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## Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling

Ian Peck

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# Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling

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## I. INTRODUCTION

When officials stop and search a ship under the suspicion of carrying contraband, they are likely to find a surprising cargo locked in the hold of the vessel: humans. In response to poverty and unemployment in their home countries, thousands of people are moving illegally into other nations with the assistance of professional smugglers. The illicit trade in illegal aliens has become a multi-billion dollar industry resulting in the deterioration of legitimate immigration systems and the virtual enslavement of the smugglers' customers. Host countries have reacted to this recent wave of undocumented foreigners by passing tough anti-immigration laws which often lead more immigrants to turn to the expertise of unscrupulous human smugglers.

This Note examines Japan's 1997 Amendment to the Immigration Control and Refugee Recognition Act as a response to illegal Chinese immigration. Part II of the Note identifies and explains the international human smuggling crisis. Part III examines Sino-Japanese human smuggling. Finally, Part IV analyzes the Immigration Control and Refugee Recognition Act in detail and suggests some of the Act's shortcomings.

## II. THE INTERNATIONAL HUMAN SMUGGLING CRISIS

### A. *The Definition of Human Smuggling*

In order to conduct an analysis of human smuggling between two specific countries, it is helpful to examine the nature of the smuggling phenomenon in a larger context. The first step in analyzing the human smuggling crisis is to define the activity. While the trafficking of illegal aliens takes many forms, scholars have identified the basic framework of the smuggling trade. All human smuggling involves (1) the exchange of money, (2) a voluntary journey and, (3) a facilitator that arranges an illegal passage across an international border.<sup>1</sup> These transactions have become a worldwide phenomenon, and those who wish to move into another country

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1. See Paul J. Smith, *Chinese Migrant Trafficking: A Global Challenge*, in HUMAN SMUGGLING: CHINESE MIGRANT TRAFFICKING AND THE CHALLENGE TO AMERICA'S IMMIGRATION TRADITION 1, 9 (Paul J. Smith ed., 1997).

illegally consider human trafficking an essential service.<sup>2</sup> Without smugglers, people fear that they cannot successfully make the long trip to a foreign country or overcome the host country's anti-immigration restrictions which grow stricter each year.<sup>3</sup> Upon reaching their final destinations, immigrants fear that they may be unable to find jobs or housing.<sup>4</sup>

To the immigrant, the smuggler is the crucial nexus between the home country and a "global marketplace of human smuggling services."<sup>5</sup> As respected entrepreneurs, smugglers contract with illegal immigrants, subcontract with facilitators of transportation and entry, collect the fees from immigrants, and retain the net profits.<sup>6</sup> To access these services, potential immigrants have come to accept smugglers, even though the price they pay can often be their life or liberty. The ominous nicknames that customers attribute to smugglers, such as snakeheads, shetou,<sup>7</sup> and coyotes,<sup>8</sup> demonstrate the real fear that immigrants feel for this necessary yet grisly business.

### B. *International Scope of Smuggling Operations*

While it is difficult to measure the precise figures of human smuggling and illegal immigration given the covert methods involved,<sup>9</sup> it has become clear in recent years that the problem is of great magnitude. The International Organization for Migration (IOM) estimates that traffickers move 4 million people each year<sup>10</sup> and

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2. See Willard H. Myers III, *Of Qinqing, Qinshu, Guanxi, and Shetou: The Dynamic Elements of Chinese Irregular Population Movement*, in HUMAN SMUGGLING: CHINESE MIGRANT TRAFFICKING AND THE CHALLENGE TO AMERICA'S IMMIGRATION TRADITION, *supra* note 1, at 93, 104.

3. See Smith, *supra* note 1, at 9 (stating various reasons why potential immigrants seek the services of human smugglers).

4. See *id.*

5. Myers, *supra* note 2, at 104.

6. See *id.* at 128 n. 20. The smuggling enterprise provides all the necessary capital and compensates its employees based on the number of immigrants whose passage they arrange. See *id.*

7. See *id.* "Shetou" is a slang Mandarin term for an alien smuggler. The English translation is "snakehead." Chinese refer to any person associated with human smuggling and to collective smuggling enterprises as "shetou." See *id.*

8. See INTERNATIONAL ORGANIZATION FOR MIGRATION, *More Targeted Policies Needed in the Source Areas*, TRAFFICKING IN MIGRANTS Q. BULL. (Sept. 1997) at 16.

9. See Paul J. Smith, *Introduction* to HUMAN SMUGGLING: CHINESE MIGRANT TRAFFICKING AND THE CHALLENGE TO AMERICA'S IMMIGRATION TRADITION, *supra* note 1, at viii, x (noting that while officials have recently emphasized careful documentation of illegal Chinese immigration, uncertainty remains as to the actual numbers involved).

10. See INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 8, at 16. The increase in numbers forces proportional increases in anti-trafficking spending. See *id.*

conduct activities in seventy countries.<sup>11</sup> Smugglers have discovered a boundless market in China, where government officials estimate that more than 700,000 citizens have left the country illegally in recent years.<sup>12</sup> This movement of large numbers of Chinese involves over thirty countries.<sup>13</sup>

The profits earned by the smugglers have also risen dramatically in recent years. In 1995, studies placed worldwide smuggling profits at \$3 billion per year.<sup>14</sup> By 1997, this figure had drastically increased. Experts now estimate the value of the smuggling industry to be between \$7 and \$10 billion, making it both one of the fastest growing and most profitable industries in the world.<sup>15</sup> One study concludes that smuggling into Europe alone is worth more than \$7 billion per year,<sup>16</sup> and experts place annual profits of the smuggling of Chinese citizens between \$3 and \$3.5 billion.<sup>17</sup> The Chinese market is dominated by criminal organizations whose total profits top \$200 billion per year.<sup>18</sup>

### C. *The Host Countries*

The prime targets of smugglers and their customers are North America, Western Europe, and Japan.<sup>19</sup> Each of these areas attract impoverished foreigners because of the high per capita incomes and relatively luxurious standards of living. One commentator explains

11. See Ulises Hernández, *The Mexican Connection*, WORLD PRESS REV., Nov. 1, 1995, at 36, available in 1995 WL 12621502.

12. See Smith, *supra* note 9, at x (reporting a statement made in 1994).

13. See Smith, *supra* note 1, at 5-6.

14. See Hernández, *supra* note 11, at 36.

15. See Paul J. Smith, Editorial, *Smuggling People Into Rich Countries Is a Growth Industry*, INT'L HERALD TRIB. (Neuilly-sur-Seine, France), June 28, 1996, at 6, available in 1996 WL 4091685.

16. See Birna Helgadóttir, *Four Variations on a Xenophobic Tune: of Smugglers, Hatred and Crackdowns*, EUROPEAN, Feb. 27, 1997, at 8, reprinted in WORLD PRESS REV., May 1997, at 8, available in LEXIS, WORLD Library, IMT File.

17. Compare Paul J. Smith, Editorial, *Illegal Chinese Immigrants Everywhere, and No Letup in Sight*, INT'L HERALD TRIB., May 26, 1994, at 6, available in 1994 WL 9790365 (estimating that annual Chinese human smuggling profits exceed \$3.5 billion) with Ko-lin Chin, *Safe House or Hell House? Experiences of Newly Arrived Undocumented Chinese*, in HUMAN SMUGGLING: CHINESE MIGRANT TRAFFICKING AND THE CHALLENGE TO AMERICA'S IMMIGRATION TRADITION, *supra* note 1, at 169, 170 (placing profits between \$1 billion and \$3 billion).

18. See Hernández, *supra* note 11, at 36 (total profits came from extortion, prostitution, heroin trafficking, arms smuggling, car theft and immigrant smuggling).

19. See Smith, *supra* note 15, at 6. As long as economic disparity exists among nations, citizens in the "have not" countries will flock to the wealthier nations. Experts indicate that the trend will continue through the twenty-first century. See Smith, *supra* note 9, at ix.

the draw of these nations: "[t]he drab lives most Chinese still lead, coupled with pervasive television images of life in Western countries and in Japan have become a powerful incentive for young Chinese to emigrate. . . ."<sup>20</sup>

The United States reports dramatic statistics regarding illegal Chinese aliens. The estimated number of Chinese illegals entering the country varies, with a range of 10,000-100,000 per year.<sup>21</sup> One inter-agency study places the number at 50,000,<sup>22</sup> but CIA director James Woolsey recently testified to Congress that 100,000 Chinese are smuggled into the United States each year.<sup>23</sup> The total number of illegal Chinese living in the United States in 1991 was approximately 500,000.<sup>24</sup> Of those that U.S. immigration officials do detect, many make successful claims for political asylum based on China's strict birth control policies.<sup>25</sup> Recent studies report that half of all illegal aliens entering the country are from Asia.<sup>26</sup>

Mexico has become a key link in the smuggling of people from Asia into the United States.<sup>27</sup> The number of Chinese arrested by Mexican officials doubled from 1994 to 1995,<sup>28</sup> exacerbating the long-standing problem of illegal movement across the 1,800 mile Mexican-American border.<sup>29</sup> When the U.S. Immigration and Naturalization Service detects and shuts down one pipeline of illegal immigration, another more complex route quickly opens.<sup>30</sup> The smugglers thrive in this environment, charging anywhere from \$5,000-\$35,000 for each immigrant they move from China to the United States.<sup>31</sup>

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20. TAKASHI OKA, *PRYING OPEN THE DOOR: FOREIGN WORKERS IN JAPAN* 21 (Carnegie Endowment for Int'l Peace Contemporary Issues Paper No. 2, 1994).

21. See Smith, *supra* note 9, at x.

22. See *id.*

23. See Smith, *supra* note 17, at 6.

24. See Chin, *supra* note 17, at 169.

25. See Smith, *supra* note 1, at 16. Organized smuggling syndicates often coach their clients on techniques for making successful claims of political asylum in the United States. The coaching includes the proper use of phrases designed to elicit the sympathy of custom officials. See *id.*

26. See Smith, *supra* note 17, at 6.

27. See Hernández, *supra* note 11, at 36. The Caribbean region is another major corridor for Sino-United States illegal immigration. See Smith, *supra* note 1, at 4.

28. See Hernández, *supra* note 11, at 36.

29. See *id.*

30. See Smith, *supra* note 1, at 4 (citing the Caribbean as an example of a location where routes are quickly shut down and reopened). Corruption among Mexican and U.S. officials, as well as some Mexican law firms, creates more possible routes of entry. This corruption exists not only at local levels but as high as the central office of Mexico's National Migration Institute. See Hernández, *supra* note 11, at 36.

