American insurance companies forfeit millions of dollars in payments to compensate the owners of stolen vehicles. Staley, *supra* note 1, at 115-16. Second, the Mexican government loses import duty revenues for each smuggled vehicle. *Id.* Third, Mexico's fledgling automotive industry is threatened by the influx of American automobiles. K. SCHMITT, *MEXICO AND THE UNITED STATES, 1821-1973: CONFLICT AND COEXISTENCE* 237, 249 (1974). Finally, the thefts are directly related to the massive drug, arms, and contraband traffic. *Convention Between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft which was signed at Washington on January 15, 1981, June 11, 1982: Hearing Before Senate Foreign Relations Comm., 97th Cong., 2d Sess. 9 (1982)* (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico) [hereinafter cited as *Hearings*]. The drug traffic particularly concerns the United States for 60% of the heroin seized in the United States comes from Mexico. THE DEAN RUSK CENTER, *COMPARATIVE FACTS ON CANADA, MEXICO AND THE UNITED STATES: A FOUNDATION FOR SELECTIVE INTEGRATION AND TRILATERAL COOPERATION* 138 (1979).

The problem is of current concern. Recently, after a 14-month investigation, the United States indicted 28 Mexican nationals for conspiracy to steal cars in California and transport them across the border. Members of the gang included officials of Mexico's Directorate of Federal Security and possibly its chief, Miguel Nassar Haro. From 1979 to 1981, they and civilian members of the gang stole 600 cars from southern California, then drove them across the border where they were sold for around \$8 million. *N.Y. Times*, Mar. 28, 1982, at A1, col. 1.

Although there exists a traffic of stolen and embezzled automobiles and aircraft from Mexico to the United States, testimony indicates that the paramount problem concerns vehicles stolen in the United States and transported into Mexico. *Hearings, supra*, at 15 (statement of Paul Gilliland, President, National Automobile Theft Bureau).

estimated at approximately 10,000 to 20,000 vehicles<sup>4</sup> and up to 50 aircraft<sup>5</sup> with a combined estimated value of \$100 million to \$200 million.<sup>6</sup> Although the United States and Mexico signed an agreement to address the problem in 1936,<sup>7</sup> it has been criticized as ineffective.<sup>8</sup> In response to the deficiencies of the original agreement, the United States and Mexico recently completed negotiations for a new agreement.<sup>9</sup> *Convention Between the United States of*

<sup>4</sup> *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice). *But see* Staley, *supra* note 1, at 116 (suggesting that the annual volume of traffic consists of 5,000 to 10,000 vehicles and aircraft).

<sup>5</sup> *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice).

<sup>6</sup> *Id.* The exact estimates given were between \$100-\$200 million for vehicles and an approximate value of \$6 million for airplanes.

<sup>7</sup> *Convention Between the United States of America and the United States of Mexico for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Aeroplanes or Component Parts of Any of Them*, Oct. 6, 1936, United States-Mexico, 50 Stat. 1333, T.S. No. 911 [hereinafter cited as 1936 Convention].

<sup>8</sup> The 1936 Convention failed to serve the interests of the United States in at least four respects: 1) it placed no obligation on the Mexican authority, which seized a stolen vehicle or aircraft, to notify the United States; 2) it contained no restrictions on the use of seized vehicles or aircraft by the authorities who seized them before they were returned; 3) it required that all claims by United States owners be made through the United States Embassy in Mexico City to the Mexican Ministry of Foreign Relations regardless of the location of the motor vehicles; and 4) it failed to specify what documentation would be required to effectuate the return of the items. *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice).

One illustration of the ineffectiveness of the 1936 arrangement is that the immediate border area, where direct negotiation rather than the Convention recovery process is used, shows significantly higher rates of return than the Mexican interior where recoveries are only possible through treaty procedures. *See* Staley, *supra* note 1, at 116. *See also* *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice, discussing the successful Baja Program designed to combat the ineffectiveness of the 1936 Convention).

<sup>9</sup> *Convention Between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles, and Aircraft*, Jan. 15, 1981, United States-Mexico, 20 I.L.M. 711 (1981) [hereinafter cited as 1981 Convention]. Negotiations on the 1981 Convention began in May 1979 in the Legal Affairs Working Group of the United States-Mexico Consultative Mechanism. On January 15, 1981, United States Ambassador at Large, Robert Krueger, and Mexican Ambassador to the United States, Hugo B. Margain, signed the 1981 Convention which will supersede the 1936 Convention when acceded to by Mexico. 81 DEP'T ST. BULL., Mar. 1981, at 32. Senate hearings were held June 11, 1982 before the Senate Foreign Relations Committee and on June 30 the Committee unanimously (15-0) recommended the 1981 Convention for Senate consideration. On September 30, 1982, the full Senate gave its advice and consent and President Reagan later ratified the Convention on October 22, 1982. At this time the 1981 Convention is awaiting Mexico's accession. S. REP. No. 55, 97th Cong., 2d Sess. 5 (1982) [hereinafter cited as S. REP. No. 55].

While the revised Convention is a reciprocal agreement, this Recent Development will concentrate primarily on the United States perspective since the primary problem involves

*America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft*, Jan. 15, 1981, United States-Mexico, 20 I.L.M. 711 (1981) (1981 Convention).

