

# Intercountry Adoption Act Ten Years Later: The Need for Post-Adoption Requirements

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\* Editor-in-Chief, *Ohio State Law Journal*; J.D. Candidate, The Ohio State University Moritz College of Law, expected 2012; B.A., University of Notre Dame, 2007. I dedicate this Note to the memory of my father, who spent his life teaching me to do the best I can in each activity, class or sport in which I participate, and to always appreciate the opportunity to do so. I am indebted to my mother for her patience, unconditional love, and support through twenty years, three states, and two countries' worth of academic endeavors. I would also like to thank Kevin for his companionship and tangible support during my law school years, and of course, thank you to an incredible *Journal* staff, with whom I am grateful to work.

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## I. INTRODUCTION

In April 2010, American adoptive mother Torry Ann Hansen put seven-year-old, Russian-born Artyom on a plane back to Russia, alone, and with a note stating that “[a]fter giving my best to this child, I am sorry to say that for the safety of my family, friends and myself, I no longer wish to parent this child.”<sup>1</sup> In the note, Torry Ann included that Artyom was “violent and has severe psychopathic issues” and that she “was lied to and misled by the Russian orphanage workers.”<sup>2</sup>

Russian officials reacted with concern for Artyom, as well as an apprehension to continue permitting Americans to adopt Russians. Russian President Dmitry Medvedev called this action a “monstrous deed.”<sup>3</sup> He expressed unease over “the fact that the quantity of such cases in America is on the rise” and said that “[w]e should understand what is going on with our children, or we will totally refrain from the practice of adopting Russian children by American adoptive parents.”<sup>4</sup> Russian Foreign Minister Sergey Lavrov echoed President Medvedev’s strong reaction, stating that “[w]e have made a decision that the Foreign Ministry will insist on freezing all adoptions by U.S. families until Russia and the United States sign an interstate treaty setting out adoption terms.”<sup>5</sup>

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<sup>1</sup> Clifford Levy, *Russia Calls for Halt on U.S. Adoptions*, N.Y. TIMES, Apr. 9, 2010, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> *Transcript: George Stephanopoulos Interviews Russian President Dmitry Medvedev*, ABC NEWS (Apr. 12, 2010), <http://abcnews.go.com/GMA/transcript-george-stephanopoulos-interviews-russian-president-dmitry-medvedev/story?id=10348116&page=10>.

<sup>4</sup> *Id.* The most recent case that President Medvedev was likely referencing involved Russian-born Ivan Skorobogatov, who passed away in August 2009 after sustaining a number of head injuries. *Another Adopted Russian Boy Beaten to Death in U.S.*, RT USA (Mar. 4, 2010, 5:04 AM) <http://rt.com/usa/news/adopted-russian-boy-murdereed/>. Ivan’s American adoptive parents, Michael and Nanette Craver, were charged with his murder. *Id.* The Cravers defend themselves by arguing that Ivan had a “predisposition to destructiveness and self-mutilation.” *Id.* However, the prosecutors say the Cravers tortured Ivan. *Judge Won’t Dismiss Charges in Adopted Boy’s Death*, ABC 27 (Feb. 24, 2011, 3:49 PM), <http://www.abc27.com/story/14131632/judge-wont-dismiss-charges-in-adopted-boys-death>. For a list and brief story of other Russian-born children who have died while under the care of their American adoptive families, see Galina Bryntseva, *Mom, That Sounds Painful*, RT POLITICS (Aug. 31, 2010 5:19 AM), <http://rt.com/politics/press/rossijskaya-gazeta/mom-that-sounds-painful/en/>.

<sup>5</sup> Conor Humphries, *Russia Eyes U.S. Adoption Freeze After Boy Sent Back*, REUTERS, Apr. 9, 2010, available at <http://www.reuters.com/article/2010/04/09/us-russia-usa-adoption-idUSTRE6384TA20100409>. On July 13, 2011, Secretary of State Hillary Rodham Clinton and Russian Foreign Minister Sergey Lavrov signed a bilateral adoption agreement. Press Release, U.S. Dep’t of State, *Agreement Between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children* (July 13, 2011).

Russia is not the only country whose officials have indicated their willingness to halt adoptions following adoption publicity, as Chinese officials are clear that “[h]igh profile attention to adoption in China could curtail or eliminate altogether adoption of Chinese children by persons from countries that have caused adoption to become the subject of public attention.”<sup>6</sup> While adopted children and adoptive families are undoubtedly hurt in situations such as Artyom’s, because these situations directly implicate the future of intercountry adoptions<sup>7</sup> broadly, the stakes are much higher.

Despite some recent negative publicity, the U.S. government has demonstrated support for intercountry adoptions through major legislative commitments in the last two decades.<sup>8</sup> First, U.S. officials signed the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague Convention”) in 1994.<sup>9</sup> Second, U.S. officials ratified the Hague Convention with the Intercountry Adoption Act of 2000

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[hereinafter U.S.–Russia Agreement], available at <http://www.state.gov/r/pa/prs/ps/2011/07/168180.htm>. In addition to giving Russian officials the authority to determine which American adoption agencies are able to operate in Russia, “[t]he Agreement also includes provisions designed to improve post-adoption reporting and monitoring and to ensure that prospective adoptive parents receive more complete information about adoptive children’s social and medical histories and anticipated needs.” *Id.* The significance of these post-adoption reporting and medical needs provisions is discussed in detail in the remaining portions of this Note.

<sup>6</sup> *China Adoption Factsheet*, ADOPTION.COM, <http://china.adoption.com/chinese/china-adoption-factsheet.html> (last visited Nov. 14, 2011).

<sup>7</sup> Intercountry adoptions are often called international adoptions, but their definitions do differ: international adoption applies to an adoption that involves parents of a nationality different from that of the child, whereas intercountry adoption is seen as “one that involves a change in the child’s habitual country of residence, whatever the nationality of the adopting parents.” Int’l Child Dev. Ctr., UNICEF, *Intercountry Adoption*, INNOCENTI DIGEST, Dec. 1998, at 1, 2, <http://unicef-irc.org/publications/pdf/digest4e.pdf>. In this Note, I will refer to adoptions between children not born in the United States and parents who are U.S. citizens as intercountry adoptions.

<sup>8</sup> See Elizabeth Bartholet, *International Adoption*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE 63, 68–70 (Lori Askeland ed., 2006). The phenomenon of intercountry adoption largely began with World War I, as the war made the plight of parentless children visible to the rest of the world, and the advances in communication and transportation made intercountry adoption viable. *Id.* at 64. For a historical review of intercountry adoption in the United States, see Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 370–76 (2007) (discussing the impact of World War II, the Korean Conflict and Vietnam War, collapse of Communism, and China’s one-child policy on the development of intercountry adoption).

<sup>9</sup> Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (1993) [hereinafter Hague Convention]. For explanation of and further discussion on the provisions of the Hague Convention, see *infra* Part II.B.

("IAA").<sup>10</sup> While these legislative actions are significant steps to promoting healthy intercountry adoptions, they focus almost exclusively on pre-adoption requirements;<sup>11</sup> without addressing post-adoption services or follow-up reporting, they do not enable the prevention of situations such as Artyom's.

To better address difficult post-adoption matches, this Note argues that the federal government should adopt post-adoption requirements for medical and reporting follow-up in the IAA. The creation of post-adoption requirements is necessary to alleviate stress on adoptive parents and the countries from which the adoptive children are sent—and therefore alleviate strain on the institution of intercountry adoption more generally. Including post-adoption services in the IAA would enable the prospective adoptive parent to be better informed of the child's medical and psychological needs when pre-adoption medical reports from sending countries<sup>12</sup> do not always do so. Mandatory follow-up reporting in the IAA would provide the U.S. government with more control over maintaining strong relationships with sending countries, so that when an adoption arises that is not in the "best interests of the child,"<sup>13</sup> sending countries are less likely to institute a moratorium on adoptions with U.S. families.<sup>14</sup>

First, this Note describes the current legislation and regulation of intercountry adoptions in the United States. Next, this Note explains the particular difficulties with intercountry adoptions and why the current regulatory regime of medical reporting and nonmandatory sending country reporting is insufficient. Last, this Note proposes two regulatory provisions necessary to protect potential adoptees, prospective adoptive parents, and the institution of intercountry adoption: (1) post-adoption services to support parents in understanding the medical needs of their adoptee, and (2) post-adoption requirements of ensuring that proper follow-up reporting is provided to the sending countries. Adopting these post-adoption regulations will provide a regulatory environment that better ensures intercountry adoptions remain in the "best interests of the child" and fosters good relations with sending countries so that intercountry adoptions remain a viable institution.

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<sup>10</sup> Intercountry Adoption Act of 2000, 42 U.S.C. § 14901 (2000).

