

THE AGREEMENT BETWEEN THE UNITED STATES AND VIETNAM REGARDING COOPERATION ON THE ADOPTION OF CHILDREN: A MORE EFFECTIVE AND EFFICIENT SOLUTION TO THE IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION OR JUST ANOTHER ROAD TO NOWHERE PAVED WITH GOOD INTENTIONS?

Lindsay K. Carlberg*

Following today's news story of the tragic death of two-year old Russian-born Nina Hilt, allegedly at the hands of her adoptive mother, the National Council for Adoption (NCFA) convened a meeting of leaders of accredited adoption agencies working in Russia. Together, the group is calling for immediate action and implementation of reforms, in order to prevent future cases of abuse. Unfortunately, Russian law currently also allows independent adoptions,¹ which do not meet the same strict requirements that the accredited agencies do. Nina Hilt's adoption was, in fact, an independent adoption.² Eliminating independent adoptions and a swift implementation of the Hague Convention by both the American and Russian government is necessary to greatly reduce the risk of future tragedies such as Nina Hilt's.³

*J.D. Candidate, Indiana University School of Law-Indianapolis; expected graduation date, May 2007.

1. An independent adoption is an adoption that is arranged by the birth parent with an identified family and is frequently facilitated by an attorney. Adoption Open, Adoption Terms – Definition of Adoption Legal Terms – Adoption Dictionary, <http://www.adoptionopen.com/adoptionterms.html> (last visited Dec. 20, 2006). Independent adoptions, however, are not without risk, and often occur without an exchange of information, making them susceptible to the risks involved in for-profit adoptions. On the other hand, an agency adoption is “an adoption that is facilitated by a State Licensed Agency that provides counseling to birthparents, home studies to prospective adoptive parents, relinquishment services and post-placement programs for triad members. These Agencies may also provide Intercountry and Special Needs adoption services.” *Id.* Further, a private agency adoption is an adoption handled by a private, licensed agency. A private agency is not government-sponsored, but must meet state requirements to obtain and keep its licensed status. “The agency will provide services to birth families, adoptive families and children.” *Id.*

2. Lee Allen, *U.S. Adoption Leaders Express Grief and Outrage Over Death of Russian-Born Nina Hilt, Call for Immediate Changes to International Adoption Policies*, U.S. NEWSWIRE, July 8, 2005, available at <http://releases.usnewswire.com/GetRelease.asp?id=50123>.

3. *Id.*

I. INTRODUCTION

Children are the most precious resource we have for the future.⁴ Tragically, however, natural disasters, such as war, disease, and changing governmental regimes, have left children throughout the world with neither family to turn to nor resources to utilize.⁵ With approximately 9.5 million children now confined to orphanages around the world,⁶ intercountry adoption has become an attractive alternative for many Americans that have always dreamed about adopting.⁷

Intercountry adoption is the "process by which a married couple or single individual of one country adopts a child from another country."⁸ It is an "instrument for giving a family to a child who does not have one and not the other way around."⁹ Statistics show that the adoption of orphans around the world by citizens of the United States has "'doubled over the last decade, exceeding 16,000 in 1999,' with four out of five internationally adopted children being adopted by U.S. parents."¹⁰ More recent statistics report that in 2005, 22,728 immigrant visas were issued to orphans coming to the United States.¹¹

Intercountry adoption does not always assure the adoptive parents, the biological parents, or the child that the experience will be pleasant.¹² Unique social and cultural factors coupled with the ongoing heightened demand among wealthy countries for infants from poorer countries have led to corruption that inevitably seeps in and distorts the humanitarian aspect of intercountry

4. Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov./Dec. 2003, at 115.

5. Notesong Srisopark Thompson, Note, *Hague is Enough?: A Call For More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L.J. 441, 441 (2004) [hereinafter Thompson, *A Call for More Protection*].

6. Kapstein, *supra* note 4, at 115.

7. Shannon Thompson, *The 1998 Russian Federation Family Code Provisions on Intercountry Adoption Break the Hague Convention Ratification Gridlock: What Next? An Analysis of Post-Ratification Ramifications on Securing a Uniform Process of International Adoption*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 703, 703 (1999) [hereinafter Thompson, *Post-Ratification Ramifications*].

8. Thompson, *A Call for More Protection*, *supra* note 5, at 442. International adoption is also interchangeably referred to as intercountry adoption or transcountry adoption. *Id.* (citing CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, INTERCOUNTRY ADOPTION GUIDELINES 97 (1980)).

9. Thompson, *Post-Ratification Ramifications*, *supra* note 7, at 703.

10. Amy Grillo Kales, Note, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT'L L. REV. 477, 477 (2004) (citing Press Release, Congressman Bill Delahunt, House & Senate Clear Delahunt Global Adoption Treaty Bill, Senate also Poised to Enact Delahunt for Automatic Citizenship (Sept. 20, 2000), available at <http://www.holtintl.org/update/092000.html>).

11. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S., available at http://www.travel.state.gov/family/adoption/stats/stats_451.html (last visited Dec. 20, 2006).

12. Kales, *supra* note 10, at 477.

adoption.¹³ The development of a general, uniform solution to intercountry adoption has thus been hindered.¹⁴

Two prominent groups are involved in intercountry adoptions: “(1) countries consisting of low birth rates and small numbers of children in need of homes, such as the United States, and (2) countries with high birth rates and large numbers of homeless children.”¹⁵ Countries in the latter group, such as Vietnam, have a poor economic state; unfortunately, the incentives for trading human life have become too high for some biological parents to forego.¹⁶ When this occurs, the price tag placed on these children can be anywhere from \$5,000 to \$25,000.¹⁷ As a result, there has arguably been a shift away from the best interest of the child and the suitability of the adoptive parents and a shift toward awarding the child to the highest bidding prospective parents.¹⁸

Through the innocence of intercountry adoption, the most pervasive and startling effect of adoption corruption occurs through the purchase and sale of babies on the black market.¹⁹ In addition to trading children for items such as cameras or watches, the *New York Times* discovered a family who sold their infant for twenty dollars to a woman living in a nearby village, who then decided to sell the infant to an orphanage, which in turn arranged for the infant to be adopted abroad.²⁰ The lack of uniform laws and procedures, combined

13. Kapstein, *supra* note 4, at 115.

14. See generally Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. L. 181 (1996).

To some, [international adoption] presents in extreme form problematic issues they see at the heart of all adoption. It can be viewed as the ultimate form of exploitation, the taking by the rich and powerful of the children born to the poor and powerless. It does tend to involve the adoption by the privileged classes in the industrialized nations, of the children of the less privileged groups in the poorest of nations, the adoption by whites of black- and brown-skinned children from various Third World nations, and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well.

Id. at 182.

15. Thompson, *A Call for More Protection*, *supra* note 5, at 444.

16. Kapstein, *supra* note 4, at 115; Sarah Sargent, *International Adoption and Cultural Transformation: Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX. WESLEYAN L. REV. 351, 358 (2004).

17. Kapstein, *supra* note 4, at 115.

18. Thompson, *Post-Ratification Ramifications*, *supra* note 7, at 704; see Kales, *supra* note 10, at 483-84 (looking at Peru in the early 1990s, with increased malnutrition from rising prices, a cholera epidemic on the rise, rabies and tuberculosis, and a guerilla war, children were the one thing people could demand high prices for and count on Western prospective adoptive parents to supply much needed cash that was in short supply in Peru). *Id.*; see also Sargent, *supra* note 16, at 359. But see Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006) (“It almost seems like putting them up for adoption would ultimately be the best option if their parents are willing to sell them for only \$20. So while this sounds inhumane, it actually is in the best interest of the child.”).

19. Kapstein, *supra* note 4, at 115.

20. *Id.*

with intercountry adoptions performed or assisted by unethical adoption intermediaries, facilitators, and professionals, have contributed to this problem.²¹

The discovery of this shift toward corrupt adoption practices has prompted countries to attempt to regulate adoption on an international level.²² Several conventions and conferences have laid the groundwork for more uniform and cooperative standards and practices for intercountry adoptions.²³ The 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption represents the first considerable effort.²⁴ Unfortunately, this Convention was not particularly successful in implementing change because it lacked an effective enforcement mechanism. Most notably, a provision in the Convention allowed countries to disregard any provision that was against the countries' public policy.²⁵ Consequently, only three nations ratified it.²⁶

The next wave of efforts began in 1986 when the U.N. General Assembly Resolution guidelines entitled "The Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption" (U.N. Adoption Declaration) were adopted.²⁷ The U.N. Adoption Declaration promoted national adoption over intercountry adoption and regarded intercountry adoption as a last resort only to be used after a child was not adopted in its state of origin.²⁸

Next, in 1989 intercountry adoption was addressed at the United Nations Convention on the Rights of the Child (U.N. Convention).²⁹ The U.N. Convention lacked any significant power due to its reliance on national laws to provide specific legal measures.³⁰ Although the U.N. Convention had good intentions of curtailing the black market-selling of babies, it failed to specify uniform measures specifically directed at reducing the problem; the measures

21. Kales, *supra* note 10, at 483.

22. Mary Ann Candelario McMillan, Comment, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT'L L. REV. 137, 157 (1993).

23. See Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369, 369 (1999).

24. *Id.* at 377.

25. *Id.* at 378. "This is not the only reason that it failed; however, this loophole provision is used as an example of a common thread throughout all of the attempted solutions and conventions that has been a factor in their failure." Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

26. Gates, *supra* note 23, at 377.

27. Jennifer M. Lippold, Note, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465, 490 (1995).

28. *Id.* at 490-91. The U.N. Declaration's guidelines even chose to promote national foster care over intercountry adoption. *Id.* This Convention also had the loophole provision allowing countries to disregard any provision of the Convention that was against the countries' public policies. *Id.*; see generally Gates, *supra* note 23.

29. Susann M. Bisignaro, *Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow*, 13 DICK. J. INT'L L. 123, 134 (1993).

30. *Id.* at 134.

lacked the necessary tools to be truly successful in combating the heart of the problem.³¹ Further, the U.N. Convention was weakened by the failure of the United States to finalize ratification.³²

Today, without uniform, global regulations for intercountry adoptions in place, children throughout the world continue to wait for permanent and stable homes.³³ Thus, the inadequacy of current adoption regulations is both detrimental to countries that have the resources and desire to adopt children from poorer countries and to countries that have an overabundance of children that will continue to struggle for survival because the odds are continually being stacked against them.³⁴

In response to these ensuing concerns regarding the lack of consistent, worldwide regulations,³⁵ the Hague Conference on Private International Law completed the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Convention) in May 1993. This Convention represents the most recent step taken to normalize and systemize the process of intercountry adoption.³⁶ The Hague Convention distinguishes itself by setting out the importance of children as a nation's first priority and focuses on the fact that "a child's only opportunity for a permanent family life" might be through intercountry adoption.³⁷ Unfortunately, it too is fraught with problems.

