ASIAN-AMERICAN JURISPRUDENCE AND CORPORATE LAW: POLITICIZATION, RACIALIZATION, FOREIGNNESS, AND THE U.S. CFIUS FOREIGN DIRECT INVESTMENT REVIEW MECHANISM

Norman P. Ho

MODERN FAMILY: AN IN-DEPTH LOOK AT INTERNATIONAL ADOPTION

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I. INTRODUCTION

This article seeks to apply Asian-American jurisprudence theories and methods to the realm of corporate law. Specifically, it addresses the U.S. legal and regulatory review of inbound foreign direct investment under the Exon-Florio Amendment of the Omnibus Trade and Competitiveness Act of 1988 (Exon-Florio).\(^1\) The primary regulatory institution under Exon-Florio is the Committee on Foreign Investment in the United States (CFIUS).\(^2\) Over the past several decades, CFIUS has taken charge of identifying problematic inbound transactions, mitigated their effects on national security, and granted the President the authority to intervene and stop such transactions when necessary.\(^3\)

Before delving into the specifics of Exon-Florio and analyzing its provision under an Asian-American jurisprudence framework, it is important to explain and justify this article’s theoretical basis. Asian-American jurisprudence, similar to all race-based approaches to the analysis of law, is part of the larger Critical Race Theory (CRT) school of legal thought. CRT arose from the Critical Legal Studies (CLS) movement, tracing its origins to the 1977 Conference on CLS at the University of Wisconsin.\(^4\) The CLS movement has been

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\(^3\) Id. at 263

\(^4\) Guyora Binder, Critical Legal Studies, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (BLACKWELL COMPANIONS TO LEGAL PHILOSOPHY) 267, 267 (Dennis Patterson ed., 2010).
influential primarily in the areas of legal and constitutional theory, legal history, labor and employment law, international law, local government, and administrative law. While the intellectual movement is complex and difficult to summarize, CLS’s foundational tenet provides that “law is politics[,] and it is not neutral or value free.” Essentially, CLS scholars argue that law is not pure; instead, it grows out of the power relationships in society and exists to advocate the interests of the party or class that supports it. It is a “rhetorical apparatus” that has been historically used as justification for state power and intervention. Law does not exist as a posited rule or norm, but as a “collection of beliefs and prejudices that legitimize the injustices of society.” Law, in sum, is ideological.

CRT emerged in the late 1980s, as both an off-shoot of and as a response to CLS, espousing a race-conscious form of legal criticism. The main charge of the CRT movement toward CLS was that very few CLS scholars made “more than a token effort to address racial domination specifically, and their work does not seem grounded in the reality of the racially oppressed.” Generally, the CRT movement considers the impact of race as a contributing factor when evaluating laws or their effects on society. Within CRT, the concept of intersectionality broadens the inquiry of legal oppression by not only looking at race, but also at other dimensions that can account for the disempowerment of individuals or entities under the law. These other dimensions include race, sex, class, national origin, sexual orientation, or a combination of those factors.

As part of the CRT school, Asian-American jurisprudence-based scholarship has predominately focused on the racial and national identity of Asians and Asian-Americans, reinterpreting cases, statutes, regulations, and histories in three central narratives: immigration, citizenship, and race. Through this racial lens, Asian-American jurisprudence has specifically pointed to the notions of Asiatic unassimilability and the process of "Asiatic

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5 Id.
7 Id.
8 A rhetorical apparatus is a method of political discourse.
10 Cornell Law School Legal Information Institute, supra note 6.
11 M.D.A. Freeman, Lloyd’s Introduction to Jurisprudence 1491 (8th ed. 2008).
15 Id.
17 Id.
racialization." These theories argue that the Asiatic racial categorization continuously prevents American and foreign-born Asian-Americans from “obtaining full citizenship rights” and “den[ies] them full political participation.” Essentially, Asian-American jurisprudence scholars argue that Asians and Asian-Americans, under the law, have been victimized and treated differently because there is something more foreign and, therefore, more dangerous to authorities about an individual’s or group’s distinctly Asian identity. This foreignness makes it impossible for Asians to fully assimilate into American society.

The general argumentative methodology and framework of Asian-American jurisprudence has generally been applied to substantive areas of law, such as criminal law and constitutional law. It is especially applicable, however, to immigration law, “the most familiar terrain of Asian-American jurisprudence.” Focus on these substantive areas is not surprising, as these areas highlight an individual Asian-American's treatment and experience under the law, challenges associated with standing up to prejudices and assumptions of unassimilability, and threatening foreignness.

This article seeks to expand the traditional areas of substantive law affecting Asian-American jurisprudence to the realm of corporate law. Specifically, it will examine the experience of some Chinese and, to a lesser extent, Japanese corporations that have gone through CFIUS review. In turn, this article hypothesizes that the outcome of these Chinese and Japanese corporations' transactions involving CFIUS were influenced, to some extent, by Asian-American jurisprudential themes of racialization, foreignness, and politicization. The outcomes of these transactions are akin to what individual Asians and Asian-Americans face in their quest for immigration or citizenship. At the very least, this article suggests that when individual Chinese and Japanese corporations are subject to CFIUS review, it is difficult to distinguish between legitimate national security concerns and more politically and racially-motivated concerns regarding the corporation’s identity.

This article will first explore the history of Exon-Florio and CFIUS from an Asian-American jurisprudential perspective, arguing first that Exon-Florio arose from racial and

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19 Id.

20 Gotanda, New Directions, supra note 16, at 8.

21 Gotanda, Citizenship Nullification, supra note 18, at 79, 80, 83.

22 Gotanda, New Directions, supra note 16, at 8

23 Id.

24 Id.

25 Gotanda, Citizenship Nullification, supra note 18, at 80; Gotanda, New Directions, supra note 16, at 8 (for example, the scholarship examining the justifications for the Chinese Exclusion Act of 1882).

26 Research conducted for this article reveals a lack of scholarly work using the CRT perspective. Additionally, the use of an Asian-American jurisprudential lens is almost unprecedented when examining any topic in corporate law.

27 Regarding foreignness, it more precisely refers to the attributes of foreignness to the corporation in question.
political concerns surrounding Japanese corporations in the 1980s. Essentially, since the beginning and very enactment of Exon-Florio, racial concerns about the foreignness of Asian corporations were present. From this politicized and racialized historical basis, this article will then examine selected case studies of Chinese corporations and how they fared under CFIUS review. This article will argue that racialization, politicization, and attributions of “foreignness,” unsurprisingly, continued in these cases. The premise underlying this article maintains that there is something enriching about examining CFIUS review and, more generally, corporate law from an Asian-American jurisprudence perspective. Applying Asian-American jurisprudence techniques and methods to CFIUS review highlights the true complexity and multidimensional nature of foreign direct-investment review in the United States.

Before delving into the analysis of CFIUS, another theoretical remark is in order. It may seem natural to apply the Asian-American jurisprudence themes of foreignness and racialization to a single Asian-American or Asian individual, or group of individuals who are applying for citizenship or immigration. It may seem odd, however, to apply such themes to a corporation, which of course, biologically, is not a real person. For purposes of the legal analysis in this article, though, such an approach is nevertheless sound, as under U.S. law, corporations have been granted “corporate personhood.”28 For nearly a century, U.S. courts have recognized corporations, like people, have constitutional rights.29 Most notably in Citizens United v. Federal Election Commission, the Supreme Court held corporations should be afforded certain First Amendment protections.30 Thus, viewing corporations as persons, who can be racialized and labeled as overly “foreign,” is not without a theoretical and, indeed, a legal basis.31

II. A History of Exon-Florio and CFIUS – An Asian-American Jurisprudence Perspective

This section will argue the very history of Exon-Florio and CFIUS has been colored by Asian-American jurisprudential themes of racialization, politicization, and foreignness—specifically, fear of Japanese corporations exerting too much influence over the U.S. economy. It will not provide a comprehensive or descriptive history of Exon-Florio and

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31 For example, consider the experience of Computer Associates with the owner, Charles Wang, a Shanghai-born Chinese-American, and his company, Computer Associates. In 1998, Wang tried to execute a major hostile takeover of Computer Sciences Corporation, an American IT services company. The transaction eventually failed as Wang and his company were both “victimized” by allegations that Wang was “insufficiently assimilated” and thus could not be trusted due to continuing ties and contacts to China. Gotanda, Citizenship Nullification, supra note 18, at 96-97.
CFIUS, as much scholarly work has already done so. America’s current foreign direct-investment review process is codified largely under Exon-Florio, which authorizes the President to block “mergers, acquisitions, or takeovers” involving foreign entities if they threaten to impair national security. The aforementioned presidential action is typically a last resort measure if the President feels other laws are inadequate to protect national security. The primary regulatory institution that identifies and investigates the aforementioned transactions is CFIUS. CFIUS was created by executive order under President Gerald Ford on May 7, 1975, in response to concerns stemming from growing foreign direct investment in the United States and in response to stagflation and the weakened U.S. dollar. CFIUS's mandate encompassed monitoring and coordinating U.S. policy on foreign investment. 

Exon-Florio expanded CFIUS’s power and, most importantly, authorized the President to block problem transactions. Exon-Florio was developed and enacted between 1980 and 1988 when there was increasing foreign investment in the United States. Indeed, foreign direct investment during that eight-year time period increased 300% from 90 billion to 304.2 billion. In terms of composition, CFIUS is an interagency committee with sixteen members and is chaired by the Secretary of the Treasury. Other members include the chairs and heads of various Departments, including State, Defense, Justice, Homeland Security, and Energy.

In addition to congressional concern over an increasing trend of foreign direct-investment rates in the United States in the 1980s, two specific, high-profile, controversial bids by foreign firms in the mid-1980s directly brought about the rise and passage of Exon-Florio. A U.K. citizen initiated one deal, while the other was led by a Japanese company.


34 Id.


36 Feng, supra note 2, at 258-59.

37 Id.

38 Exec. Order No. 11858, supra note 35, at 991.

39 Id.


41 See Hicks, infra note 54.

In comparing the two deals and, particularly, the U.S. government’s response to each, the effects of racialization and foreignness are evident, especially in the Japanese case, which was arguably the impetus for Exxon-Florio.

The first deal involved U.K. citizen Sir James Goldsmith’s attempted takeover of Goodyear Tire and Rubber in 1986.43 Goldsmith had a reputation as a corporate raider, a “flamboyant billionaire financier” and “imposing buccaneering…figure” who acquired much of his immense wealth through some of the “boldest and most outrageous takeover bids ever seen.”44 Goldsmith and a group of allied investors purchased 11.5% of Goodyear stock in a greenmail, hostile takeover attempt, which Goodyear resisted45 along with many in Congress.46 Many were also concerned about the national security implications of the deal, as Goodyear had contracts with the Pentagon.47 Yet, most objections to the deal were framed in general, economic terms. Some of the most notable bases for objection included the fear that Americans working for Goodyear would lose their jobs and general concerns over the ambiguity of Goldsmith’s intentions.48 For example, Senator John Glenn (D-Ohio) argued, “Sir James and current management should be explicit about their intentions for the company [Goodyear] in the future. . .[w]ill employment remain at the present level, or will a large number of jobs disappear?”49 Similarly, Representative Barbara A. Mikulski (D-Maryland) framed her opposition in terms of corporate takeovers as a whole, arguing the deal “represent[ed] the most serious threat to job security” to workers in her community, and such takeovers were forms of “corporate strip mining,” in which the raider seized the corporation’s best assets and discarded the rest.50 Representative Mary Roase Oakar (D-Ohio) painted Goldsmith as the

newest strain of corporate raider[,]…who focuses on a healthy and profitable company[,]…forces it to defend itself at great expense[,]…buys large blocks of stock in the target company,…forces the company to try to raise the price of its stock, usually at great expense, [before] selling at a huge profit [to the raider].51

Republicans also expressed opposition to the deal. Representative Michael DeWine (R-Ohio) focused on Goldsmith’s takeover history to determine Goldsmith’s intentions in

45 Goodyear – History by Year, supra note 43.
47 Sosesman, supra note 39, at 599.
48 See generally Hearing on H.R. 35, supra note 46.
49 Id. at 241 (statement of John Glenn, Sen. from Ohio).
50 Id. at 248 (statement of Barbara A. Mikulski, Congresswomen from Md.).
51 Id. at 259 (statement of Mary Roase Oakar, Rep. from Ohio).
taking over Goodyear and emphasized the deal’s negative impact on the U.S. economy.\textsuperscript{52} Importantly, there was no emphasis on Goldsmith’s race or foreign national origin; instead, justification for opposition to the deal was presented using macroeconomic arguments. Due to continued opposition from Goodyear, the federal government, and the Ohio state government,\textsuperscript{53} Goldsmith dropped his bid after he agreed to be bought out by Goodyear for approximately $620.7 million.\textsuperscript{54} As a result, Goldsmith pocketed a $90 million profit.\textsuperscript{55}