31. See Hernández, *supra* note 11, at 36.

The rising threat of illegal Chinese immigration gained worldwide attention in 1993 when the Chinese ship *Golden Venture* ran aground offshore of Queens, New York. The ship contained approximately 300 illegal Chinese immigrants who had spent three months in unsanitary conditions on their voyage to America.<sup>32</sup> Upon their rocky arrival, some immigrants followed their smugglers' orders to jump into the 53 degree water while others waited for the U.S. Coast Guard for rescue.<sup>33</sup> Ten Chinese drowned in the confusing episode while U.S. authorities apprehended most of the other immigrants.<sup>34</sup> The episode led President Clinton to declare Chinese immigration a security threat<sup>35</sup> and order the National Security Commission to direct the U.S. response to Chinese smuggling organizations.<sup>36</sup>

America is not the only country facing the ever-growing problem of human smuggling. In Europe, despite strict border control and recent immigration law reform, the International Center for Migration Policy estimates that 300,000 people per year enter the European Union illegally.<sup>37</sup> Smugglers have moved tens of thousands of Chinese into France, Germany, and Spain. Russia, while not one of the premiere destinations, has become a major holding depot for an estimated 200,000 Asian immigrants at any given time who are waiting to move on to western destinations.<sup>38</sup> Eastern Europe, Hong Kong, and Taiwan have become other major holding areas for illegal west-bound travelers,<sup>39</sup> while Thailand has become an "epicenter" of illegal immigration from which smugglers move approximately 2,000 persons, both Thai nationals and foreigners, every month.<sup>40</sup>

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32. See Smith, *supra* note 1, at 1.

33. See *id.*

34. See Kevin Tessier, Immigration Project *The New Slave Trade: The International Crisis of Immigrant Smuggling*, 3 IND J. GLOBAL LEGAL STUD. 261, 261 (1995). Four years after the *Golden Venture* sank, 55 of the Chinese passengers remained in prison, 80 were free on bond and 99 were deported. In 1997, President Clinton ordered the release of the incarcerated immigrants pending adjudication of the cases. See *id.*; Smith, *supra* note 1, at 1.

35. See Smith, *supra* note 17, at 6.

36. See Smith, *supra* note 1, at 2.

37. See Helgadottir, *supra* note 16, at 8. EU officials admit that the "Fortress Europe" policy has made it almost impossible for migrants to enter legally. See *id.*

38. See Smith, *supra* note 15, at 6. Russia has become an immigration corridor given its "porous" borders, the rise of organized crime, and the recent decline of authority in the region. *Id.*

39. See *id.* Smugglers move immigrants in trucks, vans, and planes from Hungary, Poland, and Lithuania. See *id.*

40. *Id.*

#### D. *The Implications of Human Smuggling*

These host countries are dealing with the smuggling phenomenon as a serious issue. Along with the United States, several countries now consider the problem of smuggled immigrants a threat to national security.<sup>41</sup> Others have become concerned about the rise in crime surrounding the arrival of smuggled immigrants, especially organized crime, extortion, and prostitution.<sup>42</sup> The link between smuggling and organized crime has recently become more pronounced,<sup>43</sup> leading some to fear that these will be the two most important international issues in the future.<sup>44</sup> Legal immigration systems suffer as well, prompting the director of the International Center for Migration Policy Development [the ICMPD] to note, "[t]he phenomenon of trafficking already threatens to undermine the very fundament[als] of national immigration systems."<sup>45</sup>

Another important issue in the human smuggling crisis is the concern for human rights. In addition to the growing number of deaths of immigrants during the horrible transnational voyages,<sup>46</sup> the conditions that immigrants face upon arriving at their final destination are atrocious. Smugglers often force their clients into slavery, prostitution, or various other criminal acts to pay the ever-increasing smuggling fee.<sup>47</sup> Smugglers occasionally kidnap illegal

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41. Studies estimate that 100,000 Chinese are hiding in Indonesia at any one time, prompting the government to declare a threat to national sovereignty. See Smith, *supra* note 17, at 6. Malaysia also views the problem as a security threat, now detaining suspects without trial to help fight human smuggling. See Smith, *supra* note 15, at 6. Russian Interior Ministry officials reiterated the presence of a security threat (which they first declared in 1995) after President Boris Yeltsin met with President Jiang Zemin of China and forged a "strategic partnership" to prevent smuggling. Paul J. Smith, Editorial, *China's 'Immigration Card' Is a Potent Psychological Weapon*, INT'L HERALD TRIB., May 20, 1997, at 8, available in 1997 WL 4491429.

42. See Smith, *supra* note 41, at 8; Marlowe Hood, *Trafficking in Humans: Big Business in Europe Light Penalties and Huge Profits Spell a Boon for Organized Crime*, INT'L HERALD TRIB., Jan. 3, 1995, at 1, available in 1995 WL 7541426.

43. See Hood, *supra* note 42, at 1. The high-tech organized crime networks have adopted smuggling, with its large profit margin and low potential penalties, as their new most lucrative venture. See *id.*

44. See Smith, *supra* note 9, at viii-ix.

45. Hood, *supra* note 42, at 1.

46. For example, 280 smuggled immigrants drowned in waters near Sicily on Christmas Day in 1996, and the current director of the ICMPD estimates that hundreds more die each year. See Helgadottir, *supra* note 16, at 8.

47. See Chin, *supra* note 17, at 173; Barry James, *Europeans Are Shutting Door Ever Tighter on Asylum-Seekers*, INT'L HERALD TRIB., Nov. 24, 1995, at 7, available in 1995 WL 11288744.



immigrants immediately upon their arrival in the host country and demand ransom payments from the immigrants' families.<sup>48</sup>

The employment conditions of undocumented workers are not much better. Eighteen hour days are not infrequent for smuggled immigrants.<sup>49</sup> Smugglers often respond to their customers' inability to pay their debts with torture and rape.<sup>50</sup> As mentioned above, another common technique involves extorting money from the families of immigrants by threatening to kill the immigrants.<sup>51</sup> One undocumented Chinese immigrant in the United States jumped from a fourth story window to escape the abuses of his smuggler.<sup>52</sup> The administrator of the International migration and labor market policies division of the Organization for Economic Cooperation and Development (OECD), Jean-Pierre Garson, notes, "[t]rafficking is happening not just to get people into a country but to exploit them in underground economies once they are there."<sup>53</sup> Since immigrants are both violators of the law and victims of their smugglers,<sup>54</sup> the problem is legally complex.

The policies of the host country also contribute to the hardships that the immigrants must face. Many nations deny welfare, education, and health care benefits to illegal immigrants.<sup>55</sup> Combined with the long hours of work and large percentage of salary that aliens must pay their smugglers, this lack of benefits makes life difficult. Illegals cannot report crimes committed against them for fear that officials will discover their true nationality and deport

48. See Gita Mendis, "Snakeheads": A Chinese Immigrant's Nightmare, Inter Press Service/Global Information Network, Apr. 13, 1995, available in LEXIS, MARKET Library, IACNWS File. Several recent cases in New York involve snakeheads that hold immigrants hostage and demand \$20,000 to \$30,000 from their families. If the families refuse to pay, the smugglers kill the immigrants. See *id.*

49. See Hernández, *supra* note 11, at 36. Given the high fees and rates of interest smugglers charge, smuggled immigrants must often work for years to pay off their debts. See Chin, *supra* note 17, at 178.

50. See generally Chin, *supra* note 17, at 173-89 (describing such common tactics as gang rape, beatings, and amputation of fingers).

51. U.S. authorities have uncovered instances of torture and murder resulting from non-payment. In one case, New York police found 17 Chinese illegals chained to the wall in a room that measured approximately five feet square. See Hernández, *supra* note 11, at 36.

52. See Mendis, *supra* note 48.

53. Hood, *supra* note 42, at 1.

54. A meeting of government officials to deal with smuggling problems was fittingly titled, "International Response to Trafficking Migrants and the Protection of Migrant Rights." *Id.*

55. The United Kingdom is among this list. See James, *supra* note 47, at 7.

them.<sup>56</sup> If the host country does deport an immigrant, the alien's home country may refuse to accept him.<sup>57</sup>

### III. SINO-JAPANESE HUMAN SMUGGLING: A GROWING PROBLEM

#### A. Facts and Figures

Recent reports estimate that the total number of *registered* Chinese currently living in Japan is approximately 234,264.<sup>58</sup> Chinese are second only to North and South Koreans in the number of documented foreigners,<sup>59</sup> but experts on immigration trends predict that Chinese could soon become the largest foreign presence in Japan by a large margin.<sup>60</sup> The precise number of Chinese living *illegally* in Japan is unknown, but studies place that number near 25,000.<sup>61</sup>

Arrest records for recent time periods indicate that the number of undocumented Chinese in Japan is growing. In forty-one separate intercepted entry attempts from December 1996 to February 1997, 1068 illegal immigrants were arrested,<sup>62</sup> of which 912 were Chinese.<sup>63</sup> During the same four month period one year earlier, the number of arrests of Chinese totaled only 137<sup>64</sup>—a difference of 775 arrests. Studies show similar results for the period from January to May 1997, in which officials apprehended 726 undocumented Chinese.<sup>65</sup> One report states that undocumented Chinese in the

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56. See Yoko Selleck, *Illegal Foreign Migrant Workers in Japan: Change and Challenge in Japanese Society*, in *MIGRATION: THE ASIAN EXPERIENCE* 169, 191-92 (Judith M. Brown & Rosemary Foot eds., 1994).

57. For example, Burma refused to accept Burmese citizens that Malaysia deported, and Taiwan experienced problems sending Chinese illegals back to mainland China. Paul J. Smith, Editorial, *East Asia's Immigration Crisis Demands Careful Choices*, *INT'L HERALD TRIB.*, May 22, 1995, at 8, available in 1995 WL 7545482.

58. See Japan Immigration Ass'n, *Statistics on Registered Foreign Residents*, (last modified June 30, 1997) <[http://jin.jcic.or.jp/stat/category\\_21.html](http://jin.jcic.or.jp/stat/category_21.html)> (visited Sept. 9, 1997).

59. See *id.*

60. See OKA, *supra* note 20, at 20.

61. See Smith, *supra* note 17, at 6.

62. See *Government Seeks to Curb Levels of Illegal Alien Smuggling*, *THE DAILY YOMIURI/YOMIURI SHIMBUN*, Mar. 1, 1997, available in 1997 WL 9499988 [hereinafter *Government Seeks to Curb*].

63. See *Law Cracks Down on Alien Smugglers*, *THE DAILY YOMIURI/YOMIURI SHIMBUN*, May 12, 1997, available in 1997 WL 10707430.

64. See *id.*

65. See *Illegal Chinese Immigrants Pouring Into Southern Japan*, *Kyodo News International*, May 12, 1997, available in LEXIS, MARKET Library, IACNWS File [hereinafter *Illegal Chinese Immigrants*].

Kyushu and Okinawa regions of Japan account for nearly forty percent of all illegal immigrants in the country.<sup>66</sup>

The 1997 arrest figures are staggering when compared to the 542 arrests of Chinese citizens that Japanese officials made during the *entire year* of 1996.<sup>67</sup> Prior to this recent outburst of immigration-related arrests, the long-standing record for arrests of all nationalities was 500 set in 1951 during mass migration surrounding the Korean War.<sup>68</sup> Incredibly, sources estimate that Japanese immigration officials apprehend only ten percent of all illegals entering the country.<sup>69</sup>

The fees that Chinese pay smugglers to travel to Japan range from 170,000 to 200,000 yuan or approximately 2.6 million to 3.1 million ¥ (\$19,335 to \$23,053).<sup>70</sup> The smugglers usually require a partial down payment and allow the immigrant to pay the rest of the debt in installments, often deducted from the immigrant's salary.<sup>71</sup> This can result in lifelong servitude, leading some authors to label human smuggling the "new slave trade."<sup>72</sup> As Japanese immigration laws become more strict, demand for the smugglers' services increases, and the smugglers are able to increase their fees.<sup>73</sup> While many Chinese view the United States as a superior destination, Japan is "closer and not quite so foreign,"<sup>74</sup> increasing the demand and cost of smuggling operations.

