

ADOPTION

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**QUESTIONNAIRE SUR L'ENLÈVEMENT, LA VENTE ET LA TRAITE D'ENFANTS ET  
SUR CERTAINS ASPECTS DU FONCTIONNEMENT PRATIQUE DE LA CONVENTION  
DE LA HAYE DU 29 MAI 1993 SUR LA PROTECTION DES ENFANTS ET LA  
COOPÉRATION EN MATIÈRE D'ADOPTION INTERNATIONALE**

*établi par le Bureau Permanent*

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**QUESTIONNAIRE ON THE ABDUCTION, SALE OF, OR TRAFFIC IN CHILDREN AND  
SOME ASPECTS OF THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF  
29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT  
OF INTERCOUNTRY ADOPTION**

*drawn up by the Permanent Bureau*

*Document préliminaire No 4 d'avril 2010 à l'intention de la  
Commission spéciale de juin 2010 sur le fonctionnement pratique de la  
Convention de La Haye du 29 mai 1993 sur la protection des enfants et  
la coopération en matière d'adoption internationale*

*Preliminary Document No 4 of April 2010 for the attention of the  
Special Commission of June 2010 on the practical operation of the  
Hague Convention of 29 May 1993 on Protection of Children and  
Co-operation in Respect of Intercountry Adoption*

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*29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT*  
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## **Introduction**

The Permanent Bureau is currently preparing the Third Meeting of the Special Commission to review the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, which is to be held in The Hague from 17 to 25 June 2010. It is intended that the Special Commission will provide the opportunity for State Parties to the Convention (as well as States which are considering or preparing for ratification or accession) to exchange information and experiences on the operation of the Convention, to compare practices, and to consider any difficulties in respect of the implementation and practical operation of the Convention.

The first day of the Special Commission will be devoted to examining issues of abduction, sale and traffic in children in the context of adoption. One object of this special day is to identify some agreed practices to manage cases where such abuses have occurred in the adoption procedure. The majority of the questions in this short questionnaire are concerned with this topic.

In order to make the maximum use of the time available at the Special Commission, the Permanent Bureau is gathering this information with a view to its circulation for use by the Special Commission. *We would be very grateful for your co-operation in this exercise, and we hope that you will be able to send us your replies to this Questionnaire by 14 May 2010.*

This Questionnaire is now available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "work in progress" then "intercountry adoption".

**NAME OF STATE OR ORGANISATION: United States of America**

**A. QUESTIONS ON ABDUCTION SALE AND TRAFFIC IN CHILDREN IN THE CONTEXT OF ADOPTION**

**Preventive measures**

1. Please indicate the laws (including criminal sanctions), measures and procedures in place in your State to prevent the abduction, sale and traffic in children within your intercountry adoption programmes. Please also provide details of who these laws, etc apply to (accredited bodies, adoptive parents, orphanage directors, etc).

The U.S. response to this question focuses specifically on abduction, sale, and trafficking in children in the context of intercountry adoption, i.e., as it applies to illicitly obtaining children for placement abroad with adoptive families. The United States does not use the term "trafficking" in this context as it implies obtaining children for an exploitative purpose, such as forced labor, slavery, or commercial sexual exploitation. Adoption by its nature does not result in such a purpose, rather it results in placement of a child in a loving family. To us, this distinction cannot be ignored. Where intercountry adoption is used as a screen for trafficking in children in order to force them into slavery, forced labor, or the commercial sex trade or anything similar, it is clearly not for the purpose of placing a child in a loving home and would not therefore be an appropriate use of the term "adoption." The United States is not aware of any such use of intercountry adoption within its own jurisdiction.

For a more general look at U.S. laws, regulations, and criminal sanctions relating to abduction, sale and trafficking in children, we have attached the United States' report on the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Also attached is the summary of U.S. laws and regulations cited in the Report.