The Convention Between the United States of America and the United States of Mexico for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Aeroplanes or Component Parts of Any of Them (1936 Convention),<sup>10</sup> used imprecise language to address the problem of smuggled automobiles and airplanes.<sup>11</sup> In 1936, this situation was not a serious problem.<sup>12</sup> As the annual number of stolen vehicles and airplanes increased, however, it became apparent that the recovery provisions in the 1936 Convention contained two weaknesses.<sup>13</sup> First, the old arrangement lacked specificity regarding the procedures to be followed to effect the return of a seized vehicle or aircraft.<sup>14</sup> The ambiguous language caused disputes over the obligations of each nation, vested a great

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automobiles and aircraft stolen in the United States and transported into Mexico. *See supra* note 3.

<sup>10</sup> *See supra* note 7.

<sup>11</sup> Article II of the 1936 Convention, which covers the process for recovery of United States automobiles in Mexico, is particularly vague:

Whenever the Government of the United States of America through its embassy in Mexico City shall so request the Department of Foreign Relations of the United Mexican States, that Department will use every proper means to bring about the detention of allegedly stolen or embezzled motor vehicles, trailers, airplanes or the component parts of any of them.

The request of the Embassy shall be accompanied by documents legally valid in the United States of America supporting the claim of the person or persons interested to the property the return of which is requested.

After the property shall have been detained, and in the absence of evidence conclusively controverting the proof just before mentioned, it will be delivered to the person or persons designated for such purpose by the Embassy in Mexico City of the United States of America.

1936 Convention, *supra* note 7, art. II, 50 Stat. at 1334-35. What constitutes "every proper means" or is considered a "motor vehicle" is never discussed. Similarly, the article does not clarify what documents are necessary to be "legally valid" to support a claim for the return of the stolen vehicle, or what is sufficient evidence "conclusively controverting the proof just before mentioned." However, the indefinite nature of the 1936 Convention is best revealed in this article's failure to mention how or when the return of the stolen vehicle should occur beyond the statement that "it will be delivered to the person or persons designated for such purpose by the Embassy in Mexico City."

<sup>12</sup> *Hearings, supra* note 3, at 15 (statement of Paul Gilliland, President, National Automobile Theft Bureau).

<sup>13</sup> For a discussion of various deficiencies of the 1936 Convention, see generally *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice); S. REP. No. 55, *supra* note 9, at 1-2. For greater simplicity, this Recent Development has classified these criticisms with other problems which the 1981 Convention addresses into two categories.

<sup>14</sup> *See generally* S. REP. No. 55, *supra* note 9, at 1-2.

deal of discretion in those executing the treaty, and led to unnecessary delays.<sup>15</sup> Second, many aspects of the notification and return process, even though unambiguous, proved increasingly unwieldy and burdensome as the number of thefts increased.<sup>16</sup>

The 1981 Convention attempts to rectify the first problem of ambiguous terminology in a number of ways. The new agreement details the circumstances under which a stolen vehicle or aircraft will<sup>17</sup> or will not<sup>18</sup> be returned, as well as the procedures which must be followed by an owner or his country in order to effect recovery.<sup>19</sup> After seizure of a vehicle or aircraft, the authority which

<sup>15</sup> *Id.*

<sup>16</sup> See generally *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice).

<sup>17</sup> According to article I(1)-(2) of the 1981 Convention, *supra* note 9, the two governments must return any stolen or embezzled vehicles or airplanes registered or documented in the other nation and found in their territory. This pledge is echoed in article IV(2) which states that after any legitimate request for recovery, "the vehicle or aircraft shall be delivered within fifteen days." *Id.* art. I(1)-(2).

<sup>18</sup> Despite the basic pledge to return stolen or embezzled material, the 1981 Convention provides for several circumstances under which the authority which seizes the item may refuse to return a vehicle or aircraft. Article I(3) specifies that the requested state may refuse to return the item if the request for return is not made within certain time limits: 45 days after notification for a vehicle, 60 days after notification for an aircraft. *Id.* art. I(3). Article I(4) provides that the requested state also may refuse to return an embezzled vehicle or aircraft that is subject to forfeiture under Mexican law if it was used in the commission of a felony in Mexican territory with the knowledge of the owner. *Id.* art. I(4). Article I(4) was added to the 1981 Convention because the Mexican government felt that only if they could seize and keep vehicles and aircraft used in smuggling operations could they effectively combat smuggling. See S. REP. No. 55, *supra* note 9, at 2. Before, they were generally obligated to return the captured item regardless of whether it was used in a crime; article I(4) is designed to prevent the 1981 Convention from serving as a mechanism for restoring to felons the means of continuing their illegal activity. *Id.* at 3. Article I(4) would only be applicable after a judicial proceeding was conducted, pursuant to article 40 (Forfeiture Provision) of the Mexican Penal Code, to establish that the vehicle had been used in the commission of the felony with the knowledge of its owner. *Id.* at 2.

Article 40 of the Mexican Penal Code states:

Instruments of the crime and any other thing with which it is committed or intended to be committed, as well as the objects of the crime, shall be forfeited if their use is prohibited. Objects of lawful use referred to in this article shall be forfeited by the accused only when he has been convicted of an intentional crime. If they belong to third parties, they shall be forfeited only when they have been used for unlawful ends with the knowledge of their owner.

DIARIO OFICIAL [D.O.] art. 40 (Mex. Aug. 14, 1931). For a discussion of potential problems with this provision, see *infra* notes 74, 77.