This Note focuses heavily on the cost and efficiency problems with implementing the Hague Convention in many poorer countries.³⁸ This Note will argue that problems of cost and inefficiency are associated with

31. *Id.* at 135. The U.N. Convention promoted intercountry adoption only when a child could not be cared for properly in the child's original state. Thus, the U.N. Convention promoted goals aimed toward national care as the best alternative. Alexandra Marvel, *Implementation of the United Nations Convention on the Rights of the Child: II. Implementation and International Bodies: The U.N. Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children's Rights Through Legal Strata*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 309, 314 (1996). In contrast, the Hague Convention seems to move away from a main focus of intracountry adoption and focuses on placing children into the intercountry adoption system to further the best interests of the child. *See id.* at 317.

32. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

33. *See* Thompson, *A Call for More Protection*, *supra* note 5, at 442.

34. *See id.*

35. The ideas and goals towards the unification of private law are accomplished through developing multilateral treaties called "conventions." Sargent, *supra* note 16, at 353.

36. *See* Hague Conference on Private International Law: Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *opened for signature* May 29, 1993, 1870 U.N.T.S. 182, *reprinted in* 32 *I.L.M.* 1134 [hereinafter Hague Convention].

37. Gina M. Croft, Note, *The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 *GA. J. INT'L & COMP. L.* 621, 629 (2005).

38. *See generally* Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 *DENV. J. INT'L L. & POL'Y* 561 (2005).

implementing the Hague Convention, thus rendering it a less promising solution than originally hoped for regarding resolution of intercountry adoption issues.³⁹

As one solution to the problems created by the Hague Convention, the United States and Vietnam recently signed a treaty that embodies everything the Hague Convention is trying to accomplish. At the same time, it also allows Vietnam to attain these goals without going through all of the burdensome requirements that would inevitably prevent Vietnam from being able to fully implement the Hague Convention.⁴⁰ If this type of treaty is successful, it could be an effective way to enable poorer sending countries to implement new adoption standards in order to curtail the corruption in intercountry adoptions.

A bilateral treaty has the potential to address more appropriately the specific issues of individual nations and create a more efficient process than the Hague Convention.⁴¹ It can do so by avoiding the vague definitions and lack of enforcement and accountability mechanisms that will likely render the Hague Convention another failed attempt at establishing uniform intercountry adoption.⁴² Unfortunately, it is unclear how another failure of the Hague Convention would affect countries that have already invested a great deal of time and money implementing the Hague Convention. In addition, although the treaty between the United States and Vietnam embodies the goals of the Hague Convention, it has problems of its own and therefore, might not have the desired impact of furthering the international goal of curtailing corruption in intercountry adoption.⁴³

Part (II) of this Note will briefly examine the history of intercountry adoption, including a discussion of current intercountry adoption trends throughout the world. Part (III) will examine the current role of U.S. law and international law in intercountry adoptions and consider the difficulties in meaningful implementation of the Hague Convention. Part (IV) will examine how the United States is currently in the process of implementing the Intercountry Adoption Act of 2000. Part (V) will examine the future of intercountry adoptions with an emphasis on the critical state of Vietnam orphans as a realistic illustration of the need for the implementation of uniform global requirements. It will also explore the recent agreement between the United States and Vietnam regarding cooperation on the adoption of children as

39. *Id.*

40. Agreement Between the United States of America and The Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children, U.S.-Vietnam, June 21, 2005, available at http://travel.state.gov/pdf/vn_final_agreement.pdf [hereinafter Vietnam Bilateral Treaty].

41. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

42. See Lippold *supra* note 27, at 497; see also Thompson, *A Call for More Protection*, *supra* note 5, at 460.

43. Vietnam Bilateral Treaty, *supra* note 40; see also Hague Convention, *supra* note, 36, art. 1.

an example of the possible new trend to accomplish these goals. Finally, Part (VI) will provide a brief conclusion.

II. CHILDREN ON THE MOVE

a. *Brief History of Intercountry Adoption*

Historically, adoption was unheard of under common law tradition because it did not create the proper parent-child relationship under the law.⁴⁴ In the middle of the twentieth century, however, domestic adoption became more acceptable.⁴⁵ Thereafter, intercountry adoptions became prevalent in the United States in the 1950s due to the abundance of newly orphaned or abandoned children in the aftermath of two renowned wars.⁴⁶

World War II produced the first major wave of intercountry adoptions.⁴⁷ Due to soldiers stationed abroad and expanded media coverage of the war, the struggles of these children forced into displacement came home to a U.S. audience.⁴⁸ The Korean War resulted in the second major wave that brought global awareness of intercountry adoption.⁴⁹

Since intercountry adoption became popular in the 1950s, it has been subject to a tangled web of conflict of laws and bureaucratic red tape in both sending and receiving countries.⁵⁰ Despite these problems, between 1953 and 1981, huge increases in adoptions by U.S. citizens seem to have been a win-win situation; adoptive parents were receiving children they had wished for and in return the burden of poverty on war-torn countries began to lessen.⁵¹

Many American adoptive parents choose to adopt because of philanthropic motives that go beyond the mere desire to raise a child for their personal benefit; instead, they are motivated by a sense of saving their adopted child from a possible life of poverty in his or her country of origin.⁵² In addition to facilitating an increase in adoptions by U.S. citizens, news stories

44. Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 285 (1995).

45. *Id.*

46. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 141 (1993).

47. *Id.* Although there were extraordinary numbers of children available for adoption after World War II, it was the aftermath of the Korean War that brought global awareness of intercountry adoption. Katz, *supra* note 44, at 286.

48. Kales, *supra* note 10, at 479.

49. Thompson, *A Call for More Protection*, *supra* note 5, at 445; Katz, *supra* note 44, at 286.

50. Kimball, *supra* note 38, at 562.

51. Thompson, *Post-Ratification Ramifications*, *supra* note 7, at 705-06.

52. Kelly M. Wittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM L. & POL'Y J. 595, 598 (2003).

involving child trafficking and baby-selling also prompted international organizations to establish some uniform standards and requirements to regulate intercountry adoptions.⁵³

b. The Current State of Intercountry Adoption

The number of intercountry adoptions has continually increased over the last fifty years. This is due in part to the recognition of sending countries that adoption serves as a viable solution to the problem of an overabundance of orphans.⁵⁴ The desirability of adopting and its steady increase has been due to a variety of social and legal changes in receiving countries, such as the "advent of contraception, legalization of abortion, and the increased tendency and social acceptance of single parents choosing to keep their children."⁵⁵ These changes have led to a further reduction of U.S. infants available for adoption and thus, have made the option of intercountry adoption increasingly popular.⁵⁶

Currently, citizens of more economically stable nations are primarily adopting children from underdeveloped countries.⁵⁷ For example, the U.S. Department of State reported that in 2001, over 34,000 intercountry adoptions took place worldwide, with the United States receiving over 19,000 adoptees.⁵⁸ Further, from October 2004 to September 2005, approximately 22,739 foreign-born children were received by the United States.⁵⁹ Of these children, 13,241 were from countries that have joined the Convention, and thus account for approximately fifty-two percent of incoming intercountry adoptions in 2005.⁶⁰ In 2005, U.S. citizens adopted the majority of children from the following ten

53. Kimball, *supra* note 38, at 562.

54. *Id.* at 564.

55. Thompson, *A Call for More Protection*, *supra* note 5, at 446. There are many other factors that have contributed to the desirability and increased interest in intercountry adoptions:

(1) The decline in the number of healthy American babies due to the increased availability of abortion and contraceptive use; (2) the increasing number of unwed mothers now keeping their babies due to the decreased stigma; (3) society's acceptance of adoption by single persons; (4) the increased number of Americans who postponed marriage and childbearing, only to find they are unable to conceive; (5) the shorter waiting period for a foreign adoption (six months to one year, compared to as long as ten years for a healthy American Caucasian child); (6) the procedural "red tape" and stringent requirements for domestic adoption complicated by the involvement of United States adoption agencies in the adoption process; and (7) Americans' increased acceptance of people from other cultures.

McMillan, *supra* note 22, at 138-39.

56. Thompson, *A Call for More Protection*, *supra* note 5, at 446.

57. *Id.*

58. Kimball, *supra* note 38, at 564-65.

59. U.S. OFFICE OF THE SPOKESMAN, U.S. DEP'T OF STATE, IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION (February 15, 2006), <http://www.state.gov/r/pa/prs/ps/2006/61274.htm>.

60. *Id.*

countries: China, Russia, Guatemala,⁶¹ South Korea, the Ukraine, Kazakhstan, Ethiopia, India, Colombia, and the Philippines.⁶²

While allowing children to be adopted internationally *does* facilitate the wants and needs of both sending and receiving countries by helping “unwanted” children find homes and helping childless couples to have a family, intercountry adoption also opens the door to people who are only interested in turning a profit.⁶³ This has led to receiving countries being skeptical about “doing business” with sending countries that do not have legitimate safeguards in place, as those countries fear they might inadvertently contribute to corrupt adoption proceedings.⁶⁴ Further, since use of the Internet has become so widespread, prospective parents can find children at minimal costs, making baby trafficking more profitable for the sending country.⁶⁵ The Internet has also made traffickers more difficult to track down and prosecute.⁶⁶

Due to reports of corrupt adoption procedures and horror stories about mistreated children and child trafficking in countries like Vietnam, many receiving countries, such as the United States, have condemned and put a hold on doing business with them.⁶⁷ This has led to an ongoing internal struggle between not wanting to promote the corrupt behavior of some sending countries and the many benefits that come from the practice of intercountry adoption.⁶⁸

Therefore, the desire to legitimize intercountry adoptions in countries like Vietnam has been a primary goal of the United States. While this goal has been complicated due to the need to adhere to the laws of three separate jurisdictions—foreign domestic law, U.S. federal immigration law, and individual state law regulations⁶⁹—the Hague Convention has provided the first

61. Guatemala is a party to the Hague Convention; however, Guatemala’s adoption procedures are not up to the minimal standards required by the Hague Convention. *Id.*

62. U.S. BUREAU OF CONSULAR AFFAIRS, *supra* note 11. China was ranked first with 7,906, Russia was second with 4,639, Guatemala was third with 3,783, South Korea was fourth with 1,630, the Ukraine was fifth with 821, Kazakhstan was sixth with 755, Ethiopia was seventh with 441, India was eighth with 323, Colombia was ninth with 291, and the Philippines was tenth with 271. *Id.*