<sup>11</sup> See *infra* notes 37–38, 58–59.

<sup>12</sup> Sending country is the country of the orphan's citizenship, or the orphan's "habitual residence" if he or she is not currently residing in the country of citizenship. 8 C.F.R. § 204.3(b) (2011).

<sup>13</sup> Hague Convention, *supra* note 9, at 1139. One objective of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the *best interests of the child*." *Id.* (emphasis added).

<sup>14</sup> See Levy, *supra* note 1. At the time of publication of this Note, Russia and the United States had reached a bilateral agreement, which included provisions similar to these, but the details were not yet released. See U.S.–Russia Agreement, *supra* note 5. The Agreement bolsters support to include similar provisions for the Hague Convention and Intercountry Adoption Act, as suggested in this Note.

## II. THE HISTORY OF THE INTERCOUNTRY ADOPTION ACT AND CURRENT REGULATIONS

Despite the risk that situations such as Artyom's can arise in intercountry adoptions, intercountry adoptions are necessary to provide a stable, loving home for the more than thirteen million children who are documented to have no legal relationship with either of their biological parents.<sup>15</sup> Domestic and international agreements regarding adoption have helped forge the path for intercountry adoption as a viable institution. These agreements include the U.N. Convention on the Rights of the Child in 1989 ("U.N. Convention"),<sup>16</sup> the Hague Convention of 1993, and the IAA of 2000 and its corresponding regulations.<sup>17</sup> The remainder of Part II of this Note discusses the framework that these agreements provide for intercountry adoptions, exposing the pre-adoption focus of the agreements and near absence of language protecting children and families in the post-adoption phase.

### A. *The U.N. Convention on the Rights of the Child*

Before discussing the two major agreements that the United States has ratified and implemented, the Hague Convention and the IAA, it is first necessary to discuss the 1989 U.N. Convention on the Rights of the Child, which laid the foundation for the Hague Convention and IAA.<sup>18</sup>

The U.N. Convention is the single-most widely ratified treaty in existence, having been ratified by all countries in the world with the exception of the United States and Somalia.<sup>19</sup> The U.N. Convention mandates that all actions concerning children should have "the best interests of the child" as "a primary consideration."<sup>20</sup> Further, the U.N. Convention provides that all children have the right to education, right to a home, right to family, right to health and

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<sup>15</sup> Press Release, United Nations Children's Fund, Orphans (Feb. 6, 2009), *available at* [http://www.unicef.org/media/media\\_45290.html](http://www.unicef.org/media/media_45290.html). Additionally, as of 2007, an estimated 163 million children between the ages of 0–17 have only one surviving parent. *Children Orphaned Due to All Causes*, UNDATA, <http://data.un.org/Data.aspx?q=orphans&d=SOWC&f=inID%3a88> (last updated Aug. 24, 2011).

<sup>16</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>17</sup> 22 C.F.R. §§ 96.1–111 (2011).

<sup>18</sup> *See generally* Convention on the Rights of the Child, *supra* note 16. This brief discussion shows that nearly all countries support the notion that the "best interests of the child" should be a country's primary consideration in regulating adoption. Subsequent governmental commitments show that the reason the United States did not sign the U.N. Convention was not because it fundamentally disagrees with this sentiment. *See infra* notes 26–27.

<sup>19</sup> HUMAN RIGHTS WATCH, PROMISES BROKEN: AN ASSESSMENT OF CHILDREN'S RIGHTS ON THE 10TH ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD 1 (1999), *available at* <http://www.hrw.org/legacy/press/1999/nov/children.htm>.

<sup>20</sup> Convention on the Rights of the Child, *supra* note 16, at 46.

medical care, and right of protection from abuse and neglect.<sup>21</sup> But Article 21(b) limits these rights with respect to intercountry adoptions, stating that it is “an alternative means of child’s care, *if* the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”<sup>22</sup> This suggests that, under the U.N. Convention, institutional care in the native country is preferred over intercountry adoption.<sup>23</sup>

While the U.N. Convention gives children the rights to freedom of expression, thought, conscience, and religion, as well as requires states to protect children from abuse and neglect and to provide health care,<sup>24</sup> traditional U.S. jurisprudence protects parental rights with minimal state influence.<sup>25</sup> Therefore, the United States’s “failure to ratify the [U.N. Convention] may be explained in part by [the] traditional focus on privacy in the family sphere, strong parental rights, and freedom from state interference [in the United States].”<sup>26</sup>

Even though the United States did not sign the U.N. Convention, it signed the Hague Convention just five years later, demonstrating a commitment to intercountry adoption.

### *B. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*

The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,<sup>27</sup> popularly known as the Hague Convention, is a multilateral treaty that sets a framework to protect the children of intercountry adoptions, and their birth and adoptive parents.<sup>28</sup> The Hague Convention moves forward from the U.N. Convention’s position that institutional care in the native country is preferred over intercountry adoption, recognizing that “intercountry

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<sup>21</sup> See *id.* at 47–48, 50, 52, 53–54 (arts. 9, 19, 24, 27, 28).

<sup>22</sup> *Id.* at 51 (emphasis added).

<sup>23</sup> Cf. Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 190 (2003) (“Since there is little chance that most [institutionalized] children will be adopted locally, if the drafters [of the U.N. Convention] had acknowledged the unacceptability of institutional care, it would have amounted to a concession that intercountry adoption could provide at least a partial solution to widespread violations of children’s rights.”).

<sup>24</sup> See Convention on the Rights of the Child, *supra* note 16, at 48–49, 50, 52, 53 (arts. 13–15, 19, 24, 27).

<sup>25</sup> See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (holding that children are not “the mere creature[s] of the State” and that parents have the responsibility and liberty to decide what kind of school to which to send their children); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that legislation infringing upon a child’s ability to learn a foreign language violated the Due Process Clause).

<sup>26</sup> McKinney, *supra* note 8, at 365.

<sup>27</sup> Hague Convention, *supra* note 9, at 1139.

<sup>28</sup> *Id.* at 1134 (introductory note of Peter H. Pfund).

adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>29</sup> While the Hague Convention is more specific and comprehensive than the U.N. Convention, signaling progress towards guaranteeing internationally adopted children minimum standards of care, it maintains the focus of pre-adoption requirements.<sup>30</sup> The Hague Convention currently has eighty-seven contracting states.<sup>31</sup>

A key new component of the Hague Convention is that it requires each state that signs the Hague Convention to designate a Central Authority (“CA”) to oversee the intercountry adoption process, cooperate with other signing states to share information, and promote the objectives of the Convention.<sup>32</sup> The CA, when acting on behalf of a sending state, must set up a procedure to determine: that the child is adoptable, that intercountry adoption is in the child’s best interests, and that permission for the adoption has not been induced by illicit means.<sup>33</sup> The sending state is also required to “prepare a report including information about [the child’s] . . . background, social environment, family history, medical history including that of the child’s family, and any special needs of the child.”<sup>34</sup> On the other side of the adoption, the CA, when acting on behalf of a receiving state, must determine whether the prospective adoptive

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<sup>29</sup> *Id.* at 1139. The Hague Convention also recognizes that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” *Id.* Some authors question the effectiveness of the Hague Convention, in light of political opposition and genuine difficulties in implementing the Hague standards. See McKinney, *supra* note 8, at 392 (“Although receiving countries such as the United States have faced some difficulties with Hague Convention implementation, the real challenges have arisen in sending countries, many of which lack the necessary financial resources and political will to effectively implement the Convention’s provisions.”).

<sup>30</sup> Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT’L L. REV. 1, 26 (2010) (noting that this agreement specifies procedural steps for the adoption process, as well as defines “improper financial gain,” both in furtherance of attacking the problem of pre-adoption corruption).

<sup>31</sup> See *Status Table*, HAGUE CONF. ON PRIVATE INT’L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last updated Mar. 2, 2011) [hereinafter *Status Table*, HAGUE CONF.].

<sup>32</sup> Hague Convention, *supra* note 9, at 1140–42. The objectives of the Convention are

- (a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

*Id.* at 1139.

<sup>33</sup> *Id.* at 1139–40.