<sup>19</sup> See 1981 Convention, *supra* note 9, arts. I-IV. An individual who believes his or her vehicle or aircraft has been stolen or embezzled and possibly taken into Mexico should first report the theft to the proper federal authorities — possibly including the National Automobile Theft Bureau, International Aviation Theft Bureau, State Department, and the Justice Department — in order to comply with article III(2)(d). See Crim. Div., U.S. Dep't of

seizes the item (seizing authority) must notify the other state within a specified time frame.<sup>20</sup> Upon receiving notice, the state which desires the item's return has a certain amount of time in which to request the return of the item<sup>21</sup> from the authority of the seizing state which has custody over the item.<sup>22</sup> The request must both be documented and in the prescribed form.<sup>23</sup> The seizing authority determines "as soon as practicable"<sup>24</sup> if the request is satisfactory. If the documentation is satisfactory,<sup>25</sup> the time limits are met,<sup>26</sup> and the vehicle or aircraft is not forfeited on grounds of having been used in the commission of a felony<sup>27</sup> or held in rela-

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Justice, Procedures Relating to the Implementation of the Revised Convention with Mexico on the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft (Nov. 1982) (unpublished draft) [hereinafter cited as Draft Procedures]. If the owner has insurance, he should attempt to recover as soon as possible, as there is no guarantee that the item will be recoverable. The owner does not have to personally pursue the attempted recovery; the 1981 Convention permits the owner to grant power of attorney authorizing another person to recover the item. 1981 Convention, *supra* note 9, art. III(1)(d), (2)(e). Assuming the item is located in Mexico, all return requests under the 1981 Convention must be made through a United States consular office. *Id.* art. III(1)-(2). An individual should also be aware that owners in the past have offered "gratuities" and large rewards across the border in order to secure the release of their vehicles. See *Hearings, supra* note 3, at 18 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division).

<sup>20</sup> The time frame varies according to the nature of the item. The period is one month for vehicles, but only 15 days for aircraft. 1981 Convention, *supra* note 9, art. II(1)-(2). The time requirement distinction is based on the fact that aircraft notification is to go directly to the other nation's embassy immediately after each plane is seized, although the seizing authorities may elect to submit monthly lists of captured automobiles. *Id.*; Telephone interviews with Fay Armstrong, Assistant Negotiator and Steve Weglian, Assistant Negotiator, Crim. Div., Dep't of Justice (Nov. 1, 1982).

<sup>21</sup> The time limits are 45 days for vehicles, and 60 days for aircraft. 1981 Convention, *supra* note 9, art. I(3). Extra time is given to aircraft to facilitate the preparation of the customs report required in article III(2)(d). Telephone interviews with Fay Armstrong, Assistant Negotiator and Steve Weglian, Assistant Negotiator, Crim. Div., Dep't of Justice (Nov. 1, 1982). The time period starts at the time notification is received from the Mexican government. *Hearings, supra* note 3, at 17 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division).

<sup>22</sup> Under the 1936 Convention, the Mexican Department of Foreign Relations was the appointed authority over the item. 1936 Convention, *supra* note 7, art. II, 50 Stat. at 1334-35. A local custodial authority is not designated in the 1981 Convention. Nevertheless, when notification of a seizure is sent to the United States, Mexico is required to reveal to whom the request for return should be sent. 1981 Convention, *supra* note 9, art. II(3). A copy of the request should also be transmitted under cover of a note to the foreign ministry of the seizing state. *Id.* art. III(1).

<sup>23</sup> *Id.* art. III.

<sup>24</sup> *Id.* art. IV(1).

<sup>25</sup> *Id.* art. III.

<sup>26</sup> *Id.* art. I(3).

<sup>27</sup> *Id.* art. I(4).

tion to a criminal investigation,<sup>28</sup> the seizing authority must release the item to the owner or his authorized representative within fifteen days.<sup>29</sup> The owner of the item must pay all expenses of return before he can recover his vehicle or aircraft.<sup>30</sup>

In addition to enumerating the process through which a state can recover its vehicles and aircraft, the 1981 Convention contains detailed guidelines which clarify the requirements of each procedural step in this process.<sup>31</sup> These guidelines should eliminate uncertainty and streamline the recovery process.<sup>32</sup> A definitional section explaining the scope of certain concepts in the 1981 Convention also is included.<sup>33</sup> Previously, the applicability of the 1936 Convention provisions to certain items could be disputed because the scope of terms such as "vehicle" or "aircraft" was unspecified. Each of these terms is defined in the 1981 Convention.<sup>34</sup>

Two particularly vague areas under the 1936 Convention which are more clearly delineated in the 1981 Convention concern the storage procedures for seized machines and the documentation required to secure their release.<sup>35</sup> The 1936 Convention placed no restrictions on the use of seized vehicles or aircraft by the seizing officials.<sup>36</sup> Frequently, the item was stripped or wrecked by the time release was effected.<sup>37</sup> Article II of the 1981 Convention estab-

<sup>28</sup> *Id.* art. IV(3).

<sup>29</sup> *Id.* art. IV(2).

<sup>30</sup> *Id.* art. VI(2).

<sup>31</sup> Compare 1981 Convention, *supra* note 9, arts. II-IV (three articles, containing 26 sections and subsections to explain the new detention and recovery process) with 1936 Convention, *supra* note 7, art. II, 50 Stat. at 1334-35 (three sentences devoted to the detention and recovery process).

<sup>32</sup> See generally *Hearings*, *supra* note 3, at 5-6 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico).

<sup>33</sup> The terms defined are: stolen, embezzled, felony, storage area, vehicle, aircraft, and certified copy. 1981 Convention, *supra* note 9, art. VII.