The other transaction that triggered the enactment of Exon-Florio involved a Japanese corporation, Fujitsu.\textsuperscript{56} In 1986, Fujitsu attempted to acquire Fairchild Semiconductor Corporation, a manufacturer of sensitive technology equipment, including computer chips.\textsuperscript{57} In contrast to the aforementioned Goldsmith-Goodyear deal, congressional reactions were arguably more racialized and politically-charged, resulting in framing the opposition in terms of fear of a uniquely Japanese takeover in the United States.\textsuperscript{58} In hindsight, this racialized language is ironic since this potential acquisition was a friendly\textsuperscript{59} takeover in contrast to Goldsmith’s hostile greenmail transaction. Fairchild invited Fujitsu to bid because it desperately needed to raise its capital to maintain its business operations.\textsuperscript{60} Thus, for Fairchild, Fujitsu was the “white Samurai” who offered $200 million for the acquisition.\textsuperscript{61} When the Fujitsu-Fairchild deal collapsed, however, Fairchild’s market value significantly declined, and a U.S. rival, National Semiconductor, acquired Fairchild for about one-half of the price of Fujitsu’s original offer.\textsuperscript{62}

The reaction to the Fujitsu-Fairchild deal was very different than the reaction to the Goldsmith-Goodyear deal due to the intense interest that came from every federal agency,
especially the Treasury, Defense, Commerce, and Justice Departments. As political pressure intensified, President Ronald Reagan ordered CFIUS review. Some observers stated that letting Fujitsu acquire Fairchild was akin to “selling Mt. Vernon to the Redcoats.” This analogy was, quite ironically, not used to attack U.K. citizen Goldsmith’s deal. By the end of 1987, total Japanese investment in the United States increased to $33.3 billion, by 195% from 1982, instilling fear that the Japanese would take over the U.S. economy. Rather than frame opposition to the Fujitsu-Fairchild deal in broad, economic, and generalized terms, anti-Japanese racialized rhetoric was employed. This outlook was exemplified by U.S. Commerce Secretary Baldrige’s view that America’s future was at stake when he attacked the sale as a “threat to national security,” and “something that [gave him] great problems.” Administrators declared the deal was “part of a master plan of the Japanese to take over the U.S. information industry.” A former Fairchild executive, Wilfred Corrigan, warned any acquiescence to the Fujitsu-Fairchild deal could initiate the “domino theory,” in which “all the major Japanese companies would be coming in to acquire U.S. semiconductor manufacturing” companies by the end of 1987.

Ironically, such inflammatory Cold War-style rhetoric was used against Japan, even though Japan was a military ally to the United States. Others referred to a “Japanese conspiracy,” in which the Japanese Ministry of International Trade and Industry and Japanese corporations targeted U.S. industries by heaping “green tea and dirty tricks” on U.S. industries. Charles Geruson of the Massachusetts Institute of Technology’s Center for Technology, Policy, and Industrial Development threatened that “the Japanese are coming.” Such language and reference to the phrase commonly attributed to Paul Revere would have been rhetorically more effective if used to attack the Goldsmith-Goodyear deal. One critic of the dominant opposition summarized the response as “sheer Japan bashing.” In the end, there was never any clarity on whether the Fujitsu-Fairchild deal actually posed a national security threat; thus, the opposition was arguably based on a perceived Japanese threat. For example, some top-ranking officials like Richard Armitage, the Assistant Secretary of Defense, supported the deal, as he believed Fujitsu could contribute new technologies to Fairchild that would subsequently be provided to the U.S. military.

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64 Id. at 60; Feng, supra note 2, at 261.
65 Feng, supra note 2, at 261.
67 Rempel & Walters, supra note 42.
68 Id.
69 Id.
71 Rempel & Walters, supra note 42.
72 Id.
73 Id.
74 Id.
Additional evidence suggesting the Fujitsu-Fairchild deal was rejected due to specific fears of Japanese “foreignness” stems from the lack of concerns expressed about Fairchild’s purchase by the French-controlled company, Schlumberger, which continued to own Fairchild at the time of Fujitsu’s proposed acquisition. It is only natural to wonder why there were such pronounced concerns over the Japanese acquisition of Fairchild but none over the 1979 French acquisition. This contrast suggests racialization and fears of Asiatic “foreignness” played a large role in the public opposition to Fujitsu-Fairchild.

The same elements that drove public opposition to the Fujitsu-Fairchild deal also influenced Exon-Florio. The concerns arising from the Fujitsu-Fairchild deal were arguably more influential on the enactment of Exon-Florio than fears over the Goldsmith-Goodyear deal, giving the legislation the potential to be racially charged from the outset. Indeed, Senator Florio, one of the main sponsors of the Exon-Florio legislation, specifically mentioned the Fujitsu-Fairchild deal, and not the Goldsmith-Goodyear deal, when he spoke favorably of the bill, stating, “When Fujitsu, a Japanese semiconductor firm, tried to takeover Fairchild, a United States-based semiconductor firm, earlier this year, the President found that he had very little authority to act. This provision [of Exon-Florio] would give the President important powers to protect our national security.”

At this point, some background information regarding the CFIUS review process and post-Exon-Florio developments is helpful. Under Exon-Florio, CFIUS has the authority to review certain business dealings, known as covered transactions, to determine their effect on U.S. national security. A covered transaction is defined as “any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.” With regards to initiating CFIUS review, “CFIUS review can begin with either a voluntary notice from a party of a potential or proposed ‘covered transaction’ or on recommendation from a CFIUS member agency that believes a given transaction might affect U.S. national security.” Although pre-notification by a party involved in a covered transaction is voluntary, it is important to note that CFIUS has the authority to review problematic transactions even after a deal has been consummated. Accordingly, many parties choose to file notice with CFIUS beforehand to avoid the prospect of CFIUS subsequently interfering with a completed transaction.

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75 Id.

76 Greidinger, supra note 66, at 115.


79 Id.


81 Goldstein, supra note 33, at 223.

82 Id.
Subsequent amendments and additional regulations have added substance to Exon-Florio. In 1992, the Byrd Amendment authorized CFIUS to investigate proposed transactions, in which the “acquirer…is controlled by or acting on behalf of a foreign government.” In 2007, the Foreign Investment and National Security Act broadened the CFIUS definition of “national security,” and in November 2008, new CFIUS regulations were promulgated, establishing new timelines for CFIUS review. The regulations maintained the voluntary notification system but added a thirty-day deadline for CFIUS to review a party’s application and a forty-five day deadline to investigate if such action is deemed necessary. After the maximum forty-five day period, CFIUS can either (1) dismiss the investigation, (2) draft a mitigation agreement to reduce the threats posed by the transaction, (3) allow or recommend parties to withdraw the transaction or resubmit the application after divestment or some other activity, or (4) submit the findings to the President for him to make a decision within fifteen days. If CFIUS has chosen to carry out an investigation, they must send a report to the President requesting that he make a decision. Such a report must be sent if: “(1) The Committee recommends that the President suspend or prohibit the transaction; (2) The members of the Committee…are unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction; or (3) The Committee requests that the President make a determination with regard to the transaction.” Most importantly, the regulations attempted to eliminate the presumption that foreign direct investment in a U.S. business contributes positively to the U.S. economy. Previously, CFIUS had the burden of establishing that there was a threat to national security; now, that burden is transferred to the transacting parties.

When comparing the number of covered transactions that have been filed in recent years, it is evident that there is a trend of an increasing number of filed covered transactions that fall under CFIUS’s purview. Companies file notices of transactions, and CFIUS will

83 Id.
87 Id.
88 Id.
90 Reinis, supra note 86, at 44.
91 Id.
later determine whether or not the filed transaction is a “covered transaction.”\(^93\) In 2008, 155 notices were filed; of those notices, eighteen notices were withdrawn during review, twenty-three CFIUS investigations were held, and five notices were withdrawn during investigation.\(^94\) In 2009, sixty-five notices were filed; of those filed notices, five notices were withdrawn during review, twenty-five CFIUS investigations were held, and two notices were withdrawn during investigations.\(^95\) In 2010, ninety-three notices were filed; of those notices, six notices were withdrawn during review, thirty-five CFIUS investigations were held, and six notices were withdrawn during investigation.\(^96\) In 2011, 111 notices were filed; of those filed notices, one notice was withdrawn during review, forty CFIUS investigations were held, and five notices were withdrawn during investigation.\(^97\) From 2008 to 2011, there were no presidential decisions rendered on any of the CFIUS-reviewed transactions.\(^98\) Since the enactment of Exon-Florio, the only two stymied transactions by presidential decision involved Chinese companies.\(^99\)

### III. Themes of Racialization, Politicization, and “Foreignness” Playing a Role in CFIUS Review of Chinese Corporations

Having now covered the history of Exon-Florio from an Asian-American jurisprudence perspective as well as providing the basic background information related to CFIUS, we will now proceed to look at the continued racialization, politicization, and attribution of “foreignness” to Asian corporations that have faced CFIUS review. Instead of Japan, however, we will now look at China, who is now one of the United States’ largest foreign investors.

In line with the racialized history of Exon-Florio, the themes of racialization and “foreignness”—namely, Gotanda’s notion of “political foreignness”\(^100\)—have continued to play a role in CFIUS review of Asian and, specifically, Chinese corporations. Indeed, many argue that the debate over Japan in the 1980s has recently transitioned to China, as China increases its foreign direct investment in the United States.\(^101\) Similar to the furor over

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\(^93\) Id.

\(^94\) Id.

\(^95\) Id.

\(^96\) Id.


\(^98\) Dep’t. of the Treasury, Committee on Foreign Investment in the United States – Annual Report, supra note 90; Id.


\(^100\) Gotanda, Citizen Nullification, supra note 18, at 93.

\(^101\) GRAHAM & MARCHICK, supra note 32, at 95.
Fujitsu-Fairchild, the debates over Chinese investment are “often heated, emotional, and a topic of conversation” throughout the United States.\textsuperscript{102} Congress responded to China’s emergence as a major economic competitor by reforming CFIUS to “address the emergence of China economically, diplomatically, and military.”\textsuperscript{103} Thus, Chinese corporations appear to have been specifically singled out for CFIUS review.

The attempted 1989 acquisition of MAMCO Manufacturing Inc. (“MAMCO”) by the China National Aero-Technology Import and Export Corporation (“CATIC”) reflects the special attention CFIUS has placed on reviewing Chinese corporations. Out of the then fifteen possible cases subjected to CFIUS investigation, President George H.W. Bush ostensibly appeared to use his authority to stop the acquisition of MAMCO because the purchasing company, CATIC, was a Chinese company.\textsuperscript{104} Following CATIC’s proposed purchase of MAMCO, an airplane parts manufacturer, MAMCO voluntarily notified CFIUS of the proposal on November 3, 1989.\textsuperscript{105} CFIUS conducted an investigation, which resulted in President Bush issuing an order in accordance with CFIUS’s recommendation that CATIC divest from MAMCO.\textsuperscript{106} The precise logic and rationale for voiding the transaction was arguably weak—in Bush’s message to Congress, he relied heavily on mere juxtaposition in his arguments:

CATIC is an export-import company of the Ministry of Aerospace Industry of the People's Republic of China. CATIC has business dealings with various companies in this country, in several sectors including commercial aircraft. The Ministry engages in research and development, design, and manufacture of military and commercial aircraft, missiles, and aircraft engines. MAMCO machines and fabricates metal parts for aircraft. Much of MAMCO’s production is sold to a single manufacturer for production of civilian aircraft. Some of its machinery is subject to U.S. export controls. It has no contracts with the United States Government involving classified information.\textsuperscript{107}

President Bush justified his decision by arguing the acquisition was a danger to national security.\textsuperscript{108} Specifically, he argued that CATIC’s association with the Chinese government, and possibly its military, posed a threat to national security.\textsuperscript{109} President Bush, \textsuperscript{102}Id.

\textsuperscript{103} See National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (Jan. 6, 2006), §§1234(c)(8) and 1234(b).


\textsuperscript{105} Gavioli, supra note 32, at 13.

\textsuperscript{106} Young, supra note 104, at 47; see also Andrew Rosenthal, Bush, Citing Security Law, Voids Sale of Aviation Concern to China, N.Y. TIMES, Feb. 3, 1990, at 1.

\textsuperscript{107} 136 CONG. REC.761-05, (1990) (message from President Bush received during recess).