<sup>34</sup> *Id.* at 1141.

parents are “suited to adopt” and have been adequately “counselled as may be necessary.”<sup>35</sup>

Even with these provisions, the Hague Convention largely focuses on pre-adoption measures to prevent corruption rather than providing any post-adoption framework. Specifically, the Hague Convention defines the ambiguous term of “improper financial gain” contained in Article 21(d) of the U.N. Convention by stating that only costs and expenses—including reasonable professional fees—may be charged, and that the directors, administrators and employees of bodies shall not receive remuneration that is unreasonably high for services rendered.<sup>36</sup> Secondly, the Hague Convention states that any consent obtained by “the persons, institutions and authorities” necessary shall not be “induced by payment or compensation of any kind.”<sup>37</sup>

U.S. officials signed the Hague Convention in 1994, although it was not ratified until 2000 when Congress and the President signed the IAA into law<sup>38</sup> and not enacted until 2008 when the regulations were promulgated.<sup>39</sup>

### *C. The Intercountry Adoption Act of 2000 and Corresponding Regulations*

The stated purposes of the IAA are:

(1) to provide for implementation by the United States of the [Hague] Convention; (2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions subject to the Convention, and to ensure that such adoptions are in the children’s best interests; and (3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad. . . .<sup>40</sup>

The Hague Convention requires a CA, and Congress designated the U.S. Department of State as its CA when fulfilling the first purpose of implementing

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<sup>35</sup> *Id.* at 1140.

<sup>36</sup> *Id.* at 1143 (citing art. 32(2)–(3)).

<sup>37</sup> Hague Convention, *supra* note 9, at 1140.

<sup>38</sup> President Clinton signed the IAA into law on October 6, 2000. 42 U.S.C. § 14901 (2000).

<sup>39</sup> Two additional, recent congressional measures made intercountry adoption more accessible to American families in the last decade. *See* Child Citizenship Act of 2000, 8 *id.* § 1431 (listing requirements needed for adopted child to acquire automatic citizenship); 26 *id.* § 23 (amendment to the federal income tax law increasing the amount of tax credits for expenses for any adoption, including international adoptions).

<sup>40</sup> 42 *id.* § 14901(b)(1)–(3).



the Hague Convention;<sup>41</sup> thus, Congress charged the U.S. Department of State with promulgating the regulations.<sup>42</sup>

The U.S. Department of State published final regulations (“Regulations”) in 2006, thereby implementing the IAA and the Hague Convention in the United States.<sup>43</sup> Of the prospective adoptive parents, the Regulations require an accredited agency service provider<sup>44</sup> to conduct a home study that includes information about their suitability, including background, family and medical history, social environment, and reasons for adoption;<sup>45</sup> a statement describing the counseling and training provided;<sup>46</sup> and a criminal background check.<sup>47</sup>

The Regulations also require that the agency sponsoring the adoption “provides prospective adoptive parent(s) with at least ten hours (independent of the home study) of preparation and training.”<sup>48</sup> This training should address: the intercountry adoption process and the general needs of children awaiting adoption; the effects of malnutrition and other developmental risk factors associated with children from the expected country of origin; data on institutionalized children and the impact of institutionalization on children; and information on laws regarding the adoption process of the expected country of origin.<sup>49</sup> The Regulations require the agency to provide the prospective adoptive parents with counseling on the child’s history and cultural background; known health risks in the specific region or country where the child resides; and “[a]ny other medical, social, background, birth history, educational data, developmental history, or any other data known about the particular child.”<sup>50</sup>

The agency needs to provide a “copy of the child’s medical records (including, to the fullest extent practicable, a correct and complete English-language translation of such records)” at least two weeks before the adoption or the date on which the prospective parent leaves for the Convention country to

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<sup>41</sup> See *id.* § 14911(a)(1) (designating the U.S. Department of State as the CA, pursuant to art. 6(1) of the Hague Convention).

<sup>42</sup> See *id.* § 14911(c) (authorizing the Secretary of the Department of State to “prescribe such regulations as may be necessary to carry out central authority functions on behalf of the United States”).

<sup>43</sup> 22 C.F.R. §§ 96.1–111 (2011).

<sup>44</sup> The Secretary of State designates an accrediting entity, which is authorized to determine whether agencies are eligible to be an “accredited agency service provider.” §§ 96.4, 96.7. Once accredited, an adoption agency can perform any one of the these six services: (1) identifying a child for adoption and arranging an adoption; (2) securing the necessary consent to termination of parental rights; (3) performing a home study on prospective adoptive parents; (4) making non-judicial determinations of the best interests of the child; (5) monitoring placement until final adoption; or (6) assuming custody pending alternative placement when necessary because of a disrupted adoption. §§ 96.12, 96.2.

<sup>45</sup> § 96.47(a)(1).

<sup>46</sup> § 96.47(a)(3).

<sup>47</sup> § 96.47(a)(4).

<sup>48</sup> § 96.48(a).

<sup>49</sup> § 96.48(b).

<sup>50</sup> § 96.48(c).

complete the procedures.<sup>51</sup> The agency must use reasonable efforts “to obtain available [medical] information,” including the date the welfare authority assumed custody of the child; the history of any significant illnesses, hospitalizations, and special needs since the authority assumed custody; the growth data and developmental status over time; and specific information on the known health risks in the specific region or country where the child resides.<sup>52</sup> The agency should use reasonable efforts to provide information about the child’s birth family, past and current placements prior to adoption, and information about any siblings.<sup>53</sup>

Regarding post-adoption reporting, the IAA requires that the accredited agency inform the prospective adoptive parent in their contract whether the agency will provide any post-adoption services.<sup>54</sup> When these reports are required by the child’s country of origin, “the agency . . . [should] include[] a requirement for such reports in the adoption services contract and make[] good-faith efforts to encourage adoptive parent(s) to provide such reports.”<sup>55</sup>

With these regulations in place, the United States became a signing, ratifying, and enforcing party of the Hague Convention on April 1, 2008.<sup>56</sup> As of 2011, more than eighty countries have signed and ratified the Hague Convention,<sup>57</sup> and thus, adoptions between American families and a child who lives within one of these nations are subject to the provisions of the IAA.

Notwithstanding the undoubted importance of the Hague Convention and IAA process, neither decree provides sufficient post-adoption relief, as the Hague Convention foundation was meant to provide “only a framework of *minimum* standards for regulating intercountry adoption.”<sup>58</sup> To the extent that the IAA addresses post-adoption reporting, it places the primary responsibility on the parents, and as long as the agency makes an effort to encourage the parents to comply, then the U.S. Department of State has no control over the outcome.<sup>59</sup>

<sup>51</sup> § 96.49(a).

<sup>52</sup> § 96.49(d).

<sup>53</sup> § 96.49(f).

<sup>54</sup> § 96.51(b).

<sup>55</sup> § 96.51(c).

<sup>56</sup> See *Status Table*, HAGUE CONF., *supra* note 31.

<sup>57</sup> *Id.*

<sup>58</sup> KERRY O’HALLORAN, *THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY & PRACTICE* 289 (2006) (emphasis added). Halloran continues, “Even if fully implemented by all countries engaged in intercountry adoption it would still fall short of ensuring that optimal standards prevail in all instances for all the children concerned.” *Id.*; see also Bartholet, *supra* note 8, at 68 (“Even if the Convention is implemented, the new bureaucratic hurdles it creates will likely increase the expense of international adoption for all prospective parents . . . creating the risk that reduced numbers of prospective parents will step forward, and reduced numbers of children will receive homes.”).

<sup>59</sup> See § 96.51(b) (“The agency or person informs the prospective adoptive parent(s) in the adoption services contract *whether* the agency or person will or will not provide any post-adoption services.” (emphasis added)).

Part III addresses such problems as when an adoption might not be “corrupt” in the pre-adoption phase contemplated and preempted by the Hague Convention, IAA, or corresponding Regulations, but nonetheless turns out not to be in the child’s best interest, such as Artyom’s case.

### III. POST-ADOPTION PROBLEMS NOT ADDRESSED BY THE CURRENT REGULATIONS

The Hague Convention, IAA, and Regulations do not adequately address post-adoption services. Post-adoption services are defined as the services performed after a final adoption decree is granted in the sending country.<sup>60</sup> Because of this, the people involved with “providing post-adoption services, including reports, visits and counseling do not need to be Hague accredited or supervised, as post-adoption is not defined as an adoption service [covered by the IAA].”<sup>61</sup> Part III of this Note addresses the particular post-adoption areas that are severely affected by this lack of attention: mental health concerns exacerbated by the fact that a large majority of the children adopted internationally are institutionalized and without complete medical records, and the inability of the receiving government to enforce post-adoption reporting required by many sending countries. This Part also addresses the reality that court and state statutes do not provide relief, and that the current decline in numbers is in part due to a vocal opposition. For all of these reasons, post-adoption regulation measures are necessary.