Increased organization of the Sino-Japanese smuggling trade has also led to the growth of individual smuggling transactions. A single transaction involving twenty million ¥ (\$148,732) and hundreds of aliens is not uncommon.<sup>75</sup> Commentators have noticed the growing size of these transactions and have stated that the number of Chinese entering Japan illegally in groups has surged

66. *See id.*

67. *See id.*

68. *See Two Hundred Thirty-Nine Stowaways Arrested So Far This Year, THE DAILY YOMIURI/YOMIURI SHIMBUN*, Aug. 10, 1996, available in 1996 WL 11783774 [hereinafter *Two Hundred Thirty-Nine Stowaways*]. The large number of illegal immigrants in 1951 has been attributed to an influx of Koreans during the Korean War. *See id.*

69. *See Government Seeks to Curb*, *supra* note 62.

70. *See Illegal Chinese Immigrants*, *supra* note 65. All dollar-yen conversions are based on the currency exchange rate in New York as of September 22, 1998.

71. *See HIROSHI KOMAI, MIGRANT WORKERS IN JAPAN* 33 (Jens Wilkinson trans., 1995); *see also* Tessier, *supra* note 34, at 261 (discussing the exorbitant prices charged to smuggled immigrants).

72. Tessier, *supra* note 34, at 261. This terminology is advanced by both Jonas Widgren, head of the ICMPD, and United States Congressman George Sangmeister. *See id.*

73. *See* Smith, *supra* note 15, at 6.

74. OKA, *supra* note 20, at 21.

75. *See Illegal Chinese Immigrants*, *supra* note 65.

since 1996.<sup>76</sup> With numbers of this magnitude, the smuggling trade poses a clear threat to Japanese interests.

### B. Causes of Chinese Immigration

To understand the rising number of Chinese immigrants in Japan, one must examine the causes of migration and determine why so many Chinese want to leave their home country. Perhaps the most important of these reasons is unemployment. China has a population of 1.2 billion<sup>77</sup> and is growing at a reported rate of 13 million per year.<sup>78</sup> When one adds the estimated 6 million unreported births, China's population threatens to overwhelm the country's resources.<sup>79</sup> At the same time, unemployment data, while inconsistent, suggests an incredible labor surplus in China. Recent figures estimate that there will be up to 270 million unemployed Chinese by the year 2000.<sup>80</sup> If China is unable to provide jobs for these workers at salaries comparable to those in Japan and other destination countries, millions will respond to their situation by leaving China.<sup>81</sup>

Another important "push factor" of international immigration is a disparity between incomes in the home country and those in the destination country. An estimated 300 million Chinese are living in poverty.<sup>82</sup> The per capita income of the Chinese is estimated at only \$500 per year<sup>83</sup> while studies place Japan's per capita income at as much as sixty-four times that amount.<sup>84</sup> The perception of a better life abroad is often enough to lead Chinese to emigrate.<sup>85</sup> Whether based on perception or reality, as long as this difference in quality of life exists, Chinese will continue to enter Japan and other western nations in order to receive higher wages.

It may seem that China's unprecedented recent growth will slow the trend toward massive emigration. After all, China's economy is

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76. *See id.*

77. *See Smith, supra note 57, at 8.*

78. *See Smith, supra note 41, at 8.*

79. *See Smith, supra note 1, at 13.*

80. *See Smith, supra note 57, at 8.* The Chinese government estimates that 153 million workers will be unemployed in 2000. *See Smith, supra note 1, at 12.* China is so sensitive about its unemployment crisis, the government does not allow open discussions on the subject. *See id.* Reports state that the government recently attempted to shut down a domestic magazine that planned to write a detailed account of the unemployment crisis. *See id.*

81. *See Smith, supra note 1, at 17.*

82. *See id.* at 12.

83. *See id.*

84. *See Selleck, supra note 56, at 180.*

85. *See Smith, supra note 1, at 13* (noting that the media, relatives living abroad, and Chinese tourism all contribute to the perception of wealth in other nations).

presently growing at an annual rate of nine percent.<sup>86</sup> However, poverty in the country of origination is not a driving factor behind international migration.<sup>87</sup> Rather, countries at an intermediate level of development experience increased emigration.<sup>88</sup> Commentators explain this phenomenon by noting that technological advances eliminate many jobs in labor intensive industries, especially in the agricultural field.<sup>89</sup> This creates an immediate need for employment, and the displaced workers are willing to take bigger risks and travel farther in the hope of finding employment.<sup>90</sup> Similar technological advances in communication spread tales of wealth in other countries, while better modes of travel make emigration easier.<sup>91</sup> This explains why China can be experiencing economic growth but losing so many of its citizens to other nations.

### C. Links in the Sino-Japanese Smuggling Chain

Large criminal organizations control the overwhelming majority of the Asian smuggling market.<sup>92</sup> Given the huge potential earnings, high profit margins, low overhead,<sup>93</sup> and the relatively small criminal penalties,<sup>94</sup> many of these gangs now prefer human smuggling to drug trafficking as their primary means of income.<sup>95</sup> Sources indicate that the profits from smuggling operations into Japan now equal drug profits,<sup>96</sup> and the use of existing networks and personnel makes the shift from drug dealer to "snakehead" an easy one for Chinese gang members.<sup>97</sup> As one commentator puts it, "[a] key factor in the rapid increase in stowaways is the growing number of brokers assisting them, particularly those entering Japan by way of South

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86. See *id.* at 12. Smith notes that this development is uneven, improving the lives of some Chinese but leaving many impoverished. See *id.*

87. See Jack A. Goldstone, *A Tsunami on the Horizon? The Potential for International Migration from the People's Republic of China*, in HUMAN SMUGGLING: CHINESE MIGRANT TRAFFICKING AND THE CHALLENGE TO AMERICA'S IMMIGRATION TRADITION, *supra* note 1, at 48, 51.

88. See *id.* Goldstone supports this theory by noting the boom in illegal immigration in the United States following economic development in Mexico and Puerto Rico. *Id.*

89. Peasant farmers and their offspring are left without land and livelihood. See *id.*

90. See *id.* at 52.

91. See *id.* at 51.

92. See Tessier, *supra* note 34, at 262.

93. See Helgadottir, *supra* note 16 (comparing the risks associated with smuggling to the potential profits).

94. See Hood, *supra* note 42.

95. See Smith, *supra* note 1, at 9 (discussing trends in overall trade in humans).

96. See Hood, *supra* note 42, at 1.

97. See *id.* The strengths of these networks are technologically advanced communications and first rate legal advice. See *id.*

Korea and China."<sup>98</sup> Chinese gangs have met the huge migration demand by providing services that are either too dangerous or too complicated for most individuals to perform on their own.<sup>99</sup>

The Chinese gangs are not alone in their efforts to move growing numbers of Chinese into Japan. Several Japanese Mafia organizations ("yakuza") are now cooperating with the Chinese gangs in order to get a piece of this booming transnational trade.<sup>100</sup> The largest of the yakuza, the Yamaguchi-Gumi, actively moves immigrants in large numbers for massive profits.<sup>101</sup> This criminal syndicate, along with another large yakuza organization, Sumiyoshi-Kai,<sup>102</sup> and their Chinese counterparts, now have widespread operations in China and Japan as well as Hong Kong, Taiwan, and Chinese Taipei.<sup>103</sup>

The goal of these organizations is not only to lure Chinese citizens into Japan with promises of jobs and great potential incomes,<sup>104</sup> but also to use them as a cheap source of labor that, because of fear of discovery, refuses to report the smugglers to the Japanese government.<sup>105</sup> The syndicates are composed of various groups with different assignments including recruiting, forwarding, receiving, or transporting migrants to their final destination.<sup>106</sup> This complex system produces effective results and helps snakeheads create complex modes of entry to avoid Japanese detection.

98. *Two Hundred Thirty-Nine Stowaways*, *supra* note 68.

99. See Hood, *supra* note 42, at 1. Increased restrictions against illegal entry usually fuel the demand for human smugglers. See *id.*

100. *Illegal Chinese Immigrants*, *supra* note 65.

101. See *Japan's Organized Crime Infiltrating South China*, Kyodo News International, Aug. 15, 1994, available in LEXIS, MARKET Library, IACNWS File [hereinafter *Japan's Organized Crime*]. Japanese officials arrested three members of the Yamaguchi-gumi organization after an attempt to smuggle 145 Chinese into Japan. See *id.*

102. See *Gangster Jailed for Smuggling Chinese*, Kyodo News International, Oct. 25, 1993, available in LEXIS, MARKET Library, IACNWS File [hereinafter *Gangster Jailed*]. The Sumiyoshi-kai is one of the three largest criminal organizations in Japan. See *id.*

103. See *Japan's Organized Crime*, *supra* note 101. "Yakuza have been implicated in the smuggling of Chinese workers into Japan as cheap labor and the enticement of women from mainland China, Taiwan and Southeast Asia to work as prostitutes or bar hostesses in Japan . . ." *Id.*

104. See *Government Seeks to Curb*, *supra* note 62.

105. See Hood, *supra* note 42, at 1.

106. See Masaki Kunieda, *Foreign Worker Policy and Illegal Migration in Japan*, in *MIGRATION AND THE LABOUR MARKET IN ASIA: PROSPECTS TO THE YEAR 2000* 195, 202 (Organization for Economic Co-operation and Development ed., 1996).

#### D. *Methods of the Sino-Japanese Smuggling Trade*

As Japanese officials detect and close many of the human pipelines from China, the methods of transporting the Chinese into Japan become more and more complicated.<sup>107</sup> In addition to the common smuggling methods of stowing immigrants away in Japanese-bound freighters,<sup>108</sup> sailing into Japan in small crafts under the cover of darkness, or enlisting the aid of family members already in Japan,<sup>109</sup> Chinese gangs have developed a highly effective method of immigrant smuggling by "high seas transfer." During these transfers, gangs move large numbers of Chinese to sea in the cargo holds of Chinese or Korean vessels.<sup>110</sup> Japanese fishing boats crewed by co-conspirators meet the foreign vessels at sea, where the smugglers make the dangerous transfer of the immigrants into the Japanese ships.<sup>111</sup> Officials are less suspicious of the Japanese ships than of their foreign counterparts at the shoreline, and the Chinese can either masquerade as crew members or quickly meet family members who await their arrival.<sup>112</sup>

Another common method snakeheads and individual immigrants use to enter Japan is to circumvent the normally arduous task of obtaining official Chinese passports by purchasing or producing fake passports.<sup>113</sup> China's decentralization of power has led to less governmental control of local officials, making it easy for snakeheads to obtain these illegal passports by bribery.<sup>114</sup> The officials provide fake documents in exchange for cash or, more recently, for the snakehead's promise to transport a family member into Japan at a reduced charge.<sup>115</sup> Alternatively, officials sell their own government passports, which smugglers can easily doctor with a razor blade, replacing the actual photograph with that of a Chinese peasant. Using this method,<sup>116</sup> the immigrant could enter Japan through normal, legal channels.