\textsuperscript{108} Id.

\textsuperscript{109} Id.
however, never clearly explained why this association and the MAMCO acquisition posed such a threat.\textsuperscript{110} In addition, CFIUS inadequately justified its recommendation that CATIC break ties with MAMCO—CFIUS did not explain why CATIC’s ties to the Chinese military would result in “unique access” to U.S. aerospace and how that might pose a threat to national security.\textsuperscript{111}

In contrast to the allegations from President Bush and CFIUS, there was evidence to contradict the alleged threat to national security, as MAMCO did not design actual airplane parts and did not have classified contact with the federal government.\textsuperscript{112} Moreover, MAMCO never exported its products out of the United States,\textsuperscript{113} was described as nothing more than a “machine shop” and “metal basher” used to produce metal airplane and helicopter components for civilian aircrafts,\textsuperscript{114} did not design its products, and did not employ full-time designers or engineers.\textsuperscript{115} Furthermore, MAMCO’s products were unlikely to pose a threat to national security because its production of simple components, such as simple metal brackets, were prohibited from export to China.\textsuperscript{116} If CATIC was truly unable to and did not produce items for export, it seems that the security threat argument was without merit. It seems, therefore, that the very identity of CATIC as a Chinese corporation with ties to the Chinese government doomed the deal.\textsuperscript{117}

CATIC-MAMCO cannot, however, compare to the firestorm that surrounded the 2005 China National Offshore Oil Corporation (“CNOOC”)—Unocal deal. In CNOOC-Unocal, negative outcries arose after the Chinese corporation entered a bid for an American corporation.\textsuperscript{118} Rhetoric akin to the allegations attacking the Fujitsu-Fairchild deal, based on national origin grounds rather than general economic arguments or takeover policy, resurfaced in the CNOOC-Unocal deal.

On April 4, 2005, the Unocal Board accepted a rival U.S. corporation’s, Chevron’s, offer to acquire Unocal for approximately $16.5 billion, which was funded with a mixture of debt and equity.\textsuperscript{119} Thereafter, on June 23, 2005, CNOOC made an unsolicited all-cash bid of $18.5 billion for Unocal through its Hong Kong subsidiary, CNOOC, Ltd.\textsuperscript{120} Even though the deal appeared positive for all parties involved, there were concerns raised because

\textsuperscript{110} Id.
\textsuperscript{111} Gavioli, supra note 32, at 13.
\textsuperscript{112} Young, supra note 104, at 47.
\textsuperscript{113} Gavioli, supra note 32, at 13.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 292.
\textsuperscript{118} Feng, supra note 2, at 274.
\textsuperscript{119} Id. at 272.
\textsuperscript{120} Id. at 273.
CNOOC was a Chinese state-owned petroleum company, its management had ties with the Chinese government, and the purchasing funds were advanced by a Chinese state-owned bank loan. In 2005, Congressman Richard Pombo (R-California) introduced a resolution which attacked the proposed deal by alleging threats to national security, stating that the “People’s Republic of China remains strongly committed to national one-party rule by the Communist Party.” Essentially, Representative Pombo equated CNOOC with the Chinese government, and assumed that association to be a threat on its face. Similar rhetoric criticized the CNOOC transaction as the “Communist government gaining foothold in the U.[S.] economy.” R. James Woolsey, director of the CIA during the Clinton Administration, even remarked, “China is pursuing a national strategy of domination of the energy markets and strategic domination of the western Pacific,” CNOOC is “an organ, effectively, of the world’s largest communist dictatorship,” and allowing CNOOC to buy Unocal “should be beyond the pale, given the nature of the Chinese government.” Concerns similar to those raised in the 1980s regarding Japan buying up the United States were voiced by some, including the Chairman of the U.S.-China Economic and Security Review Commission, who asserted China was going on a “buying spree into the American economy.” Duncan Hunter, then-Chairman of the House Armed Services Committee, also said that:

the Chairman of the Chinese company, Fu Chengyu, also happens to be Secretary of the Leading Group of the Communist Party. Can anyone honestly believe that his primary interest lies in protecting the interest of his shareholders and the stability of global energy markets? Of course not. He answers to the Politburo in Beijing.

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121 Id. at 273-274.
122 Id. at 274.
123 Id. at 274.
124 Feng, supra note 2, at 274.
128 Id.
129 Hearing on the Unocal-China Oil Merger before the House Committee on Armed Services (statement of C. Richard d’Amato, Chairman of the U.S. China Economic and Security Review Commission), (July 13, 2005), 2005 WL 1673246.
130 Hearing on the Unocal-China Oil Merger before the House Committee on Armed Services, 109th Cong. 2 (2005) (statement of Duncan Hunter, Chairman of the House Armed Services Committee).
Other members of Congress wrote letters to the President urging him to kill the deal.\textsuperscript{131} Congress also cut off funding to CFIUS and prohibited the Treasury from spending any money to approve the CNOOC-Unocal deal.\textsuperscript{132} Chevron also went on the offense, offering a forty percent cash amount of $17 billion dollars.\textsuperscript{133} In addition, Congress included a provision in an energy bill, which required a four-month study of Chinese energy needs before any transaction between CNOOC and Unocal could be consummated.\textsuperscript{134} This legislation targeted the pending deal, as CNOOC had to present its offer to Unocal shareholders before their vote on August 10, 2005. Consequently, with the mandated study, there would not have been enough time for the deal to come to fruition.\textsuperscript{135} CNOOC withdrew its bid on August 2, 2005, enabling Chevron to purchase Unocal about a week later.\textsuperscript{136} To explain its actions, CNOOC released a statement blaming the failed deal on political opposition: “[t]he unprecedented political opposition that followed the announcement of our proposed transaction, attempting to replace or amend the CFIUS process that has been successfully in operation for decades, was regrettable and unjustified.”\textsuperscript{137} The Chinese Ministry of Foreign Affairs also expressed its displeasure, demanding the U.S. Congress correct its “mistaken ways of politicizing economic and trade issues” and “to stop interfering in the normal commercial exchanges between enterprises of the two countries.”\textsuperscript{138}

In the end, it was very difficult to separate true national security concerns from politicization, racialization, and the attribution of the Chinese “foreignness” threat, as epitomized by China’s non-Western Communist government, held to be completely antithetical to that of American democracy, to CNOOC.\textsuperscript{139} Many argued that the deal posed little or no national security threat because the CNOOC-Unocal transaction was of a small scale.\textsuperscript{140} Unocal was a minor player in the world’s oil and gas scene, and, had the deal been


\textsuperscript{132} 151 Cong. Rec. H 5514, at *H 5515 (LEXIS).


\textsuperscript{133} Feng, \textit{supra} note 2, at 276.

\textsuperscript{135} Feng, \textit{supra} note 2, at 276.

\textsuperscript{136} \textit{Id.} at 276-77.


\textsuperscript{138} Goldstein, \textit{supra} note 33, at 242; see also Chris Baker, \textit{China Tells US Not to Meddle in Bid for California Oil Giant}, \textit{WASH. TIMES} (June 30, 2005), at A1.

\textsuperscript{139} See Joshua W. Casselman, \textit{China’s Latest ‘Threat’ to the United States: The Failed CNOOC-Unocal Merger and its Implications for Exon-Florio and CFIUS}. \textit{17} \textit{Int’l & Comp. L. Rev.} 155, 156 (2007) (explaining the failure of CNOOC’s bid and proposed amendments that would alter the definition of “national security”).

\textsuperscript{140} See \textit{id.}
consummated, the combined oil production of CNOOC and Unocal would have only amounted to about 0.3% of domestic U.S. consumption.\textsuperscript{141} Some observers believed xenophobia and racism toward China played a role in killing the CNOOC-Unocal deal.\textsuperscript{142} For example, James Feinerman, one of the United States’ leading experts on Chinese law, maintained that the threat from the proposed transaction “seems almost negligible” and that the “national security argument [was] bound-up in a zero-sum view of China: the idea that we can’t give them any advantage, any edge, if they are going to be a future enemy . . . everything they gain, in other words, is a loss for us.”\textsuperscript{143} Feinerman also asserted that blocking the CNOOC-Unocal merger, a “relatively harmless economic transaction,” would be seen as a “protectionist, xenophobic, or maybe even racist reaction.”\textsuperscript{144}

Feinerman compared the CNOOC-Unocal merger with Daimler-Benz’s acquisition of Chrysler, and emphasized that there may have been something about the perceived threat of Chinese foreignness which led to the deal being blocked. He paralleled this to the perceived threat of Japanese foreignness in the 1980s deal:

> [w]hen Daimler-Benz acquired Chrysler, people didn’t say, [t]his company served the Nazis and my [g]o[sh], the people who caused the Holocaust are taking over an American engineering and technical icon. They were white Europeans, and a lot of their surnames they share with a number of American citizens. But when it[’]s the Chinese, or before them, the Japanese, then all of a sudden we get worried because they[’]re different.\textsuperscript{145}

Thus, a transaction that would have been arguably a good economic deal and an opportunity for China to put money in the hands of Unocal’s U.S. shareholders was ultimately blocked by a decision marked by the intrusion of racialization and politicization.

Another deal highlighting the difficulty of separating true national security concerns from themes such as foreignness involved a 2009 acquisition deal, in which Northwest Nonferrous International Company Ltd. (“Northwest”), a company controlled by the Shaanxi Provincial Government, made a friendly offer of $26 million to acquire a majority of the outstanding shares of Firstgold (“Firstgold”), a U.S. mining and gold company.\textsuperscript{146} The

\textsuperscript{141} See id. at 165.

\textsuperscript{142} Seven Questions: China and Unocal – Interview with Professor James Feinerman, FOREIGN POLICY (July 1, 2005), http://www.foreignpolicy.com/articles/2005/06/30/seven_questions_china_and_unocal.

\textsuperscript{143} See id.

\textsuperscript{144} Id.

\textsuperscript{145} Id.

\textsuperscript{146} Matthew C. Sullivan, Mining for Meaning: Assessing CFIUS’s Rejection of the Firstgold Acquisition, 4 PUBLICIST 12, 15 (2010).
deal was quite small, but the parties involved in the transaction nevertheless filed notice to CFIUS on October 5, 2009.

One month later, the parties learned that CFIUS had decided to initiate a forty-five day investigation, and in December 2009, CFIUS announced it was going to advise President Barack Obama to block the investment. Unlike the circumstances surrounding the prior deals reviewed by CFIUS, Firstgold leaked a memorandum to the New York Times from external legal counsel regarding the CFIUS review process upon learning about the rejection. The leak was an unprecedented source of information considering CFIUS proceedings usually remain confidential. Based on the leaked information, CFIUS was allegedly concerned about the proximity of Firstgold properties to the Fallon Naval Air Base and other related facilities. Firstgold, a Delaware corporation, owned or leased mining exploration and development properties in Nevada, with its main mining property, Relief Canyon Mine, located 100 miles northeast of Reno, Nevada, “adjacent to or in the same proximate area as the Fallon Naval Air Base and related facilities.”

In a conference call arranged on December 10, 2009, among the parties and CFIUS, CFIUS simply recited the proximity to the air base and “other sensitive and classified security and military assets that cannot be identified” as its justification. Disagreeing with CFIUS, Firstgold’s CEO “fail[ed] to see the connection between [U.S.] national security and [the company’s] principal asset – the Relief Canyon mine – which has existed at its present location since the early 1980s.” CFIUS pressure resulted in Northwest and Firstgold withdrawing from the deal on December 21, 2009. The lack of clear justification for rejecting the deal, as well as accusations that the rejection was based on concerns over China “hoarding gold,” led some to believe that the rejection was influenced by various political factors and by a fear of Chinese foreignness and anti-Chinese sentiment.