#### *A. Mental Health Concerns Exacerbated by International Context*

Determining the extent of an adoptee’s mental health concerns, as well as the corresponding capacity of a prospective adoptive parent’s ability to handle the adoptee’s mental health concerns, is difficult to do prior to finalizing an intercountry adoption for three reasons: the severe impact orphanages have on children, the differences in country standards for maintaining health records, and the fact that many adoptees’ health risks are unknown until they are older. Congress was aware of these problems, but did not include any remedies when promulgating the Regulations.<sup>62</sup>

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<sup>60</sup> More specifically, “post-adoption” is defined as “after an adoption; in cases in which an adoption occurs in a Convention country and is followed by a re-adoption in the United States, it means after the adoption in the Convention country.” § 96.2. Post-placement services are defined as services provided during the period of time between a grant of custody or legal guardianship and a final decree of adoption. *See id.*

<sup>61</sup> Susan Myers, *International Adoption and Post-Placement Services*, ADOPTION TODAY, Feb.–Mar. 2007, at 58, 59, available at <http://www.lanadopt.org/Ethics.pdf>. For further explanation, see Myers, *supra*.

<sup>62</sup> *See infra* notes 75–80.

The developmental effects of children spending time in orphanages abroad are well documented.<sup>63</sup> In addition to developmental delays, children in orphanages are often subject to a lack of medical care, inappropriate medical care, exposure to infections, poor nutrition/growth, physical neglect, delayed cognitive development, emotional neglect, and physical or sexual abuse.<sup>64</sup> Institutionalization also “increases the likelihood that children will grow into psychiatrically impaired and economically unproductive adults.”<sup>65</sup>

In addition to the fact that prospective intercountry adoptees have increased health risks due to their lives prior to adoption, a fully-informed transition into an adoptive family is further complicated by incomplete medical records. In many foreign countries where children are available for adoption, “health care systems and training, record-keeping, and legal surrender procedures, to name just a few items, do not even remotely approach or resemble Western standards.”<sup>66</sup> For example, in one study of internationally adopted children, 34% of the adoptees had documented immunizations in their pre-adoptive record, but 66% did not.<sup>67</sup> In another study, pre-adoptive medical reports were compared with the actual health of fifty-six Russian children upon arrival into the United States,<sup>68</sup> revealing multiple unfamiliar, esoteric neurologic diagnoses

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<sup>63</sup> See Femmie Juffer & Marinus H. van IJzendoorn, *Behavior Problems and Mental Health Referrals of International Adoptees: A Meta-Analysis*, 293 JAMA 2501, 2501–02 (2005); see also LAURIE C. MILLER, *THE HANDBOOK OF INTERNATIONAL ADOPTION MEDICINE: A GUIDE FOR PHYSICIANS, PARENTS, AND PROVIDERS* 25 (2005) (“Many of the problems seen in [internationally adopted] children after arrival in the United States have been attributed, rightly or wrongly, to institutional care during critical early phases of development.”).

<sup>64</sup> MILLER, *supra* note 63, at 28–36. For example, at arrival, height, weight, and head circumference are less than the fifth percentile in nearly 50%, 35%, and 40% of postinstitutionalized children, respectively. *Id.* at 29.

<sup>65</sup> Teena McGuinness & Leona Pallansch, *Competence of Children Adopted from the Former Soviet Union*, 49 FAM. REL. 457, 457 (2000); cf. Joan Heifetz Hollinger, *Intercountry Adoption: A Frontier Without Boundaries*, in *FAMILIES BY LAW: AN ADOPTION READER* 216 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) (reporting that longitudinal research studies have determined that intercountry adoptees function just as well as most domestic adoptees and biological children of the same socioeconomic status, even if the foreign-born children suffered from untreated illnesses and severe neglect at a young age).

<sup>66</sup> Howard M. Cooper, *Enforcement of Contractual Release and Hold Harmless Language in “Wrongful Adoption” Cases*, 44 BOS. B. J. 14, 28 (2000) (“[T]he ability of an adoption agency to obtain and furnish available records and medical information in connection with an international adoption is not comparable to what is possible in the context of a domestic adoption. These real world differences must be recognized.”).

<sup>67</sup> Jane Aronson, *Medical Evaluation of the Internationally Adopted Child*, in *ADOPTION LAW INSTITUTE 2007*, at 143, 156 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. C-211, 2007).

<sup>68</sup> McGuinness & Pallansch, *supra* note 65, at 457.

that could not be confirmed by American doctors once the child reached the United States.<sup>69</sup>

In light of these complications, some intercountry adoption advocates advise prospective parents to “discuss the type of medical information they will be given and the way in which questions arising from this material will be handled with their adoption agency or facilitator”<sup>70</sup> to preemptively compensate for a lack of information. But this alone is insufficient advice: one study of 326 U.S. families with intercountry adoptees showed that “[a]doptive parents who are concerned about [the developmental and psychological challenges of intercountry adoptees and who do] not have the appropriate resources to address[] them effectively are at a greater risk of experiencing dissatisfaction with the adoption process.”<sup>71</sup>

This information is corroborated by longitudinal studies of domestic adoptions of special needs children,<sup>72</sup> which show that the use of both general and clinical post-adoption services increased over time amongst these families, recognizing the “lifelong process of adjustment and the need for ongoing post-adoption support.”<sup>73</sup> The study also demonstrates that families receiving more comprehensive pre-adoptive preparation services are more likely to use both general and clinical post-adoption services, reflecting the “influence of better

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<sup>69</sup> *Id.* Furthermore, in 20% of these children, serious medical problems, and substantial growth and developmental delays were either found or corroborated. *Id.*; see also MILLER, *supra* note 63, at 70.

<sup>70</sup> MILLER, *supra* note 63, at 70. Of almost 10,000 medical reports reviewed in the International Adoption Clinic, few were considered complete on the first review, so discussion about the amount of time prospective adoptive parents have to make a decision about their ability to support an adoption in the child’s best interests is imperative. *Id.*

<sup>71</sup> Charlotte Paulsen & Joseph R. Merighi, *Adoption Preparedness, Cultural Engagement, and Parental Satisfaction in Intercountry Adoption*, 12 ADOPTION Q. 1, 14 (2009); see also *id.* at 16 (“The importance of educating families about potential challenges they may face—as well as creating a support network in collaboration with the agency or social worker for parents who are confused or overwhelmed or just want to ask a question—is extremely important for the family and the effectiveness of the agency.”).

<sup>72</sup> Some advocates argue that all internationally adopted children would fall within the “special needs” category used in domestic adoption categorization. See *Implementation of the Hague Convention on Intercountry Adoption: Hearing Before the H. Comm. on Int’l Relations*, 106th Cong. 139 (1999) [hereinafter *1999 House Hague Hearing*] (statement of Jerri Ann Jenista, M.D., Am. Acad. of Pediatrics) (“[A]ll children adopted from institutional settings, that is most of the children being adopted to the US today, should be considered to have special needs.”).

<sup>73</sup> Leslie H. Wind et al., *Influences of Risk History and Adoption Preparation on Post-Adoption Services Use in U.S. Adoptions*, 56 FAM. REL. 378, 385 (2007). The authors define “special needs” generally to designate children whose race or ethnicity, older age, sibling group status, history of unstable placements, or emotional, physical, or behavioral disabilities may impede adoptive placement. *Id.* at 378. General adoptive services include ongoing meetings with a caseworker or participation in adoption support groups, while clinical services include individual therapy, family therapy, and crisis intervention. *Id.* at 380.

preparation on parents' understanding of the complexities of adoption adjustment for all family members, an appreciation of opportunities for sharing concerns and mentoring available through adoption services, and awareness of the serious impact of a pre-adoptive risk history and its impact on adoptive family cohesion."<sup>74</sup>

Congress knew of the need for this post-adoption support when considering passage of the IAA, but did not address a solution or response.<sup>75</sup> A representative of the American Academy of Pediatrics testified to the House of Representatives that "there are significant medical and behavioral problems unique or far more common in internationally adopted children than in those adopted domestically."<sup>76</sup> Similarly, in the Senate hearings, one doctor testified that "80% of the children I have evaluated whose families were told by their agency that they were 'healthy' were, in fact neuropsychiatrically impaired and would pose a financial and emotional burden to the family for life."<sup>77</sup> Furthermore, the American Academy of Pediatrics's testimony included an acknowledgement that "pre- and post-adoption support services are essential to the success of adoption," yet "intercountry adoption agencies and facilitators have no responsibility to provide support for, or even to keep track of the children that they place in adoptive homes."<sup>78</sup> One of the recommendations made by the American Academy of Pediatrics at this hearing was that "[a]gencies and adoption facilitators should be required to provide post-adoption services to families and make efforts to determine the well-being of the *adopted* child."<sup>79</sup>

Despite documented difficulty with attaining accurate medical records in the pre-adoption phase, and a congressional awareness of potential solutions, no

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<sup>74</sup> *Id.* at 386–87.