63. Kimball, *supra* note 38, at 567.

64. *Id.*

65. Wittner, *supra* note 52, at 602.

66. *Id.* While this could have happened, the safeguards in place make the percentage of occurrences of this type very minimal. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

67. Kimball, *supra* note 38, at 567-68. This hold on adoptions from a country is referred to as a “moratorium.” *See id.* at 580. A moratorium is defined as “a period of permissive or obligatory delay; specifically, a period during which an obligor has a legal right to delay meeting an obligation.” BLACK’S LAW DICTIONARY 1009 (6th ed. 1990). Also, it is defined as a “suspension of an ongoing or planned activity.” *Id.*

68. Kimball, *supra* note 38, at 568.

69. Jordana P. Simov, Comment, *The Effects of the Intercountry Adoptions on Biological Parents’ Rights*, 22 LOY. L.A. INT’L & COMP. L. REV. 251, 251 (1999). These drastically different adoption procedures and rules create confusion and frustration for adopting parents. Bisignano, *supra* note 29, at 125-26. Many countries, especially receiving countries, have failed to modify immigration and adoption laws to facilitate these adoptions. *Id.* Consequently,

inclusive step toward completing this mission. The Hague Convention, at least in part and from the outset, seeks to develop safe and consistent guidelines to prevent child trafficking and other abuses, all in the best interest of the child.⁷⁰

c. *The Current Process of Intercountry Adoption in the United States*

Currently, the requirements for intercountry adoption lie primarily with the states;⁷¹ however, there are some general federal rules imposed on all states by the U.S. Citizenship and Immigration Services (USCIS), formerly known as the Immigration and Naturalization Services.⁷² Once a child is found, the prospective parents residing in the United States must comply with the foreign government, federal government, and individual state government regulations.⁷³ After complying with the sending country's procedures, prospective parents must meet the standards of the United States.⁷⁴ While U.S. immigration standards can be complicated, they have been the one constant element throughout the process.⁷⁵ Although state law governs almost all adoptions, the USCIS puts the final stamp of approval on intercountry adoptions.⁷⁶

An immigration petition must meet two requirements: (1) the prospective parents must show that they can provide a stable and loving home for the child, and (2) the child must be an "orphan" according to U.S. federal regulations.⁷⁷ Once U.S. federal requirements are met, the requirements of the adopter's state of residence within the United States have to be met.⁷⁸ Most states have two requirements that must be met: (1) termination of the biological parents' parental rights and (2) a determination by the court that the adoption is in the best interest of the child.⁷⁹

intermediaries or agents become the primary contact for many adopting parents because of the intermediaries' expertise and knowledge in circumventing bureaucratic channels, which shortens the adoption process. *Id.*

70. Kimball, *supra* note 38, at 568.

71. See Peter H. Pfund, *Implementation of the Hague Intercountry Adoption Convention in the United States: Issues and Problems*, in E. Pluribus Unum, *Liver Amicorum Georges A.L. Droz on the Progressive Unification of Private International Law*, 321, 322-26 (1996).

72. U.S. Citizenship and Immigration Services, About Us, <http://uscis.gov/graphics/aboutus/index.htm> (last modified Jan. 20, 2006). "On March 1, 2003, service and benefit functions of the U.S. Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security as the U.S. Citizenship and Immigration Services (USCIS)." *Id.*

73. Lisa K. Gold, Comment, *Who's Afraid of Big Government? The Federalization of Intercountry Adoption: It's Not as Scary as It Sounds*, 34 TULSA L.J. 109, 111 (1998).

74. See 8 U.S.C. § 1101 (2006). This statute codified the U.S. Adoption and Immigration requirements.

75. Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 205 (1994).

76. Bisignaro, *supra* note 29, at 130.

77. Gold, *supra* note 73, at 114.

78. Liu, *supra* note 75, at 208. After the federal immigration standards are met, the next step is to meet the requirements of the parents' state of residence. This process is referred to as "readoption." *Id.*

79. Gold, *supra* note 73, at 115-16.

Although intercountry adoption has amazing potential, the system unfortunately has many defects.⁸⁰ Because definitions of key terms such as “orphan” and the procedures to meet these requirements differ in every country, they tend to frustrate the overall systematic flow of adoptions.⁸¹ The increase in bureaucratic red tape, problems with immigration and obtaining visas, and the constantly changing laws and economic climates in various sending countries, coupled with an increasing demand for children, all have prompted corruption in intercountry adoption.⁸²

III. THE HAGUE CONVENTION: A UNIFORM APPROACH TO INTERCOUNTRY ADOPTIONS

To date, no gathering of the international community has resulted in the implementation of a measure that satisfactorily addresses and effectively curtails baby trafficking.⁸³ In response to prior ineffective attempts to regulate intercountry adoption, representatives from sixty-six nations⁸⁴ met in 1993 to develop a legal framework for intercountry adoption.⁸⁵ The final text of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), a multilateral treaty, was approved by sixty-six nations⁸⁶ on May 29, 1993.⁸⁷

The Hague Convention has been the most ambitious and monumental action taken so far regarding the need to protect children, birth parents, and adoptive parents involved in intercountry adoptions from child trafficking and other abuses.⁸⁸ The Hague Convention applies to adoptions between countries that are parties to it and sets out certain internationally agreed-upon minimum norms and procedures for adoption.⁸⁹ According to the Hague Convention, by

80. Katz, *supra* note 44, at 298.

81. *Id.* For example, the United States only recognizes “unconditional abandonment.” Thus, until the birth parent(s) relinquish their rights to the child in a legal proceeding or are otherwise divested of their rights, the child will not be ready for adoption in the United States. Gold, *supra* note 73, at 113 n.39. This could be a probable cause for extensive baby trafficking because birth parents who have not “legally” relinquished their rights but have abandoned their children simply sell their child for the highest price they can get. *See id.*

82. Wittner, *supra* note 52, at 599; *see* Sargent, *supra* note 16, at 358. Each country’s rules and procedures differ regarding eligible children and prospective families. Katz, *supra* note 44, at 299. This is not so much the problem as the fact that there is no international central agency to keep track of the ever changing standards caused by outside forces such as politics. *Id.*

83. Holly C. Kennard, Comment, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, 14 U. PA. J. INT’L ECON. L. 623, 629 (1994).

84. Thompson, *A Call for More Protection*, *supra* note 5, at 442.

85. Gates, *supra* note 23, at 380.

86. Thompson, *A Call for More Protection*, *supra* note 5, at 442.

87. *See generally* Hague Convention, *supra* note 36.

88. Thompson, *A Call for More Protection*, *supra* note 5, at 442.

89. *See generally* Hague Convention, *supra* note 36.

signing the Convention a state expresses its intention to become a party to the Convention.⁹⁰ Being a party to the Hague Convention, however, does not in any way oblige a state to take any further action toward ratification.⁹¹ Therefore, if a country never takes the additional step of ratification, it is not bound by the Hague Convention's terms even though it has affirmed its commitment to accede to the policy.⁹² Ratification of the Hague Convention by a country *does*, however, create a legal obligation to incorporate the terms of the Convention in its domestic and international law.⁹³

For example, the United States is a signatory to the Hague Convention and has taken several steps in preparation of ratification, but it has not yet finalized ratification.⁹⁴ As of November 2006, there are sixty-nine contracting countries to the Hague Convention.⁹⁵

a. Requirements of the Hague Convention

"The Hague Convention consists of five Parts, seven Chapters, and forty-eight Articles."⁹⁶ The Hague Convention's overall goals are to organize the intercountry adoption process, to ensure the recognition of such adoptions, and to prevent baby selling.⁹⁷ Specifically, the goals of the Hague Convention are:

- (1) to ensure that the international adoption is in the child's best interest;
- (2) to create a cooperative system amongst participating nations, in efforts to curtail child trafficking and prevent other abuses;
- (3) to ensure that intercountry adoptions that conform to the Hague Convention's requirements are recognized;
- and (4) to ensure proper consent to the adoption.⁹⁸

90. Sargent, *supra* note 16, at 354.

91. *Id.* Countries that are a part of the Hague Convention vote on the final draft and then ultimately sign it as a way of showing they are in favor of the policies it encompasses. If a country is a signatory to the Hague Convention, it can then choose to ratify it in their own country. If a country is not a member to the Hague Convention, it can choose to "accede" to it. The next step after either "acceding" or "ratifying" is implementation; the process of incorporating the Hague Convention into their countries domestic laws. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

92. Kimball, *supra* note 38, at 569.

93. Sargent, *supra* note 16, at 354.

94. *Id.* at 355. The United States has drafted legislation titled "The Intercountry Adoption Act of 2000 in order to implement the Hague Convention." Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000).

95. Elizabeth Bernstein, *Rules Set to Change on Foreign Adoptions*, WALL ST. J., Nov. 2, 2006.

96. Lippold, *supra* note 27, at 493.

97. *Id.*

98. Kimball, *supra* note 38, at 569; *see* Hague Convention, *supra* note 36, art. 1; *see also* U.S. CITIZENSHIP AND IMMIGRATION SERV., U.S. DEP'T OF JUSTICE, FACT SHEET: THE INTERCOUNTRY ADOPTION ACT OF 2000, APPROVAL OF THE HAGUE CONVENTION REGARDING

To accomplish these goals, Article 1 of the Hague Convention sets out three generalized categories of compliance: (1) to safeguard appropriate intercountry adoptions and ensure they are in the best interest of the child, (2) to establish a national "Central Authority" in each country to carry out the duties of the Hague Convention, and (3) to secure with reasonable certainty that adoptions decreed pursuant to the Convention will be recognized and given effect in all other countries that are parties to the Hague Convention.⁹⁹

Articles 4 and 5 require that an adoption covered by the Hague Convention take place only after competent authorities of the respective state of origin ensure that the necessary consents have been given and that the child is eligible for adoption under the provisions of the Hague Convention.¹⁰⁰ In addition, the state receiving the child is responsible for establishing that the prospective parents receive adoption counseling, and if the prospective parents *are* found eligible to adopt, the receiving state then has to ensure that the child will be allowed to enter.¹⁰¹

Articles 6 through 13 require the creation of a "Central Authority" and other accredited bodies to oversee intercountry adoptions and to delegate responsibilities.¹⁰² Articles 14 through 22 set forth significant procedural requirements, including the requirement that both states provide reports concerning the parents of the receiving state and the child of the sending state, which include information such as identity, eligibility or adoptability, background, family, medical history, reasons for adopting, and the social environment the children will be entering.¹⁰³

Articles 23 through 27 discuss the procedure for recognizing adoptions and the effects of an adoption.¹⁰⁴ Specifically, Article 24 permits a contracting state that is a signatory to the Hague Convention to refuse to recognize an adoption, but only when it is "manifestly contrary to its public policy, taking into account the best interests of the child."¹⁰⁵

The general provisions of the Hague Convention are set forth in Articles 28 through 42. Article 32, however, specifically requires that the Central Authorities take all appropriate measures to prevent improper financial benefit or other gain in connection with adoptions.¹⁰⁶

The initial investigation of the child and prospective parents between the sending and receiving countries is divided: the sending country establishes that the child is an orphan, while the receiving country must go to the home of the

INTERCOUNTRY ADOPTIONS (Jan. 22, 2001), *available at* <http://uscis.gov/graphics/publicaffairs/factsheets/adoption.htm> [hereinafter FACT SHEET].