<sup>34</sup> "Vehicle" is defined as "any automobile, truck, bus, motorcycle, motorhome, or trailer." *Id.* art. VII(5). "Aircraft" refers to "any self-propelled vehicle used or designed for flight." *Id.* art. VII(6). Inclusion of these definitions does not resolve all disputes, however. For example, it is unclear whether "vehicle" includes a jeep or a van, or whether "aircraft" includes a non-self-propelled flying vehicle. See *infra* notes 62-64 and accompanying text (additional problems with the definitional section).

<sup>35</sup> *Hearings*, *supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice).

<sup>36</sup> *Id.* The 1936 Convention did not mention how the property should be detained. See *supra* note 11. The only restriction on detention was that property held as evidence in a criminal case could not be detained more than 20 days after being presented to the Department of State or the Department of Human Relations of the seizing nation. 1936 Convention, *supra* note 7, art. III, 50 Stat. at 1335.

<sup>37</sup> *Hearings*, *supra* note 3, at 17 (prepared statement of Charley Evans, Manager, Na-

lishes new procedures for the detention of seized vehicles and aircraft.<sup>38</sup> Once the seizing authority has notified the other party, it is required to take the item promptly to a storage area for a specified period of time.<sup>39</sup> Operation of the seized machine by the seizing officials is prohibited except in certain designated situations.<sup>40</sup> The 1936 Convention also failed to specify the documentation required to secure the return of these vehicles.<sup>41</sup> When submitting requests, the state could never be certain that the documentation would be acceptable since the Mexican foreign ministry often would require that the documents be valid under Mexican law rather than American law, contrary to the 1936 Convention.<sup>42</sup> Technical deficiencies frequently could not be recognized by the United States Embassy, which, without a clear standard in the treaty, could result in an unlimited demand for further documentation to meet the requirements of Mexican law.<sup>43</sup> In article III of the 1981 Convention, the

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tional Automobile Theft Bureau, Southwestern Division).

<sup>38</sup> 1981 Convention, *supra* note 9, art. II(4). The seizing authority must promptly take the vehicle or aircraft to a storage area. *Id.* It must refrain from any action such as administrative sale, forfeiture, or auction which could affect any preexisting claim to ownership, and is barred from operating the vehicle or aircraft. *Id.* arts. I(3), II(4).

<sup>39</sup> *Id.* art. II(4). "Storage area" is defined as "the place in which authorities normally keep seized vehicles and aircraft." *Id.* art. VII(4). There is no specific requirement that this place be safe or that it be easily accessible to the owner attempting recovery. The seizing authorities are not liable for any damage to the stored item. *Id.* art. VI(5). If no request for return is received, storage need only last for 45 days for a vehicle, or 60 days for an aircraft. *Id.* art. II(4)(c)-(d).

<sup>40</sup> *Id.* art. II(4)(a)-(d). There are four such situations: (a) the vehicle or aircraft was not stolen or embezzled within the meaning of the 1981 Convention; (b) the seizing state confiscates the vehicle under article I(3) or (4), and notifies the embassy of the requesting state, *see supra* note 18; (c) no request is made for the return of a vehicle within 45 days of notification of its seizure; and (d) no request is made for the return of an aircraft within 60 days of notification of its seizure. 1981 Convention, *supra* note 9, art. II(4)(a)-(d).

<sup>41</sup> The 1936 Convention required only that some "legally valid" documents "supporting the claim of the person or persons interested in the property" accompany a request for the return of the detained property. 1936 Convention, *supra* note 7, art. II, 50 Stat. at 1334-35. The request could still be denied if evidence that "conclusively controverted the proof" was present. *Id.* No guidelines were included to clarify these standards. *See supra* note 11.

<sup>42</sup> *Hearings, supra* note 3, at 5 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico).

<sup>43</sup> *Id.* If a document was questioned by the Mexican government, then that document, which had been notarized in the United States, had to be reauthenticated by a Mexican consul located near the area where the document had been prepared. These requirements cost upward to \$11 per page for individual claimants and there was no limit on the number of translations which could be requested. *Id.* at 14 (statement of Paul Gilliland, President, National Automobile Theft Bureau). In some cases, requests were required to be repeatedly submitted, each attempt awaiting further documentation from the claimant. The process was frustrating and time-consuming. *Id.* at 5 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico).

necessary documentation which must be submitted in order to recover stolen or embezzled vehicles or aircraft now is listed.<sup>44</sup> This article also elaborates the procedures required for submission of such requests<sup>45</sup> and provides for the use of mutually acceptable forms.<sup>46</sup>

Finally, the 1981 Convention clarifies the fundamental motivation behind the two Conventions. Although both treaties were intended to facilitate the recovery of stolen or embezzled vehicles or aircraft,<sup>47</sup> the terms of the 1936 Convention primarily directed each state to detain alleged stolen or embezzled vehicles or airplanes.<sup>48</sup> Under the 1981 Convention, however, the emphasis shifts to returning rather than detaining the stolen or embezzled items.<sup>49</sup>

The 1981 Convention also addresses the second problem: unworkable procedures. Under the 1936 Convention, one nation was obligated to request that the other party search for and detain a

<sup>44</sup> For vehicles, properly notarized evidence of ownership includes: title of ownership or certified statement from the titling authority; certificate of registration or certified statement from the registering authority; bill of sale; possible document of transfer; translated certified copy of the theft report; and possible power of attorney. 1981 Convention, *supra* note 9, art. III(1)(a)-(d).

For aircraft, properly notarized evidence of ownership includes: a bill of sale; certificate of registration or certified statement from the registering authority; possible document of transfer; and a certified copy and translation of the investigative report by the requesting state's customs service which includes a copy of the theft report. *Id.* art. III(2)(a)-(e). Whether the investigative report comprises more than a theft report is never explained. The terms are not intended to be synonymous since the Convention states that "the investigative report shall include a copy of any theft report made within a reasonable time to a competent authority." *Id.* art. III(2)(d).