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147 Id. at 15.
148 Id. at 12.
149 Id.
150 See id. at 15.
151 Id.
152 Id.
154 Id. at 2.
155 Id. at 3.
157 Sullivan, supra note 146, at 16.
159 Timothy J. Keeler & Simeon M. Kriesberg, The United States Rejects Chinese Investment on National Security Grounds, MAYER BROWN CLIENT ALERT (Dec. 22, 2009),
An even clearer indication of the role of racialization and fear of and attribution of Chinese “foreignness” on the corporation is present in the 2008 Huawei-3Com deal.\textsuperscript{160} Huawei, China’s largest telecommunications equipment maker and the world’s third largest mobile gear maker behind Ericsson and Nokia,\textsuperscript{161} along with Bain Capital, attempted to buy a stake in 3Com, an American maker of internet router equipment, in a $2.2 billion dollar deal.\textsuperscript{162} Washington was concerned that Huawei could negatively alter 3Com’s electronic equipment; this was of specific concern because 3Com sold certain types of equipment to the U.S. military.\textsuperscript{163}

Congress responded with intense rhetoric, attributing racialized, political foreignness to Huawei. As Gotanda has argued, aspects of Asiatic political foreignness continue to “remain active in the American imagination;” these aspects include related ideas of “political disloyalty and a preference for despotistic, antidemocratic rule…[A]sians, both in the United States and in Asia, are seen as naturally averse to democracy and likely to betray American democracy.”\textsuperscript{164} Representative Thaddeus McCotter’s (R-Michigan) drew on such themes of political disloyalty and despotism, stating that if the Huawei-3Com deal were approved, “Communist China’s Huawei Technologies stake in the 3Com Corporation will gravely compromise our free Republic’s national security.”\textsuperscript{165} Representative McCotter painted a stark picture between the “despotism” that Huawei symbolized and the democratic principles as represented by 3Com.\textsuperscript{166} He further added the deal was “unacceptable on its face to our free people’s sensibility[,]” and “it endangers our military and our security.”\textsuperscript{167} Representative McCotter also equated the deal with “pulling the plug on America’s happy days” and “threaten[ing] our liberty, our security, and the bounds of sanity itself.”\textsuperscript{168} Similarly, Representative Frank Wolf (R-Virginia) argued that even if Huawei was only attempting to increase its market share in the United States, it was still controlled “by the same government that jails Catholic bishops and Protestant pastors, oppresses the Uyghur Muslims, has plundered Tibet, and that is providing the very rockets that Sudanese President Bashir is using to kill his own people.”\textsuperscript{169} In the end, CFIUS blocked the deal,\textsuperscript{170} which was later withdrawn.\textsuperscript{171}

\textsuperscript{161} Id.
\textsuperscript{162} Bruce Einhorn, Huawei's 3Com deal Flops, BUS. WEEK EYE ON ASIA, (Feb. 21, 2008), http://www.businessweek.com/globalbiz/blog/eyeonasia/archives/2008/02/huaweis_3com_deal_flops.html.
\textsuperscript{164} Gotanda, Citizen Nullification, supra note 18, at 79, 93.
\textsuperscript{166} See id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
The antagonism toward Huawei resumed in May 2011, when Huawei purchased assets worth $2 million from 3Leaf, a U.S. server technology company. Huawei did not file with CFIUS until November 2011, and, according to Huawei, CFIUS suggested Huawei voluntarily divest the assets it purchased. Congress responded as it did with the Huawei-3Com deal with several congressmen arguing that the “3Leaf acquisition appears certain to generate transfer to China by Huawei of advanced U.S. computing technology” and that “[a]llowing Huawei and, by extension, communist China to have access to this core technology could pose a serious risk as U.S. computer networks come to further rely on and integrate this technology.” Furthermore, accusations were made that “Huawei has well-established ties with the People’s Liberation Army” and has “[l]ikewise, supplied equipment to Saddam Hussein and the Taliban.”

Huawei’s vice president of government affairs, William Plummer, vociferously denied these accusations, maintaining that Huawei is “100% employee-owned and has no ties with any government, nor with the [People’s Liberation Army].” Despite the denial, Huawei dropped its bid in February 2011, and a Chinese Ministry of Commerce official asserted the United States “used all kinds of excuses, including national security, to engage in the obstruction and interference in the trade and investment activities of Chinese businesses in the United States.” As in the Huawei-3Com deal, we see continued attribution of political foreignness to Huawei. More recently, President Obama blocked Ralls Corp., a Chinese company, from constructing wind turbines near a U.S. naval site in Oregon following the CFIUS review process; Ralls Corp. has since filed a lawsuit against CFIUS, and as of October 2012, the case is still proceeding.

It can be argued that the racialization or attribution of foreignness to Chinese companies such as Huawei and CNOOC are valid and legitimate because China, after all, is neither an ally nor entirely a political or military friend of the United States. This argument, however, does not negate a central argument of this article: namely, that racialization and attribution of foreignness are present and play a role in CFIUS review of Chinese


171 See Huawei Backs Away from 3Leaf Acquisition, supra note 160.

172 Id.

173 Id.


175 Id.


corporations. Indeed, considering the example of 1980’s, Japan was a clear military and political ally to the United States, but Japanese companies were nevertheless affected by racialization, politicization, and attribution of foreignness when compared to European bidders such as Goldsmith.

IV. CONCLUSION

Chinese and Japanese corporations and the outcome of their CFIUS-involved transactions were influenced to some extent by racialization, the attribution of foreignness, and politicization, all of which are central themes and theories in Asian-American jurisprudence scholarship. Moreover, when certain Chinese and Japanese corporations were subjected to CFIUS review, national security concerns became enmeshed with those themes. Racialization and the attribution of foreignness often doomed deals initiated by Chinese and Japanese companies, even when those deals brought about mutual economic benefit for the parties involved, such as the Fujitsu-Fairchild and Northwest-Firstgold deals. The failed deals were often of a small scale, economically speaking, such as the CNOOC-Unocal and Northwest-Firstgold deals; this raises questions as to whether national security concerns were the true driving factor in CFIUS’s recommendations to prohibit such transactions. Indeed, one scholar examined and selected twenty major foreign, direct-investment deals initiated by Chinese-multinational corporations to various destination countries from 2002 to 2009. Out of the twenty deals, he found only four failures, of which three occurred in the United States, including the Huaiwei-3Com and CNOOC deal.\textsuperscript{179} Such data suggests that the CFIUS review process is neither as simple nor as insulated from outside factors as some may think.

On a broader scale, this article argues for the efficacy of utilizing themes and methods of Asian-American jurisprudence to analyze components of corporate law, a substantive area of law which has received little attention from a CRT perspective. The importance of applying Asian-American jurisprudence methodologies to this area of corporate law is neither a purely intellectual, nor academic exercise and has the ability to have significant implications on the practice of law. For example, Asian-American jurisprudence can reveal that the CFIUS review process may be more burdensome on Chinese (and was more burdensome on Japanese) companies due to the influx of racialization and attribution of foreignness factors. This observation may allow corporate law practitioners representing, for example, Chinese clients to better deal with this problem and to help present a more assimilated image of Chinese companies before CFIUS and before Congress. If the problem of racialization and foreignness in the CFIUS process had not been uncovered, however, such practitioners may never have had the opportunity to overcome such issues.

\textsuperscript{179} Syed Tariq Anwar, \textit{CFIS, Chinese MNCs’ Outward FDI, and Globalization of Business}, 2 J. WORLD TRADE 419, 439 tbl.3 (2010).
MODERN FAMILY: AN IN-DEPTH LOOK AT INTERNATIONAL ADOPTION

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ABSTRACT

International adoption has been popular in the United States since the early 1950s. Americans have opened their homes to children from around the world for a variety of reasons. As time progressed, Americans have developed preferences for children of specific races and for countries with lenient adoption policies. The black market sale of children is a major issue surrounding international adoption. In response to the popularity of black market adoptions, the international community has attempted to develop uniform laws aimed at protecting birth parents, adopting parents, and the children involved. The Hague Convention of 1993 has been the most successful attempt to provide such protection; there still, however, remains much room for improvement in the realm of international adoption. This Note is aimed at identifying new ways to make the international adoption process more uniform, reduce the demand for black market adoptions, and to promote cooperation between state actors.
I. Introduction

Many Americans desire to create or expand their family by adopting a child. In 1997, the population of adoptable American children living in foster care totaled over one-hundred thousand. Approximately 18% of those children were adopted within the United States, representing 16% of the total number of children adopted in the United States that year. This low rate of domestically adopted children is in stark contrast to the overwhelmingly high rate of internationally adopted children in the United States. In 1999, four out of every five international adoptions were by United States parents. International adoption, also referred to as intercountry adoption, continued to increase in the United States for fifty years, and eventually peaked in 2004 at 22,990 children adopted that year. By 2009, international adoptions by United States citizens steadily declined to 12,753 children for the year, a trend that is expected to continue.

It is truly heartwarming to know that Americans are willing to open their homes and hearts to children in need from around the world, but why do American families adopt internationally when there are many American children available for adoption? From which countries do Americans prefer to adopt? What are the reasons for these preferences? Are these preferences good or bad for international adoption as an institution?

In Part I of this Note, the reasons why many Americans prefer international adoption over domestic adoption will be explored. The arguments for and against international adoption will also be discussed. In Part II, case studies of popular sending countries since World War II will be examined. Part III will compare the international adoption procedures of the United States as a

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3 Palermo, supra note 1, at 719 (approximately 20,000 American children are adopted under the public agency system yearly).


5 Palermo, supra note 1, at 719.

6 Palermo, supra note 1, at 442.


8 Id. at 442.
receiving country to international laws, and to the laws of sending countries. In Part IV, attempts to standardize international adoptions will be discussed. Finally, the shortcomings of the most recent international standardization efforts and the Hague Convention of 1993 will be explored. This Note will conclude with suggestions for improving the international adoption process as a whole.

II. WHY AMERICANS ADOPT INTERNATIONALY

International adoption began as a humanitarian effort. Children living in third-world countries were portrayed as being in need of rescue from the devastating effects of war and famine. American families adopted thousands of Asian children at the end of World War II and after the Korean War as well. American men who were drafted for military service in Asia fathered many children during their time of service. The media portrayed these children as “Amerasians,” left behind after the wars had concluded. In 1975, the United States withdrew the last of its troops from Vietnam. Operation “Babylift” was portrayed by the United States government as a wonderful “last” heroic effort to rescue Vietnamese orphans who were in harm’s way due to the advancing North Vietnamese forces.

The Korean War exposed Americans to the plight of the homeless children. Neither the Korean people nor their government could afford to care for their country’s homeless children. Americans adopting Korean children were seen as benevolent saviors, especially considering the major ethnic and cultural differences. Many prospective American parents believed that they had a moral or ethical duty to better the lives of these Asian children.

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11 Id. at 343-44.
13 Bonnie Grover, Aren’t These Our Children? Vietnamese Amerasian Resettlement and Restitution, 2 VA. J. SOC. POL’Y & L. 247, 253 (1994-95) (it is estimated that tens of thousands “Amerasian” children were born to Vietnamese mothers during and immediately after the Vietnam War).
14 Id. at 259.
15 Id. at 258.
16 Id. at 259.
17 Bergquist, supra note 10, at 344.
18 Id. (South Korea was economically devastated from war. Families and extended families had been torn apart. The South Korean government recognized the needs of the children, its inability to provide for them and looked positively upon international adoptions); see also Robert Gordon, The New Chinese Export: Orphaned Children-An Overview of Adopting Children From China, 10 TRANSNAT’L LAW. 121, 124 (1997) (by 1980, South Korea was the world’s largest sending country for internationally adopted children).
19 Bergquist, supra note 10, at 344.
20 Id.
While international adoption was on the rise, domestic adoption in the United States steadily declined. In 1989, two million American couples and one million American singles were interested in adoption, but the domestic adoption process was viewed as “lengthy, troublesome[,] and unpredictable.” In the United States, it can take many years for a couple to adopt domestically. Many prospective parents are troubled by the lengthy duration of time that United States courts have given biological parents to revoke the adoption. Moreover, prospective parents who may be considered ineligible to adopt domestically under state law, due to their age, marital status, or sexual preference, often find opportunities to adopt internationally. As a result, prospective American parents are wary of the difficult undertaking that is the domestic adoption process.

Society’s evolution through the years has also added to the decline of domestic adoptions. Citizens of the United States have become more accepting of birth control, abortions, single parents, young mothers, and career-oriented individuals delaying pregnancy until later in life. These modern ideas, combined with growing infertility in the United States, have increased the demand for international adoption. Today, there is a great demand in the United States for “healthy, white babies.” The focus of international adoption has shifted from a humanitarian effort to a mechanical “supply and demand” of children.