<sup>75</sup> Congress explicitly excluded post-adoption services, as the House Committee on International Relations "amended the definition of 'adoption services' by deleting the subparagraphs relating to counseling and post-adoption services." H.R. REP. NO. 106-691, at 21 (2000). The Committee concluded that accreditation should not be conditioned on post-adoption counseling as "post-adoption services often address matters that are not related to the adoption itself, such as cultural and educational activities in connection with the adopted child's state of origin." *Id.*

<sup>76</sup> See 1999 *House Hague Hearing*, *supra* note 72, at 141; see also *id.* at 137 ("We have serious concerns . . . about the numbers of children being adopted from overseas who have significant medical and behavioral problems that are poorly understood before arrival in this country.").

<sup>77</sup> *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: Treaty Doc. 105-51 and Its Implementing Legislation S. 682: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 14 (1999) [hereinafter 1999 *Senate Hague Hearing*] (statement of Dr. Ronald Steven Federici, Developmental Neuropsychologist).

<sup>78</sup> 1999 *House Hague Hearing*, *supra* note 72, at 142; see also 1999 *Senate Hague Hearing*, *supra* note 77, at 15 ("Follow up counseling or support from international adoption agencies is virtually non-existent.").

<sup>79</sup> 1999 *House Hague Hearing*, *supra* note 72, at 144 (emphasis added).

post-adoption service requirements are included in the IAA or the corresponding Regulations.<sup>80</sup>

*B. Without Post-Adoption Reporting, Relations with Other Countries Are Strained and Beyond the Control of the Government*

In addition to the notable absence of addressing the heightened medical concerns present with intercountry adoptions, neither the IAA nor the Regulations address post-adoption reports.<sup>81</sup> Yet, these reports are often required by sending countries and are significant to maintaining healthy relations with these countries.<sup>82</sup> For example, Russia requires post-adoption placement reports at certain intervals: six months after the court decision finalizing the adoption goes into effect, no later than twelve months after the court decision, at twenty-four months, and at thirty-six months.<sup>83</sup> The Chinese government requires prospective adoptive parents to provide a letter stating their willingness to allow postplacement follow-ups and provide postplacement reports “as required.”<sup>84</sup> Ethiopian law requires adoptive parents to submit post-adoption reports at three months, six months, one year, and then annually until the child is eighteen.<sup>85</sup> Vietnam, Ukraine, and Kazakhstan also require families to self-report for eighteen years.<sup>86</sup> Post-adoption reports are important to sending countries because they track the child’s progress in adjusting to his or

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<sup>80</sup> As the House Report recognizes these conditions, and acknowledges that the Committee heard testimony from the Department of State, the Department of Health and Human Services, private witnesses representing adoption agencies, adoptive parents, international adoptees, medical experts, and an organization responsible for accrediting social service agencies, it is likely that the Committee believed the measures they implemented would be sufficient. *See generally* H.R. REP. NO. 106-691.

<sup>81</sup> Post-adoption reports also fall within the definition of post-adoption services and therefore outside the supervision of the U.S. Department of State. 22 C.F.R. § 96.2 (2011). The IAA only requires that the adoption agency facilitating the adoption “include[] a requirement for [post-adoption reporting] in the adoption services contract and make[] good-faith efforts to encourage adoptive parent(s) to provide such reports,” but the government itself has no action against the parents for failing to do so. § 96.51(c).

<sup>82</sup> *See supra* notes 1–4 and accompanying text, demonstrating Russia’s reaction to Artyom’s situation. For country-specific requirements, see *Country Information*, BUREAU OF CONSULAR AFF., U.S. DEP’T OF STATE, [http://adoption.state.gov/country\\_information.php](http://adoption.state.gov/country_information.php) (last visited Nov. 14, 2011).

<sup>83</sup> *Russia*, BUREAU OF CONSULAR AFF., U.S. DEP’T OF STATE, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=russia](http://adoption.state.gov/country_information/country_specific_info.php?country-select=russia) (last updated Apr. 2008).

<sup>84</sup> *China*, BUREAU OF CONSULAR AFF., U.S. DEP’T OF STATE, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=china](http://adoption.state.gov/country_information/country_specific_info.php?country-select=china) (last updated June 2011) [hereinafter *China*, U.S. DEP’T OF STATE].

<sup>85</sup> *Ethiopia*, BUREAU OF CONSULAR AFF., U.S. DEP’T OF STATE, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=ethiopia](http://adoption.state.gov/country_information/country_specific_info.php?country-select=ethiopia) (last updated July 2011).

<sup>86</sup> Myers, *supra* note 61, at 58.

her new life, which provides assurance to political leaders and adoption officials that these children are receiving appropriate care and protection.<sup>87</sup>

Despite the fact that “[f]ailure to provide post-adoption reports may put at risk intercountry adoption programs for U.S. parents who wish to adopt in the future,”<sup>88</sup> the U.S. Department of State is unable to enforce compliance so long as the agency makes a good-faith effort to encourage families to produce the reports.<sup>89</sup> This means that if the agency *encourages* the adoptive parents to send the reports, and the parents choose not to, the U.S. Department of State cannot hold the parent or the agency responsible. Effectively, the U.S. Department of State has no control over whether the reports are sent, despite being the CA of the intercountry adoption process.

Many parents, however, do not follow through with their commitment to submit these reports,<sup>90</sup> in part because “[f]amilies often report wanting ‘closure’ once they return home with their child, and experience the ongoing post-adoption visits as an intrusion or an obligation they have to meet.”<sup>91</sup> Because

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<sup>87</sup> *Post Adoption*, BUREAU OF CONSULAR AFF., U.S. DEP’T OF STATE, [http://adoption.state.gov/adoption\\_process/how\\_to\\_adopt/postadoption.php](http://adoption.state.gov/adoption_process/how_to_adopt/postadoption.php) (last visited Nov. 14, 2011) [hereinafter *Post Adoption*, U.S. DEP’T OF STATE]; see also Myers, *supra* note 61, at 58 (“Hearing and seeing how well the children are faring in their new homes demonstrates to foreign officials that international adoption is a good solution and keeps adoptions an option for other children in the future.”).

<sup>88</sup> *Post Adoption*, U.S. DEP’T OF STATE, *supra* note 87.

<sup>89</sup> See 22 C.F.R. § 96.51(c) (2011) (“When post-adoption reports are required by the child’s country of origin, the agency or person includes a requirement for such reports in the adoption services contract and makes good-faith efforts to encourage adoptive parent(s) to provide such reports.”). This is despite the fact that Representative Smith made Congress aware of their importance in a subcommittee meeting, stating that “it is very important, as the largest receiving country, that we respect the rules of the sending country in terms of who can adopt and that we follow up with post-adoption services, if that was the initial agreement.” *Hague Convention on International Adoptions: Status and the Framework for Implementation: Hearing Before the Subcomm. on Africa, Global Human Rights & Int’l Operations of the H. Comm. on Int’l Relations*, 109th Cong. 2 (2006) [hereinafter *2006 House Hague Hearing*] (statement of Rep. Smith).

<sup>90</sup> For example, in 2006, more than 500 reports that were due to Ukrainian officials were missing. Myers, *supra* note 61, at 59; see also *2006 House Hague Hearing*, *supra* note 89, at 4 (“Noncompliance issues have been raised by experts who note that some families adopting from Russia and South Korea do not want their families to be disrupted by sending these reports to the countries of origin.”).

<sup>91</sup> Myers, *supra* note 61, at 58. One intercountry adoption support group would counter the general apathy to file these reports, stating that “[p]eople should not view [post-adoption reporting] as intrusive. [These] children are dual citizens. They are American—and Russian. We need . . . families [to] understand that this isn’t government interference. This is a reasonable request from a government that has entrusted precious children to [them], to raise.” Jan Wondra, *A Conversation with Michele Thoren Bond: On Common Agendas, Hope, Help and Community*, FAMILIES FOR RUSSIAN & UKRAINIAN ADOPTION, available at <http://www.frua.org/our-work/press-room/michele-bond>. Michele Bond is the Deputy Assistant Secretary of State and overseer of the U.S. Department of State, Office of Children’s Issues. *Id.*



the intercountry adoption system presents a unique landscape of international trust and independence that does not stop once the adoption is finalized, the regulatory regime should authorize the U.S. government to ensure that parents are complying with the reporting requirements of other countries. It currently does not.

### *C. Courts and State Statutes Provide No Relief*

Because the directly supporting documents, the Hague Convention and the IAA, do not address adoptive parents' post-adoption concerns, some adoptive parents have turned to the courts and other statutes to find relief, but to no avail.<sup>92</sup> This section highlights that the statutory and legal schemes do not sufficiently address the post-adoption needs of the adoptive parents and therefore the adoptees, leaving a hole in the entirety of the legal regime.