This list of documentation requirements is neither exhaustive nor intended to represent all the possible acceptable or required documents depending on the particular circumstances. Article III should be carefully read before any request is submitted.

<sup>45</sup> The request must be made under seal by a consular officer of the requesting state to the authority of the seizing state having custody over the vehicle or aircraft and in the language of the requested state. Only specifically mandated translations of some documents may be required. *Id.* art. III.

<sup>46</sup> Samples are appended at Annex A, Annex B of the 1981 Convention. *Id.* at 721, 722.

<sup>47</sup> 1936 Convention, *supra* note 7, 50 Stat. at 1333-34. 1981 Convention, *supra* note 9, at 711.

<sup>48</sup> 1936 Convention, *supra* note 7, arts. I-II, 50 Stat. at 1334-35. The agreement provided that when one government requests the other to detain alleged stolen or embezzled property, the other government will use "every proper means" to do so. *Id.* Since the phrase "every proper means" is never defined and little insight into its meaning can be gleaned from the remainder of the text, there never were any clear responsibilities that each state agreed to assume. See *supra* note 11. While the old agreement contained a return clause, it was not activated until after detention. 1936 Convention, *supra* note 7, arts. I-II, 50 Stat. at 1333-34. See *infra* note 50 and accompanying text.

<sup>49</sup> The parties "agree to return . . . any vehicle or aircraft . . . found in the[ir] territory." 1981 Convention, *supra* note 9, art. I(1)-(2).



specific item before any recovery procedures could be activated.<sup>50</sup> Recognizing that the state which seizes the stolen vehicle is probably more aware of the incident and can better initiate the return mechanisms, the 1981 Convention reverses the process.<sup>51</sup> Now, after seizing a vehicle or aircraft which may be registered in the other nation,<sup>52</sup> the seizing authorities must "make every effort to notify the other Party"<sup>53</sup> within designated time limits.<sup>54</sup> The notification not only must specify the item's location and the authority having custody of the item, but also must provide all available identifying data about the item including whether it was seized in connection with the commission of a felony.<sup>55</sup>

Another burdensome procedure corrected by the 1981 Convention was the requirement that all United States claims be made through the United States Embassy in Mexico City.<sup>56</sup> This require-

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<sup>50</sup> For example, under article II of the 1936 Convention, the United States had the initial burden of contacting the Mexican government whenever a vehicle or airplane was stolen or embezzled into Mexico. 1936 Convention, *supra* note 7, 50 Stat. at 1334-35. All claims were handled on a national rather than local level. This greatly increased the delays in processing a claim, particularly since the local Mexican authorities often would not cooperate with the Mexican foreign ministry; when the United States tried to deal directly with these custodial authorities, they refused to respond and claimed that the 1936 Convention required the United States to deal with the foreign ministry. *Hearings, supra* note 3, at 6 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico).

<sup>51</sup> 1981 Convention, *supra* note 9, art. II.

<sup>52</sup> Notification is required for a seized vehicle which is "registered or otherwise documented under the laws of the other Party" or a seized aircraft which is "registered in the other country." *Id.* art. II(1)-(2).

<sup>53</sup> *Id.* art. II(1). This language, however, only refers to vehicles. The terminology when aircraft are involved is "shall notify the Embassy of the other." *Id.* art. II(2). No explanation has been given for this variance.

Notification concerning seized vehicles may be effected by the delivery of lists at least once each month to the embassy of the other party, by direct communication between the seizing authority and the nearest consulate of the other party, or by any other mutually acceptable method. *Id.* art. II(1). Notification concerning seized aircraft should be made only through the other nation's embassy. *Id.* art. II(2).

<sup>54</sup> See *supra* note 20.

<sup>55</sup> 1981 Convention, *supra* note 9, art. II(3). Despite these mandates notification might not take place. The past Mexican practice of selling foreign vehicles at public auction without notifying the United States Embassy could conceivably continue and, therefore, circumvent the notification requirements. See *Hearings, supra* note 3, at 17 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division). Also, the tentative operating procedure recommended by the United States Department of Justice suggests that notification of seized Mexican vehicles and aircraft will only be sent if the item "has not been returned to [the] lawful owner within seven days of seizure." Draft Procedures, *supra* note 19, at 6, 14. While this last exception appears to be a logical precaution, it contradicts the mandatory notification scheme envisaged in the 1981 Convention.

<sup>56</sup> 1936 Convention, *supra* note 7, art. III, 50 Stat. at 1335. Regardless of the location of the detained motor vehicle or aircraft, all claims had to be processed through Mexico City,

ment proved to be unduly cumbersome in view of the large number of vehicles seized in northern Mexico, where direct negotiations would have been relatively easier due to the short distance separating the parties.<sup>57</sup> The 1981 Convention authorizes direct transmission of requests to the Mexican authority which has custody of the seized vehicle or aircraft.<sup>58</sup>

These changes should both clarify the procedures and reduce many of the delays and transaction costs which afflicted the old process.<sup>59</sup> Additionally, the inclusion of more specific requirements renders disputes arising from conflicting interpretations of each state's obligations less likely.<sup>60</sup> Most importantly, the new Convention should increase the recovery rate of stolen vehicles and aircraft.<sup>61</sup>

However, the 1981 Convention remains deficient in several areas which potentially could frustrate the enforcement of the new document.<sup>62</sup> For example, the present language of the treaty defines "vehicle" in a manner that excludes both construction equipment and farm equipment, two categories which constitute a significant element in the overall problem of illegal exportation of stolen property.<sup>63</sup> Also, the treaty does not attempt to provide for the recovery of ships of any type which might be seized by the other

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resulting in a "complicated bureaucratic process." S. REP. No. 55, *supra* note 9, at 1.