Race is a major consideration of parents seeking to adopt. Most international adoptions involve transracial parents and children. Many racial minority groups are opposed to trans-racial adoptions because they feel that the child will lose his or her cultural and national identity if they are raised outside of their birth country and/or by families who do not share the child’s ethnicity and heritage. The National Association of Black Social Workers (“NABSW”) has adamantly condemned trans-racial adoptions, likening it to genocide. The NABSW fears that African-American children growing up in non-African-American homes will lack awareness of and pride in their heritage. NABSW therefore contends that African-American children should never be placed

21 Intercountry Adoption: A Multinational Perspective, 8 (Howard Altstein & Rita Simon eds., 1991).
22 Gordon, supra note 18, at 128-29.
23 Id. at 129, n. 65.
24 Id. at 122. In the famous cases of Baby Richard and Baby Jessica, parenting rights were restored to the biological parents years after the children were placed for adoption. Similar situations have caused Americans to be fearful of the United States court system and its favoritism towards the rights of biological parents. See Darrow v. Deboer, 509 U.S. 938 (1993) (whereby baby Jessica was turned over to her biological father, when he married her mother, even though the biological mother fully consented to the prior adoption. The Court favored the rights of the biological parents over the “best interest of the child”); see also In re Kirchner, 649 N.E.2d 327 (Ill. 1995), cert. denied, 513 U.S. 994 (1995) (whereby baby Richard was returned to his biological parents after spending most of his childhood with his adoptive parents).
26 Id. at 724-25
27 Id.; see also Multinational Perspective, supra note 21, at 9 (it is estimated that one in six American women between the ages of 15 and 44 have some type of infertility problem).
29 Eade, supra note 12, at 385.
30 Id.
31 Id.; see also Bergquist, supra note 10, at 345.
32 Eade, supra note 12, at 385.
in Caucasian homes. Critics of this viewpoint respond by asserting that although an intraracial adoption may be preferred to a transracial adoption, a transracial adoption by loving parents is preferred to a lifetime of institutional care in foster placement.

In the United States, most adopting parents are Caucasian, and the majority of children domestically available for adoption are African-American. A commonly held viewpoint suggests it is in “the child’s best interest” to be adopted by someone of the same race. The Multiethnic Placement Act (“MEPA”), however, states that race shall not be the sole determinative factor in denying an adoption. Ultimately, an adopted child will likely be curious about his “birthplace, genealogical ancestors[,] and the identity of his biological parents.” Therefore, regardless of whether a child is adopted domestically or internationally, it is important for adopting parents to accept and promote the child’s cultural background.

People have mixed viewpoints on international adoption. To some, international adoption is one of the best and most logical solutions to the growing problem of orphaned children in need of loving parents, and prospective parents who are in need of a child to love. International adoptions are largely successful and enable a child to grow up in a secure, stable, and loving environment. As of 1995, approximately one-hundred million children were homeless worldwide. International adoption saves lives by providing food, shelter, and health care to children who would not otherwise receive such amenities. It has been defined as “the most satisfactory form of permanent care devised by Western society for children whose own parents cannot undertake it.”

Others view international adoption as “a shameful admission to the world of a government’s inability to care for its own, the loss of a vital national asset[,] and perhaps the ultimate example of exploitation by the rich nations of the poor nations of the world.”

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33 Id.
34 Id. at 386.
36 Id. at 196-97. On average, a healthy African-American infant will wait five times as long as a healthy white infant to be adopted. Racial stigmas aside, there is a shortage of African American parents looking to adopt.
37 Id. at 197. In spite of the federal court’s ruling, we live in a race-conscious society. Unfortunately, the result is that many couples are not willing to adopt across racial lines, or will selectively adopt only some races but not others.
38 Eade, supra note 12, at 384.
39 Id. at 384-86. Experts agree that it is important for a child to know the history of his people. Such knowledge gives children confidence, a strong sense of racial identity and pride. Where adoptions involve interracial parents and children, if the parent does not promote the child’s native culture the child is likely grow up being insecure and accepting of negative stereotypes about his race and ethnicity.
40 Liu, supra note 28, at 193.
41 Rachel Wechsler, Giving Every Child a Chance: the Need for Reform and Infrastructure in Intercountry Adoption Policy, 22 PACE INT’L L. REV. 1, 5 (2010) (as of 1995, there were 9.5 million children living in orphanages in the developing world).
43 Liu, supra note 28, at 193.
44 Id. at 202.
practice is viewed as permitting “wealthy Westerns to benefit from poverty in sending countries[, sustain[ing] social sanctions against children who are marginalized[, exploit[ing] the feminization of discrimination and oppression[, plac[ing] children at risk for trafficking and abduction[, and interfere[ing] with the child’s rights to national, cultural, ethnic, and family of origin access and knowledge.”45 The most significant drawback is that international adoption permits sending countries to abdicate their responsibility for enacting sociopolitical change; sending countries should actively promote social and economic development within their territory so that children may remain in their native homes.46

III. GEOGRAPHIC CASE STUDIES FROM WWII – 2011

A. Korea

After the Korean War, many American couples began to adopt outside of their race. Between 1953 and 1976, Americans adopted about forty-seven thousand foreign-born children; sixty-five percent (65%) of those children were Korean.47 Korean President Rhee initiated the international adoption process to deal with the thousands of illegitimate, biracial children; social upheaval; and poverty that resulted from the Korean War.48 Many Korean mothers put their children up for adoption because Korean culture did not accept the unwed mothers and “Ameriasian” children.49 Because Korean families were not interested in adopting the ‘Ameriasians’,50 Korea became the number one provider of healthy infants to families in the United States.51 Korea’s popularity as a sending country was attributed to its willingness to participate in international adoption and its relaxed adoption process.52

In 1990, the Korean government officially stated that “foreign adoptions in the not-too-distant future will decrease to negligible numbers[,]” and that “it would be instituting a phasing out program of sending babies from its orphanages overseas for adoptions.”53 Koreans felt that international adoption was embarrassing and shameful; it was a global admission that the country could not afford to take care of its own children.54 The change in Korea’s attitude towards international adoption is evidenced by the decline of its popularity as a sending country. Between 1993 and 2004, Korea only sent between 1,500 and two thousand children, annually, to be adopted

45 Bergquist, supra note 10, at 349.
46 Id. at 350.
47 Multinational Perspective, supra note 21, at 3.
48 Bergquist, supra note 10, at 343-44.
49 Smolin, supra note 7, at 481.
50 Id.
51 Id.
52 Multinational Perspective, supra note 21, at 4 (the international adoption process in Korea was practically unrestricted).
53 Id. at 5.
54 Id.
By 1994, Korea’s adoption laws required adoption agencies to determine that prospective parents were “married, economically stable, in good health, of good moral character, and able to provide the child with education and freedom of religion.” Moreover, a foreign family could only adopt a child if there was no Korean family wishing to do so.

B. Vietnam

After the Vietnam War, it was estimated that tens of thousands of children were born to Vietnamese mothers and American soldiers. In 1975, when the last of the American troops were evacuated from Vietnam, President Gerald Ford approved Operation “Babylift” to save some of the Vietnamese children from the advancing North Vietnamese. Some of the 2,700 children evacuated, however, were not “orphans.” Children were mistakenly evacuated for four reasons: 1) parents feared the North Vietnamese, 2) children were taken from orphanages where they had been left for safekeeping or childcare purposes, 3) parents mistakenly believed that the airlift was the safest means of getting their children out of the country, and 4) parents believed that they were releasing their children with the understanding that they would be reunited in the United States. When Vietnamese parents or relatives finally entered the United States and located the children, they were surprised to find that adoption proceedings were already in place.

After the negative publicity resulting from Operation “Babylift,” Vietnam enacted policies which greatly reduced the number of Vietnamese children available for adoption. Authorities struggled with halting international adoptions and deciding how to handle unwanted children born to Vietnamese mothers and American fathers. Essentially, those children were left with no options. They did not acquire United States citizenship by birth because they were born in Vietnam, and the United States did not confer citizenship onto children born abroad to American

55 Smolin, supra note 7, at 464, 481 (South Korean adoptions remained steady from 1993 to 2004. The once dominant sending country, however, played no part in the dramatic increase of international adoptions in the United States between 1993 and 2004. The decrease in position as a top sending country is no surprise as South Korea has improved economically and promoted domestic adoptions).

56 Liu, supra note 28, at 203.

57 Id.

58 Grover, supra note 13, at 253.


60 Id.

61 Id. (citing Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1197 (9th Cir. 1975)).

62 Id. (courts responded differently to the plight of the Vietnamese parents); see also Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) (noting that the child’s natural parents suffered from the War, permitted their children to be taken across the sea, risked their lives to be reunited with them, and that the adoptive parents had graciously provided a good home for children in need which they came to love and accept as their own).

63 See Multinational Perspective, supra note 21 at 5.

64 Id.

65 Id. at 6 (by 1989, authorities had begun to reduce the number of children allowed to leave the country for adoption purposes).
men. In Vietnam, the children were discriminated against due to their “American” appearance. Consequently, the children were typically abandoned, placed in orphanages, or given to relatives.

In 1982, the United States passed the Amerasian Immigration Act of 1982. The Act provided citizenship to “Amerasian” children if their biological Vietnamese mothers rescinded all of their future legal rights to the children. The Vietnamese government was so offended by this Act that it refused to cooperate with the program. So few Vietnamese children were able to benefit from the Act. In 2008, Vietnam sent a mere 748 children to be internationally adopted.

C. Russia

After the fall of the Soviet Union in 1991, the Russian economy collapsed, and children were institutionalized at alarming rates. The country, with a history of poor child welfare policies, emphasized institutional care rather than foster care for abandoned or relinquished children. The Russian government failed to offer assistance to families in need; encourage parents to keep their children; and failed to encourage families to adopt domestically or develop quality foster care institutions. Intercountry adoption was initially a way to get Russian children out of the horrific conditions of institutional care. The Caucasian infants, typically from Russia and Eastern Europe, were highly desirable in the United States, so it was not uncommon for adoption fees to reach a cost of $26,000. Such adoption fees also included “gifts,” which were presumed to be bribe money for government officials, orphanage employees, and others involved in the process. With so much money at stake, the adoption system was ripe for corruption.

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66 Grover, supra note 13, at 253-54.
67 Id. at 254 (children were subject to scorn and derision due to their Western appearance).
68 Id. (“Amerasian” children were discriminated against because they were the product of a relationship between Vietnamese women and the American “enemy”).
69 Id. at 264.
70 Id.
71 Id.
72 Id.
73 Smolin, supra note 7, at 483.
74 Id. at 467.
75 Id.
76 Id.
77 Id.
78 Palermo, supra note 1, at 737.
79 Id. at 729, 734. Notably, adoption facilitators are paid for each completed adoption. They have no interest or incentive in successful adoptions or with being forthcoming about the condition of the Russian children. There are few statistics on failed adoptions or relinquished rights to internationally adopted children.
80 Id. at 729 (noting that due to the high revenue potential, criminals become enticed, which ultimately leads to corruption).
Russia’s institutional care and adoption process was marked by abusive practices and poor standards.\(^{81}\) The Russian children were housed in “warehouses-like” orphanages where they were seldom held or touched as infants.\(^ {82}\) These children suffered from attachment disorder—the inability to bond or adapt socially.\(^ {83}\) Many also suffered from fetal alcohol syndrome, which causes both learning disabilities and emotional problems.\(^ {84}\) The troubling abundance of “special needs” children appeared to be unique to Russia and Eastern Europe.\(^ {85}\) Russia’s lax adoption process was widely publicized in two unfortunate United States adoption cases. The first involved the death of fourteen Russian adoptees at the hands of their United States parents; the second involved the adoption of five-year-old Masha as a sex slave to a United States “father.”\(^ {86}\) In spite of the lax standards, scandals, and unhealthy children, Russian adoptions remained popular in the United States because the children were Caucasian.\(^ {87}\)

From 1993 to 2004, Russia was one of the leading countries sending adoptable children to the United States.\(^ {88}\) The major increase in intercountry adoption in the United States was the product of only three sending nations: Russia, China, and Guatemala.\(^ {89}\) Russia sent 746 children to the United States in 1993, and 5,862 in 2004.\(^ {90}\) In response to negative publicity, Russia required adoption agencies to undergo relicensing and accreditation.\(^ {91}\) The country also began to promote domestic adoptions. In 2006, Russia placed a ban on intercountry adoptions.\(^ {92}\) Recently, Russia and the United States have been working on a bilateral adoption agreement to revive the adoption

\(^{81}\) Smolin, supra note 7, at 463-64 (poor Russian standards were combated by a lack of professionalism among agencies in the United States and corruption in Russia); Palermo, supra note 1, at 735 (in 1990, a broadcast of 20/20 described the institutional conditions as follows: “Children here are filthy and unattended. They lie in their own waste, covered with flies. Young girls, their heads shaved, were kept in a giant cage like animals: wild-eyed, screaming, half-naked”).

\(^{82}\) Palermo, supra note 1, at 731.

\(^{83}\) Id.

\(^{84}\) Id. at 731-33.

\(^{85}\) Id. at 731.

\(^{86}\) Smolin, supra note 7, at 474-75.

\(^{87}\) Palermo, supra note 1, at 723 (American parents most commonly desire children from the same race. Most domestically adoptable children are minorities; only a quarter of the children are Caucasian. Similarly, there are more Caucasian parents wanting to adopt than there are minorities interested in the same).