The mechanisms in place in the United States to prevent abduction, sale and trafficking in children in the context of adoption include, at the federal level, requiring adoption service providers that provide specified adoption services in connection with an adoption case covered by the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention adoption or Convention case) to be accredited or approved, and imposing civil and criminal penalties on (among other things) those found to have been acting without such accreditation or approval or found to have induced a consent to adoption. The relevant sections of the Intercountry Adoption Act of 2000, P.L. 106-279 (the IAA) and the Code of Federal Regulations (CFR) are included below. In addition, individual U.S. States have laws governing abduction, sale and trafficking in the adoption context.

**U.S. Federal Law**

Background on U.S. Accreditation Process: The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) entered into force for the United States on April 1, 2008. In accordance with the the IAA, the U.S. domestic legislation implementing the 1993 Hague Convention, the United States established a system for the accreditation of bodies and approval of persons to provide certain defined adoption services in connection with Convention adoption

cases. This system is memorialized in U.S. federal accreditation and approval regulations at Part 96 of Title 22 of the Code of Federal Regulations.

The accreditation and approval process is carried out in the United States through accrediting entities (AEs) in accordance with the provisions of the IAA and US accreditation regulations. Accrediting entities develop application procedures designed to assess whether an applicant is in substantial compliance with U.S. accreditation and approval standards found in 22 CFR Part 96, Subpart F, in accordance with a substantial compliance system approved by the Department, that identifies certain standards as mandatory, critical or foundational.

AEs monitor and oversee accredited bodies or approved (non-accredited) persons throughout their accreditation and approval periods, including through the review and investigation of complaints, to ensure that they maintain substantial compliance with applicable U.S. accreditation and approval standards.

Section 404 of the IAA provides civil and criminal penalties, as follows:

#### IAA Section 404

(a) Civil Penalties.--Any person who--

- (1) violates section 201 [the requirement that, in order legally to provide the designated adoption services in connection with an adoption covered by the Convention, an adoption service provider must be accredited or approved];
- (2) makes a false or fraudulent statement, or misrepresentation, with respect to a material fact, or offers, gives, solicits, or accepts inducement by way of compensation, intended to influence or affect in the United States or a foreign country--
  - (A) a decision by an accrediting entity with respect to the accreditation of an agency or approval of a person under title II;
  - (B) the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child in a case subject to the Convention; or
  - (C) a decision or action of any entity performing a central authority function;
- (3) engages another person as an agent, whether in the United States or in a foreign country, who in the course of that agency takes any of the actions described in paragraph (1) or (2), shall be subject, in addition to any other penalty that may be prescribed by law, to a civil money penalty of not more than \$50,000 for a first violation, and not more than \$100,000 for each succeeding violation.

(b) Civil Enforcement.--

- (1) Authority of attorney general.--The Attorney General may bring a civil action to enforce subsection (a) against any person in any United States district court.
- (2) Factors to be considered in imposing penalties.--In imposing penalties the court shall consider the gravity of the violation, the degree of culpability of the defendant, and any history of prior violations by the defendant.

(c) Criminal Penalties.--Whoever knowingly and willfully violates paragraph (1) or (2) of subsection (a) shall be subject to a fine of not more than \$250,000, imprisonment for not more than 5 years, or both.

#### U.S. Federal Accreditation Regulations

The U.S. accreditation regulations expressly prohibit the abduction, sale, and trafficking in children for purposes of adoption in multiple standards. These regulations include standards that apply to all accredited bodies and approved (non-accredited) persons, and such bodies and persons must be in substantial compliance with all applicable standards to achieve and maintain their accreditation or approval.

22 CFR § 96.35 Suitability of agencies and persons to provide adoption services consistent with the Convention.

(a) The agency or person provides adoption services ethically and in accordance with the Convention's principles of:

- (1) Ensuring that intercountry adoptions take place in the best interests of children; and
- (2) Preventing the abduction, exploitation, sale, or trafficking of children.