These complicated modes of entry make detection of smuggling operations extremely difficult, especially once the Chinese reach the shore. If Japanese immigration officers admit the passport-carrying

107. See *Government Seeks to Curb*, *supra* note 62. Undocumented Chinese often carry several different fake passports. See *id.*

108. See *Two Hundred Thirty-Nine Stowaways*, *supra* note 68. The number of stowaways and countries they represent has increased in recent years. See *id.*

109. See *Oka*, *supra* note 20, at 21.

110. See *Two Hundred Thirty-Nine Stowaways*, *supra* note 68.

111. See *id.*

112. See *Eighteen Posing as War-Displaced Suspected in Illegal Entry*, *THE DAILY YOMIURI/YOMIURI SHIMBUN*, Dec. 17, 1997, available in 1997 WL 15879574.

113. See *Smith*, *supra* note 1, at 14.

114. See *id.*

115. See *id.*

116. See *id.*

Chinese, detection may never occur. Japanese officials have recently concentrated on shoreline patrol, focusing many of their efforts on catching illegals before they enter the country.<sup>117</sup>

An alternate, and somewhat more legitimate, method of moving Chinese into Japan is under the guise of education.<sup>118</sup> Japan grants entry to persons coming to the country to study the Japanese language (*shugakusei*) in certain language schools with the hope that these students will remain in Japan to attend college.<sup>119</sup> To ensure the legitimacy of the entry visa, the government requires the *shugakusei* to attend classes regularly.<sup>120</sup>

Smugglers and some foreign language school administrators conspire to avoid these legal complications by requiring the *shugakusei* to attend minimal amounts of language class and by finding jobs for the students that require them to spend all of their free hours at work.<sup>121</sup> If the language classes actually exist,<sup>122</sup> they are substandard, often taught by persons lacking any educational training.<sup>123</sup> Smugglers have become very active in the language school system<sup>124</sup> and work with the school administrators to provide all the necessary, illegal documentation: false diplomas and applications, fake tuition bills, and nonexistent guarantors.<sup>125</sup> Smugglers pay a fee for the services of each party involved, which the smugglers then add to their client's total outstanding debt.<sup>126</sup> The immigrant begins life in Japan under this onerous financial burden.

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117. See *Illegal Chinese Immigrants*, *supra* note 65.

118. See OKA, *supra* note 20, at 20-21. Yet another pseudo-legitimate method of entry is an arranged marriage between a Japanese male and an undocumented Chinese woman. These arranged marriages create a legally justifiable reason for entry. See *id.* at 21.

119. See *id.* at 20. Many *shugakusei* have no intention of going to Japanese colleges but rather plan to live in Japan illegally after the two-year language course is over. See *id.*

120. See *id.* at 3.

121. See *id.* at 20.

122. One author suggests that schools often teach no classes at all. See KOMAI, *supra* note 71, at 32.

123. See *id.* at 56.

124. See *id.* at 57.

125. See *id.* at 57; OKA, *supra* note 20, at 20. Japanese law requires that a Japanese citizen of substantial income serve as guarantor to the student. See OKA, *supra* note 20, at 20.

126. Fees of this sort can reach several million yen. See OKA, *supra* note 20, at 20.



E. *Conditions of Undocumented Chinese in Japan*

Once in Japan, Chinese immigrants also face other hardships. The immigrants experience harsh conditions including, "[h]ard labour under virtual confinement, forced prostitution, work without pay, non-payment of wage arrears, reduction in wages without explanation, dismissal without proper notice, exploitation by brokers, and lack of compensation for injuries due to work-related accidents. . . ."<sup>127</sup> Undocumented Chinese refuse to report the atrocities the smugglers commit against them for fear that Japanese officials will immediately deport them.<sup>128</sup> In addition, when any short-term recession occurs, employers fire illegal workers first, often failing to pay them money they have already earned.<sup>129</sup> Some employers demand kickbacks from undocumented workers by threatening to report the worker to immigration officers.<sup>130</sup>

The Japanese government does not make the plight of the undocumented workers any easier; rather, it denies many benefits to illegal foreigners while taxing their income.<sup>131</sup> Since 1990, Japan has denied welfare benefits to illegal aliens,<sup>132</sup> and in a recent landmark Japanese court case, a judge held that illegal immigrants cannot receive health care benefits under the national system.<sup>133</sup> Similarly, Japan does not accept the children of undocumented workers into its renowned public education system.<sup>134</sup>

On the other hand, Chinese immigrants have two advantages over other foreigners in Japan. The first of these is the relative similarity between the two languages and cultures. When choosing between travelling to the popular Western destinations and Japan, Chinese often find Japan less intimidating because they can learn the language easily.<sup>135</sup> The second advantage for Chinese is the large network of countrymen already existing in Japan.<sup>136</sup> Relatives and sympathizers can help with finding a job or avoiding detection by Japanese officials. These factors ease the transition into Japanese society and make Japan an attractive destination for the Chinese.

127. Selleck, *supra* note 56, at 191.

128. *See id.* at 191-92.

129. *See id.* at 195.

130. *See id.* at 180.

131. *See* HIROMI MORI, IMMIGRATION POLICY AND FOREIGN WORKERS IN JAPAN 95 (1997).

132. *See* Selleck, *supra* note 56, at 192.

133. *See Court Rules Out Health Insurance for Illegal Immigrant*, Kyodo News International, Oct. 2, 1995, available in LEXIS, MARKET Library, IACNWS File. The Health and Welfare Ministry reported that this Tokyo District Court decision was the first to deny health care to an undocumented worker. *See id.*

134. *See* MORI, *supra* note 131, at 203. Japanese schools do accept the children of registered foreigners. *See id.*

135. *See* OKA, *supra* note 20, at 19.

136. *See* Goldstone, *supra* note 87, at 53.

#### F. Attempted Solutions to the Recent Immigration Crisis

Japanese officials have attempted various solutions to stem the recent tide of illegal Chinese immigration. Many such measures are cooperative efforts with the Chinese government. For example, in response to the numerous arrests of undocumented Chinese in the first few months of 1997, Japan organized high-level diplomatic discussions with China, convincing the Chinese government to implement several new anti-emigration campaigns.<sup>137</sup> The Japanese National Police Agency also recently met with China's Public Security Ministry officials to discuss tactics for combating Chinese criminals and human smugglers in Japan.<sup>138</sup> Japan has warned China about the alliances between the yakuza and Chinese snakeheads and the large number of immigrants that the combined powers are moving.<sup>139</sup> Japanese officials stress the need for cooperative investigations with the Chinese to detect international smuggling rings,<sup>140</sup> although Chinese state security officials acknowledge that they are powerless against the spread of Japanese crime syndicates in China.<sup>141</sup>

Another actor in Japan's war against human smuggling is the Ministry of Justice, the branch of government responsible for immigration control.<sup>142</sup> It has recently increased the number of immigration officers and improved its techniques for detecting forged immigration documents.<sup>143</sup> Japan has also stepped up the training of officers, conducting drills that simulate large-scale, gang-related smuggling operations that the officials must detect and stop.<sup>144</sup> Other measures take the form of interdepartmental collaboration.<sup>145</sup> The Ministries of Justice and Labor are working with the National Police Agency to exchange information and implement measures against the illegal employment of foreigners.<sup>146</sup> Finally, fearing that a recession could bring a "tsunami" of immigrants from China, Japan also provides \$800 million per year in economic aid to China to help maintain economic and political stability.<sup>147</sup> Even with all these

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137. See Smith, *supra* note 41, at 8.

138. See *NPA Deputy Chief to Visit China on Organized Crime*, Kyodo News International, Sept. 22, 1997, available in LEXIS, MARKET Library, IACNWS File [hereinafter *NPA Deputy Chief*].

139. See *Japan Warns of Upsurge of Illegal Immigrants*, Reuters World Service, Oct. 28, 1995, available in LEXIS, NEWS Library, ARCNWS File.

140. See *NPA Deputy Chief*, *supra* note 138.

141. See *Japan's Organized Crime*, *supra* note 101.

142. See Kunieda, *supra* note 106, at 195.

143. See *id.* at 204.

144. See *Joint Drills Conducted Against Mass Illegal Entrants*, Kyodo News International, Oct. 10, 1994, available in LEXIS, MARKET Library, IACNWS File.

145. See Kunieda, *supra* note 106, at 206.

146. See *id.*

147. OKA, *supra* note 20, at 20-21.

anti-immigration procedures in place, Japanese officials admit privately that the problem is nowhere near a solution.<sup>148</sup>

Despite the apparent cooperation between the two governments, doubt remains whether China truly desires to keep the problem in check. Commentators speculate that China is not putting forth its best anti-smuggling efforts but rather is using emigration as a safety valve for overpopulation, unemployment, and migration from the countryside to urban areas.<sup>149</sup> Furthermore, evidence suggests that China does not seriously punish those who leave the country in violation of their passport laws.<sup>150</sup> Doubts about China's dedication to the problem led the Japanese government to make a formal request that China tighten emigration control "over Chinese citizens who try to smuggle themselves into Japan or to stay illegally in Japan."<sup>151</sup>

Even some of China's legitimate attempts to control emigration produce results that are not in Japan's best interest. For example, China limits the amount of currency an international traveler can carry out of the country.<sup>152</sup> This limitation can create an immediate, desperate need for a job if the traveler decides to stay illegally in the destination country.<sup>153</sup> One policy expert on China agrees that Beijing policy often does more harm than good. The expert argues that Beijing's economic and reform policies make it easier for Chinese to leave the country.<sup>154</sup> With these few and faulty controls in place, China assures itself an effective method of dealing with its population and unemployment woes while Japan must suffer the consequences.

A final issue worth noting is the political ramifications of China's growing number of emigrants. The prevailing view in East Asia is that any economic crisis or division in the Communist leadership will lead to an exodus of millions of refugees.<sup>155</sup> Other nations fear that economic sanctions will be the spark that either ignites large scale emigration or prompts China to stop all of its internal efforts to

148. See Smith, *supra* note 41, at 8.

149. See Smith, *supra* note 17, at 6.

150. See Rajiv Chandra, *China: Forced Return of the Natives*, Global Information Network, June 16, 1994, available in LEXIS, MARKET Library, IACNWS File. Chinese officials fined one citizen \$1,100 for attempting to leave the country illegally aboard a cargo ship with 100 other Chinese. See *id.* The citizen had agreed to pay a snakehead \$20,000 to reach the United States. See *id.*

151. *Japan Calls for Tightened Emigration Control by China*, Kyodo News International, Dec. 11, 1995, available in LEXIS, MARKET Library, IACNWS File.

152. See KOMAI, *supra* note 71, at 67.

153. See *id.*

154. See OKA, *supra* note 20, at 21. The official wished to remain anonymous. See *id.*

155. See Smith, *supra* note 41, at 8.

reduce Chinese human smuggling.<sup>156</sup> The potential threat of immigration has led one author to note that “[C]hinese leaders may have discovered that they possess a weapon more psychologically potent than all of their recently purchased fighter planes, warships, submarines and missiles put together.”<sup>157</sup> Clearly, the political ramifications of Chinese emigration force Japan, as well as other countries, to avoid direct and forceful action against the Chinese government. Rather than use direct action and risk a Chinese backlash, Japan has focused on domestic statutory controls of human smuggling.