\(^{88}\) Id.


\(^{90}\) Id.

\(^{91}\) Smolin, supra note 7, at 475.

\(^{92}\) Jena Martin, The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate, 13 U. C. DAVIS J. INT’L L. & POL’Y 173, 186 (2006-07) (the Russian people were embarrassed by the international view that they could not care for their own children. Some viewed international adoption a cultural genocide).
relationship between the two countries. In 2008, only 1,857 children were adopted internationally from Russia.

D. China

In the 1990s, China and Russia became the top sending countries of adopted children to the United States. In 1991, China contributed 25% and Russia contributed 22% of all children adopted internationally into the United States. In 1995, China became the most popular sending country. Moreover, in 2005, China sent 7,903 Chinese children to be adopted in the United States.

China has become popular for international adoptions as a result of its quick, efficient, and relatively easy administrative process. Specifically, an adoption from China can be effectuated within a year’s time. In 1992, China enacted the Adoption Law of China, which centralized foreign adoptions, simplified the adoption process, and eliminated corruption within the system. Americans are also drawn to China for adoptions, as the Chinese are known for having healthy infants. Chinese newborns are generally well cared for during their mother’s pregnancy because, unlike Russian women, for example, few Chinese women abuse alcohol or tobacco while pregnant. Furthermore, infectious diseases, which are common among internationally adopted children, are rare among Chinese infants.

Perhaps one of the major reasons why China has experienced such popularity stems from the 1979 “One-Child Policy.” China’s extended family structure made it more desirable to have a

94 Smolin, supra note 7, at 483.
95 Bergquist, supra note 10, at 344.
96 Id.
97 Gordon, supra note 18, at 130-31 (stating that in 1995, China sent more than 2,130 children to the United States for adoption).
98 Smolin, supra note 7, at 471.
99 Gordon, supra note 18, at 129-30.
100 Palermo, supra note 1, at 728 (estimating that a Chinese adoption could take a few as eight months).
101 Gordon, supra note 18, at 134-35 (asserting that the Adoption Law made the Chinese adoption process more efficient. It was unable to, however, completely eliminate black market adoptions); see also Leeuwen, supra note 35, at 200 (noting that the Adoption Law required that the adoptive parent be childless and at least 35 years old. There is no preference of marital status, as is true in the United States, where married couples are favored).
102 Gordon, supra note 18, at 130.
103 Id.; see also Palermo, supra note 1, at 737.
104 Gordon, supra note 18, at 130.
105 Id. at 131 (noting that a Chinese woman who decides to keep her second child may be fined the equivalent of seventeen years of her salary).
son because males carry on the family name and care for their elders. Therefore, many female infants were aborted or abandoned.\footnote{106} It is estimated that one-hundred and fifty thousand female infants were abandoned each year because most Chinese women were financially unable to care for female infants or pay for an abortion\footnote{107} Notably, the average cost of adopting a child from China is between $10,000 and $20,000.\footnote{108}

The factors that once increased China’s appeal for international adoption have ultimately led to its demise as a leading country for international adoption. In 2009, only 3,001 Chinese children were adopted internationally.\footnote{109} This low Chinese number is likely due to: 1) the relaxation of the population control policy, resulting in a shortage of unwanted or abandoned females, 2) the increase in income, and 3) an increase in domestic adoptions.\footnote{110} As a result, China’s status as a leading sending country for international adoptions has been stymied.

E. Guatemala

Between 1998 and 2002, Americans adopted more children from Guatemala than any other Central or South American country.\footnote{111} Guatemala as a country is known for poverty and political strife. Those characteristics, combined with overpopulation, create an excess of unwanted children.\footnote{112} Notably, the average Guatemalan woman has six children.\footnote{113}

United States adoptions from Guatemala continued to increase between 1998 and 2007, with adoptions peaking at 4,727 children adopted in 2007.\footnote{114} The Guatemalan adoption system, however, was largely unregulated.\footnote{115} In May of 2007, the Guatemalan Congress reaffirmed its commitment to
the adoption safeguards of the Hague Convention; however, in August of 2003, the Guatemalan Constitutional Court found that accession to the Hague Convention was unconstitutional.

Guatemala’s position as a leading country for international adoption, however, was not altered by the Guatemalan Constitutional Court decision. Indeed, in 2008, 4,122 children were adopted internationally from Guatemala. This popularity did not last long as many developed countries are now implementing more stringent international adoption policies.

In 2009, international adoptions from Guatemala sharply declined to 756 children. The decrease was not surprising, as the adoption system in Guatemala is “corrupt, money driven, and rife with child trafficking.” The average cost of an adoption in Guatemala is between $12,000 and $20,000. When the price and demand are so high, illegal profit making is appealing to impoverished natives. In 2007, the U.S. State Department’s intercountry adoption website issued warnings about the many dangers and problems of adopting from Guatemala. The warnings consisted of: 1) arrests of known adoption facilitators conducting themselves unethically, 2) the country’s poorly protected children, 3) rampant fraud, 4) forged adoption papers, 5) deceived biological parents, and 6) many uncertain propositions. The United States ultimately advised its citizens not to adopt from Guatemala.

F. Iraq & Afghanistan

In light of the prior humanitarian efforts of United States citizens, it would be logical to conclude that Americans would want to adopt children affected by the recent war in the Middle East. Adoptions from Iraq and Afghanistan, however, are extremely rare. In 2000, Americans

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116 Wechsler, supra note 41, at 25.
117 Banks, supra note 42, at 46 (arguing that countries that have ratified the Hague Convention should not participate in international adoptions with non-compliant countries).
118 Smolin, supra note 7, at 483.
119 Id. at 484.
120 Id. at 477.
121 Id. (estimating that between 2003 and 2008, around $300 to $400 hundred million dollars were received by Guatemalan attorneys for adoption fees).
122 Banks, supra note 42, at 38.
123 Smolin, supra note 7, at 486.
124 Wechsler, supra note 41, at 35.
125 Id.; see also Banks, supra note 42, at 38 (the U.S. has taken great steps to discourage illegal acts with respect to international adoptions. The result has been either temporary or permanent moratorium (cessation) with some countries. As of April 1, 2008, the U.S. State Department refused to process any new adoptions from Guatemala).
126 Wechsler, supra note 41, at 35.
127 Bergquist, supra note 10, at 343.
adopted fewer than five Iraqi children. Notably, neither Iraq nor Afghanistan is a member of the Hague Convention.

Religion, specifically the Muslim religion, plays a major role in the adoption policies of the Middle East. The Afghan judicial system is based strictly on the Islamic Shari’a Law. Islamic Shari’a Law does not permit adoptions; instead, it allows for “Ghayyems” or “guardianships.”

The United States Immigration and Naturalization Services (“INS”), however, has declared guardianships insufficient for the purpose of immigration into the United States. The United States Embassy does not know of any guardianships granted to persons who are not of the Muslim faith. The decisions of the Islamic and Afghan Family Law courts are strongly influenced by cultural ties to their countries and to their faith.

IV. INTERCOUNTRY ADOPTION PROCEDURES (AND PROBLEMS)

Parents adopting internationally find themselves on an emotional roller coaster. They are met with a lot of red tape, varying and changing laws, and corruption. Adopting parents must meet the legal requirements of: 1) the child’s native country, 2) the INS, and sometimes 3) the state of residence of the adopting parents.

In both international and domestic adoptions, first and foremost, the child must be “adoptable.” The term entails the child must be declared an orphan or legally released for adoption by his or her biological parents or proper guardians under the law of the foreign country. This

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129 Id.
130 Id.
131 Id.
132 Id.
133 Id. (the Shari’a court, or another competent authority, must provide a written release in the form of a guardianship decree); see also Embassy of the United States, Baghdad, Iraq, http://iraq.usembassy.gov/adoptions/ (noting that there are no adoption laws in Iraq, just guardianship requirements).
134 Embassy of the United States, Baghdad, Iraq, supra note 133; but see U.S. Department of State, Bureau of Consular Affairs, Afghanistan, ADOPTION.SITE.GOV (Oct. 2011) http://adoption.state.gov/country_information/country_specific_info.php?country-select=afghanistan (if an American were successful in gaining adoption through the foreign courts, the parent would still be required to show that the child was abandoned or orphaned in the United States).
135 U.S. Department of State, Bureau of Consular Affairs, Intercountry Adoption, supra note 128; see also Embassy of the United States, Baghdad, Iraq, supra note 133 (stating that guardianship is only granted to extended family or friends who can provide for the child in Iraq, and that guardianship cannot be obtained by parents of a different religion or foreigners).
136 U.S. Department of State, Bureau of Consular Affairs, Intercountry Adoption, supra note 128.
137 See generally Smolin, supra note 7.
138 Palermo, supra note 1, at 725-26.
139 Id. at 727. Parents adopting internationally look into the foreign and international adoption laws. It is not determinative, but parents do prefer some countries over others based on more favorable adoption laws. Liu,
relinquishment is accomplished through either a formal judicial or administrative process or a private transaction in the child’s native country. After the child is declared adoptable, he or she is then able to be adopted by new parents under the laws of the foreign country.

It is important to note, however, that the realm of international adoptions is full of mixed definitions. The term “orphan” varies from country to country. “Orphan may be based on the death, disappearance or loss of both parents, abandonment[,] or other permanent separation of both parents.” ‘Abandonment’ does not have a universal definition or manner of acknowledgement; it may require parents to have the intent to desert, in addition to the actual act of deserting the child. Notably, in war stricken countries, it is nearly impossible to determine if a child is abandoned, lost, or temporarily left in the care of another. The term “consent” also lacks a standard definition for purposes of international adoptions.

[Consent . . . may require the authorization of any of the following: (1) both birth parents, (2) an unmarried birth mother, (3) the father of the child born outside marriage, (4) a step-father, (5) a parent whose spouse is deceased or unavailable, (6) a guardian, (7) an agency responsible for the child, or (8) the child [if he or she is above the age of eighteen].

It is even more complex to determine if and when actual consent from the person or persons required to give consent has been given. Such wide-ranging and inconsistent definitions make it difficult to determine if a child is in fact legally “adoptable.”

How a child becomes available for adoption is often a product of fraud and unethical practices. Baby selling, child abductions, and bribery within international adoptions are commonplace. As aforementioned, most sending countries are poor, developing countries, and parents from developed countries are willing to pay high prices to adopt a child. Since so much money can be made through adoptions and those benefiting are often in an impoverished position, independent adoption facilitators may induce impoverished parents into giving their child up for adoption for “large” sums of money, only to make an even larger profit themselves. Many


140 Liu, supra note 28, at 201.
141 Id. at 201.
142 Id. at 206.
143 Eade, supra note 12, at 387.
144 Id. at 390.
145 Id.
146 Id. at 390.
147 Id.
148 Id.
149 See Smolin, supra note 7, at 453-55.
150 See Liu, supra note 28, at 192-93.
151 Eade, supra note 12, at 388. Twenty dollars ($20) can be large for an impoverished family. Adoption facilitators, on the other hand, receive hundreds or thousands of dollars for producing a child for adoptions purposes. Id.
independent adoptions involve forged or fake paperwork and utilize actors who work around formal requirements. Other times, children are abducted right off the streets. As the price of international adoptions rise so, too, does the incentive for corruption in countries that send children.

INS governs the second stage of international adoption in the United States. Specifically, INS is charged with enforcing the United States Immigration and Nationality Act. The Act’s major provisions are: §101(b)(1)(E) which states that “providing immigration classification for ‘a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years,’” and also §101(b)(1)(F), which states that “granting immigrant classification to orphans adopted, or waiting to be adopted, by United States citizens.”

There is a three-step process for adopting internationally: (1) the child must be declared an orphan by the INS or live with the parent abroad for two years, (2) approval is issued by INS, and (3) the child is issued a U.S. visa. Federal law requires that the parent(s) also be eligible to adopt: (1)(a) if married, at least one parent must be a United States citizen, and the parents must jointly adopt the child, (1)(b) if single, the parent must be at least twenty-five years of age and a United States citizen. Federal and state laws also require that a home study be conducted to ensure that the parents are able to care for the child properly and that the adoption is in the “best interest of the child.” Approval of an adoption application is determined by the home study, which is conducted by state licensed social workers.

To comply with United States law, American parents use either a United States-based international adoption agency or an independent adoption facilitator. Adoption agencies are

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152 Id.
153 Liu, supra note 28, at 211. In 2005, a Chinese child trafficking ring was discovered and it was estimated that one thousand children had been abducted or purchased from the ring. A year later, in China, nine people were convicted for child trafficking and twenty three government officials lost their jobs because of their involvement. Wechsler, supra note 41, at 32.