99. Hague Convention, *supra* note 36, art. 1.

100. Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 57 (1994).

101. *Id.* at 58.

102. *See generally* Hague Convention, *supra* note 36, arts. 6-13.

103. *Id.* arts. 14-22.

104. Lippold, *supra* note 27, at 496.

105. Hague Convention, *supra* note 36, art. 24.

106. *Id.* art. 32.

prospective family to determine whether it is in the best interest of the child.¹⁰⁷ The sending country must ensure that: “(1) the child is adoptable, (2) that the adoption is in the child’s best interests, and (3) that there is consent from necessary parties, such as persons, institutions, and authorities that have been ‘duly informed of the effects of their consent,’ and have given their consent freely.”¹⁰⁸ The receiving state must ensure that: “(1) the prospective adoptive parents are both ‘eligible and suited to adopt’; (2) the prospective parents have been counseled on intercountry adoption and the process; and (3) the child is authorized to enter and permanently reside in the receiving state.”¹⁰⁹ The possibility of birth parents coming forward in the future to declare that the child is not an “orphan” is greatly reduced by requiring these investigatory procedures.¹¹⁰

I. A Closer Look at the Most Important Safeguards

To ensure that the proper investigations and duties are performed, every signatory country to the Hague Convention must establish a national, government-level Central Authority to carry out certain non-delegable functions. These functions include cooperating with other Central Authorities around the world, overseeing the implementation of the Hague Convention in its country, and providing information on the laws of its country.¹¹¹ The Central Authorities are to maintain “information on all children entering and leaving the authority’s borders through intercountry adoption,” establish “the suitability and eligibility of the prospective adoptive parents,” and grant “authorization for the child to enter and permanently reside in the receiving state.”¹¹²

The Central Authority, however, is not meant to locate children available for adoption, “become directly involved in the adoption process in another country,” or “act as an attorney” for prospective parents.¹¹³ These requirements ensure that the Central Authority is informed at all times and therefore, able to prevent “any potential financial gain by disallowing corrupt adoption practices” to escape the attention of the authorities.¹¹⁴

Other functions under the Hague Convention *are* delegable to public authorities and, in many cases, to adoption agencies and other intercountry

107. Kimball, *supra* note 38, at 570.

108. *Id.* (quoting Hague Convention, *supra* note 36, arts. 4, §§ a-c).

109. Kimball, *supra* note 38, at 570 (quoting Hague Convention, *supra* note 36, arts. 4, §§ a-c).

110. Kimball, *supra* note 38, at 570.

111. Hague Convention, *supra* note 36, at arts. 6-7.

112. Kimball, *supra* note 38, at 571.

113. U.S. Bureau of Consular Affairs, U.S. Dep’t of State, Information Booklet, http://travel.state.gov/family/adoption/notices/notices_473.html (last visited Dec. 20, 2006).

114. Kimball, *supra* note 38, at 571.

adoption service providers.¹¹⁵ Services provided by persons or entities other than adoption agencies are permitted if both the country of origin and the receiving country permit them.¹¹⁶ Persons wishing to adopt a child residing in another member country must apply to the designated Central Authority in their own country.¹¹⁷ The Hague Convention provides that, with limited exceptions, there can be no contact between the prospective adoptive parents and any person who cares for the child until certain requirements are met.¹¹⁸ Finally, adoption service providers must be accredited or approved to provide services under the Hague Convention.¹¹⁹

The Hague Convention addresses accreditation only briefly and leaves the establishment of most of the requirements up to the Central Authority. According to the language of the Hague Convention, accreditation is to be established in order to prevent financially motivated adoption transactions,¹²⁰ and provides that “[a]ccreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.”¹²¹ More specifically, the requirements of an accredited body are that it shall:

- (a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- (b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- (c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.¹²²

Countries that have become parties to the Hague Convention have generally incorporated its requirements and compliance standards in the form of implementing legislation.¹²³ Therefore, countries that have signed, ratified, or acceded to the Hague Convention have finalized their intent and commitment to promoting safe and legitimate intercountry adoptions.¹²⁴

In sum, the most positive aspect of the Hague Convention is its potential to provide a uniform international and intergovernmental set of minimum

115. Sargent, *supra* note 16, at 356.

116. *See* Hague Convention, *supra* note 36, art. 12.

117. *Id.* art. 14.

118. *Id.* art. 29.

119. *Id.* arts. 9-12.

120. Wittner, *supra* note 52, at 616.

121. Hague Convention, *supra* note 36, art. 10.

122. *Id.* art. 11.

123. ANNA MARY COBURN ET AL., STATUS OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND THE INTERCOUNTRY ADOPTION ACT OF 2000 (IAA) (Oct. 19, 2004), *available at* <http://www.abanet.org/intlaw/hubs/publications/familylaw2003yir.pdf>.

124. *See generally* Sargent, *supra* note 16, at 354.

standards that member countries must adhere to in order to complete an intercountry adoption. It also has many potential benefits because of its actual acknowledgment of and attempt to stop baby trafficking,¹²⁵ its mandated recognition by operation of law of any intercountry adoption that complies with the Hague Convention,¹²⁶ and its potential to eliminate problems concerning the differing definitions of consent and orphan.¹²⁷

2. *Problems with the Hague Convention*

Some have argued that there has been remarkable improvement in the clarity of the language of the Hague Convention.¹²⁸ Others insist that the Hague Convention merely enlarges and supports the U.N. Convention of 1989; therefore, it adds nothing of value toward furthering the goal of safe and cooperative intercountry adoptions.¹²⁹

One problematic issue of the Hague Convention is its failure to prohibit intercountry adoptions with non-members, which would be an incentive for both sending and receiving countries to comply with the Hague Convention regulations.¹³⁰ The Hague Convention not only fails to specifically make baby trafficking illegal, but also fails to punish those that attempt these practices.¹³¹ The Hague Convention's guidelines are too general to prevent countries like Vietnam, which have interests in the profit aspect of the adoptions, from continuing to process illegitimate adoptions.¹³²

Another provisional issue involves the requirement that a Central Authority be established in each contracting state.¹³³ Within this language, "the treaty's operation depends on each member nation's good faith and . . . the willingness of adopting parents to report an impropriety . . . to the [C]entral [A]uthority in that country."¹³⁴ More specifically, the treaty lacks enforcement mechanisms to hold the Central Authorities accountable for their own actions.¹³⁵

Countries that ratify and implement the Hague Convention are in charge of developing their own laws that merely incorporate the minimal requirements

125. Lippold, *supra* note 27, at 496; *see generally* Hague Convention, *supra* note 36.

126. Bisignaro, *supra* note 29, at 148. This will cause no state process to be necessary and will therefore eliminate the redundancy of the current procedures. *Id.*

127. Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163, 177 (1995).

128. William L. Pierce, *Accreditation of Those Who Arrange Adoptions Under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children*, 12 J. CONTEMP. HEALTH L. & POL'Y 535, 538 (1996).

129. Maravel, *supra* note 31, at 316.

130. Kimball, *supra* note 38, at 572.

131. Croft, *supra* note 37, at 635.

132. *See id.*

133. Bisignaro, *supra* note 29, at 142.

134. Lippold, *supra* note 27, at 497.

135. *Id.*

of the Hague Convention, leaving the implementing country's government with a great deal of latitude on how it wants to handle intercountry adoption.¹³⁶ A supervisory international body designated by the Hague Convention should be established to ensure compliance by participating countries and to evaluate whether the regulations designed by a respective Central Authority are in line with the goals of the Hague Convention.¹³⁷ Leaving punishment, such as sanctions or fines, up to the individual countries could encourage corrupt adoption practices that will go unpunished without a non-partisan governmental organization overseeing compliance and administering enforcement when needed.¹³⁸ Therefore, due to the leeway that the Hague Convention continues to give to its signatories, it has been argued that Central Authorities are just an example of "unnecessary inefficiency" because they merely "replace one form of bureaucratic red tape with another."¹³⁹

A third criticism of the Hague Convention has been its failure to provide definitions of many important terms.¹⁴⁰ As of now, the burden of clarifying what adoption means is up to each individual Central Authority, resulting in global piecemeal of wide-ranging and non-uniform definitions and understandings of adoption.¹⁴¹

A final criticism of the Hague Convention has focused on the substantial

136. *Id.*

137. Thompson, *A Call for More Protection*, *supra* note 5, at 467.

If there is an international body designated for international adoption, [sic] its purpose should not be to oversee every Central Authority, [sic] its job should be to promote legal international adoption, educate people on how to do it, and only monitor complaints. A complete overarching regulating body in place could lead to too much micromanaging. This ultimately could make the adoption process even longer, making healthy children wait for adoption possibly until after their second birthday, which is not in the best interest of [sic] the child to take this long. These additional restrictions could also lead to further corruption if families and agencies begin to circumvent the required process and start entering into more unlicensed adoptions.

Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

138. Kimball, *supra* note 38, at 572.

139. Michelle Van Leeuwen, Comment, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants From China)*, 8 PAC. RIM L. & POL'Y J. 189, 213 (1999).

140. Thompson, *A Call for More Protection*, *supra* note 5, at 459-60. These terms include "best interest of the child," "abandonment," "orphan," "special needs," and "exorbitant costs." *Id.* at 465; Van Leeuwen, *supra* note 139, at 208.

141. Thompson, *A Call for More Protection*, *supra* note 5, at 460. As an example, the text of the Hague Convention provides:

the sending state must determine that the child being considered for adoption is (1) 'adoptable,' (2) that 'international adoption is in the child's best interest,' and (3) that 'consent from all necessary parties has been freely obtained without any illicit inducement.' [T]he term 'adoptable,' however, is not defined anywhere in the Hague Convention, which inevitably leads to arbitrary and unpredictable of what constitutes an adoptable child or orphan.