22 CFR § 96.36 Prohibition on child buying.

(a) The agency or person prohibits its employees and agents from giving money or other consideration, directly or indirectly, to a child's parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child. If permitted or required by the child's country of origin, an agency or person may remit reasonable payments for activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following birth of the child, or the provision of child welfare and child protection services generally. Permitted or required contributions shall not be remitted as payment for the child or as an inducement to release the child.

(b) The agency or person has written policies and procedures in place reflecting the prohibitions in paragraph (a) of this section and reinforces them in its employee training programs.

22 CFR § 96.46 Using Providers in Convention Countries

- (a) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in Convention countries, ensures that each such foreign supervised provider
- (2) Does not engage in practices inconsistent with the Convention's principles of furthering the best interests of the child, and preventing the sale, abduction, exploitation, or trafficking in children;

Note: Supervised providers are defined as "any agency, person, or other non-governmental entity, including any foreign entity, regardless of whether it is called a facilitator, agency, attorney, or by any other name, that is providing one or more adoption services in a Convention case under the supervision and responsibility of an accredited agency, temporarily accredited agency, or approved person that is acting as the primary provider in the case."

#### U.S. State Law

Attached is a compilation of U.S. State laws governing abduction, sale and trafficking in the adoption context, prepared by the U.S. National District Attorneys Association and included as Annex 5b of the January 22, 2010 First Periodic Report Concerning the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and Response to Recommendations in Committee Concluding Observations of June 25, 2008.

2. Please provide details of any specific measures taken to prevent solicitation (*e.g.*, through inducements of consent) of children for adoption (Arts 8 and

29 of the 1993 Hague Convention).  
Federal Law

As noted above, Section 404 of the IAA established civil and criminal penalties for, among other things, "mak[ing] a false or fraudulent statement, or misrepresentation, with respect to a material fact, or offer[ing], giv[ing], solicit[ing], or accept[ing] inducement by way of compensation, intended to influence or affect in the United States or a foreign country . . . the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child in a case subject to the Convention." 42 U.S.C. § 14944.

Regulations related to these prohibitions were promulgated by both the Department of State, as a basis for denying an adoption service provider accreditation or approval and for taking adverse action related to an adoption service provider's accreditation or approval, and the Department of Homeland Security, as a requirement for prospective adoptive parents who seek an intercountry adoption covered by the Convention.

#### U.S. Department of State Regulations

Under the accreditation regulations issued by the Department of State, to be accredited or approved, agencies or persons must "provide[] adoption services ethically and in accordance with the Convention's principles of: (1) Ensuring that intercountry adoptions take place in the best interests of children; and (2) Preventing the abduction, exploitation, sale, or trafficking of children." 22 CFR § 96.35. The regulation details extensive disclosure standards against which the accrediting entity evaluates the adoption service provider's suitability in this context.

In addition, another standard that an adoption service provider must meet in order to become and remain accredited or approved (22 CFR 96.36, "Prohibition on child buying") provides as follows:

- (a) The agency or person prohibits its employees and agents from giving money or other consideration, directly or indirectly, to a child's parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child. If permitted or required by the child's country of origin, an agency or person may remit reasonable payments for activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following birth of the child, or the provision of child welfare and child protection services generally. Permitted or required contributions shall not be remitted as payment for the child or as an inducement to release the child. (b) The agency or person has written policies and procedures in place reflecting the prohibitions in paragraph (a) of this section and reinforces them in its employee training programs.

#### U.S. Department of Homeland Security Regulations:

The Department of Homeland Security promulgated regulations governing prospective adoptive parents who seek an intercountry adoption covered by the Hague Convention. Among those provisions is 8 CFR § 204.304, "Improper inducement prohibited":

#### 8 CFR § 204.304

- (a) Prohibited payments. Neither the applicant/petitioner, nor any individual or

entity acting on behalf of the applicant/petitioner may, directly or indirectly, pay, give, offer to pay, or offer to give to any individual or entity or request, receive, or accept from any individual or entity, any money (in any amount) or anything of value (whether the value is great or small), directly or indirectly, to induce or influence any decision concerning:

- (1) The placement of a child for adoption; (2) The consent of a parent, a legal custodian, individual, or agency to the adoption of a child; (3) The relinquishment of a child to a competent authority, or to an agency or person as defined in 22 CFR 96.2, for the purpose of adoption; or (4) The performance by the child's parent or parents of any act that makes the child a Convention adoptee.
- (b) Permissible payments. Paragraph (a) of this section does not prohibit an applicant/petitioner, or an individual or entity acting on behalf of an applicant/petitioner, from paying the reasonable costs incurred for the services designated in this paragraph. A payment is not reasonable if it is prohibited under the law of the country in which the payment is made or if the amount of the payment is not commensurate with the costs for professional and other services in the country in which any particular service is provided. The permissible services are:
  - (1) The services of an adoption service provider in connection with an adoption;
  - (2) Expenses incurred in locating a child for adoption;
  - (3) Medical, hospital, nursing, pharmaceutical, travel, or other similar expenses incurred by a mother or her child in connection with the birth or any illness of the child;
  - (4) Counseling services for a parent or a child for a reasonable time before and after the child's placement for adoption;
  - (5) Expenses, in an amount commensurate with the living standards in the country of the child's habitual residence, for the care of the birth mother while pregnant and immediately following the birth of the child;
  - (6) Expenses incurred in obtaining the home study;
  - (7) Expenses incurred in obtaining the reports on the child as described in 8 CFR 204.313(d)(3) and (4);
  - (8) Legal services, court costs, and travel or other administrative expenses connected with an adoption, including any legal services performed for a parent who consents to the adoption of a child or relinquishes the child to an agency; and
  - (9) Any other service the payment for which the officer finds, on the basis of the facts of the case, was reasonably necessary.

### Consents

3. Please provide details of the measures you have in place, as a country of origin or a receiving country:
  - a. to ensure that consents have been properly obtained in accordance with Article 4;

This response is for 3.a., 3.b, and 3.c.

As a State of origin:

In general, Convention adoptions of children resident in the United States are governed by the law of the U.S. State where the child is resident. Moreover, section 303(b) of the IAA requires that, before an adoption order or a grant of custody can be made, the relevant state court must have received, among other things, "satisfactory evidence that the requirements of Articles 4 and 15 through 21 of the Convention have been met". Both Article 4 and 16 address the issue of consents

The U.S. accreditation regulations also provide standards governing consent when the United States is the country of origin:

22 CFR 96.53(c)

(c) The agency or person takes all appropriate measures to ensure that consents have been obtained as follows:

(1) The persons, institutions, and authorities whose consent is necessary for adoption have been counseled as necessary and duly informed of the effects of their consent, in particular, whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin;

(2) All such persons, institutions, and authorities have given their consents;

(3) The consents have been expressed or evidenced in writing in the required legal form, have been given freely, were not induced by payments or compensation of any kind, and have not been withdrawn;

(4) The consent of the mother, where required, was executed after the birth of the child;

(5) The child, as appropriate in light of his or her age and maturity, has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption; and

(6) The child's consent, where required, has been given freely, in the required legal form, and expressed or evidenced in writing and not induced by payment or compensation of any kind.

(d) If the child is twelve years of age or older, or as otherwise provided by State law, the agency or person gives due consideration to the child's wishes or opinions before determining that an intercountry placement is in the child's best interests.

As a Receiving State

U.S. Department of Homeland Security regulations place a duty on the petitioner(s) (i.e., the prospective adoptive parent(s)) in the case to certify under oath that the background information about the child provided by the country of origin, in accordance with Article 16 of the Convention, including consents obtained in the case, is true, correct, and complete. See 8 CFR 204.313(d)(4)(iii)-(iv).

The Article 16 report addresses the counseling and informing required in Article 4(c)(1). Thus the certification described above includes information about the counseling received by parties giving consent as to the consequences of their consent.