<sup>57</sup> *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice).

<sup>58</sup> 1981 Convention, *supra* note 9, art. III(1)-(2). This procedure has the additional benefit that the "agency is put on notice that the aircraft or vehicle may be within the terms of the new Convention. This should prevent its transfer, use, or sale until it is determined if the vehicle or aircraft is protected by the Convention." S. REP. No. 55, *supra* note 9, at 3.

<sup>59</sup> *See Hearings, supra* note 3, at 5-6 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico). *See generally* 1981 Convention, *supra* note 9, arts. II, VI. The argument is based on a theory that fewer middlemen are desirable. Therefore, the 1981 Convention is more economical since the Mexico City authorities are circumvented. However, delays and expenses could still be significant. *See infra* notes 74, 84 and accompanying text.

<sup>60</sup> *See, e.g., Hearings, supra* note 3, at 26 (statement of Allan I. Mendelsohn, former member of the Office of Legal Advisor of the Dep't of State) (involving conflicts over forfeiture provisions).

<sup>61</sup> *See* S. REP. No. 55, *supra* note 9, at 2; *Hearings, supra* note 3, at 7 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico); *see also id.* at 18 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division) (estimating that only 13% of all recoveries under the 1936 Convention were a result of full formal treaty filings).

<sup>62</sup> *See Hearings, supra* note 3, at 10-11, 45 (statements of Chairman Percy and Mr. Lane).

<sup>63</sup> *Id.* at 11. *See id.* at 16 (statement of Paul Gilliland, President, National Automobile Theft Bureau); *see supra* note 34.

government.<sup>64</sup> Furthermore, the treaty limits recoveries to vehicles or aircraft registered in one country, stolen or embezzled in that country, and then transported across the border and found in the other country.<sup>65</sup> Thus, a vehicle or airplane registered in one country, but stolen *and* recovered in the other, would technically not be recoverable under the 1981 Convention.<sup>66</sup> Nevertheless, since this type of situation arises less frequently than when the theft of the vehicle occurs in the country in which it is registered, this omission may not prove to be troublesome.<sup>67</sup>

A potentially more serious deficiency in treaty coverage concerns the failure to address the practice of "laundering" the identification numbers on American aircraft.<sup>68</sup> This practice places aircraft outside the coverage of the 1981 Convention since the seizing airplane must be registered in the other country before the provisions of the 1981 Convention attach.<sup>69</sup> Although this problem is not easily resolved through a formal treaty, an agreement preventing Mexico from entering aircraft on their registry, which previously were registered in the United States, without first receiving Federal Aviation Administration approval could help reduce some of the undesirable consequences of the practice.<sup>70</sup>

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<sup>64</sup> See *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982); *United States v. Howard-Arias*, 679 F.2d 363 (4th Cir. 1982); *United States v. May May*, 470 F. Supp. 384 (S.D. Tex. 1979).

<sup>65</sup> 1981 Convention, *supra* note 9, art. I(1)-(2).

<sup>66</sup> *Hearings*, *supra* note 3, at 10-11, 45 (statements of Chairman Percy, Mr. Lane, Senator Hayakawa, and Mr. Killingsworth).

<sup>67</sup> See *id.* at 21 (prepared statement of Benjamin Killingsworth, Commander, Border Patrol Division, Cal. Highway Patrol). Also, despite the omission, Mexican authorities have returned vehicles in this category in the past. *Hearings*, *supra* note 3, at 11 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico). Nevertheless, since the 1981 Convention does draw a distinction, future problems could conceivably arise. Senate staffers expect Mexico to consider the problem after the treaty is ratified. Cawthorne, *Vehicle Theft Bill Faces Slim Chance for Passage*, J. Com., June 14, 1982, at 3A, cols. 1-2.

<sup>68</sup> *Hearings*, *supra* note 3, at 22, 31 (statement of Allan I. Mendelsohn, former member of the Office of Legal Advisor of the Dep't of State). Laundering is the simple process of painting over the United States registration number on the tail of the aircraft. The number might be N-5879M; a change of the N (meaning United States) to an X (meaning Mexico) or XC (meaning Mexican Government) will prevent recovery under the Convention because the plane, even if seized, will not fall under the registration requirements and the recovery process would not be activated. 1981 Convention, *supra* note 9, art. II(2). This is a potential loophole in the 1981 agreement should laundering become a common practice, because it could prevent the recovery of almost all aircraft.

<sup>69</sup> 1981 Convention, *supra* note 9, art. II(2); see also *supra* note 52.

<sup>70</sup> *Hearings*, *supra* note 3, at 31 (statement of Allan I. Mendelsohn, former member of the Office of Legal Advisor of the Dep't of State). The problem is politically sensitive since there

Another possible problem raised by the 1981 agreement concerns the meaning of the delivery provisions for returning the stolen merchandise to the owner. It is arguable that one section of the treaty suggests that the seizing state must ship the stored item to the owner,<sup>71</sup> while another section implies that the owner might have to travel to the storage area and secure the merchandise.<sup>72</sup> If there is an ambiguity, then disputes over the duties of each party could arise.<sup>73</sup>

Still another troublesome point is that a substantial amount of discretion continues to be granted to local officials in deciding whether to return a detained vehicle or aircraft.<sup>74</sup> The new decen-

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are accusations that the laundering may be carried out, or at least condoned, by government officials. *Id.* at 31, 44-45. Another possible solution would be to require Mexico to notify the United States of the seizure of any aircraft regardless of the registration.