Id.

loophole under Article 24, which provides that “a state may refuse recognition of an adoption if it is manifestly contrary to public policy when taking the child’s best interests into consideration.”¹⁴² This provision seems appropriate on its face to prevent illegal adoptions.¹⁴³ In practice, however, it allows each country to use its discretion, which creates a broad loophole that could encompass a wide range of political, social, religious, and cultural reasons to decline to recognize an adoption¹⁴⁴ and promote very different agendas and public policies.¹⁴⁵

While the Hague Convention should be sufficiently flexible so that countries have some control over their adoption policies, “too much discretion and power placed in the hands of the Central Authority to unilaterally” interpret the Hague Convention’s definitions could lead to a further lack of uniformity.¹⁴⁶ In turn, this only creates more bureaucratic steps and paperwork that the child, the birth parents, and the adoptive family must deal with to get through the adoption process, eliminating one of the advantages of adopting abroad.¹⁴⁷ These deficiencies contribute to the overall weakness and reality that the Hague Convention merely provides a minimal framework for the promotion of intercountry adoption and does little to ensure that implementation of a more uniform intercountry adoption process will become a reality for the countries involved.¹⁴⁸

On paper the Hague Convention seems to make the whole intercountry adoption process more uniform; however, in practice each country still has sole discretion to decide which of its children will be allowed to leave the country.¹⁴⁹ By failing to create an immediate incentive for countries to ratify the Hague Convention, sending countries are permitted to put off compliance until they become more stable, which could result in indefinite non-compliance.¹⁵⁰ Thus, the unrealistic and costly requirements of the Hague Convention leave the countries involved no other choice but to draft treaties or other provisions with realistic cost and efficiency standards that benefit every party involved.¹⁵¹

142. Thompson, *A Call for More Protection*, *supra* note 5, at 460 (quoting Hague Convention, *supra* note 36, art. 24).

143. Katz, *supra* note 44, at 324.

144. Van Leeuwen, *supra* note 139, at 211.

145. Thompson, *A Call for More Protection*, *supra* note 5, at 460.

146. *Id.*

147. *Id.*

148. *See id.* at 461.

149. Katz, *supra* note 44, at 325.

150. *See* Kimball, *supra* note 38, at 572.

151. *See* Bartholet, *supra* note 14, at 196.

IV. THE INTERCOUNTRY ADOPTION ACT OF 2000: UNITED STATES IMPLEMENTATION OF THE HAGUE CONVENTION

a. *Passage of the IAA*

The United States signed the Hague Convention on March 31, 1994,¹⁵² signaling its intent to proceed with efforts to ratify the Hague Convention.¹⁵³ On June 11, 1998, President Clinton analyzed the provisions of the Hague Convention, article-by-article, and gave it to the Senate for advice and consent for ratification.¹⁵⁴ On September 20, 2000, the Senate provided its advice and consented to the United States' intentions to ratify the Hague Convention, subject to the completion of preparations for its implementation in the United States.¹⁵⁵ Finally, on October 6, 2000, President Clinton signed into law the Intercountry Adoption Act of 2000 (IAA), which is the official United States' implementing legislation for the Hague Convention.¹⁵⁶

b. *Summary of Provisions of the IAA*

In order to facilitate intercountry adoption, the sending and receiving states are to cooperate with each other and exchange statistics through the required Central Authority.¹⁵⁷ The IAA will only apply to intercountry adoptions where both countries have adopted the Hague Convention.¹⁵⁸ The U.S. Central Authority will be established in the U.S. Department of State.¹⁵⁹ The Bureau of Consular Affairs, Office of Children's Issues, will have primary responsibility for Central Authority functions.¹⁶⁰ The U.S. Central Authority will be the point of contact from within the United States and from abroad for all matters related to the Hague Convention and will have oversight responsibility for the United States' implementation of the Hague Convention.¹⁶¹ Therefore, the Office of Children's Issues will have supreme authority to act within the United States to implement the requirements of the Hague Convention.¹⁶² Actual adoption services will still be provided by

152. Kales, *supra* note 10, at 485.

153. *See generally* Hague Convention, *supra* note 36.

154. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 31,8064, 31,8064 (Feb. 15, 2006) (to be codified at 22 C.F.R. pt. 96); *see* COBURN ET AL., *supra* note 123.

155. *Id.*

156. Kales, *supra* note 10, at 485.

157. Croft, *supra* note 37, at 631.

158. Wittner, *supra* note 52, at 619.

159. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 101(a)(1), 114 Stat. 825 (2000).

160. *See id.* § 101(b)(2).

161. *See id.* § 102.

162. Croft, *supra* note 37, at 633.

individual adoption agencies; however, the new addition requires these agencies to qualify for accreditation through the U.S. Central Authority.¹⁶³

The U.S. Central Authority will manage a computer-based, case-tracking system through the Department of Homeland Security in order to track all intercountry adoptions, accredited agencies, and personnel to ensure that they perform in line with both U.S. federal *and* Hague Convention regulations.¹⁶⁴

More specifically, the Hague Convention requires adoption agencies to qualify in order to provide their services through one of the following Hague Convention accreditation options: Hague Convention approval, registration for temporary accreditation, or by providing such services under the supervision and responsibility of an accredited agency or approved person.¹⁶⁵

To qualify as accredited, the agency must:

pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and be subject to supervision by competent authorities of that State as to its composition, operation, and financial situation.¹⁶⁶

The Department of State is required to designate one or more non-federally qualified accrediting entities to perform the Hague Convention accreditation/approval function pursuant to published standards and procedures.¹⁶⁷ Once the steps in the accreditation process are finalized and published in the *Federal Register*, the Department of State is required to announce the timeframe for adoption agencies to obtain Hague Convention accreditation.¹⁶⁸ All Hague Convention accredited agencies and Hague Convention approved persons will need to meet the same standards to qualify as providers of adoption services for Hague Convention adoptions and to maintain the accreditation or approval.¹⁶⁹

163. *Id.*

164. *Id.*; Kales, *supra* note 10, at 487-88; *see* Intercountry Adoption Act of 2000, Pub. L. No. 106-279.

165. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 201(a)(1-2), 114 Stat. 825 (2000); *see* Kales, *supra* note 10, at 488-89.

166. Kales, *supra* note 10, at 488-89; Hague Convention, *supra* note 36, art. 11, §§ a-c; Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 201(a)(1-2).

167. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 201(a)(1-2); *see* Kales, *supra* note 10, at 487.

168. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 201(a)(2); *see* Kales, *supra* note 10, at 489; *see also* COBURN ET AL., *supra* note 123.

169. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, HOW WILL THE UNITED STATES IMPLEMENT THE HAGUE CONVENTION? (2005), http://travel.state.gov/family/adoption/convention/convention_2313.html [hereinafter DEP'T OF

Accreditation and approval will be subject to suspension, loss, or non-renewal if an agency or person fails to maintain the required standards.¹⁷⁰ There are minimum requirements for an agency to maintain its accreditation and for an individual or for-profit entity to maintain approval: “adequate liability insurance for professional negligence and any other insurance that the Secretary considers appropriate,”¹⁷¹ “[capability] of maintaining such records and making such reports as may be required by the Secretary, the United States Central Authority, and the accrediting entity that accredits the agency,”¹⁷² and familiarity with other administrative capabilities.¹⁷³ The accreditation or approval by the Hague Convention are for a designated number of years and are subject to renewal.¹⁷⁴

c. *The IAA’s Amendment to the Immigration and Nationality Act*

The IAA also amends the Immigration and Nationality Act (INA) by adding two sections that apply only to intercountry adoptions occurring between the United States and other countries that have enacted the Hague Convention.¹⁷⁵ A child adopted from a non-Hague Convention country will still need to meet the standards as an orphan or adopted child under section 101(b)(1)(E) or (F) of the INA.¹⁷⁶ The proposed section 101(b)(1)(G), however, modifies the existing immigration laws for children who come from Hague Convention countries; it requires that the child’s parent or parents were unable to provide a suitable environment and that the parents have given written, irrevocable consent to terminate their parental rights with the child free of coercion.¹⁷⁷

The next step in the new section 204(d)(2) requires the sending country’s Central Authority to issue an adoption certificate as final evidence of the intercountry adoption.¹⁷⁸ In contrast to the previous burdensome process, this conclusive evidence of the relationship between the prospective parents and the child will help smooth out immigration requirements for Hague Convention countries, such as by not requiring parents to readopt the child in the United

STATE: HOW WILL THE UNITED STATES IMPLEMENT THE HAGUE CONVENTION?].

170. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 204(b); *see* Kales, *supra* note 10, at 489.

171. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 203(b)(1)(E). Specifically, “the agency will have to carry a minimum of \$1 million in liability insurance, and in many cases will be held responsible for staff working in other countries. This will make it more difficult for shady operators to work in adoption both in countries of origin and in the U.S.” Bernstein, *supra* note 95.

172. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 203(b)(1)(D).

173. *Id.*

174. DEP’T OF STATE: HOW WILL THE UNITED STATES IMPLEMENT THE HAGUE CONVENTION?, *supra* note 169.

175. Wittner, *supra* note 52, at 620.

176. FACT SHEET, *supra* note 98.

177. Wittner, *supra* note 52, at 620.

178. 8 U.S.C. § 1204(d)(2).

States. These changes, however, were not effective until the INS and the Department of State published implementing regulations in the *Federal Register*; in the meantime, the standard adoption procedures under section 101(b)(1)(E) and (F) governed intercountry adoptions.¹⁷⁹

After the IAA is implemented and the Hague Convention is part of national law, a country may decide to establish penalties for non-compliance, which, if used properly, could lead to greater accountability.¹⁸⁰ For example, violation of the IAA has a civil penalty of up to \$50,000 for the first violation and for each succeeding violation, a penalty not to exceed \$100,000.¹⁸¹ A fine not to exceed \$250,000, imprisonment for not more than five years, or both, is imposed for criminal penalties.¹⁸²

d. The Long Road to Implementation

Once a law such as the IAA has been passed, it cannot be modified without subsequent legislative measures; however, changes *can* occur within the regulations before they are finalized.¹⁸³ As such, on September 15, 2003, the Department of State published two proposed regulations in the *Federal Register*: (1) a proposed rule on the accreditation and approval of agencies and (2) a proposed rule on approval of persons.¹⁸⁴ Then, on October 28, 2003, the Department of State held a meeting to answer questions and concerns regarding the proposed regulations.¹⁸⁵ These proposed rules were open for a ninety-day public comment period that concluded December 15, 2003.¹⁸⁶ During September 2005, the Department of State finished its review of the public comments and submitted the regulations to the Office of Management &

179. See *infra* Part IV(d). While the Department of State published the final rules on “‘Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000’ (IAA) (22 CFR Part 96) and ‘Intercountry Adoption-Preservation of Convention Records’ (22 CFR Part 98)” in the *Federal Register* on February 15, 2006, the separate rules to establish intercountry adoption procedures under the Convention and the IAA’s amendments to the Immigration and Nationality Act (INA) are still under preparation. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8065.