In some countries of origin in which identity fraud is elevated, the U.S. Department of Homeland Security institutes a DNA-based identification procedure. See, for example the USCIS Information on DNA testing in Vietnam orphan adoption cases on the USCIS website: [www.USCIS.gov](http://www.USCIS.gov)

b. to ensure that birth parents and others understand the consequences of giving consent to an adoption;

See Response 3.a.

c. to verify the identity of the person giving consent.

See Response 3.a.

**Document integrity**

4. Please provide details of the measures you have in place to prevent the use of fraudulent, or improperly issued, documentation in the adoption process. Scrutiny of documentation in Convention adoption cases occurs at every stage of the adoption, immigration and visa processes. If an adoption

occurs in a country where the likelihood of fraud is high, accredited and approved (non-accredited) adoption service providers are made aware of the possibility of document fraud and of the necessity of giving careful scrutiny to all documents they receive. In addition, the immigration and consular officers responsible for the case have been trained to recognize local document fraud patterns. The officers, furthermore, have access to an anti-fraud manager in larger embassies and consulates who has expertise detecting fraudulent documents. If an officer is in a smaller embassy or consular section abroad, the office of Fraud Prevention Programs within the U.S. Department of State assists the officer to become aware of local fraud patterns and how to review documents.

### **Assistance and co-operation**

5. Please provide details if you have experienced any difficulties in obtaining assistance or co-operation from other States or Central Authorities regarding:

a. the elimination of practices that may lead to abduction, sale or traffic in children in the context of adoption;

This response is to both 5.a. and 5.b.:

In more than one instance, the United States has suspended adoptions when illicit practices for obtaining children for adoption could not be stopped by the State of origin given its existing laws and other structures. This step is never taken lightly and always follows sustained efforts for reform. It has been gratifying and very encouraging to see States of origin take the difficult but essential step of replacing existing laws with new child welfare systems, while including intercountry adoption under the new system as one of several means available to meet the needs of children without families. As these new systems, laws and regulations are fully implemented, the United States will reassess, in consultation with the relevant governments, when to resume Convention adoption cases. Some non-Convention States continue to struggle with gaining control over illicit practices like child buying or obtaining children for intercountry adoption through deception. The United States has worked with such governments at all levels to identify the problems and to encourage implementation of procedural and systemic changes to address these concerns. Our efforts with all such countries are ongoing. Most of these countries aspire to become parties to the Convention and want to gain full control over the adoption process such that these abuses no longer occur.

b. specific concerns relating to the abduction, sale , or traffic in children in the context of adoption.

See response 5.a.

### **Good Practice**

6. Please provide details of any examples where your State has worked in co-operation with other States in order to eliminate practices relating to the abduction, sale or traffic in children in the context of adoption.  
See the response to question 5.

7. Are there any particular measures preventing the abduction, sale or traffic in children in intercountry adoption (*e.g.*, good practices) that you would like to bring to the attention of other States?

Under Section 301 of the Intercountry Adoption Act, the Secretary of State

must certify, in the case of a child adopted from a Convention country, that the requirements of the Convention and of the IAA have been met. The United States has found it necessary to cease accepting new Convention adoption cases when it finds that certifications that adoptions from the country took place in accordance with the Convention are not possible. While this approach is rare, ceasing the acceptance of new Convention adoption cases gives the State of origin the clear message that the status quo cannot continue. When combined with concrete advice for reform, and the offer to provide capacity building assistance, this approach can lead to accelerated change and improvement.

### **Raising and dealing with concerns or individual cases**

8. If a concern or case about the possible abduction, sale or traffic of an adopted child is raised with your Central Authority:
- a. What measures and / or procedures are in place in your State for considering this concern?

This response is for parts 8.a. and 8.b.