#### IV. THE IMMIGRATION CONTROL AND REFUGEE RECOGNITION ACT

In addition to the solutions discussed above, another of Japan's recent attempts to control illegal immigration and human smuggling is the 1997 amendment of the Immigration Control and Refugee Recognition Act (the Act). The Japanese Cabinet originally passed the Act in 1951 and has amended the Act nineteen times in the last forty-seven years.<sup>158</sup> One of the most recent amendments took effect May 11, 1997.<sup>159</sup>

The Cabinet passed the 1997 amendment in direct response to the recent outburst of Chinese smuggling activities.<sup>160</sup> Justice Minister Isao Matsuura urged the Cabinet to pass the amendment, noting at the Cabinet meeting: “There is an increasing number of people who make money by smuggling illegals. We would like to revise the law to impose strict punishment on this illegal act.”<sup>161</sup> Lawmakers responded to Matsuura's call by specifically targeting organized smuggling syndicates in China and Japan. Chief Cabinet Secretary Seiroku Kajiyama summarized the government's concern with these organizations by stating, “[w]e hope to weed out the illegal entries by changing the law to consider immigrant smugglers as principle offenders.”<sup>162</sup>

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156. *See id.* For instance, the U.S. has protested China's approach to human rights and has consistently refused to deny most-favored nation status to China for fear that such action would discourage the Chinese government from helping with the human smuggling problem. *See id.*

157. *Id.* Russian officials fear that mass migration will lead to the “peaceful loss” of its Far East region. Smith, *supra* note 1, at 14.

158. *See* MORI, *supra* note 131, at 2. Before 1997, the Cabinet's most recent amendment to the Act was in 1990. *See id.* The Act was amended further in 1998. The amendments passed in 1998 are not discussed in this Note and do not affect the analysis presented.

159. *See Government Seeks to Curb, supra* note 62.

160. *See id.*

161. *Id.*

162. *Id.*

### A. The Statutory Structure

The official purpose of the Act is “to provide for equitable control over the entry into or departure from Japan of all persons and to consolidate the procedure for recognition of refugee status.”<sup>163</sup> In order to accomplish this broad objective, the Cabinet addresses two major areas of immigration. The first of these is border control, focusing on the requirements and procedures of lawful entry and landing (Chapters 2 and 3).<sup>164</sup> The Cabinet’s second area of concentration is residence control (Chapter 4),<sup>165</sup> creating classifications of workers and limiting the activities and duration of stay of each class of entrant. For the purposes of this Note, two other Chapters of the statute are also relevant. These are the procedures for deportation (Chapter 5) and perhaps most important, the statute’s penal provisions (Chapter 9).

### B. Border Control

#### 1. Chapter Two: Entry and Landing

Generally, a nation’s entry and landing procedures will have little effect on smuggling operations since many such activities occur without the knowledge of port or immigration officials. However, since some smugglers utilize forged passports to bring Chinese into Japan through the normal port system,<sup>166</sup> entry controls are still relevant to this analysis. Chapter Two of the Act creates strict procedures for entry and landing in an attempt to neutralize this channel of organized smuggling, as well as independent stowaways in boats destined for Japanese ports.

In order to enter Japan legally, the statute first requires that all potential entrants possess a valid passport or crewman’s pocket ledger.<sup>167</sup> Once officials establish that the alien has a valid passport, they have the authority to deny landing to certain classes of foreigners.<sup>168</sup> Among the types of foreigners to whom the government will automatically deny landing are those with infectious diseases or

163. Immigration Control and Refugee Recognition Act, Law No. 42 of 1997, art. 1 [*hereinafter* ICRRA].

164. The basic framework of border and residence control is a long-standing part of the Act. *See* MORI, *supra* note 131, at 2.

165. *See id.*

166. *See* discussion *supra* Part III.D.

167. *See* ICRRA art. 3, ¶ 1. A “passport” is one “issued by the Japanese Government or any competent international organization, or a Refugee Travel Document.” *Id.* art. 2, no. 5. A “crewman’s pocket-ledger” is a “mariner’s pocket-ledger, or any other document that is issued by an authorized organization and is equivalent thereto.” *Id.* art. 2, no. 6.

168. *See id.* art. 5.

mental problems,<sup>169</sup> convicted felons,<sup>170</sup> anyone associated with anti-Japanese political causes, and anyone who has been convicted of drug-related crimes.<sup>171</sup>

More important to the smuggling trade, however, is the immigration officials' power to deny landing to those engaged in prostitution or in the management of prostitutes.<sup>172</sup> Since smugglers often bring Chinese and Filipino women to Japan in order to fulfill the great domestic demand for prostitutes and "entertainers" in karaoke bars,<sup>173</sup> this exclusion discourages smugglers from bringing these women through Japanese ports with forged passports.<sup>174</sup> Similarly, the statute grants officers the authority to deny landing to any alien that the government has deported within the previous year.<sup>175</sup> This exception is designed to deter repeat offenders of Japan's immigration laws. The reasons for these exclusions are clear, but it is doubtful that immigration officials can identify either prostitutes or recent deportees, especially if they carry high-quality forged passports and are working with a sophisticated smuggling syndicate.

The Act grants Japanese officials the authority of two other important automatic denials to help reduce the flow of the smuggling pipeline. In order to create broad exclusionary power, the statute excludes the entry of anyone the Minister of Justice has "sufficient reason to believe may commit an act which *could* be detrimental to the interests or public security of Japan."<sup>176</sup> Arguably, officials could

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169. See *id.* art. 5, nos. 1, 2. Immigration officers have the power to order physical and mental examinations to ensure that potential entrants are healthy and mentally stable.

170. See *id.* art. 5, no. 4. The Act provides the authority to exclude any alien who has been sentenced to more than one year in prison by Japan or any other country. *Id.*

171. See *id.* art. 5, nos. 5, 12. See also *id.* art. 5, no. 6 (giving immigration officials authority to deny landing permission to anyone possessing opium, marijuana, stimulants, or drug paraphernalia).

172. See *id.* art. 5, no. 7. This category includes "[a]ny person who engages or has engaged in prostitution, or procuring of prostitutes for other persons or solicitation or furnishing a place for prostitution, or any other business directly connected with prostitution." *Id.*

173. At times, as much as seventy percent of illegal female migrant workers are employed in the sex industry. See Selleck, *supra* note 56, at 172. Organized crime is involved in the recruitment and employment of ninety-three percent of these workers. See *id.*

174. Of course, covert methods are always available as an alternative to falsely-documented entry, and immigration officials may not be able to determine whether immigrants are potential prostitutes. See *supra* Part III.C.

175. ICRR art. 5, no. 9.

176. *Id.* art. 5, no. 14. It is interesting to note that if another country denies the landing of a Japanese citizen for a reason not listed in Chapter 2 of the Act, Japan will exclude the members of that country for the same reason. See *id.* art. 5, ¶ 2.

consider illegal aliens, human smugglers, or anyone associated with smuggling organizations to be "detrimental" to Japan's interest or security and therefore exclude them. In addition, the Act authorizes officials to exclude paupers, vagrants, and any alien likely to become a charge of the Japanese government.<sup>177</sup> Since many illegal Chinese immigrants come from meager beginnings and must work for years in low-paying jobs to satisfy their smuggler-creditors, it may be easy for border officials to identify passport-holding entrants that are in fact Chinese peasants.

While each of these automatic exclusions serves to deter the smugglers from using the legitimate port system to bring Chinese into Japan, the large smuggling organizations will continue to thrive. Smugglers can easily shift more of their traffic to high-seas transfers and covert landings or create more advanced forgery and disguise techniques in order for their customers to pass the scrutiny of Japanese immigration officials. Stowaways entering Japan without the assistance of smuggling syndicates will have a much more difficult time entering the country under the new amendment, but with the many alternative methods of bringing aliens into Japan, the snakeheads can avoid Chapter Two border controls altogether.

## 2. Chapter Three: Landing Procedures

Chapter Three of the Act demands that all aliens apply for landing.<sup>178</sup> The Immigration Inspector shall examine the alien to determine if: (1) the passport is valid, (2) the alien has been truthful in stating the activities he will engage in, (3) these activities fall within the permitted activities listed in Chapter Four Tables One and Two (Residence Tables),<sup>179</sup> (4) the time period of stay is acceptable, and (5) the alien does not fall within any of the automatic landing denial provisions of Chapter Two.<sup>180</sup> The Inspector can board the vessel and perform all investigative techniques necessary to conduct these inquiries.<sup>181</sup> Surprisingly, the Act places the difficult burden of establishing the landing requirements upon the alien.<sup>182</sup>

If the alien meets the landing requirements, the Immigration Inspector endorses the alien's passport with a stamp of landing

177. See *id.* art. 5, no. 3.

178. *Id.* art. 6, ¶ 2. An alien may file an advance application for landing and receive entry permission from the Ministry of Justice before travelling to Japan. See *id.* art. 7-2, ¶ 1. Immigrant smugglers might use their complex networks and advanced forgery techniques and take advantage of this provision to avoid direct scrutiny by immigration officials.

179. See *infra* Part IV.C.1.

180. See ICRRA art. 7.

181. See *id.* art. 8.

182. *Id.* art. 7, ¶ 2. It seems nearly impossible for an alien to prove that he will not engage in work outside of the permitted activities.

permission.<sup>183</sup> The stamp clearly indicates the alien's status of residence and the permitted period of stay.<sup>184</sup> If the Inspector denies landing permission, the alien can appeal to a Special Inquiry officer who must hold an on-the-record hearing, allowing both evidence and cross-examination.<sup>185</sup> This officer may grant landing permission, but if he does not, the alien can file an objection with the Minister of Justice.<sup>186</sup> If there is a legitimate reason to grant landing permission or if special circumstances exist, the Minister will direct lower-level immigration officials to grant permission to land.<sup>187</sup> Finally, the Act allows the granting of provisional landing for various reasons including emergency or short-term landings.<sup>188</sup>

### C. Residence Control

#### 1. Chapter Four: Residence

Chapter Four of the Act creates Residence Tables that group foreigners by the purpose of their visit and strictly limit the activities in which they may engage.<sup>189</sup> Under the Act, aliens whose purpose

183. See *id.* art. 9, ¶ 1.

184. See *id.* art. 9, ¶ 3.

185. See *id.* art. 10, ¶ 3.

186. See *id.* art. 11, ¶ 1.

187. See *id.* art. 11, ¶ 4; art. 12.

188. *Id.* art. 13-18.

189. See ICRR art.19 annex tbl. 1-2. The Status of Residence Tables follow:

Table 1 (¶ 1)

Status of Residence	Activities authorized to engage in
Diplomat	Activities on the part of constituent members of diplomatic missions or consular offices of foreign governments hosted by the Government of Japan; activities on the part of those who are provided with similar privileges and/or immunities and is given to diplomatic mission in accordance with treaty or international customary practices; and activities on the part of their family members belonging to the same household.
Official	Activities on the part of those who engage in official business of foreign governments or international organizations recognized by the government of Japan and activities on the part of their family members belonging to the same household (excluding the activities described in this table's "Diplomat" column).