180. See Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 404, 114 Stat. 825 (2000).

181. *Id.*

182. *Id.*

183. See generally FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE (2d ed. 2001).

184. Joint Council on International Children’s Services, Hague Adoption, <http://www.jcics.org/Hague.htm> (last modified Feb. 15, 2006) [hereinafter Joint Council on International Children’s Services]; Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8065.

185. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8065.

186. Joint Council on International Children’s Services, *supra* note 184.

Budget (OMB) for final review and approval.¹⁸⁷ The OMB had up to ninety days to review the regulations, after which it had the option of publishing the regulations as final in the *Federal Register* or issuing another proposed version for a second public comment period and effectively repeating the process.¹⁸⁸

On February 15, 2006, the Department of State published in the *Federal Register* the final rules on “Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000” and “Intercountry Adoption-Preservation of Convention Records” in accordance with the Hague Convention.¹⁸⁹ As is consistent with U.S. policy on ratification of treaties, the United States will not be able to officially ratify the Hague Convention until its obligations under the Hague Convention are carried out.¹⁹⁰ As such, while this Final Rule is “effective in [thirty] days, except as otherwise indicated in the text of the rule, the [Hague] Convention will not enter into force immediately upon passage of the [thirty] days.”¹⁹¹

Overall, the Hague Convention and the IAA require that agencies and individuals receive accreditation to provide services for adoption when both parties involved come from countries that are signatories to the Hague Convention.¹⁹² Further, the IAA requires that the Department of State designate one or more qualified accrediting entities to accredit and approve agencies and persons involved with intercountry adoptions.¹⁹³ The United States must have accredited and approved these providers before depositing its instrument of ratification and bringing the Hague Convention into action for the United States.¹⁹⁴

For their own benefit and protection, while the public comments were being reviewed and preparations for publication in the *Federal Register* were taking place, the Department of State simultaneously was negotiating with potential accrediting entities that would accredit or approve adoption service

187. *Id.*; see also U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, DEPARTMENT OF STATE SELECTION OF ACCREDITING ENTITIES UNDER THE INTERCOUNTRY ADOPTION ACT OF 2000 (Mar. 1, 2005), available at http://travel.state.gov/family/adoption/implementation/implementation_2151.html (last visited Dec. 21, 2006) [hereinafter DEP’T OF STATE: IMPLEMENTATION STRATEGIES]. “Before completing the Final Rule on accreditation and approval of adoption service providers, the Department [of State] held public meetings, conducted extensive research, and reviewed and considered of 1,500 public comments on the Proposed Rule.” DEP’T OF STATE: OFFICE OF THE SPOKESMAN, *supra* note 59.

188. Joint Council on International Children’s Services, *supra* note 184.

189. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8064.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. U.S. OFFICE OF THE SPOKESMAN, U.S. DEP’T OF STATE, Hague Convention on Intercountry Adoption: Accreditation/Approval Regulations Published in the Federal Register (Feb. 15, 2006), <http://www.state.gov/r/pa/prs/ps/2006/61272.htm> [hereinafter Dep’t of State: Accreditation/Approval Regulations Published].

providers electing to provide services in cases covered by the Hague Convention.¹⁹⁵ Now that these final standards have been published in the *Federal Register*, the Department of State hopes to complete its discussions with these potential accrediting entities so that it can deposit its instrument of ratification and finalize the implementation of the Hague Convention.¹⁹⁶

The final framework for the Department of State's "oversight of accrediting entities, agencies and persons"¹⁹⁷ places the Department of State as the lead federal agency for implementation of the IAA.¹⁹⁸ The IAA required the Department of State to enter into agreements with one or more qualified entities under which these entities will be required to perform the task of accrediting or approving agencies and persons.¹⁹⁹ This requirement informed the public that the Department of State would be attempting to reach agreements with those qualified accrediting agencies so that they could become IAA accredited agencies.²⁰⁰ Additional standards will be published in the *Federal Register* to set forth how the accrediting entities should perform their functions under the IAA.²⁰¹

The Department of State, pursuant to section 202(a) of the IAA, was required to enter into at least one agreement to designate an accrediting entity.²⁰² Such accrediting entities could be: "(1) Non-profit private entities with expertise in developing and administering standards for entities providing child welfare services; or (2) State adoption licensing bodies that have expertise in developing and administering standards for entities providing child welfare services and that accredit only agencies located in that State."²⁰³

The Department of State chose two entities that will have the duty to accredit U.S. agencies and individuals, and in turn these accredited agencies and individuals will be able to arrange for adoptions from Hague Convention countries.²⁰⁴ The two entities are the Colorado Department of Human Services

195. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND THE INTERCOUNTRY ADOPTION ACT OF 2000 (Nov. 30, 2005), http://travel.state.gov/family/adoption/implementation/implementation_2641.html [hereinafter DEP'T OF STATE: REGULATIONS STILL UNDER REVIEW].

196. *Id.*; see also Dep't of State: Accreditation/Approval Regulations Published, *supra* note 194.

197. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, *supra* note 154, 71 Fed. Reg. at 31,8064.

198. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, DEPARTMENT OF STATE SELECTION OF ACCREDITING ENTITIES UNDER THE INTERCOUNTRY ADOPTION ACT OF 2000 (Mar. 1, 2005), *available at* http://travel.state.gov/family/adoption/implementation/implementation_2151.html (last visited Dec. 21, 2006) [hereinafter DEP'T OF STATE: IMPLEMENTATION STRATEGIES].

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Bernstein, *supra* note 95.

and the Council on Accreditation.²⁰⁵ It is imperative that the United States has these accredited and approved providers firmly in place before the United States can deposit its instrument of ratification and finally bring the Hague Convention into force in the United States.²⁰⁶

The Department of State has set forth the manner in which these two accrediting entities will be required to finance their functions under the IAA and how the Department of State will have the responsibility of overseeing their performance of such functions.²⁰⁷ These financial agreements conclude: "to become accredited under the Hague regulations, adoption agencies will have to pay an additional fee of about \$7,000 to \$13,000 every four years, and will also need to pay staff to compile documentation for the accreditation process and to make sure they are compliant with Hague regulations."²⁰⁸ The goal was to approve and sign most of the agreements between the adoption agencies and these accrediting entities in 2006.²⁰⁹

V. THE TREATY BETWEEN THE UNITED STATES AND VIETNAM: A MORE EFFICIENT SOLUTION OR JUST A QUICK FIX THAT FOSTERS THE PROBLEMS OF THE HAGUE CONVENTION, THEREBY ADDING TO THE EVER GROWING EXPLOITATION OF CHILDREN?

The recent bilateral treaty between the United States and Vietnam has triggered discussion over intercountry adoptions and has drawn attention to what the Hague Convention and its provisions really accomplish. Although the Hague Convention was designed to satisfy the need for a formal process, the drafters recognized that differences in culture and society between countries made it difficult to streamline the criteria for legal standards; the drafters provided only minimum standards of uniformity.²¹⁰ As a result, there has been little cooperation between major sending and receiving countries, which in turn makes it less likely that the Hague Convention will meet its lofty goals for safeguarding intercountry adoptions.²¹¹

For example, the Hague Convention has failed to take into account the fact that there are hefty burdens of compliance on sending countries compared to those of receiving countries, both in the urgency to draft and implement the

205. Bernstein, *supra* note 95. The Council on Accreditation is a New York-based non-profit company. *Id.* The Council on Accreditation has already accredited many agencies in preparation for the final implementation. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

206. DEP'T OF STATE: REGULATIONS STILL UNDER REVIEW, *supra* note 195.

207. *Id.*; see also Bernstein, *supra* note 95.

208. See *id.*; see also Bernstein, *supra* note 95.

209. DEP'T OF STATE: OFFICE OF THE SPOKESMAN, *supra* note 59. "No one knows exactly how many adoption providers there are in the U.S. but experts estimate there are about 400, with as many as half expected to apply for accreditation." Bernstein, *supra* note 95.

210. See Lippold, *supra* note 27, at 498.

211. See Kimball, *supra* note 38, at 583.

regulations and in the financial demands connected with funding compliance.²¹² More detailed and realistic measures need to be drafted in order for there to be any incentive for each country to comply with the proposed standards and further the ultimate goal of stopping the exploitation of children.²¹³ Thus, it remains for nations to develop more effective methods of intercountry adoption through treaties or other arrangements. The bilateral treaty between the United States and Vietnam could be the way to accomplish this goal.

a. Children Waiting for a Permanent Home: The History of Adoption in Vietnam

“In Vietnam, a poverty-stricken mother sheds bitter tears as she hands her daughter to the Canadian woman who will be her new mom.”²¹⁴ This has been a familiar story in Vietnam, a country that has become a major source of babies for North Americans.²¹⁵

Vietnam’s history goes back to a time when the Chinese Empire reigned; however, Vietnam became an independent kingdom in the early 10th century, and eventually gained autonomy in the 11th century.²¹⁶ France invaded Vietnam in the middle of the 19th century and then Japan invaded in the 20th century.²¹⁷ While Vietnam did regain its sovereignty in 1954, a civil war began that split the nation for a period of time.²¹⁸ During this time, the citizens of Vietnam experienced political and economic turmoil that resulted in dreadful living conditions, which in turn led to many families turning to adoption with the hope that their children would have a better life.²¹⁹ One month before the South Vietnamese government fell to North Vietnamese forces, the United States attempted to mitigate the effect of the turmoil. As a result, “Operation Babylift” was approved by President Gerald Ford, which involved airlifting 2,700 orphans out of Vietnam in order to be adopted by predominately white U.S. families.²²⁰

Today, the United States continues to closely scrutinize baby trafficking

212. *Id.*

213. See Thompson, *A Call for More Protection*, *supra* note 5, at 455.

214. Jim Rankin, *Wanted: Babies; For Lawyers It Is Good Business*, TORONTO STAR, Sept. 29, 2001.

215. *Id.* Since 2001, there has been a moratorium placed on Vietnam, and hopefully Vietnam will once again become a major source of babies for the United States. MARY M. STICKERT, THE INTERNATIONAL ADOPTION GUIDEBOOK, available at <http://vietnam.adoption.com/foreign/vietnam-adoption-background.html> (last visited Dec. 21, 2006).

216. STICKERT, *supra* note 215.

217. *Id.*

218. *Id.*

219. C.N. LE, *Asian-Nation: The Landscape of Asian Americans*, available at <http://www.asian-nation.org/adopted.shtml> (last modified Aug. 2006).