<sup>71</sup> 1981 Convention, *supra* note 9, art. IV(2) states "the vehicle or aircraft shall be delivered within fifteen days to the individual identified in the request as the owner or his authorized representative." (emphasis added).

<sup>72</sup> Article V "permit[s] the owner or his authorized representative to take delivery of a vehicle or aircraft and to return with it to the territory of the Requesting State." (emphasis added). *Id.* art. V.

<sup>73</sup> This potential ambiguity is premised only on a specific interpretation of the 1981 Convention text in article IV(2)'s "shall be delivered" which implies an affirmative duty on the seizing authority to deliver, possibly even to ship the item to the owner's country. Alternatively, article V "permit[s] the owner to take delivery and return to his or her territory," which suggests only passive delivery obligations for the seizing authority. Additionally, there is no mention of the owner returning with the vehicle or aircraft to his or her territory under article IV(2), implying that perhaps the owner need not go to Mexico to effect recovery but might be able to demand that the seizing authority transport the item to the United States. Article V, with its specific reference to returning to the home territory, suggests the opposite interpretation. Thus, the delivery obligations might change depending on which article is invoked. *See supra* notes 71-72 (containing the exact treaty language).

Another interpretation of these two provisions would eliminate any inconsistency by assuming that the draftsmen did not intend such a conflicting ambiguity and that each article was merely a different phrase for the same requirement. Both articles merely require the detaining authority to make the seized item available to the owner or his representative on demand. "Shall," under this interpretation, does not impose any affirmative duties of delivery; rather it prohibits hampering the return of the vehicle to an owner who legally is entitled to recover his or her machine. The owner under both articles would, therefore, be required to travel to the detention center to recover the item. The Department of Justice seems to have adopted this latter interpretation. *See Draft Procedures, supra* note 19, at 4.

<sup>74</sup> This discretion could come into play in three ways. First, the authority having custody may detain the vehicle indefinitely by claiming that the request does not meet the requirements of the Convention. 1981 Convention, *supra* note 9, art. IV(1)-(2). Second, the seizing authority need only "give due consideration to any information provided by the Requesting State tending to show that the enterprise from which it was embezzled was not in complicity with the felon." *Id.* art. I(4). Unless this language is read in conjunction with the "under the laws of the state" requirement that forfeiture can only occur *after* an article 40 hearing, article I(4) places no restrictions on forfeiture. *See supra* note 18. Anytime Mexico can claim complicity, the item could be confiscated. *See infra* note 77. Third, the seizing author-

tralized approach of negotiating directly with the local authority only increases the discretion available since there is no longer any pressure from the national government on the custodial authority to release the seized item.<sup>75</sup> The failure of the 1981 Convention to prescribe a process for appealing a decision of the local authorities exacerbates this problem.<sup>76</sup> Moreover, the new arrangement continues to leave open the possibilities of returning vehicles or aircraft to owners who are aiding smugglers, as the forfeiture principles under article I(4) only apply to embezzled, but not stolen vehicles.<sup>77</sup> These vague areas could create similar types of problems that the 1981 Convention is designed to correct.<sup>78</sup>

Concern also has been expressed that the time limits established in the 1981 Convention for submitting a recovery request might be too constraining since the documentation and reports on some re-

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ity determines "as soon as practicable," whether a request for return meets its requirements. 1981 Convention, *supra* note 9, art. IV(1). Seizing authorities thus could create lengthy delays by arguing that a practicable time had not yet occurred. No restrictions are placed on this standard.

<sup>75</sup> The Mexican authorities frequently have been reluctant to relinquish custody. *Hearings, supra* note 3, at 6 (statement of Larry Lane, Acting Consul General, U.S. Embassy, Mexico City, Mexico). It is argued that, even under the 1981 Convention, only continuous pressure from the highest levels of the Mexican government will result in real cooperation. *Hearings, supra* note 3, at 19 (prepared statement of Benjamin Killingsworth, Commander, Border Patrol Division, Cal. Highway Patrol). The new decentralized approach of negotiating directly with the local authority circumvents this national pressure which might be necessary to combat the increase in local discretion. Increased discretion may not automatically result in a greater degree of difficulty in retrieving a seized item. In fact, some Mexican and American agencies cooperate closely. *Id.* Nevertheless, if an agency is uncooperative, increased discretion only makes recovery more difficult.

<sup>76</sup> The new Convention only states that all conflicts shall be resolved "through diplomatic channels." 1981 Convention, *supra* note 9, art. VIII(1).

<sup>77</sup> *Id.* art. I(4). Mexico wanted to prevent seized vehicles and aircraft from being returned to owners who were in collusion with a thief. *See supra* note 18. The new wording might fail to accomplish this goal since a claim that the vehicle was stolen instead of embezzled might continue to circumvent the forfeiture procedure. This is a severe limitation, as article VII further restricts "embezzlement" only to vehicles or aircraft rented or in possession under official order by individuals. 1981 Convention, *supra* note 9, art. VII(2). Moreover, under article 40 of the Mexican Penal Code, (*see supra* note 18), forfeiture is limited to circumstances where the owner *knew* of the felony. S. REP. No. 55, *supra* note 9, at 2-3.