Professor	Activities for research, direction of research or education at colleges, equivalent educational institutions or "Koto-senmongakko".
Artist	Activities for the arts that provide income, including music, the fine arts, literature, etc. (excluding the activities described in the "Entertainer" column of Table (2)).
Religious Activities	Missionary and other religious activities conducted by foreign religionists dispatched by foreign religious organizations.
Journalist	News coverage and other journalistic activities conducted on the basis of a contract with foreign journalistic organizations.

## (¶ 2)

Status of Residence	Activities authorized to engage in
Investor/Business Manager	Activities to commence the operation of international trade or other business, to invest in international trade or other business and to operate or manage that business, or to operate or manage international trade or other business on behalf of the foreign nationals (including the foreign corporations hereinafter in this section "foreign national" is to include "foreign corporation") who have begun such an operation or have invested in such a business (excluding the activities to engage in the operation or management in the business which are not allowed without the legal qualifications described in this table's "Legal/Accounting Services" column).
Legal/Accounting Services	Activities to engage in legal or accounting business, which is required to be carried out by attorneys recognized as foreign law specialists under foreign lawyers' law (GaikokuhoJaimubengoshi) certified public accountants recognized as accountants practicing foreign accounting under the Accountant Law (Gaikokukoninkaikeishi) or those with other legal qualifications.
Medical Services	Activities to engage in medical treatment service which is required to be undertaken by physicians, dentists or those with other legal qualifications.
Researcher	Activities to engage in research on the basis of a contract with public or private organizations in Japan (excluding the activities described in the Professor column of Table ( 1 )).

in Japan is listed in the right hand column of paragraphs one, two,

Instructor	Activities to engage in language instruction and other education at elementary schools, junior high schools, high schools, schools for the blind, handicapped children's schools, advanced vocational schools (Senshugakko), vocational schools (Kakushugakko) or the other educational institutions equivalent to vocational schools in facilities and curriculum.
Engineer	Activities to engage in service, which requires technology and/or knowledge pertinent to physical science, engineering or other natural science fields, on the basis of a contract with public or private organizations in Japan (excluding the activities under "Professor" column of Table ( 1 ) and excluding the activities described in the "Investor/Business Manager", "Medical Services" "Researcher", "Instructor", "Intra-company Transferee" and "Entertainer" columns of this Table).
Specialist in Humanities or International Services	Activities to engage in service, which requires knowledge pertinent to jurisprudence, economics, sociology or other human science fields or to engage in service which requires specific ways of thought or sensitivity based on the experience with foreign culture, based on a contract with public or private organizations in Japan (excluding the activities described in the "Professor", "Artist" and "Journalist" columns of Table (1) and excluding the activities described in the "Investor/Business Manager", "Legal/Accounting Services", "Medical Services", "Researcher", "Instructor", "Intra-company Transferee" and "Entertainer" columns of this Table).
Intra-company Transferee	Activities on the part of personnel who are transferred to business offices in Japan for a limited period of time from business offices which are established in foreign countries by public or private organizations which have head offices, branch offices or other business offices in Japan and who engages at these business offices in the activities described in the "Engineer" or "Specialist in Humanities/ International Services" column of this table.
Entertainer	Activities to engage in theatrical performances, musical performances, sports or any other show business (excluding the activities described in the "Investor/ Business Manager" column of this table).
Skilled Labor	Activities to engage in service, which requires industrial techniques or skills belonging to special fields on the basis of a contract with public or private organizations in Japan.

and five of the Residence Table One cannot perform activities involving business management or work in any other capacity for compensation except as listed in the corresponding right hand column of the table.<sup>190</sup> The Act also forbids visitors and students,

## (¶ 3)

Status of Residence	Activities authorized to engage in
Cultural Activities	Academic or artistic activities that provide no income, or activities for the purpose of pursuing specific studies on Japanese culture or arts, or activities for the purpose of learning and acquiring Japanese culture or arts under the guidance of experts (excluding the activities described in the columns from "College Student" to "Trainee" in Table ( 4 )).
Temporary Visitor	Sightseeing, recreation, sports, visiting relatives, going on inspection tours, participating in lectures or meetings, business contact or other similar activities during a short period of stay in Japan.

## (¶ 4)

Status of Residence	Activities authorized to engage in
College Student	Activities to receive education at colleges or equivalent educational institutions, specialize courses of study at advanced vocational schools (Senshugakko), educational institutions designated for preparing persons who have completed 12 years of education at schools in foreign countries to enter college, or "Kotosenmongakko".
Pre-college Student	Activities to receive education at high schools, high school courses of schools for the blind or of handicapped children's schools, higher or general courses of advanced vocational schools (Senshugakko), or vocational schools (Kakushugakko) (excluding the educational institution described in the "College Student" column of this table) or the other educational institutions which are equivalent to vocational schools in facilities and curriculum.
Trainee	Activities to learn and acquire the technology, skills or knowledge at public or private organizations in Japan (excluding the activities described in the "College Student" and "Pre-college Student" columns of this table).
Dependent	Daily activities on the part of the spouse or unmarried minor child of those who stay in Japan with the status of residence mentioned in Tables (1), (2) or (3) (excluding "Diplomat", "Official" and "Temporary Visitor") or of those who stay with the status of residence of "College" "Pre-College" or "Trainee" in this table.

listed in paragraphs three and four of Residence Table One, from managing businesses or working for pay.<sup>191</sup>

Any alien can apply to the Ministry of Justice for permission to engage in activities outside the limited scope of their authorized activities, and if reasonable grounds to grant such permission exist, the Minister will issue a certificate of eligibility allowing the alien to engage in the requested activities.<sup>192</sup> The Minister may also grant a change in residence status,<sup>193</sup> extend the alien's period of stay,<sup>194</sup> or grant permanent resident status if the alien demonstrates good behavior and sufficient assets, or the ability to make an adequate

(¶ 5)

Status of Residence	Activities authorized to engage in
Designated Activities	Activities which are specifically designated by the Minister of Justice for foreign individuals.

Table 2

Status of Residence	Personal relationship or status on which the residence is authorized
Permanent Resident	Those who are permitted for permanent residence by the Minister of Justice.
Spouse or Child of Japanese National	The Spouses of Japanese nationals, the children adopted by Japanese nationals in accordance with the provisions of Article 817-2 of the Civil Code (Law No. 89 of 1896) or those born as the children of Japanese nationals.
Spouse or Child of Japanese National	The Spouses of Japanese nationals, the children adopted by Japanese nationals in accordance with the provisions of Article 817-2 of the Civil Code (Law No. 89 of 1896) or those born as the children of Japanese nationals.
Spouse or Child of Permanent Resident	The Spouses of those who stay with the status of residence of "Permanent Resident" or those who are Special Permanent Residents described in the Special Law on the Immigration Control of, inter alia, those who have lost Japanese Nationality on the basis of the Treaty of Peace with Japan (hereinafter referred to as "permanent resident etc."), those born as children of permanent resident etc. in Japan and having been residing in Japan.
Long Term Resident	Those who are authorized to reside in Japan with designation of period of stay by the Minister of Justice in the consideration of special circumstances.

190. ICRRRA art. 19, no. 1. *See supra* note 189, tbl.1.

191. ICRRRA art. 19, no. 2. *See supra* note 189, tbl.1.

192. *See* ICRRRA art. 19-2, ¶ 1.

193. *See id.* art. 20.

194. *See id.* art. 21.

living.<sup>195</sup> Finally, the Act requires all aliens to carry valid passports with them at all times.<sup>196</sup>

## 2. The Exclusion of Unskilled Workers

One of the most striking provisions of Japan's 1997 amendment to the Act is the retention of the long-standing exclusion of unskilled workers. The Residence Tables do not list unskilled employment as an acceptable reason for entry,<sup>197</sup> an omission that demonstrates the official policy of disallowing this large class of foreign laborers. Japan's traditional immigration framework supports this exclusion: (1) employing foreign workers is a last resort, only to be used when other solutions to labor shortage fail, (2) no unskilled workers should be imported, and (3) all foreigners, both skilled and unskilled, should stay in Japan only temporarily.<sup>198</sup>

The reasons for this blanket exclusion are complex. Primarily, Japan feels that the infusion of unskilled foreign labor will have negative impacts on industry, labor, education, welfare, and public security.<sup>199</sup> The government fears the economic burden of providing benefits to this large group of workers and believes that uneducated foreigners will bring crime and poverty into Japan, especially as short-term cutbacks lead to the firing of foreign workers.<sup>200</sup> To the Japanese government, the costs of foreign workers do not outweigh the benefits.

In addition, a large portion of the Japanese populace resents the injection of foreigners into their highly self-contained society.<sup>201</sup> Right-wing groups regularly post anti-foreigner signs and broadcast racist messages from loudspeakers in areas frequented by Chinese.<sup>202</sup> Others fear that Chinese immigrants will destroy Japanese identity and cultural homogeneity.<sup>203</sup> Landlords and restaurant owners often refuse to provide services to Chinese, and

195. See *id.* art. 22.

196. *Id.* art. 23.

197. See *supra* note 189, tbl.1.

198. See Gary P. Freeman & Jongryn Mo, *Japan and the Asian NICs as New Countries of Destination*, in INTERNATIONAL TRADE AND MIGRATION IN THE APEC REGION 156, 164 (P.J. Lloyd & Lynne S. Williams eds., 1996). The government continues to exclude unskilled workers even though they increased allowable job categories from 18 to 28 in 1990. See *id.*

199. See Kunieda, *supra* note 106, at 195.

200. See Selleck, *supra* note 56, at 195.

201. See *id.* at 193.

202. See *id.* at 194.

203. See *id.* at 194; Johanna Son, *Asia-Labor: Filipino Maid's Hanging Sends Wake-up Call to Region*, Global Information Network, Mar. 27, 1995, available in LEXIS, MARKET Library, IACNWS File.

many other Japanese citizens avoid foreigners whenever possible.<sup>204</sup> If it is true that “[h]ost countries face a choice: either they embrace immigrant workers and gradually evolve into increasingly multicultural societies, or they can resist immigration and cling to traditions of cultural and racial insularity,”<sup>205</sup> Japan has obviously chosen the latter strategy in dealing with unskilled foreign workers.

The exclusion of unskilled foreign workers creates a dilemma for firms that require many manual laborers. Most Japanese workers refuse to perform the dangerous, low-paying work of the construction and manufacturing industries.<sup>206</sup> “It is this type of employment that is unattractive to indigenous workers and in their place, a large number of illegal migrant workers have filled the vacancies despite official policies designed to exclude them and encourage selected foreigners to work legally in the country.”<sup>207</sup> Small firms have turned to illegal aliens as their only source of unskilled labor, and smuggling organizations have become effective links between the employers and a large pool of unemployed Chinese. Labor surplus countries like China will continue to supply undocumented aliens for menial service and production jobs as long as local workers refuse to take these positions.<sup>208</sup> Aliens have no qualms about accepting these “unattractive positions” because wages in Japan are much higher than those in China and because smugglers often offer deceptively optimistic portrayals of the type of work waiting for the aliens in Japan.