Reports of the possible abduction, sale or trafficking in children for purposes of adoption may come to the attention of the U.S. Central Authority in different ways. How a case is handled depends in large part on the means by which the U.S. Central Authority learns of it, as well as the facts of the particular case, e.g., where the child is located and if the child is a U.S. citizen. If the allegations come to the U.S. Central Authority in the form of a complaint filed through the U.S. Hague Complaint Registry against an accredited or approved (non-accredited) adoption service provider, the U.S. accrediting entity would open an investigation into the facts of the case in the first instance. (The U.S. accrediting entities have authority to and responsibility for investigating allegations that an accredited body or its supervised providers may have be out of compliance with the accreditation regulations.) In addition, all allegations that come to the attention of the U.S. Central Authority -- whether from a U.S. accrediting entity or from any other source -- are referred to the appropriate law enforcement authority either state or federal or both.

- b. Please provide details of the body / bodies within your State which would be responsible for considering and / or investigating this concern.

See the response for 8.a.

- c. What sort of assistance (e.g., access to records, mediation, counselling), if any, would be available to (a) the adoptee (b) birth parents, or (c) adoptive parents in individual cases?

The resources that would be available would depend on the facts of the specific case (in particular, whether the United States was the receiving country or the country of origin) as well as at what point in the process these allegations came to light. For example, if they emerged during the immigration and visa process, before the family has traveled to the United States from the State of origin, the accredited or approved (non-accredited) adoption service provider would be responsible for assisting the family. Accredited and approved (non-accredited) adoption service providers generally have sophisticated and experienced clinical social workers on staff who are well qualified to identify resources and to facilitate assistance to the family.

Likewise, the accredited or approved (non-accredited) adoption service provider in a Convention case would be well situated to offer and provide

assistance in the first instance to adoptees and adoptive families if they are in the United States, including coordinating services with the U.S. State child welfare system in the U.S. State where the family resides.

As for services to be provided to birth parents, inasmuch as the birth parents are in the United States as the State of origin, they would rely on the U.S. State child welfare system in the U.S. State where the family resides. Additionally, the accredited body providing services in the case may have birth parent counseling and other services to offer and would typically assist birth parents in obtaining such services.

## General

9. Are you aware of any cases of the abduction, sale or traffic in children within your intercountry adoption programmes? Please also provide details of any sanctions or penalties applied if such cases were prosecuted successfully.

Since the Convention entered into force with respect to the United States in 2008, we have not had a confirmed Convention case involving the abduction, sale or trafficking in children for purposes of adoption.

10. Have you suspended, or restricted, an intercountry adoption programme due to concerns regarding the possible abduction, sale or traffic in children?  
No.

11. Have you suspended, or restricted, or taken any action, in respect of an adoption accredited body (Art. 11) or an approved (non-accredited) person (Art. 22(2)) or an institution, due to concerns regarding the possible abduction, sale or traffic in children?

No.

12. Are private or independent adoptions permitted by your State? Define what is meant in your State by "private" or "independent" adoptions.

In cases in which the United States is the receiving country, a fully independent Convention adoption is not possible because in every Convention case the prospective adoptive parent(s) must work with a primary provider (accredited body or approved (non-accredited) person). The U.S. Central Authority provides the following guidance to prospective adoptive parent(s):

"The Hague Adoption Convention accreditation regulations (22 CFR Part 96) establish the central importance and role of primary providers. Section 96.14 provides that "...in each Convention adoption case, an accredited agency, a temporarily accredited agency, or an approved person will be identified and act as the primary provider." Section 96.2 defines a primary provider as "the accredited agency, temporarily accredited agency, or approved person that is identified pursuant to section 96.14 as responsible for ensuring that all six adoption services are provided and for supervising and being responsible for supervised providers where used."