This wording potentially could affect the United States because it would allow Mexican authorities to refuse to return a seized vehicle or aircraft by claiming that the owner was in complicity with the crime and, therefore, the machine was neither "stolen" nor "embezzled" and, hence, not covered by the treaty. *Hearings, supra* note 3, at 26 (statement of Allan I. Mendelsohn, former member of the Office of Legal Advisor of the Dep't of State).

<sup>78</sup> Release could still be relatively easy if limited storage space, as well as the inability to provide adequate security, induced the Mexican authorities to dump vehicles under less than full treaty requirements. *Hearings, supra* note 3, at 17 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division).

quests take considerably more time than others.<sup>79</sup> Experience under the 1936 Convention was not sufficient to judge whether the forty-five day limit will provide ample time to complete a treaty filing.<sup>80</sup> If the notification requirements cannot be complied with, then Mexico could systematically and legitimately refuse to return seized items under article I(3) due to the United States inability to satisfy the very requirements it had insisted upon.<sup>81</sup>

Finally, serious problems exist in the area of possible expenses chargeable to the owner of the vehicle or aircraft. Only a few limitations are specified as to the expenses that may be charged to the person seeking recovery,<sup>82</sup> and no liability is imposed on the seizing authorities for any damage which occurs to the stored item.<sup>83</sup> Therefore, it may be extremely difficult to prevent inflation of "expense" payments for recovery or serious damage to the stored item.<sup>84</sup>

Despite these potential weaknesses, the 1981 Convention accomplishes its original objectives.<sup>85</sup> It clarifies those elements of the 1936 Convention which were vague and confusing, and it corrects those procedures which had become cumbersome and unwork-

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<sup>79</sup> See 1981 Convention, *supra* note 9, art. I(3); *Hearings, supra* note 3, at 17 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division).

<sup>80</sup> *Hearings, supra* note 3, at 17 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division).

<sup>81</sup> 1981 Convention, *supra* note 9, art. I(3).

<sup>82</sup> The only limitations are that costs of any work performed on the vehicle or aircraft while it was in custody, other than repairs, reconditioning or maintenance costs, may not be passed on to the owner. *Id.* art. VI(4). Nor can the seizing authority impose any duties, fines, or monetary penalties for return. *Id.* art. VI(1).

<sup>83</sup> *Id.* art. VI(5).

<sup>84</sup> Some of the specific expenses mentioned are translation of documents, repairs or reconditioning done to the vehicle or aircraft, and maintenance costs. *Id.* art. VI(3)-(4). However, this list is not exhaustive. Any general expenses could conceivably fall under article VI(2) of the 1981 Convention including: storage costs; transportation costs to storage facilities; cost of processing request; labor costs of locating vehicle; and any traveling costs to either pick up the item or have it shipped home.

Not only could the expenses be inflated by the detaining authority, but that authority is not liable for any damage to the vehicle or aircraft during storage or recovery. *Id.* art. VI(5). Thus, there is no protection for the owner from any possible gouging by the detaining authority. Testimony further indicates that, not only could the Mexican authorities demand "payments" for the return of items, or strip the vehicles of parts before return, but they have done so in the past. See generally *Hearings, supra* note 3, at 17 (prepared statement of Charley Evans, Manager, National Automobile Theft Bureau, Southwestern Division).

<sup>85</sup> See generally *Hearings, supra* note 3, at 4 (statement of Roger Olsen, Deputy Attorney General, Dep't of Justice).

able.<sup>86</sup> Therefore, the new treaty is a clear improvement over the old and should increase the recovery rate of stolen vehicles and aircraft. Furthermore, while the new Convention should not be viewed as a panacea to the border issues facing the two nations,<sup>87</sup> it is one example of how the United States and Mexico can work together to solve mutual problems.<sup>88</sup>

*J. Kennard Neal*

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<sup>86</sup> *Id.*

<sup>87</sup> Stolen cars and airplanes are just one small aspect of a greater problem — arms and drug smuggling. The 1981 Convention, however, is an example of the traditional United States policy of decentralizing and compartmentalizing its international negotiations. See Erb, *Formulating U.S. Policies Toward Mexico: Problems and Complexities*, in U.S. POLICIES TOWARD MEXICO 19-20 (R. Erb & S. Ross ed. 1979); Weintraub, *Organizing the U.S.-Mexican Perspective*, in UNITED STATES RELATIONS WITH MEXICO 65 (R. Erb & S. Ross ed. 1981). While the United States has many separate treaties with Mexico on narcotics smuggling, the stolen car problem is isolated and negotiated separately. Apart from the forfeiture provisions in article I(4), the treaty has no elements with which to combat the causes of smuggling of vehicles across the border. In fact, the treaty is almost solely concerned with the post-facto return of smuggled vehicles. Until the issue is perceived and negotiated in the broader context, permanent solutions will not be achieved.

<sup>88</sup> An example of the futility of trying unilateral solutions to joint problems is the 1969 American anti-drug initiative known as Operation Intercept. See Schmitt, *supra* note 3, at 241 (a history of this ill-fated venture and its replacement by Operation Cooperation).

After signing the new Convention, Ambassador Krueger commented on the potential for bilateral solutions between the United States and Mexico.

In the last year and a half, both governments have worked hard through the Consultative Mechanism to arrive at agreements on the sale of natural gas, the sale of grains, mutual assistance in the event of natural disasters, and a joint marine pollution contingency plan. Today the citizens of both countries, particularly those in the border states, can look forward to better law enforcement and the protection of personal property. With this spirit in mind, I anticipate continued coordination with our good neighbor in the south.

81 DEP'T ST. BULL., Mar. 1981, at 32.