The Act’s prohibition of unskilled foreign workers and the resulting hiring of illegal aliens to fill these jobs places Japan in an advantageous position. These workers fill unwanted positions and pay taxes on their wages, but the government does not have to provide the same benefits that it does for Japanese nationals and legally registered foreigners. If any undocumented foreign workers become a burden on the state, their illegal status gives the

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204. See Selleck, *supra* note 56, at 193-94. A record number of AIDS cases, including many instances of disease in female prostitutes from other nations, has led to increased feelings of xenophobia among Japanese. See *id.*

205. See Smith, *supra* note 57, at 8.

206. Commentators refer to this type of work as “3D” work because it is dirty, dangerous, and demanding. See Piyasiri Wickramasekara, *Recent Trends in Temporary Labour Migration in Asia*, in *MIGRATION AND THE LABOUR MARKET IN ASIA: PROSPECTS TO THE YEAR 2000* 97, 108 (Organization for Economic Co-Operation and Development ed., 1996). Japanese refer to these jobs as “six-K” industries because they are “Kitanai” (dirty), “Kitsui” (hard-work), “Kiken” (dangerous), “Kyuryo ga yashui” (low-wages), “Kyujitsu ga sukunai” (few-holidays) and “Kakko ga warui” (not-smart-in-appearance). See Selleck, *supra* note 56, at 183.

207. Selleck, *supra* note 56, at 195.

208. See Tess Rod & Lynne S. Williams, *Migration Intensification in the APEC Region: 1981 to 1994*, in *INTERNATIONAL TRADE AND MIGRATION IN THE APEC REGION* 32, 47-48 (P.J. Lloyd & Lynne S. Williams eds., 1996).

government grounds for deportation and/or punishment.<sup>209</sup> One author notes:

[I]t is true that Japanese workers are largely exempt from unpleasant, dirty and dangerous work. The illegality of the migrants means that there is little incentive to provide them with even basic human rights, such as social security benefits and protection under the law, and there is no fear of their building unsightly slums since they have to live silently in small groups, constantly in fear of being found out and deported. In a way, the Japanese people and the government have themselves been reaping the benefits of this illegality which might be considered to be an extreme case of institutional discrimination underpinned by common feelings among Japanese people of discrimination against other Asian people.<sup>210</sup>

Illegal workers are contributing to the incredible growth of Japan's economy but receiving little or nothing in return.<sup>211</sup> The government has no short-term incentive to create an unskilled worker category in the Residence Tables because doing so would require Japan to recognize foreign workers officially and to pay benefits to unskilled foreign workers, while illegal employees work in silence and receive no such benefits.

### 3. Japan's Labor Shortage

If Japan chooses not to create an unskilled worker category, the long-term ramifications could be severe. Economists have closely monitored a growing labor shortage in Japan, although, with the many factors involved, no authoritative estimate exists.<sup>212</sup> The Japanese Ministry of Labor projects labor shortages of 2.5 million workers in 2000, 5.5 million in 2005, and 9.1 million by 2010.<sup>213</sup> Other estimates are more dire, suggesting a 5 million worker labor shortage (7% of total labor demand) by 2000.<sup>214</sup> Labor supply will reportedly reach a peak in 1998 and then decrease 1.9% by 2005,

209. See *supra* Part IV.B.1.

210. Selleck, *supra* note 56, at 195-96.

211. See Johanna Son, *Asia-Labor: More Migrant Workers, Not Enough Rights*, Global Information Network, Apr. 25, 1995, available in LEXIS, MARKET Library, IACNWS File (noting that many Asian countries receive the benefits that migrant workers provide while ignoring the workers themselves). Philippine President Fidel Ramos has publicly stated that migrant workers in Asia make great contributions to national growth while they receive no protective human rights. See *id.*

212. See HARUO SHIMADA, JAPAN'S "GUEST WORKERS" 184 (Roger Northridge trans., 1994).

213. See *id.* The same study noted that if there is a large increase in the number of female workers, the shortage may only total 1.8 million by 2010. See *id.*

214. See MORI, *supra* note 131, at 92.

5.3% by 2010 and 13.8% by 2025.<sup>215</sup> While the number of job openings continues to grow, the population of Japan is aging.<sup>216</sup> At the same time, Japan's fertility rates have rapidly fallen to an unprecedented low.<sup>217</sup>

Regarding areas of employment, while most management positions have an oversupply of applicants, blue collar workers are desperately needed.<sup>218</sup> The industries with the greatest need for workers are construction, manufacturing, and various service industries.<sup>219</sup> The Japanese government and industry groups have tried to remedy the problem by increasing automation in existing industries and redeploing production facilities to foreign countries with a surplus of unskilled laborers.<sup>220</sup> However, most companies cannot completely eliminate the need for human labor, especially those in the construction and service industries. Experts suggest that technological efforts and the movement of production facilities abroad will not solve a labor shortage of millions of workers.<sup>221</sup> Clearly, as long as the labor shortage continues, Japanese employers will turn to illegal immigrants to fill the much-needed positions, and human smugglers will experience great gains as the primary suppliers of unskilled labor to a needy labor market.

#### 4. The "Side Door"

In response to the growing labor shortage and need for unskilled workers, the Japanese government created the "trainee" category of Residence Table One of the Act.<sup>222</sup> This status allows employers to hire unskilled foreign workers under the theory that firms will

215. See *id.* at 90

216. 1990 studies estimated that the life expectancy of Japanese men is 76, while Japanese women live to age 81 on average. See Selleck, *supra* note 56, at 182. Older people make up a growing portion of the Japanese labor force. See *id.*

217. Japan has dropped from a total fertility rate of 2.0 in 1960 to a rate of 1.6 in 1995. See Naohiro Ogawa & Rikiya Matsukura, *Demographic Characteristics of Selected Asian Countries*, in *MIGRATION AND THE LABOUR MARKET IN ASIA: PROSPECTS TO THE YEAR 2000* 29, 40 (Organization for Economic Co-Operation and Development ed., 1996).

218. See SHIMADA, *supra* note 212, at 186.

219. See Selleck, *supra* note 56, at 182-85. There is also a great demand for prostitutes in Japan. In this 10 billion ¥ per year industry, employers pay their prostitutes no more than 8,000 ¥ per client, or sometimes nothing at all. See *id.* at 184-85.

220. See MORI, *supra* note 131, at 94.

221. See *id.* Mori suggests that the labor shortage of the twenty-first century will put a stop to Japan's current economic growth. See *id.*

222. Chinese comprise the largest nationality of trainees in recent surveys. The Ministry of Justice's figures show that there were 15,688 Chinese trainees in 1993 compared to 4,075 Thai trainees, the second largest national group. See *id.* at 117 tbl.4.5.



provide helpful training that the aliens will then take back to their home countries to find permanent employment.<sup>223</sup> Regulations require that the training must include both classroom instruction and practical, on-the-job lessons.<sup>224</sup>

In reality, however, many training programs of individual firms are either nonexistent or consist solely of on-the-job training.<sup>225</sup> If employees receive any useful skills, they tend not to take the information back to their homeland but choose to remain in Japan illegally, where they can continue to earn high wages.<sup>226</sup> Commentators suggest that Japanese politicians have created the trainee residence status under the pretext that trainees do not pose the same national threat as do unskilled foreign workers.<sup>227</sup> Thus, Japan uses trainees to ameliorate its threatening labor shortage, while lawmakers show their constituencies that they remain steadfastly opposed to allowing foreign unskilled workers into Japan.<sup>228</sup>

The trainee program is another short-term solution that will not solve Japan's immigration problems. Not only is the number of trainees insufficient to satisfy a shortage of millions of workers, but as Japanese citizens realize that trainees are no different from unskilled workers, the government will respond by tightening the controls on individual trainee programs. Once again, smuggling will be the only method available for unskilled workers who wish to enter Japan. Until Japan recognizes the urgent need to solve its labor shortage and legally admits unskilled foreigners, smuggling and illegal immigration will continue to grow.

#### D. Deportation

As a final check on illegal immigration, Chapter Four of the Act states the reasons for deportation of aliens. Officials will deport any alien without a valid passport<sup>229</sup> as well as any "overstayer"—an alien who is residing in Japan after the expiration of his period of residence without receiving an extension from the Ministry of

223. See Selleck, *supra* note 56, at 186.

224. Japan requires that trainees spend at least one third of their time receiving classroom instruction, but many employers ignore this ordinance. See *id.* at 186.

225. See KOMAI, *supra* note 71, at 37-38 (describing a 1989 Ministry of Justice inquiry that discovered several companies conducting no training whatsoever or giving instruction late at night, after the trainees had worked for several hours).

226. See generally MORI, *supra* note 131, at 17-18 (suggesting that many illegal workers are trainee-overstayers).

227. See *id.* at 37.

228. See *id.*; Selleck, *supra* note 56, at 186.

229. See ICRRRA art. 24, no. 1. See also *id.* art. 3 for passport requirements.

Justice.<sup>230</sup> Likewise, aliens who violated landing procedures when entering Japan can be deported.<sup>231</sup> Japanese officials also have the authority to deport aliens for many of the same reasons that they can deny landing, such as drug crimes and prostitution, as well as any perceived threat to Japan's interests and security.<sup>232</sup> More important to smugglers, officials will deport any person who has "incited, instigated, or aided the illegal entry or illegal landing of an alien into Japan."<sup>233</sup>

Deportation is not a great threat to smuggling operations. Most Sino-Japanese smuggling activities involve covert operations, so deported foreigners can sneak back into Japan. The small marginal cost of bringing an extra Chinese citizen to Japan by boat suggests that smugglers will re-route deported customers and bring back any of their associates that Japanese officials have discovered and deported.

#### E. Chapter Nine: Penal Provisions

The Cabinet has made several important changes to the penal provisions of the Act in order to combat the human smuggling trade. The first group of the Act's penalties address the illegal aliens themselves. The maximum penalty for aliens who either enter Japan in violation without a passport or without a stamp of landing permission, stay in Japan beyond the authorized period of stay, or engage *solely* in activities outside of their status of residence, is a 300,000 ¥ (\$2,230) fine, three years in prison, or both.<sup>234</sup> If an alien participates only in *some* activities not permitted for his status of residence, the maximum penalty is less severe: a 200,000 ¥ (\$1,487) fine, a prison term of one year, or both.<sup>235</sup> The only statutory defense for these crimes is either that the alien is a refugee<sup>236</sup> or that the alien entered directly from a territory that was likely to be harmful to his life or liberty.<sup>237</sup> The Act even punishes aliens who fail to carry or produce a valid passport with up to a 100,000 ¥ (\$743) fine.<sup>238</sup>

The second group of offenders consists of those that employ illegal aliens. These offenders include: (1) persons who employ an alien to engage in illegal work, (2) persons who place an alien under their control in order to employ the alien in illegal work, and (3)

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230. See *id.* art. 24, no. 4(b).

231. See *id.* art. 24, no. 3.

232. See *id.* art. 24, no. 4(h, j, o).

233. *Id.* art. 24, no. 4(k).