155 Palmero, supra note 1, at 726.

156 Id. §101(b)(1)(F) is easily complied with as most parents adopting internationally are required to reside in the child’s native country for at least two years.

157 Id. at 727.

158 Liu, supra note 28, at 207.

159 Id. Home studies are conducted to ensure that the parent has the financial, mental and moral ability to care for the adopted child. Federal Law in the United States strives to ensure that adoptions are only approved of if they are in the “best interest of the child.”

160 Multinational Perspective, supra note 21, at 27. Social workers question the reasons the individual(s) want to adopt, personal values, childrearing preferences and the individual(s) readiness for the child and the responsibilities of being a parent. See Liu, supra note 28, at 207.

161 Liu, supra note 28, at 198-99. Independent facilitators are often lawyers, doctors or social workers. Asian countries prefer adoptions to be handled through a U.S. based agency, while Latin American countries prefer independent adoptions. See also Kales, supra note 4, at 481.
beneficial because they offer professional staff members, a range of adoptive homes, certified consultants, uniform records of the agency’s transactions, and alternative resources for adopting such as foster homes.\textsuperscript{162} Agencies, with a high standard of accountability, screen adopting parents to ensure that the placement will be in the “best interest of the child.”\textsuperscript{163} Alternatively, independent or private adoptions involve facilitators who are fluent in foreign languages and work closely with birth parents. They often occur, however, without the exchange of information including the child’s health history and information of the adoptive parents. Independent or private adoptions are also more susceptible to becoming black market adoptions.\textsuperscript{164} Nevertheless, no matter which method is chosen, the adoptive parents must comply with the domestic laws of their home state.\textsuperscript{165}

During the third stage of completing an international adoption, prospective parents must comply with the state law of the state in which they live. State law varies throughout the country, but most states will recognize the foreign adoption as legal.\textsuperscript{166} In some states, all that is required for a legal adoption are the foreign adoption records;\textsuperscript{167} alternatively, there may be more formal paperwork required by other states.\textsuperscript{168} Whichever the case, the United States adoption process must be complete in order for an international child to receive a U.S. birth certificate.\textsuperscript{169} The average wait time for the finalization of an international adoption by the United States is one to two years.\textsuperscript{170}

V. DECLARATIONS, CONVENTIONS, AND “THE BEST INTEREST OF THE CHILD”

In December of 1986, the first significant attempt to unite the legal community’s policies on international adoption came with the United Nations Declaration of Social and Legal Principles

\begin{itemize}
\item [\textsuperscript{162}] Id., at 200.
\item [\textsuperscript{163}] Id.
\item [\textsuperscript{164}] Kales, supra note 4, at 481-82. Often times, independent adoptions are tainted with illegal actions. The unethical practice of adoptions for profit has lead to black market adoptions, fraud and kidnapping.
\item [\textsuperscript{165}] Liu, supra note 28, at 198.
\item [\textsuperscript{166}] Id. at 208-10. Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, India, Iowa, Maine, Massachusetts, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania and Vermont all have statutory provisions for the recognition of foreign adoptions under the doctrine of comity. The laws of Arizona, Nebraska, New York, Utah, and Wisconsin mandate documentation of consent to the adoption, the adoption petition and sometimes bond posting.
\item [\textsuperscript{167}] Id.
\item [\textsuperscript{168}] Multinational Perspective, supra note 21, at 27-28. Some state applications include: 1) a formal application, 2) criminal background check, 3) family photographs, 4) marriage certificate, 5) birth certificate, 6) medical forms for parents and children, 7) letter of employment, 8) most recent IRS form 1040, 9) financial statement, 10) proof that health care services are ready for the adopted child, 11) letters of reference, 12) state clearance that neither parent has ever been involved in child abuse or neglect and 13) a mental health certificate. Wechsler, supra note 41, at 31 (international adoption decrees are not always given full faith and credit in the United States).
\item [\textsuperscript{169}] Id. at 28.
\item [\textsuperscript{170}] Id. at 25.
\end{itemize}
Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally. Article 5 reads “in all matters relating to the placement of a child outside the care of the child’s own parents[,] the ‘best interest of the child,’ particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.” The Declaration also reaffirmed the international community’s interest in protecting children and prohibiting child trafficking. While the 1986 Declaration outlines general goals and concerns for international adoptions, its provisions were too broad.

To begin, the terms of the 1986 Declaration were poorly defined and too flexible. For example, “the best interest of the child” was not defined at all. The undefined concept and varying cultural criteria complicated international adoptions. Participants relying upon the Declaration tended to define the “best interest of the child” with nationalistic ideas about proper child welfare and upbringing, which furthered cultural biases and ethnocentric idealism. In addition, the text of the 1986 Declaration asserted that states should, as opposed to shall, act in the specified manner. Furthermore, no specific guidelines for international adoptions or their enforcement were provided.

The next attempt at international adoption policy uniformity was in 1989, at the United Nation’s Convention on the Rights of the Child. This Convention was the first to regulate international adoptions. It also differed from the 1986 Declaration, as the Convention was comparable to a treaty; the Convention was legally binding, once ratified by a signing country. The Convention on the Rights of the Child recognized international adoption as a legitimate way to care for children, but it cautioned that international adoption should be a last resort, utilized only when the child’s native country can no longer care for the child. Article 21 requires the adoption system “ensure that the ‘best interest of the child’. . .be the paramount consideration[.]” and Article 3(1) states, “all actions concerning children should have ‘the best interest of the child’ as a primary

171 26 I.L.M. 1096 (1987) (the 1986 Declaration was adopted on December 3, 1986 without a vote.)
172 Id., at 1099 (Article 3 stresses that “the first priority is for the child to be cared for by his or her own parents.” The Declaration viewed international adoption as the last resort).
173 Liu, supra note 28, at 195.; 26 I.L.M. 1096, 1101 (1987) (Articles 18-20 stress that laws should be enacted to prevent child abduction and improper financial gain from international adoptions. However, the countries themselves are left to enforce these key principles).
174 Wechsler, supra note 41, at 21.
175 Eade supra note 12, at 383.
176 Id.
177 Eade, supra note 12, at 394.
178 Liu, supra note 28, at 198.
179 Leeuwen, supra note 35, at 204.
181 Wechsler, supra note 41, at 21-22 (a United Nations Convention is legally binding on a country if that country signs and ratifies the Convention in its legal system).
182 Id., at 22 (Article 20 and 21 stressed the preference for raising a child in his or her native ethnic, religious, cultural and linguistic background. Unfortunately, this may result in children being placed in institutions and foster care for long periods of time).
consideration.” Remarkably, the United States and Somalia are the only two countries that have not ratified the United Nation’s Convention on the Rights of the Child. Although the Convention on the Rights of the Child improved the 1986 Declaration, it still had many of the Declaration’s shortcomings. For example, the terms “best interest of the child” and “improper financial gains” were still left undefined. Thus, the international adoption field still lacked uniformity.

Significantly, the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption was adopted in May of 1993. It was designed to provide the international community with a means of global cooperation, regulation, and a uniform set of minimum standards to improve the process of international adoptions. The Hague Convention had three main goals:

1. The establishment of safeguards to ensure that intercountry adoptions would take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law,
2. The establishment of a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or the trafficking in children, and
3. To secure the recognition in Contracting States of adoptions made in accordance with the Convention.

The Hague Convention required each state to create a Central Authority (“CA”) in an effort to give each country a means of enforcement and accountability. Each CA was charged with overseeing the process, communicating with CAs of other countries, and implementing the directives. The Convention also emphasized safeguards, which were designed to protect children involved in international adoptions. Unlike its predecessors, the 1993 Hague Convention was much more detailed. It specified the procedural steps required by the CA along with the reports necessary for both sending and receiving countries. The term “improper financial gain” was finally clarified. An additional

\[\text{id. at 22-23.}\]
\[\text{id. at 24 (noting that the Convention was widely adopted and favored by the international community).}\]
\[\text{id. at 23.; Leeuwen, supra note 35, at 207 (Article 21(d) addresses these concerns).}\]
\[\text{Wechsler, supra note 41, at 25.}\]
\[\text{id. at 26.}\]
\[\text{Leeuwen, supra note 35, at 204; see also Martin, supra note 92, at 192 (stating that a fourth objective was to ensure that adoptions between countries were given “full faith and credit”).}\]
\[\text{32 I.L.M. 1139, 1140 (1993).}\]
\[\text{id. (Articles 6-13, discuss the role of the Central Authorities). The CA is charged with providing information on the laws of the country and the progress of the adoption to other CA’s. It should also take all appropriate measures to prevent improper financial gain and to deter all practices contrary to the objectives of the Convention. Article 16 requires that the CA, upon determining that the child is adoptable, make a determination of whether the placement is in “the best interest of the child” upon consideration of the child’s ethnic, religious and cultural background.}\]
\[\text{32 I.L.M. 1139 (1992).}\]
\[\text{id. .}\]
improvement was that the Hague Convention focused on the need for a child to have a “family environment,” as it also favored international adoption over foster care. The 1993 Hague Convention was an enormous improvement when compared to its predecessors.

The Hague Convention was not without flaws. Many critics argued that the requirements were too costly for poor, developing countries because those countries lacked the financial means and functional government to comply with the Convention’s requirements. Consequently, poor, developing countries could not comply, and thus, international adoptions continued to be unregulated, corrupt, and fraudulent. Another concern stemmed from Convention provisions, which permitted each country to police its own international adoption system. Under the Convention, each country had the responsibility of accrediting its own CA, and each CA possessed broad discretion. A further issue with the 1993 Convention was that it was not created to address the criminal law responses to illegal child trafficking and other abuses; at most, it facilitated the reporting of such offenses. Even with the above flaws, however, the Convention has been marked by success.

Between 2004 and 2005, 22,739 children were adopted into the United States. Fifty-two percent (52%) of those children came from countries that participated in the 1993 Convention. Significantly, the Hague Convention governs international adoptions, both public and private.

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193 Id.; see also 32 I.L.M. 1139, 1143 (1993) (Article 32 specifically prohibits improper financial gain resulting from adoption related activity and holds that only reasonable professional fees and remunerations to directors, administrators and employees of bodies involved in an adoption will be paid only if the fees are reasonable in relation to the services rendered). By forbidding unreasonable fees, the Convention is able to make strides to end the black market for children. The term “best interest of the child” is still yet to be given a global definition.

194 Martin, supra note 92, at 199.

195 Leeuwen, supra note 35, at 205; Martin, supra note 92, at 199 & 214. A child’s fundamental right and need of a loving family is placed above the notions of cultural identity. However, “family” is not defined by the Convention. The United States has a nuclear view of family, while Europe and Asia have a more expansive definition. Most view the lack of clearly defined terms as a negative. Martin, on the other hand, believes that such flexibility is essential to ensuring that the Convention is applicable to as many countries as possible, by meeting more than one cultural definition.

196 Wechsler, supra note 41, at 27 (specifically of concern are the creation of the Central Authority and its administrative tasks); Carlberg, Lindsay, 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? 17 INT’L & COMP. L. REV. 119, 147-48 (2007) (estimating that it would cost the United States four million dollars a year to create and support its Central Authority).

197 Wechsler, supra note 41, at 27.

198 Id., at 29; Martin, supra note 92, at 215-16. The deferral to the individual countries is one of the Convention’s successes. It allows the countries to develop their own laws that accurately reflect their specific, individualized circumstances; such flexibility ensures that the Convention is applicable to many countries.

199 Smolin, supra note 7, at 451. The 1993 Hague Convention only indirectly prevents child trafficking, and other illegal acts. Implementation of the rules and regulations of the Convention is supposed to reduce and eliminate the criminal offenses.

200 Carlberg, supra note 196, at 126.

201 Id.
between 76 nations.\textsuperscript{202} The United States signed the 1993 Hague Convention on March 31, 1994, but did not ratify the Convention until December 12, 2007. Moreover, the Convention did not go into effect in the United States until April 1, 2008.\textsuperscript{203} Similarly, the Convention was not in effect in China until 2006, and has yet to be ratified in Russia.\textsuperscript{204} The Guatemalan Constitutional Court ruled Guatemala’s ratification unconstitutional in 2003, “eliminating the possibility that Guatemala might become a party to the Hague Convention.”\textsuperscript{205} In order for the Convention to have its desired effect, it is necessary for both sending and receiving countries to ratify and abide by the 1993 Convention.\textsuperscript{206}

In October of 2000, President Clinton signed the Intercountry Adoption Act (“IAA”) of 2000 in order to implement the 1993 Hague Convention in the United States.\textsuperscript{207} The IAA applied only to international adoptions between two countries that have both ratified the Hague Convention.\textsuperscript{208} The IAA sought to “improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries who are party to the [1993 Hague] Convention and seeking to adopt children from the United States.”\textsuperscript{209} The United States ratification of the Hague Convention was essential, as the United States is a major receiver of internationally adoptable children.