#### *1. The Courts Protect the Rights of Adoption Agencies Without Legislation Pointing to the Contrary*

While some courts have granted parents of domestic adoptees certain rights, it is more difficult for parents of intercountry adoptees to find relief to support a child with more needs than they originally considered. This is due to the nature of exculpatory clauses in most contracts involving intercountry adoptees, and the IAA indicating congressional intent to do the opposite.

Adoptive parents of domestic adoptees have used the courts to recover damages from an adoption agency under a "wrongful adoption" cause of action.<sup>93</sup> Parents are often successful in this type of action when an intentional misrepresentation as to the known medical histories of the children exists.<sup>94</sup> Some courts will allow recovery based upon an agency's negligent misrepresentation as to the adoptee's medical history.<sup>95</sup> For example, the

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<sup>92</sup> In-depth treatment of adoption disruption and dissolution, or adoptive parents' right to monetary damages for any torts committed by adoption agencies, is beyond the scope of this Note. The limited purpose of this section is to show that post-adoption support does not exist in either the courts or state legislatures, bolstering the need for Congress to handle this issue as a regulatory matter.

<sup>93</sup> See, e.g., *Burr v. Bd. of Cnty. Comm'rs*, 491 N.E.2d 1101 (1986). In this action, the adoptive parents successfully alleged that an adoption agency's material misrepresentations of fact concerning an infant's background and condition fraudulently misled them to their detriment. *Id.* at 1105. The elements of wrongful adoption are the same as fraud: representation or concealment of a fact, which is material to transaction at hand, made falsely or with utter disregard and recklessness, with intent to mislead, justifiable reliance, and an injury proximately caused by the reliance. *Id.*

<sup>94</sup> See, e.g., *Gibbs v. Ernst*, 647 A.2d 882, 893 (Pa. 1994) (holding that an adoption agency only has a duty to disclose fully and accurately to adoptive parents all relevant information in its possession concerning the adoptee).

<sup>95</sup> See *Roe v. Catholic Charities*, 588 N.E.2d 354, 360-61, 366 (Ill. App. Ct. 1992) (recognizing both a wrongful adoption tort based on intentional misrepresentation and

Wisconsin Supreme Court held that public policy would not bar a claim for negligent misrepresentation when an agency voluntarily assumed a duty to inform the adoptive parents about Huntington's disease and the child's risk in developing it.<sup>96</sup> Courts have declined to find agencies liable on a duty to investigate theory even in domestic adoptions.<sup>97</sup>

However, the same causes of action are not likely to be successful in an intercountry adoption because of the frequency of which exculpatory clauses exist in these contracts, as well as the language of the IAA. For example, the District of Columbia recognized "wrongful adoption" as a tort in an intercountry adoption dispute, but because the signed contract between the prospective adoptive parents and the agency noted the risks of intercountry adoption and the problematic state of Russian medicine, the court held that the agency had the minimal duty to provide the parents with medical information only when it was available.<sup>98</sup> Furthermore, the IAA explicitly precludes adoptive parents from utilizing any private right of action against agencies when their child's medical history is incomplete.<sup>99</sup> Because of these two barriers, intercountry adoptive parents are unlikely to prevail under wrongful adoption tort theories in a U.S. court, despite the frequency with which this method is used in domestic adoption.

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negligent misrepresentation); *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995) (allowing liability for wrongful adoption based on both intentional misrepresentation and negligent misrepresentation).

<sup>96</sup> See *Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989); see also *Michael J. v. L.A. Cnty. Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Ct. App. 1988) ("[A]n adoption agency cannot be made the guarantor of an infant's future good health and should not be liable for mere negligence in providing information regarding the health of a prospective adoptee."); *Foster v. Bass*, 575 So. 2d 967, 980 (Miss. 1990) (refusing to recognize wrongful adoption claim on negligent misrepresentation grounds because it didn't want to impose "on the agency a duty to predict the future health of a prospective adoptee" (quoting *Michael J.*, 247 Cal. Rptr. at 513)); *Nierengarten v. Lutheran Soc. Servs. of Wis.*, 563 N.W.2d 181, 185-86 (Wis. Ct. App. 1997) (holding that a family has a claim for "extraordinary expenses, the unexpected expenses resulting from [the child's] special needs," under a theory of negligent misrepresentation, when reporting to the agency that the child's behavior was uncontrolled and unfocused and the agency assured them that this was normal behavior).

<sup>97</sup> See *Sherman v. Adoption Ctr. of Wash.*, 741 A.2d 1031, 1037 (D.C. 1999) (holding that an agency did not consciously conceal information about the child's health nor had a duty to verify the child's medical information); *Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 70 (R.I. 1995) (refusing to create a common law duty to disclose).

<sup>98</sup> *Ferenc v. World Child, Inc.*, 977 F. Supp. 56, 61 (D.D.C. 1997). Upholding the exculpatory clause on the basis of full disclosure, the court noted that, "[w]ith respect to Russian children in particular, the [contract] contains nearly two pages of text advising of 'ambiguous clinical diagnoses' by Russian physicians and the 'problematic state' of Russian medical education and proficiency." *Id.*

<sup>99</sup> 42 U.S.C. § 14954 (2000) (expressly stating that the IAA "shall not be construed to create a private right of action").

## 2. State Laws Do Not Offer Support for Intercountry Adoptive Families

State laws offer no protection to intercountry adoptive families either. In state statutes, governing intercountry adoption laws fall into one of three categories<sup>100</sup>: (1) states that grant full effect and recognition to foreign adoption decrees;<sup>101</sup> (2) states that allow re-adoption for the validation of the adoption;<sup>102</sup> and (3) states that have no statutory provisions.<sup>103</sup> Like the lack of substantive support for post-adoption services and needs in the IAA, these purely procedural state laws offer no safe haven for parents who adopt a child without full disclosure of the child's medical needs.

### D. Vocal Opposition Associated with Decline in the Number of Adoptions

In addition to the exclusion of post-adoption support in the Hague Convention and IAA, and an absence of support in courts or state laws, a vocal opposition to intercountry adoptions is further hindering intercountry adoption success. In 2010, the number of foreign children adopted by American parents reached its lowest level since 1995.<sup>104</sup> If this trend reflected a decrease in the

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<sup>100</sup> SHAWN C. STEVENS, *INTERNATIONAL ADOPTION: A LEGAL RESEARCH GUIDE* 9 (2004).

<sup>101</sup> See, e.g., ALASKA STAT. § 25.23.160 (2010) ("A decree of court terminating the relationship of parent and child or establishing the relationship by adoption issued under due process of law by a court of any other jurisdiction within or outside of the United States shall be recognized in this state and the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree were issued by a court of this state."); see also FLA. STAT. ANN § 63.192 (West 2005 & Supp. 2011); IDAHO CODE ANN. § 16-1514(4) (2009); OHIO REV. CODE ANN. § 3107.18 (West 2005); VT. STAT. ANN. tit. 15A, § 1-108 (2010).

<sup>102</sup> See, e.g., CAL. FAM. CODE § 8919 (West 2010) ("Each state resident who adopts a child through an intercountry adoption that is finalized in a foreign country shall readopt the child in this state . . . [T]he readoption shall include, but is not limited to, at least one postplacement in-home visit, the filing of the adoption petition, the intercountry adoption court report, accounting reports, the home study report, and the final adoption order."); CONN. GEN. STAT. ANN. § 45a-730 (West 2004); MD. CODE ANN., FAM. LAW § 5-3B-04(d) (LexisNexis 2006 & Supp. 2011).