220. *Id.*

in Vietnam.²²¹ With Vietnam's rapidly growing population and per capita income of about \$200 a year,²²² allegations of baby buying operations have repeatedly surfaced in Vietnam over recent years.²²³ One reason for this is that Vietnam is a war-torn and poverty-stricken country that has a weaker adoption infrastructure; therefore, it is more susceptible to corruption.²²⁴ Consequently, countries like Vietnam lack adequate laws to protect the parties involved and therefore have no way to prevent or criminalize child trafficking.²²⁵

With neighboring China's strict and well-established adoption rules, adoptive parents have been turning to Vietnam, where the rules are much more lenient.²²⁶ Vietnam has a more "elastic definition than the United States of what constitutes an 'orphaned' or 'abandoned' child."²²⁷ For example, two healthy parents who claim they are not economically stable can hand over their child to an orphanage without ever legally relinquishing their rights as parents. As such, the child does not meet the U.S. definition of an orphan under U.S. immigration law.²²⁸ Another issue involves the ineligibility of children receiving an immigrant visa under U.S. immigration law, where a child is adopted directly from the natural parents instead of through an agency.²²⁹

As a result of the ongoing problems in Vietnam, on July 10, 2002, the Vietnamese government promulgated a new Marriage and Family Law pertaining to intercountry adoptions that took effect on January 2, 2003.²³⁰ The decree announced a number of new requirements for intercountry adoptions, including the requirement that there be a bilateral agreement between Vietnam and other countries before intercountry adoptions can take place.²³¹ This was

221. See generally U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, INTERCOUNTRY ADOPTION: VIETNAM (2006), http://www.travel.state.gov/family/adoption/country/country_349.html (last visited Dec. 21, 2006) [hereinafter DEP'T OF STATE: VIETNAM].

222. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, 1995: INTERNATIONAL ADOPTION—VIETNAM, *available at* <http://dosfan.lib.uic.edu/ERC/population/children/adoptions/Vietnam.html> [hereinafter 1995 VIETNAM].

223. Rankin, *supra* note 214.

224. Wittner, *supra* note 52, at 599.

225. *Id.*

226. See Rankin, *supra* note 214.

227. 1995: VIETNAM, *supra* note 222. Vietnamese courts do not apply U.S. legal standards when classifying a child as an orphan or abandoned, and therefore, many children in orphanages in Vietnam may not meet the U.S. eligibility requirements. *Id.*

228. See *id.*

229. *Id.*

230. U.S. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, EXPECTED DELAYS IN ADOPTIONS IN VIETNAM (Jan. 27, 2003), http://travel.state.gov/family/adoption/notices/notices_1994.html.

231. *Id.* The Vietnamese Marriage and Family Law has three main provisions:

- (1) A Memorandum of Understanding on international adoption must be formulated and signed by the governments of the U.S. and Vietnam in order for adoptions to continue;
- (2) Foreign adoption agencies must be licensed in their own country and in Vietnam, and these adoption agencies must maintain offices

unfortunate because in 2002, the last year adoptions were allowed between Vietnam and the United States, Americans completed approximately 766 adoptions of children born in Vietnam.²³² Today, Vietnam has a population of more than eighty million people.²³³ Due to the ongoing corruption of intercountry adoptions involving Vietnamese children, however, there has been a hold on all intercountry adoptions with Vietnam until new Vietnamese regulations regarding intercountry adoption are drafted and implemented.²³⁴

On June 21, 2005, in an attempt to renew their relationship, the United States and Vietnam signed the "Agreement Between the United States of America and The Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children" (Bilateral Treaty), which is expected to pave the way for American parents to once again adopt Vietnamese children.²³⁵ The Bilateral Treaty reflects both countries' "commitment to the welfare and well-being of children and parents, as well as to a transparent and effective adoption system between the two countries."²³⁶ According to the agreement, Vietnam and the United States must "agree" to the Hague Convention before the adoption measures can resume and adoptions by can once again be processed by the United States and Vietnam.²³⁷

b. The Infeasibility of Implementing the Hague Convention in Developing Countries

The Hague Convention has yet to be proven as a very successful way of accomplishing the noble goal of preventing adoption abuses and will never be able to reach that goal unless it is signed and ratified by a majority of sending countries.²³⁸ The cost and the organization entailed to implement and conform to the Hague Convention exemplify two reasons why most countries, including Vietnam and the United States, continue to avoid the Hague Convention completely or have a difficult time drafting compliant legislation.²³⁹

in Vietnam supporting humanitarian projects; and (3) All international adoptions in Vietnam will be processed through a new Central Authority at the Ministry of Justice.

STICKERT, *supra* note 215.

232. STICKERT, *supra* note 215.

233. *Id.*

234. *Id.*

235. *See generally* Vietnam Bilateral Treaty, *supra* note 40.

236. Children's Hope International, Children's Hope International Latest News (scroll down to Vietnam Program Update) (June 22, 2005), <http://www.childrenshopeint.org/hotline.htm>.

237. *See generally* Vietnam Bilateral Treaty, *supra* note 40. The United States and Vietnam do not have to implement the Hague Convention before adoptions will take place. The Bilateral Treaty covered the Hague requirements. Further, Vietnam is currently sending out referrals to U.S. couples, and adoptions are beginning without either Vietnam or the United States having implemented the Hague Convention. Rainbow Kids, *Vietnam Adoption Re-Opens!* (July 1, 2005), <http://www.rainbowkids.com/ArticleDetails.aspx?id=151>.

238. *See* Wittner, *supra* note 52, at 595.

239. Jeff D. Opdyke, *Changes in Global Rules Toughen Process*, WALL ST. J., Oct. 14,

First, the Hague Convention does nothing to remedy the situation that young, under-developed countries face in implementing the necessary measures to ensure that intercountry adoptions will truly benefit the children of their country.²⁴⁰ In general, the Hague Convention requires contracting countries to implement an extensive system of laws pertaining to intercountry adoption; however, the governments in under-developed countries, such as Vietnam, are reluctant or unable to undertake these responsibilities.²⁴¹ Implementation and start-up costs would be extraordinarily high and would be almost impossible to attain in under-developed countries without continued foreign aid.²⁴² Moreover, very little incentive exists for countries like Vietnam to substantially change a system that currently brings in millions of dollars a year.²⁴³

Most sending countries like Vietnam culturally oppose dependence on intercountry adoption to raise their children, yet they continue to engage in the practice out of necessity.²⁴⁴ If Vietnam had the resources, it would likely devote that money to caring for its orphans in order to end the shameful practice of baby trafficking rather than expending those resources in implementing the Hague Convention.²⁴⁵ Unfortunately, Vietnam does not have the financial resources needed to do either of these things. Instead, it has decided to take the passive approach of putting off compliance for an extended period of time; realistically, it may never finalize compliance, thereby undermining the goals of the Hague Convention.²⁴⁶ Detrimentially, these countries are the ones with the highest number of orphans that are desperate for a solution.

Even the United States, one of the wealthiest and most organized receiving countries in the world of intercountry adoption, has put off *full* compliance since 1993.²⁴⁷ Most of the delay in the United States'

2003, *available* at http://www.adoptachild.org/Messageboard/forum_posts.asp?TID=89&TPN=1&KW=opdyke&dlimit=0#1005.

240. Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 140 (1999) (citing ELIEZER D. JAFFE, INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF "SENDING" COUNTRIES 227 (1995)). The Hague Convention favors compliance of receiving countries, which tend to be wealthier and more able to bear the economic burdens posed by compliance than comparatively poor sending countries. *Id.*

241. See generally Chris Decherd, *Official: U.S. Aid at Risk if Cambodia Doesn't Fight Human Trafficking*, ASSOC. PRESS, Jan. 24, 2003.

242. *Id.*

243. *Id.*

244. See Kimball, *supra* note 38, at 582; see Wittner, *supra* note 52, at 621.

245. See Kimball, *supra* note 38, at 582. For example, when Korea's economy was growing in the 1990s, the Korean government contemplated ending intercountry adoption altogether, feeling that the nation should move toward full dependency on domestic adoption. *Id.*

246. Chadwick, *supra* note 240, at 140 (citing ELIEZER D. JAFFE, INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF "SENDING" COUNTRIES 227 (1995)); Kimball, *supra* note 38, at 572; Thompson, *A Call for More Protection*, *supra* note 5, at 459.

247. See Kimball, *supra* note 38, at 581.

implementation of the IAA has been due to business and financial issues concerning cost of implementation, which has been estimated to cost \$4 million per year to create and continue to operate the U.S. Central Authority and the large adoption case-tracking database.²⁴⁸

Second, not only do sending countries potentially face these same financial issues, they also face the more serious problem of organizing legislation in the face of societal and cultural objections to intercountry adoption of their children.²⁴⁹

More and more, countries have committed themselves to compliance with the internationally agreed upon norms with the goal of protecting children and their families. Nevertheless, these same countries do not have established governmental structures to support the requirement of such an intense Central Authority.²⁵⁰ While the goal is to streamline the process through a Central Authority, countries that do not have a strong infrastructure may be inefficient, ineffective, or face increased time delays, thus defeating the original goal of the Hague Convention.²⁵¹ This organization is not easy for any country, especially for under-developed countries like Vietnam.²⁵² Therefore, without strong domestic enforcement, the Hague Convention will fail.²⁵³

The success of the Hague Convention weighs heavily on the shoulders of the individual countries because countries that choose to ratify the Hague Convention are required to incorporate the specific terms and provisions into their domestic and international laws.²⁵⁴ In fact, regulations at the international level, such as the Hague Convention, merely serve to impose burdensome responsibilities on sending countries without doing anything to help these countries implement the regulations on a domestic level.²⁵⁵ Although the international conventions have the potential to encourage cooperation among countries, they can have the effect of increasing the burden on poorer sending countries that have difficulty formulating and implementing guidelines for adoption.²⁵⁶

c. The Potential Impact on Other Countries If the United States Implements the IAA

The United States' implementation of the IAA, and thus a subsequent ratification of the Hague Convention, could provide a good avenue to assure Vietnam and the rest of the world that American adoptions are in the best

248. *See id.*

249. *Id.* at 582; *see also* Chadwick, *supra* note 240, at 140.

250. Thompson, *A Call for More Protection*, *supra* note 5, at 459.

251. Katz, *supra* note 44, at 326.

252. *See generally id.*

253. *Id.*

254. Kimball, *supra* note 38, at 572.

255. *See* Chadwick, *supra* note 240.