234. See *id.* art. 70, nos. 1-5.

235. See *id.* art. 73.

236. See *id.* art. 70-2, no. 1.

237. See *id.* art. 70-2, nos. 2-3.

238. *Id.* art. 76.

persons who have repeatedly mediated the procurement of aliens to engage in illegal work.<sup>239</sup> Number three directly addresses the division of smuggling syndicates that places Chinese workers with Japanese employers. Under the Act, "illegal work" encompasses both violations of the status of residence tables and all work performed by aliens living in Japan in violation of any part of the Act.<sup>240</sup> Offenders of this provision face a maximum three years imprisonment, 2 million ¥ (\$14,873) fine, or both.<sup>241</sup>

The Act also contains harsh penalties directed specifically at smugglers and their accomplices. For example, anyone who transports stowaways and helps them enter Japan faces a maximum sentence of five years or a maximum penalty of three million ¥ (\$22,309).<sup>242</sup> This provision contains no stated requirement of scienter,<sup>243</sup> suggesting the possibility of a conviction for a captain or ship owner who negligently brings stowaways into Japan. The Act provides penalties of up to three years or two million ¥ in fines for anyone who controlled stowaways during any part of their journey to Japan.<sup>244</sup>

For persons who prepare vessels with the intent to transport stowaways or knowingly provide vessels for this use, the Act calls for a maximum two years imprisonment or a one million ¥ (\$7,436) fine.<sup>245</sup> Anyone who receives stowaways or who transports, harbors, or conceals received stowaways faces up to five years imprisonment or a fine up to three million ¥.<sup>246</sup> This provision includes all associates of the receiver of stowaways.<sup>247</sup> The Act also penalizes those who help aliens avoid deportation with a maximum of three years imprisonment or a fine of one million ¥.<sup>248</sup> Finally, persons who controlled stowaways during any part of the aliens' journey and persons who aided or helped prepare for the passage of stowaways also face severe penalties.<sup>249</sup>

To obtain the maximum deterrent effect of these anti-smuggling provisions, the Act creates additional penalties if certain of the preceding crimes are committed for the purpose of profit. Since some covert entry of aliens involves individual efforts or occurs through the assistance of relatives without any notion of profit, these extra penalties single out smuggling syndicates. The Act increases the

239. *See id.* art. 73-2, ¶ 1.

240. *Id.* art. 73-2, ¶ 2.

241. *See id.* art. 73-2, ¶ 1.

242. *See id.* art. 74, ¶ 1.

243. *See id.*

244. *Id.* art. 74-2, ¶ 1.

245. *Id.* art. 74-3.

246. *See id.* art. 74-4.

247. *See id.*

248. *Id.* art. 74-8, ¶ 1.

249. *See id.* art. 74-6.

penalties for transporting stowaways for profit to a maximum seven years prison sentence and a fine of five million ¥ (\$37,183).<sup>250</sup> For harboring aliens from deportation, the penalties increase to a maximum five years and three million ¥,<sup>251</sup> and for receiving and hiding aliens as they enter Japan, the Act increases the total penalty to a maximum ten years and ten million ¥.<sup>252</sup> In addition, Justice Minister Isao Matsuura has stated that immigration officials will confiscate all profits from smuggling operations.<sup>253</sup>

A final penal measure of the Act comes in the form of civil penalties. The maximum amount of these fines is 500,000 ¥ (\$3,718), and they apply primarily to crew members who frustrate the investigations of immigration officers.<sup>254</sup> Courts may also assess fines against captains of vessels who either fail to take preventive actions to make sure no onboard aliens violate landing requirements or who detect illegal aliens and fail to send them home.<sup>255</sup> Finally, if any ship owner has knowledge that smugglers are using his ship to bring undocumented foreigners into Japan, immigration officers will confiscate the ship.<sup>256</sup>

These penal provisions, while harsh for individual smugglers, are insufficient to deter the organized smuggling groups. For example, under Article 73-2, the penalty for hiring or helping place an alien in illegal work is a maximum three years imprisonment, two million ¥ fine, or both.<sup>257</sup> This seemingly severe penalty loses its bite when compared to the five million ¥ earned by two Chinese students who helped place one hundred undocumented Chinese workers with a marine products processing company.<sup>258</sup> Even the stowaway provisions which carry a maximum seven years imprisonment and 5 million ¥ penalty are relatively insignificant to the snakeheads. A group of Japanese men reportedly earned over 100 million ¥ (\$743,660) for helping snakeheads perform a single high-seas transfer of a group of illegal Chinese.<sup>259</sup>

The growing size of individual transactions also lessens the impact of the new penalties. In one recent case, a member of the

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250. *Id.* art. 74-2, ¶ 2.

251. *Id.* art. 74-8, ¶ 2.

252. *Id.* art. 74-4, ¶ 2.

253. *See Government Seeks to Curb, supra* note 62. Despite Matsuura's statement, the Act does not expressly provide for the seizure of these profits.

254. *See* ICRR art. 77, no. 1.

255. *See id.* art. 77, nos. 2-4. A captain who detects an undocumented foreigner on his ship must send the alien home at the captain's own expense. *See id.* art. 59.

256. *See id.* art. 78.

257. *Id.* art. 73-2

258. *See Two Students Held in Immigration Case, THE DAILY YOMIURI/YOMIURI SHIMBUN*, Nov. 15, 1997, available in 1997 WL 15878949.

259. *See Twelve Referred to Tax Authorities in Illegal Alien Smuggling, THE DAILY YOMIURI/YOMIURI SHIMBUN*, Sept. 14, 1997, available in 1997 WL 12801912.

Sumiyoshi-kai received 16 million ¥ (\$118,985) for bringing one hundred undocumented Chinese into Japan through a high-seas transfer.<sup>260</sup> Twenty million ¥ changed hands in a single smuggling operation in November of 1996.<sup>261</sup> One successful female Chinese smuggler has earned more than \$10 million as a snakehead, expanding her services to include underground banking as well as American real estate.<sup>262</sup> Additionally, the statute refers to stowaways rather than individual illegal entrants, suggesting that smugglers may not be held liable for each immigrant whom they assist. This only encourages large smuggling transactions.

Since smuggling fees from China to Japan now average 2.6-3 million ¥ (\$19,335 to \$22,309),<sup>263</sup> violators can pay the Act's monetary penalties for most infractions with the fee received from one smuggled alien. In addition, the apprehension of a single human smuggler or even a group of co-conspirators will not affect the large criminal organizations involved. Upper-level managers are likely to order others to assume smuggling duties, and given the potential salary, willing employees will not be hard to find. Clearly, even though the Act's penalties are relatively harsh compared to those of other nations, the profits that smuggling generates make Japan's new penal structure insignificant.

Many commentators and immigration experts also believe that attempts to tighten immigration laws are not the answer to the human smuggling crisis. According to Peter Schatzer, the director of external relations for the International Organization for Migration (IOM), increasing the fines and jail sentences of smugglers are "stop-gap" measures that will be ineffective unless governments identify and stamp out the causes of immigration.<sup>264</sup> The OECD agrees, noting that historical examples prove that tighter immigration policies will not help reduce the number of clandestine smuggling operations in Asia.<sup>265</sup> The Act, along with many international discussions of the smuggling crisis, focuses on deterrence, penalties, and strict visa regulation,<sup>266</sup> but this focus may exacerbate rather than ameliorate the problem.

When a country chooses to punish violators of immigration law more harshly, foreigners have fewer available legal methods of

260. See *Gangster Jailed*, *supra* note 102.

261. See *Illegal Chinese Immigrants*, *supra* note 65.

262. See Myers, *supra* note 2, at 128 n. 20. Chen Choi Ping, known as "Big Sister Ping," has large real estate holdings in Fujian and Manhattan's Chinatown, along with farms in New York and New Jersey. Ping employs many Chinese immigrants in the United States with illegal jobs at her farms. See *id.*

263. See *Illegal Chinese Immigrants*, *supra* note 65.

264. See Son, *supra* note 203.

265. See Wickramasekara, *supra* note 206, at 115.

266. See, e.g., Son, *supra* note 203.

entering that country. Anti-immigration legislation pushes the aliens into the hands of the smugglers, who force the aliens into crime and prostitution.<sup>267</sup> The very rules that Japan has implemented, namely, "tougher asylum policies, enhanced powers of summary exclusion, bilateral agreements with transit countries, stricter employment laws, and tougher requirements for visas and work permits," fuel the demand for professional smuggling services rather than deter such activities.<sup>268</sup> The Ministry of Justice's attempt to increase border controls and improve the techniques of immigration officers will also drive more and more potential immigrants to rely on smuggling syndicates.<sup>269</sup>

Examples illustrate the effects of strict immigration policies. Before the 1997 amendment to the Act, Japan already had in place some of the strictest immigration laws in the world.<sup>270</sup> Yet, some 25,000 undocumented Chinese currently reside in Japan.<sup>271</sup> Czech officials have noted a correlation between tighter visa restrictions and increases in human smuggling, while smugglers in Mexico merely increased their fees in response to recent anti-smuggling amendments to U.S. immigration law.<sup>272</sup> As Chinese and Japanese smugglers raise their prices in response to the increased demand for their services, the living situations of their customers in Japan will become even more deplorable than before. If the historical experiences of other nations occur in Japan, snakeheads will also try to avoid detection by using more circuitous and dangerous routes to transport their human cargo.<sup>273</sup> The customers, however, will still utilize the smuggling services since "[as] long as people are pessimistic about their future, they will look to migration, no matter what the risks, as their only viable option. And waiting for them will be the professional smugglers."<sup>274</sup>

## V. CONCLUSION

Japan has reacted to the surge in Chinese immigration by making its strict immigration law even tougher on illegal immigrants and human smugglers. By increasing penalties for illegally entering

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267. See James, *supra* note 47.

268. Hood, *supra* note 42, at 1 (discussing the effects of these policies in EU countries).

269. See Helgadottir, *supra* note 16, at 8.

270. See Smith, *supra* note 17, at 6.

271. See *id.*

272. See Smith, *supra* note 15, at 6 (noting that anti-immigration measures ultimately benefit smugglers).

273. See INTERNATIONAL ORG. FOR MIGRATION, *supra* note 8.

274. See Smith, *supra* note 15, at 6.

the country, human smuggling, and employing illegal workers, Japan hopes to block the efficient pipeline of Chinese immigrants and deter future Chinese from trying to enter the country. However, increasing penalties will only lead more immigrants to rely on professional smugglers who possess the expertise to bypass Japanese border controls. Organized smuggling groups will continue to make profits while the penalties present no substantial threat to their operations.

Since the Act continues to exclude unskilled foreign workers from the country, large firms in the service and construction industries and small firms of all types will look to undocumented Chinese workers to fill the jobs that Japanese nationals find unattractive. As the labor shortage becomes worse, Japanese employers of all sizes will have no choice but to hire illegal aliens unless the prohibition of unskilled workers is lifted. For now, smugglers are more than willing to supply the labor, and their clients will continue to pay large fees and live in pitiful conditions in order to escape unemployment and extreme poverty in China. Until the Chinese situation improves, Chinese citizens will pay any price to find a way out, especially if the destination is as attractive as Japan.

*Ian Peck\**

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\* J.D. Candidate, 1999, Vanderbilt University; B.A., University of Oklahoma. The author wishes to thank his wife, Emily, for her love and support and his parents and brothers for their constant encouragement.