<sup>103</sup> For example: Alabama, Arizona, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New York, Rhode Island, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

<sup>104</sup> David Crary, *Foreign Adoptions by Americans Hit 15-Year Low*, MSNBC.COM (Jan. 31, 2011, 5:09 A.M.), [http://www.msnbc.msn.com/id/41357694/ns/us\\_news-life/t/foreign-adoptions-americans-hit--year-low](http://www.msnbc.msn.com/id/41357694/ns/us_news-life/t/foreign-adoptions-americans-hit--year-low). In 2010, 11,059 children were adopted internationally by American parents, down more than 50% from its all-time peak in 2004 when the number of adoptions totaled 22,884. *Id.* The five countries from which the most children were adopted in 2010 include: (1) China—3,401, (2) Ethiopia—2,513, (3) Russia—1,082, (4) South Korea—863, (5) Ukraine—445. U.S. DEP'T OF STATE, FY 2010 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS tbl.1 (2010), available at [http://adoption.state.gov/content/pdf/fy2010\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2010_annual_report.pdf).

number of orphans worldwide, this would be a positive development. However, this is not the case.<sup>105</sup>

The reasons for this dramatic decrease in the number of intercountry adoptions are diverse. One reason is that the decrease is a necessary “growing pain” associated with preventing “baby trafficking.”<sup>106</sup> For example, the United States halted adoptions from Guatemala in 2007; U.S. officials stated they will consider resuming such adoptions only when “it is confident that a Hague-compliant system is in place, including strong safeguards against abuses and resolution of the issues that led to corrupt and fraudulent practices” prior to 2007.<sup>107</sup> This resulted in an 81% decrease in total U.S. adoptions from Guatemala between 2008 and 2009.<sup>108</sup>

Another reason for the decrease in intercountry adoptions is that other countries are choosing to regulate the demographics of prospective adoptive parents when placing children in intercountry adoption.<sup>109</sup> For example, Chinese officials adopted regulations that disqualify prospective intercountry adoptive parents from adopting Chinese children if they are over the age of fifty, recently divorced, homosexual, or even overweight.<sup>110</sup>

While these two reasons have admittedly caused significant declines in the number of intercountry adoptions in the last few years, the scope of this Note suggests a third reason—the lack of trust and confidence in the institution of intercountry adoptions. A strong, vocal opposition to intercountry adoption

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<sup>105</sup> See Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov.–Dec. 2003, at 115, 117–18 (“The baby trade is likely to continue to grow, partly because it is no longer simply a response to wars and humanitarian crises. . . . As the HIV/AIDS pandemic grows, many more babies will become available for adoption around the world.”).

<sup>106</sup> *Id.* at 119 (“The most widespread and alarming problem [with unregulated international adoptions] has been the illicit purchase and sale of babies.”).

<sup>107</sup> *Alert: Guatemala Pilot Program*, BUREAU OF CONSULAR AFF., U.S. DEP’T OF STATE (Oct. 5, 2010), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=alerts&alert\\_notice\\_file=guatemala\\_8](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=guatemala_8). For context, a 2000 U.N. Report found that in Guatemala, “in the majority of cases, international adoption involves a variety of criminal offences including the buying and selling of children, the falsifying of documents, the kidnapping of children, and the housing of babies awaiting private adoption.” Special Rapporteur on the Sale of Children, Child Prostitution & Child Pornography, *Rights of the Child*, Comm’n on Human Rights, ¶ 13, U.N. Doc. E/CN.4/2000/73/Add.2 (Jan. 27, 2000), available at <http://www.unhcr.org/refworld/pdfid/3ae6b0fe0.pdf>.

<sup>108</sup> Americans adopted 4112 children from Guatemala in 2008, but this number decreased to 754 in 2009. *Guatemala*, BUREAU OF CONSULAR AFF., U.S. DEP’T OF STATE, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=guatemala](http://adoption.state.gov/country_information/country_specific_info.php?country-select=guatemala) (last updated Nov. 2009).

<sup>109</sup> *International Adoption: Trends and Issues*, CHILD WELFARE LEAGUE OF AM., (Nov. 2007), [http://www.ccaoinstitute.org/pdf/international\\_adoption/International%20Adoption%20Trends%20and%20Issues.pdf](http://www.ccaoinstitute.org/pdf/international_adoption/International%20Adoption%20Trends%20and%20Issues.pdf).

<sup>110</sup> *China*, U.S. DEP’T OF STATE, *supra* note 84. While China is still the largest source of adopted children in the United States, with 3401 Chinese children adopted in 2010, this number is down from 7903 in 2005. *Id.*

believes that intercountry adoption as an institution is “one of the ultimate forms of human exploitation, with the rich, powerful and white taking from poor, powerless members of racial and other minority groups their children.”<sup>111</sup> With opposition such as this, countries that wish to support intercountry adoption—like the United States—“have nothing to gain and much to lose if they look as if they are taking children from unwilling countries.”<sup>112</sup>

Because mental health concerns are not identifiable pre-adoption, a need exists to address them in the post-adoption phase; also, as post-adoption reporting is important to sending countries, a need exists to give the U.S. Department of State control over its compliance. Neither court jurisprudence nor state statutes are able to provide these families and adoptees solutions, and as a vocal opposition threatens a further decline in the number of intercountry adoptions, a regulatory solution is necessary.

#### IV. POST-ADOPTION REGULATORY SOLUTIONS ARE NECESSARY TO SUPPORT THE “BEST INTERESTS OF THE CHILD” STANDARD

Whether American families have the opportunity to adopt abroad in the future depends, at least in part, on the perceived success of intercountry adoptions today.<sup>113</sup> While adoption numbers are down partially because of necessary regulations to prevent baby trafficking, the United States does have an interest in controlling public perception of American adoptions to control the vocal opposition trying to further bring down the rate at which children are adopted internationally. Post-adoption regulation is needed to enable adoptive parents to care for a child with unanticipated health risks, and improve the perception sending countries have of American adoptive families. This is best achieved through creating regulations to: (1) require agencies to produce certain

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<sup>111</sup>Bartholet, *supra* note 8, at 63–64. Often, opponents point out that “at best international adoption is a band-aid operation” providing homes only to a small fraction of children in need, and money would be “much better spent on improving conditions that would benefit the larger group of children in need.” *Id.* at 71.

<sup>112</sup>Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOBAL POL’Y 91, 92 (2010). The United States needs to do more to combat this opposition by emphasizing that “children’s most fundamental interests are in being raised in a loving, nurturing manner, in the context of a permanent family, and that these interests can best be served by giving them the homes that often will only be available in international adoption.” Bartholet, *supra* note 8, at 68. It is an institution to “serve[] the fundamental need of some of the world’s neediest children for family. The families formed demonstrate our human capacity to love . . .” *Id.* at 63. Furthermore, although corruption and other problems that can occur in the intercountry adoption process are far from ideal, they are arguably the lesser evil when compared with the conditions that orphaned and homeless children endure in their own countries. See Shannah Tharp-Taylor, *The Effects of Early Social Deprivation on Children Reared in Foreign Orphanages* 6–7 (Feb. 11, 2003), available at <http://www.eric.ed.gov/PDFS/ED475594.pdf>.

<sup>113</sup>See *supra* notes 1–4 and accompanying text for Russian reaction of threatening a moratorium on intercountry adoptions based upon Artyom’s return to Russia.

medical records, and (2) bring post-adoption services within the governance of the IAA with respect to post-adoption reporting and post-adoption counseling.<sup>114</sup> These measures are necessary to protect the best interests of the child as well as to build trust between sending and receiving countries. These measures will help receiving countries overcome the notion that “sending countries harbor deep resentment of the historic oppression and exploitation their peoples have been subjected to by imperialist powers, as well as genuine, even if misguided, fear that adoption abroad puts their children at risk of mistreatment.”<sup>115</sup>

### *A. Require Agencies to Produce Certain Medical Records*

The initial step toward better protection of intercountry adoptions in the United States is for Congress to provide language for requirements of medical history and records in the IAA. First, this would allow parents the opportunity to make an informed decision as to whether or not they have the necessary time and support to care for the prospective child. Second, this also enables the prospective adoptive parents *and* the agency to ensure the adoption is within the “best interests of the child”; by doing so, the agency can more completely fulfill its IAA requirements. Third, a requirement that each child adopted into the United States must possess certain medical records would provide courts a foundation to grant parents recovery for damages when parents do not wish to dissolve the adoption. Fourth, these requirements would create a standard on which both sending and receiving countries can rely, giving legitimacy to the institution of intercountry adoption more generally.

Some examples of the types of medical records Congress should consider implementing include the recommendations made by the American Academy of Pediatrics: blood tests for HIV 1 and 2, syphilis, Hepatitis B and C, and a complete blood count; stool samples for ova and parasites; a skin test for tuberculosis; and an update of all immunizations.<sup>116</sup> However, these immunizations alone will not address the mental issues, sometimes latent, that will affect these children throughout their lives. Therefore, additional post-adoption services may be necessary, which is why, in addition to requiring specific medical records in the pre-adoption phase, some post-adoption services should be brought within the governance of the IAA.<sup>117</sup>

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<sup>114</sup> See Bartholet, *supra* note 112, at 96. (“When parents violate laws prohibiting child maltreatment, we [should] not shut down the system that sends newborns home with their parents. We [should] call for better enforcement of laws prohibiting maltreatment.”).

<sup>115</sup> ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* 160–61 (1999).

<sup>116</sup> COMM. ON INFECTIOUS DISEASES, AM. ACAD. OF PEDIATRICS, *RED BOOK: 2009 REPORT OF THE COMMITTEE ON INFECTIOUS DISEASES* 182–88 (Larry K. Pickering et al. eds., 2009) (discussing the medical evaluation of internationally adopted children for infectious diseases).

<sup>117</sup> See *infra* Part III.B.