256. *See id.*

interest of the child. The United States could also benefit from implementation through access to adoptions in countries that have previously banned adoptions with the United States.²⁵⁷

On the other hand, even if the United States implements the IAA, problems between the United States and countries like Vietnam might continue to exist if these countries have not finalized *their* implementation of the Hague Convention.²⁵⁸ For example, since Vietnam is not a contracting nation under the Hague Convention, the non-uniform definition of an “orphan” could still cause immigration problems between the respective parties.²⁵⁹ This type of non-uniformity in poorer countries, where the Hague Convention is too costly to implement, is likely to result in fraudulent labeling of children as orphans to facilitate their adoption.²⁶⁰

A solution could be to adhere to the stricter definition under the INA, which states that “only children who are orphaned with no living parents or abandoned are eligible for adoption and immigration to the United States,” and therefore, a child voluntarily given up by his or her parents would be ineligible for adoption under the INA.²⁶¹ This would force countries to implement a system in compliance with the INA abandonment proceedings if they wanted to continue finding homes in the United States for their orphans.²⁶² A result of this also could be a backlash of adoptions with the United States.

If the IAA is not implemented by the United States, however, it might also be difficult for the Hague Convention to be successful.²⁶³ For example, member countries will limit their intercountry adoptions to other member countries, which will result in a greater number of suspended adoptions until the United States completes ratification.²⁶⁴ In addition, if the United States chooses not to participate, there could be an increase in non-Hague adoptions, or worse, a total withdrawal of member countries from the Hague

257. See Opdyke, *supra* note 239. “Some countries that are party to the treaty but that send relatively few children to the U.S. for adoption—such as Brazil and Mexico—might allow more American adoptions once the U.S. implements the new guidelines, experts say.” Bernstein, *supra* note 95.

258. See Wittner, *supra* note 52, at 621.

Once the U.S. ratifies the Hague treaty, the convention’s regulations will govern all adoptions in countries that are party to it. It will be against the law for Americans to adopt children from countries that have ratified its treaty but are in violation of its laws. Yet Americans will still be able to adopt children from non-convention countries; Hague rules and safeguards will not technically apply to those adoptions.

Bernstein, *supra* note 95.

259. See Wittner, *supra* note 52, at 621.

260. See *id.*

261. *Id.*

262. Interview with Michele L. Jackson, Partner, Butler, Conley, Jackson & Sture, in Indianapolis, Ind. (Feb. 24, 2006).

263. See Croft, *supra* note 37, at 644.

264. See *id.*

Convention.²⁶⁵ As a result of the uncertain future of the United States' final implementation of the IAA, current member countries could be discouraged from complying with the Hague Convention guidelines.²⁶⁶ In sum, with many nations delaying their next move regarding the Hague Convention (not regarding intercountry adoption in general) until the United States adopts or rejects the IAA, the United States' decision could eventually result in another failed attempt at global regulation of intercountry adoption standards.²⁶⁷

d. Analysis of the Bilateral Treaty: Is the Treaty Between the United States and Vietnam a More Efficient Way to Fulfill the Goals of the Hague Convention?

In general, the Bilateral Treaty with Vietnam has almost identical language to the Hague Convention, which means it fosters many of the same problems.²⁶⁸ Articles 1 and 2 lay out the general goals of trying to obtain common understanding and mutual cooperation in the adoption of children between the two countries, as well as the applicable law.²⁶⁹ Article 3 provides the scope of the treaty, which applies to children "who are eligible for adoption under the applicable domestic laws of that Party."²⁷⁰ Article 4 sets out the principles of the treaty, using language such as "voluntary," "humanitarian grounds," and "in accordance with the laws of the Parties," which continues to leave wide discretion to each country to set their own adoption laws and could result in a return to a path destined to defeat the purpose of the Hague Convention.²⁷¹

Article 6 establishes the "competent authorities," which is similar to the "Central Authority" requirement in the Hague Convention; where Vietnam has the Ministry of Justice as its competent authority, while the United States has the Department of State.²⁷² The language of Article 8 also continues to leave wide discretion to the respective country to implement "necessary measures to penalize such practices under applicable law for inappropriate activities that take place within their own country," which again fails to provide mechanisms for accountability.²⁷³ Article 9 is a key provision that distinguishes itself from the language in the Hague Convention, reading: "the decision to make a child available for adoption will be made by the competent authorities of the Country

265. *Id.* at 644-45.

266. See Rhonda McMillion, 'Save the Children' More Urgent: U.S. Delays in Ratifying Accord Could Jeopardize Adoptions by American Citizens, 86 A.B.A. J. 94, 94 (2000).

267. *See id.*

268. *See* Hague Convention, *supra* note 36; *see generally* Vietnam Bilateral Treaty, *supra* note 40.

269. Vietnam Bilateral Treaty, *supra* note 40, arts. 1-2.

270. *Id.* art. 3.

271. *Id.* art. 4.

272. *Id.* art. 6.

273. *Id.* art. 8.

of Origin,” and it further provides:

For purposes of this Agreement and in accordance with the U.S. Immigration and Nationality Act previously cited, a child shall be determined to be an orphan if the child is under the age of 16 at the time of the adoption and: (a) The child has no parents because of the death or disappearance of, abandonment or desertion by, or separation from or loss of both parents, as clearly evidenced through documentation certified by the competent Vietnamese authorities; or (b) The sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption. In such instances, the U.S. competent authorities may require evidence through DNA testing and/or an interview with the child’s birth parent. DNA testing and interview expenses shall be borne by the prospective adoptive parent(s).²⁷⁴

This language in Article 9 establishes the use of the U.S. definition as the controlling standard to which the countries must adhere.²⁷⁵ This cooperation will potentially eliminate all problems of unpredictability that were previously associated with immigration into the United States after a child has been adopted from Vietnam. After taking this step forward by laying a concrete uniform foundation on which Vietnam and the United States can more efficiently cooperate with immigration laws, Article 11 takes a step back; it includes the same loophole that is found in Article 24 of the Hague Convention.²⁷⁶ Article 11 provides that a “decision of the competent authorities of one Party on the adoption of a child in accordance with its applicable law is recognized in the other Party’s country *unless contrary to its public policy*, taking into account the best interests of the child.”²⁷⁷ This provision does nothing more than provide a way out if one party decides not to go through with the adoption, which could be the case for a number of reasons.²⁷⁸

Articles 13 through 18 lay out the responsibilities of the competent authorities of the receiving country, much like the Central Authority under the Hague Convention; however, there are no burdensome or costly provisions that Vietnam or the United States must implement.²⁷⁹ Finally, Article 25 sets out the effective date and date of termination; the agreement will be effective “on the first day of the second month, after the Parties notify each other through the

274. *Id.* art. 9.

275. *Id.*

276. *See id.* art. 11; Hague Convention, *supra* note 36.

277. Vietnam Bilateral Treaty, *supra* note 40, art. 11. (emphasis added).

278. *See id.*

279. *Id.* arts. 13-18; *see supra* Part V(b).

diplomatic channels confirming that each Party has completed the necessary legal procedures for entry into force."²⁸⁰ This agreement will automatically terminate "should the Hague Adoption Convention enter into force for *both* the Socialist Republic of Vietnam and the United States of America."²⁸¹

With much of the same vague language as the Hague Convention, the Bilateral Treaty is susceptible to similar criticisms given earlier in this Note regarding the Hague Convention.²⁸² The success of the Bilateral Treaty is dependent on the capacity of Vietnam to withstand pressures and on the integrity of each professional involved to make ethical decisions.²⁸³ Another potential pitfall would be if Vietnam or the United States enacts the Bilateral Treaty but fails to completely modify their policies and procedures, or does not adjust the structure of their services, thereby weakening the effectiveness of the Bilateral Treaty.²⁸⁴ With many of the provisions that allow key standards and enforcement mechanisms to fall within the wide discretion of the respective parties, there will continue to be a great deal of room for the parties to distort these articles through mistranslations that alter the intended meaning of provisions and that lead to conclusions unintended by the Bilateral Treaty.²⁸⁵

Although there are many criticisms, this type of treaty is a step in the right direction to allow communication and intercountry adoption to begin again between the United States and Vietnam. The United States' delayed implementation of the Hague Convention coupled with a Bilateral Treaty that allows Vietnam to get around implementing the Hague Convention does, however, potentially send a message to the rest of the world: there may be an artificial way of side-stepping the costly implementation of the Hague Convention, while still allowing for adoptions with the United States.²⁸⁶ If the wealthiest country is not compelled to follow the international rules, then why should other sending countries feel any particular need to take on the economic burdens that come with the implementation of the Hague Convention?²⁸⁷

V. CONCLUSION: SHOULD THE HAGUE CONVENTION HAVE BEEN A DECLARATION THAT COUNTRIES IMPLEMENT BILATERAL TREATIES?

"When one has a stronger sense of confidence in what another nation will do with respect to a child who leaves its country of origin, the more faith one has in the credit of the country who

280. *Id.* art. 25, § 1.

281. *Id.* art. 25, § 3 (emphasis added).

282. *See supra* Part IV.

283. *See generally* Sargent, *supra* note 16.

284. *Id.*

285. *Id.*

286. *See generally* Kimball, *supra* note 38.

287. *Id.*

will assume the responsibility of that child.”²⁸⁸

In the past, the international community has responded to allegations of baby trafficking by drafting treaties designed to streamline the adoption process among countries and to eliminate the monetary motivations currently involved in the intercountry adoption process. While the Hague Convention has attempted to provide solutions to the corruption in intercountry adoptions, it has only skimmed the surface of addressing deeply rooted issues that go well beyond intercountry baby trafficking. The diversity and country specific aspects of intercountry adoption do not lend themselves to overly vague solutions. By taking the focus off improving the system from the ground up, the Hague Convention has once again failed to reach the end goal of more uniform intercountry adoption standards.

The substantial financial and organizational burdens imposed on sending countries, as well as the voluntary and humanitarian nature of the treaties, tend to make them ineffective solutions to Vietnamese adoption abuses. Vietnam cannot afford to implement the provisions required by the Hague Convention and is unlikely to voluntarily change its lucrative adoption process without the help of larger sending and receiving countries like China and the United States. Intercountry adoptions will only be free from fraud and abuse when policies and initiatives exist that more fairly and intelligently delegate the burdens of a transparent intercountry adoption process.

Consequently, agreements like the Bilateral Treaty have provided a way to sidestep implementation of the Hague Convention. The Bilateral Treaty, although seemingly a viable solution for under-developed countries that cannot finance the implementation of the Hague Convention, contains similar language as the Hague Convention; therefore, it tends to discredit the importance of implementing the Hague Convention.

The Bilateral Treaty is subject to the same criticisms as the Hague Convention and fails to offer an effective solution to address the core issue or fulfill the primary goal involved in intercountry adoption: *an agreed upon uniform standard that is in the best interest of the child*. If countries focused on the core interest involved in the adoption process, *what is in the best interests of the children*, when implementing adoption policy, each country might be more successful in formulating a workable solution that may involve private support for each country. With countries working together to support one another financially, each is more likely to carry out adoption regulations that have been imposed upon them. Only then will the best interests of children be served.

288. Pierce, *supra* note 128, at 535.