The IAA named specific processes and actors to achieve its objectives; it designated the Department of State as the Central Authority of the United States and the Secretary of State as head of the CA.\textsuperscript{210} The INS staffed the CA, established computerized, case-tracking systems, accredited adoption agencies, promulgated accreditation regulations, and created a network for information sharing.\textsuperscript{211} In order to be accredited, the agency must:

1. have ‘adequate liability insurance for professional negligence and any other insurance that the Secretary considers appropriate;’
2. be capable of maintaining such records and making such reports as may be required by the Secretary, the

\textsuperscript{202} Wechsler, \textit{supra} note 41, at 25 (as of 2010, there were seventy-six signatories to the 1993 Hague Convention).

\textsuperscript{203} Leeuwen, \textit{supra} note 35, at 211 n.122.; Smolin, \textit{supra} note 7, at 463.

\textsuperscript{204} Smolin, \textit{supra} note 7, at 464, 466.

\textsuperscript{205} Banks, \textit{supra} note 42, at 46.

\textsuperscript{206} Carlberg, \textit{supra} note 196, at 130. Ratification of the Convention legally requires the country to incorporate the regulations of the Convention into its domestic and international law.

\textsuperscript{207} Kales, \textit{supra} note 4, at 478 & 485-86. Upon signing the IAA the United States began to implement the 1993 Convention requirements. The family law of individual states will no longer dominate the international adoption process in the United States.

\textsuperscript{208} Carlberg, \textit{supra} note 196, at 137.

\textsuperscript{209} Kales, \textit{supra} note 4, at 486.

\textsuperscript{210} Id. at 486-87.

\textsuperscript{211} Id., at 486-89. With respect to accreditation, the IAA states, “no person may offer or provide adoption services in connection with a Convention adoption in the United States unless that person is accredited or approved in accordance with this title, or is providing such services through or under the supervision and responsibility of an accredited agency or approved person.”
United States [CA], and the accrediting entity that accredits the agency;’ and (3) possess other administrative capabilities.

Accreditation was subject to suspension, loss, and non-renewal if any agency or agency actor failed to meet the required standards. The IAA also had an enforcement mechanism: the first violation of the Act carried a civil penalty of up to $50,000. The IAA further elaborated on much of the Convention’s requirements and goals.

The IAA was significant, but not without drawbacks. Although accreditation of adoption agencies is needed, the process can take up to two years to complete. In addition, smaller agencies will feel the pinch of accreditation requirements and have fewer resources to meet the IAA’s standards. While the safeguards and regulations were key improvements to the process, they, too, are costly to implement. Increases in administrative processes, personnel, and other business costs of international adoptions will unfortunately lead to increased costs in the price of adoptions themselves. In order to help meet the Act’s requirements, the IAA does provide assistance to smaller adoption agencies. Adoption agencies may, for instance, register with the CA Secretary and be accredited to provide services for one or two years if the agency has provided such services for less than 100 (fifty for smaller agencies) international adoptions in the previous year. With the IAA’s assistance, compliance is possible for all.

A final and unique attempt at uniformity came in June of 2005, when 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”). The Bilateral Treaty was not a global agreement; instead, it was an agreement that specifically regulated adoptions between the two countries. Vietnam adopted the Marriage and Family Law in 2002, which stated that in order for international adoptions to take place with Vietnam, there must be a Bilateral Treaty between it and the country receiving its children. The Bilateral Treaty was a way to revive

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212 Id., at 489-90. Additional requirements include having a sufficient number of qualified staff members, financial resources, organizational structure and providing prospective parents with counseling and guidance.

213 Carlberg, supra note 196, at 139.

214 Id., at 140.

215 Kales, supra note 4, at 490.

216 Id., at 491.

217 Id.

218 Id., at 491.

219 Id. at 492

220 Id. at 492. In order to qualify for this special accreditation period, an agency must be licensed within the State it is located in, be a non for profit agency, have three years of experience, and have begun the accreditation process of the 1993 Hague Convention.


222 Id.

223 Carlberg, supra note 196, at 145-46. Between 2002 and 2005 there were few, if any, international adoptions between the United States and Vietnam.
international adoption between Vietnam and the United States. It reflected “the 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.” The Bilateral Treaty required both countries to agree to the 1993 Hague Convention before adoptions could proceed. The Bilateral Treaty is unique and takes into consideration the individualized concerns of the two countries involved.

Bilateral treaties between child sending and receiving countries are encouraged. A treaty between two countries can appropriately address specific concerns and issues. It also creates an efficient process that is not limited by vague wording. These treaties help poor sending countries implement the goals of the 1993 Hague Convention without forcing them to meet the lengthy and expensive administrative requirements. When countries work together on their own terms and in support of one another, their treaties are more likely to be followed. In turn, it is more likely that adoptions will be done in “the best interests of the child.”

VI. IMPROVEMENTS FOR THE FUTURE

The process of adopting internationally has come a long way. There is always room, though, for improvement. There are many ways to strengthen the international adoption process. These suggestions, however, will take time and money to implement.

Critics of the entire international adoption process suggest it would be best for countries to promote domestic adoptions. They suggest the United States should revamp its policies to make

\[\text{224 Id. at 146.}\]
\[\text{225 Id.}\]
\[\text{226 Id. at 146, 150. To “agree” does not mean the countries must ratify the Hague Convention before adoptions can be processed. The Bilateral Treaty’s standards are similar to the Convention. However, since the two are so similar, they also have similar downfalls.}\]
\[\text{227 Id. at 146.}\]
\[\text{228 Id. at 124.}\]
\[\text{229 Id.}\]
\[\text{230 Id.}\]
\[\text{231 Id. at 124.}\]
\[\text{232 Id. at 153.}\]
\[\text{233 Id.}\]
\[\text{234 See 26 I.L.M. 1096, supra note 125; Wechsler, supra note 41, at 25; Kales, supra note 4, at 478 & 485.}\]
\[\text{235 See Id.}\]
\[\text{236 Id.}\]
\[\text{237 Id.}\]
\[\text{238 Palermo, supra note 1, at 743.}\]
it easier for Americans to adopt domestically and to encourage participation generally.\textsuperscript{239} The 1997 Adoption and Safe Families Act was such an attempt.\textsuperscript{240} Opponents of the entire international adoption process point out the demand for children can be met within the United States population.\textsuperscript{241} Domestic adoptions lessen the government’s burden in the foster care system.\textsuperscript{242} On an individual level, American families would not incur the additional expenses associated with international adoption.\textsuperscript{243} American critics believe American children should be taken care of before the rest of the world’s children.\textsuperscript{244}

Conversely, others postulate that when steps are taken to prevent international adoptions, there is an increase in black market adoptions.\textsuperscript{245} This phenomenon is likely the most disheartening problem concerning international adoptions.\textsuperscript{246} Nations may be able to reduce the black market through the criminalization of the sale of children across international borders, and by coupling harsh punishments with such crimes.\textsuperscript{247} By strictly monitoring and punishing those who participate in the black market, the black market will not flourish as it has in the past.\textsuperscript{248} In addition, both sending and receiving countries need to set and enforce strict limitations on fees and “donations.”\textsuperscript{249} They should work together to thoroughly investigate and confirm the “orphan” status of every child in a pending adoption.\textsuperscript{250} Participating countries in the Hague Convention must also enforce its standards when working with non-parties to the Hague Convention.\textsuperscript{251} Furthermore, international adoptions need to focus on promoting “the best interest of the child.”

Another device to improve the process would create both an international agency on international adoption and an international family court. The agency would be the sole coordinator

\textsuperscript{239} Id. (noting that as of 1999, about one hundred and ten thousand children in the United States were adoptable. More than 25\% of these children are white, while 50\% are African American. Most are between one and fifteen years of age).

\textsuperscript{240} Id. at 744. (noting that the Act mandates earlier and more decisive permanency hearings and deadlines for initiating the termination of the biological parents’ parental rights to the child).

\textsuperscript{241} Id. at 745.

\textsuperscript{242} Id. at 718. For example, in 1998, the United States paid approximately $3.5 billion into the foster care system.

\textsuperscript{243} Id. at 745.

\textsuperscript{244} Id.

\textsuperscript{245} Eade, supra note 12, at 394.

\textsuperscript{246} Id.

\textsuperscript{247} Eade, supra note 12, at 389-90.; Smolin, supra note 7, at 493. It is important that sending countries investigate every case of reported child trafficking. As of 2010, child trafficking has continued to be prominent in Cambodia, Chad, China, Guatemala, Haiti, India, Liberia, Nepal, Samoa and Vietnam. Some countries have found the problem of illegal child trafficking to be too great a concern to continue international adoptions. Africa and much of Latin America have completely, or almost completely, ended international adoptions from their country in order to combat the problem.

\textsuperscript{248} Smolin, supra note 7, at 497-98.

\textsuperscript{249} Smolin, supra note 7, at 496.

\textsuperscript{250} Id. at 496-97.

\textsuperscript{251} Id. at 497.
of adoptions between countries.\textsuperscript{252} The uniform method would decrease the costs associated with international adoptions and reduce the black market for children. The International Family Court would adjudicate all disagreements arising from International adoptions \textsuperscript{253} with consideration of “the best interest of the child” at the forefront.

The United States, as a nation, must strive to break down racial barriers prevalent in our society.\textsuperscript{254} Inter-racial adoption, as an institution, is stigmatized in American society. “[W]e live in a racist society, in which we are defined as much by our ethnicity as by the culture we grow up in.”\textsuperscript{255} Foreign children adopted by Americans often know of no other home or culture than the American home in which they are raised. It is society that distinguishes these adopted children by their race.\textsuperscript{256} Cultural and racial barriers must be overcome in order for “the child’s best interest” to be served, and for such children to be allowed to have fulfilling lives in the United States.

Finally, countries should work together in small coalitions to foster international adoptions between each other.\textsuperscript{257} Treaties between individual countries are an effective way to organize, standardize, and police international adoptions.\textsuperscript{258} The arrangements are ideal because they do not require the approval of many countries to become legally binding.\textsuperscript{259} Compared to generalized and vague agreements, such treaties are better suited to deal with the ethnic, cultural, and political concerns of the involved countries.\textsuperscript{260} A treaty between two countries can address specific concerns and issues, create a workable adoption process, and will not be limited by vague wording.\textsuperscript{261} The two countries, as parties to the treaty, can define the terms of their treaty amongst themselves.\textsuperscript{262} Most importantly, they can define the ill-defined “best interest of the child.”

\textsuperscript{252} Wechsler, supra note 41, at 38 (“the agency would be responsible for handling applications from prospective adoptive parents, investigating applications to ensure the they will provide a healthy nurturing environment for adoptees, storing data on worldwide orphans, investigating children’s backgrounds to confirm they are truly available for adoption, and developing rules governing the intercountry adoption process. The agency’s decision-making body would consist of representatives from every country that has entrusted its intercountry adoptions to the agency”).

\textsuperscript{253} Id. at 40 (arguing that the International Family Court should provide damages for those are wronged by the system. Biological parents, prospective parents and children, all need protection by the legal system).

\textsuperscript{254} Liu, supra note 28, at 190. As previously noted there has been a high demand in the United States for healthy, white babies. Palermo, supra note 1, at 743. As of 1999, about one hundred and ten thousand children in the United States were adoptable. More than 25% of these children are white, 50% are African American, and most are between one and fifteen years of age. Leeuwen, supra note 35, at 196-97. Yet, on average, a healthy, African American infant will wait five times as long as a healthy, white infant to be adopted domestically.

\textsuperscript{255} Leeuwen, supra note 35, at 216.

\textsuperscript{256} Id, at 216-17. Adopted children are constantly reminded of both their adoption status and their “difference” from the natives in the country to which they are brought.

\textsuperscript{257} Eade, supra note 12, at 394-95

\textsuperscript{258} Id.

\textsuperscript{259} Id.

\textsuperscript{260} Id.

\textsuperscript{261} Carlberg, supra note 196, at 124. Vague wording is not necessary because the treaty only needs to be accepted and workable between two countries. It is easier for two, as opposed to twenty, countries to come to a specific agreement.

\textsuperscript{262} They can define the terms of the treaty between themselves and in line with their own cultural values.