One counterargument to this proposal would be that, by providing explicit language of what medical documentation is necessary, the United States is projecting a severe message to sending countries that the United States feels the need to better protect adopting parents. However, informing the prospective adoptive parents of the needs of the child will better ensure that the child's needs can be fulfilled and the adoption is in the child's best interests; because the child's best interests form the basis for permitting an intercountry adoption under both the U.N. Convention<sup>118</sup> and the Hague Convention,<sup>119</sup> the governments of all countries have ratified their support for measures that protect the children.

*B. Bring Post-Adoption Services Within the Regulation of the IAA and the U.S. Department of State*

The second step toward better protection of intercountry adoptions in the United States is for Congress to bring post-adoption services within the regulation of the IAA and the U.S. Department of State. As mentioned previously, the current regulatory measures implementing the Hague Convention in the United States are devoted to ensuring that adoption agencies fulfill their pre-adoption obligations.<sup>120</sup> Public attention on intercountry adoptions that result in an arrangement not in the best interests of the child, like the headlines of seven-year-old Artyom's American adoptive mother placing him on an airplane back to Russia,<sup>121</sup> could eliminate the opportunity for American families to adopt internationally altogether.<sup>122</sup> Although sending countries often require annual post-adoption reporting, including statutory follow-up counseling and reporting in the IAA will provide a basis on which to detect and support adoptions with unanticipated complications.<sup>123</sup>

Measures that specifically need to be taken include the incorporation of a mechanism that requires families and agencies to work together to "provide sending countries with regular feedback on what has happened to the children who are sent abroad for adoption. Regular reports could help assure sending countries that their children are receiving good treatment and are thriving in their new homes."<sup>124</sup> By placing this responsibility with the families *and* the agencies, the U.S. government can require agency compliance in order for an agency to remain accredited.

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<sup>118</sup> See Convention on the Rights of the Child, *supra* note 16, at 46 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests of the child* shall be a primary consideration." (emphasis added)).

<sup>119</sup> Hague Convention, *supra* note 9, at 1139.

<sup>120</sup> See *supra* Part II.C.

<sup>121</sup> See *supra* notes 1–4 and accompanying text.

<sup>122</sup> See, e.g., *China Adoption Factsheet*, *supra* note 6.

<sup>123</sup> See O'HALLORAN, *supra* note 58, at 288.

<sup>124</sup> BARTHOLET, *supra* note 115, at 161.

### C. Other Viable Solutions

Broader reform efforts that would help prospective adoptive parents understand the needs of their prospective adoptive children and build trust between sending and receiving countries are also needed, but they are not part of the primary proposal of this Note because they are broader in scope and understandably more difficult to implement. One example of such a measure includes enhancing American efforts to facilitate the safe and healthy upbringing—and timely placement—of abandoned children in the sending countries. Specifically, the U.S. government should aid sending countries in “creating systems for identifying and freeing up children who have been effectively permanently abandoned” and work “to create realistic methods of expediting the [adoption] process, so that children are placed in adoptive homes as early in life as possible.”<sup>125</sup> These efforts mitigate the health risks associated with children who are institutionalized for long periods of time while waiting to be adopted. In the same vein, the U.S. government should provide aid to countries from which U.S. families adopt, demonstrating a genuine interest that the purpose of the institution is to improve the lives of children.<sup>126</sup> These measures would mitigate the length of time in and severity of health risks associated with institutionalization of prospective intercountry adoptees, in addition to bolstering support between the United States as a receiving country and the number of sending countries from which American families adopt.

At least one critic of expanding global efforts to support intercountry adoptions suggests that the IAA should call for a permanent ban on all future adoptions serviced by an agency that commits a single violation of the IAA, therefore denying violators the profits from the large U.S. market on intercountry adoptions.<sup>127</sup> However, when intercountry adoption is in the “best interests of a child,” such as a child who is in an institution because her biological parents have given up their legal right to be her parents, or the child has gone unnoticed in the domestic adoption program, closing adoption to a prospective adoptive family is not in this child’s best interest. As stated by leading international adoption scholar Elizabeth Bartholet:

[C]losing down international adoption does not put poor countries in a better economic position or a better power position with respect to foreign governments. It is simply a symbolic gesture ‘for’ the nation and ‘against’ the

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<sup>125</sup> Bartholet, *supra* note 8, at 74.

<sup>126</sup> See BARTHOLET, *supra* note 115, at 161 (“Receiving countries could demonstrate good faith and a genuine concern for . . . children’s welfare within a sending country, in conjunction with any international adoption programs that are instituted.”).

<sup>127</sup> Kate O’Keefe, Note, *The Intercountry Adoption Act of 2000: The United States’ Ratification of the Hague Convention on the Protection of Children, and Its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT’L L. 1611, 1640 (2007).



foreigners. It is a gesture that is easy and cheap to make because the children at issue have no political clout; their voices are not heard.<sup>128</sup>

The U.S. government echoed these sentiments in its statements following Russian adoptee Ivan Skorobogatov's unfortunate death,<sup>129</sup> stating that "[e]nding adoptions is not a solution to the problem. There are hundreds of thousands of adopted children in the United States in loving homes, and thousands of children in orphanages in Russia who are hoping to find good homes and parents."<sup>130</sup>

Furthermore, if policy makers thought "positively about international adoption, they could easily increase the numbers of children placed many times over, particularly given that such adoption is self-financing, with adoptive parents paying the costs not simply of the children's future support but also of the services involved in facilitating adoption arrangements."<sup>131</sup>

With additional measures to protect adoptions once they are finalized, including requiring certain medical information and bringing post-adoption services and reporting within the governance of the IAA, families and the U.S. government can better manage the challenges of intercountry adoption together. This will create a more favorable platform to foster good relations between sending and receiving countries. It is under these conditions that the United States will be able to mitigate the adoption tragedies of Artyom's experience and continue to provide the opportunity for intercountry adoption.

## V. CONCLUSION

Congress has expressed its support for the institution of intercountry adoptions these last two decades through creation of the IAA and the implementation of the corresponding regulatory measures necessary to bring the United States into compliance with the Hague Convention. In doing so, Congress focused on implementing the pre-adoption measures required by the Hague Convention, including designating the U.S. Department of State as the CA authorized to accredit adoption agencies to conduct intercountry adoptions.

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<sup>128</sup> BARTHOLET, *supra* note 115, at 162; see also Marc Zappala & Chuck Johnson, *A Case for Ethical Intercountry Adoption*, ADOPTION ADVOC., Apr. 2009, at 1, 1, available at <https://www.adoptioncouncil.org/images/stories/documents/IntercountryAdoptionAdoptionAdvocateApril2009.pdf> ("To shut down intercountry adoption, as some of its more radical critics suggest, would harm far more children than it would help and is therefore not an appropriate response to the problems facing the institution.").

<sup>129</sup> See *supra* note 4.

<sup>130</sup> *Statement by Ambassador Beyrle on the Death of Ivan Skorobogatov*, EMBASSY OF THE U.S., U.S. DEP'T OF STATE (Mar. 3, 2010), <http://moscow.usembassy.gov/beyrle-st030310.html>. Ivan was the most recent Russian-born child adopted by an American family who passed away in the United States. See *Another Adopted Russian Boy Beaten to Death in U.S.*, *supra* note 4. Ivan's adoptive parents are on trial for his murder. See *id.*

<sup>131</sup> Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333, 343-44 (2007).

This structure created legitimacy in the intercountry institution of adoption, and provided a basic mechanism for implementation. However, the rest of the Regulations also largely focus on pre-adoption requirements and are virtually silent on requiring adoption agencies to support families once the adoption is finalized. When the pre-adoption home study that the IAA requires does not reveal psychiatric concerns in the prospective adoptive parents, and the pre-adoption medical reports do not reveal psychiatric concerns in the prospective adoptive children, the adoption proceeds and the requirements of the IAA are fulfilled—although the adoption may surface as not being in the child's best interest.

In the current regulatory regime, the U.S. government does not require any post-adoption services or protections that might detect or correct psychiatric concerns of a child or a parent, nor does it control whether sending countries receive required updates on their children. This regulation is insufficient. The regulatory void has created an opportunity for American adoptive parents and sending countries to doubt the viability of intercountry adoption, and threatens the future of the institution.

The IAA needs to require that certain medical tests be conducted pre-adoption, and bring post-adoption services within the IAA. These two measures allow the U.S. government to better monitor and control intercountry adoptions, therefore better ensuring that some unfortunate adoptions do not inhibit the adoption process for future prospective adoptive parents. After all, intercountry adoption became the institution that it is because there is a need for children to be raised in permanent homes. Protecting prospective adoptive parents and fostering relationships between sending and receiving countries is necessary to keep the institution alive and thriving, and adding these measures to the IAA will help achieve this outcome.