"Furthermore, [Department of Homeland Security (U.S. Citizenship and Immigration Service)] regulations governing the I-800A [Application for Determination of Suitability to Adopt a Child from a Convention Country] application process and the I-800 [Petition to Classify Convention Adoptees as an Immediate Relative] immigrant visa petition process require participation by an accredited agency, temporarily accredited agency, or approved [(non-accredited)] person that is acting as the a primary provider

at important points in the adoption process, as follows:

- "-- A home study must be prepared by an individual or agency authorized under 22 CFR Part 96. As provided in 8 CFR 204.311(t)(2), when the home study is not performed in the first instance by an accredited or temporarily accredited agency, then an accredited agency must review and approve the home study in writing per 22 CFR 96.46(c), before the home study is submitted to USCIS;
  - "-- As part of the I-800 petition, prospective adoptive parents must file a statement from the primary provider indicating that all of the pre-placement preparation and training provided for in 22 CFR 96.48 have been completed. See 8 CFR 204.313(d)(2);
  - "-- Prospective adoptive parents must also file a statement from the primary provider certifying that the information in the article 16 report on the child is true, correct, and complete. See 8 CFR 204.313(d)(4)(iii);
  - "-- Prospective adoptive parents must also file a statement from the primary provider detailing the primary provider's plan for post-placement duties, as specified in 22 CFR 96.50. See 8 CFR 204.313(d)(4)(v);
  - "-- Finally, before final approval of the I-800 petition, in incoming cases in which the child is to be adopted in the United States and a plan for monitoring the placement until the final adoption was not submitted as part of the I-800A application, a statement from the primary provider must be submitted summarizing the plan under 22 CFR 96.50 for monitoring of the placement until the adoption is finalized. See 8 CFR 204.313(h)(ii)(B).
- "In summary, the U.S. Department of Homeland Security, Citizenship and Immigration Services (USCIS) regulations governing the I-800 processes impose duties on a primary provider that may not be accomplished by anyone else. Every family adopting from a Convention country needs a primary provider to perform these duties and functions."

In adoptions in which the United States is the country of origin, the law of the relevant U.S. State governs, including whether, and to what extent, they may be "private" or "independent". In this context, independent usually refers to an adoption through an attorney and not through an adoption agency or the foster care of child protection systems. Independent adoptions often permit direct communication between prospective adoptive parents and birth parents. In most cases, independent adoptions are infant adoptions. Independent adoption is permitted in 46 US States.

As noted above, section 303(b) of the Intercountry Adoption Act requires that, before an adoption order or a grant of custody can be made, the relevant state court must have received, among other things, satisfactory evidence that adoptability and best interests of the child determinations, consent requirements, and subsidiarity and counseling provisions of the Convention have been met as well as satisfactory evidence that a determination of suitability of adoptive parents have been made. In addition, the receiving State must have certified that the child may enter and reside permanently in the receiving State following the adoption.

13. What measures are taken in your State to ensure that the process of matching is carried out by a properly qualified and independent authority?  
In cases in which the United States is the State of origin, the matching

process is governed by State law. In order to ensure that Convention safeguards are maintained, the accredited or approved primary provider in the case is responsible for ensuring that matching -- as well as all other adoption services in the case -- are provided in accordance with the Convention, the IAA and the accreditation regulations.

Moreover, as noted above, section 303(b) of the Intercountry Adoption Act requires that, before an adoption order or a grant of custody can be made, the relevant state court must have received, among other things, "satisfactory evidence that the requirements of Articles 4 and 15 through 21 of the Convention have been met."

## **B. QUESTIONS ON THE PRACTICAL OPERATION OF THE CONVENTION**

### **Difficulties related to international mobility**

14. When foreign prospective adoptive parents are habitually resident in your State and wish to adopt a child from another State (*i.e.*, intercountry adoption), is this permitted and if so, what special requirements are imposed?

U.S. immigration law permits only U.S. citizens to adopt abroad and obtain a visa for an adopted child that permits the child to immediately enter the United States and reside permanently. Thus non-U.S. citizen parents who are permanent residents of the United States may adopt abroad but may not immediately obtain a visa for the child to return with the parent(s) to reside permanently in the United States.

U.S. immigration law does not prohibit non-U.S. citizen permanent residents of the United States from adopting a child under the age of 16 abroad, but requires that a U.S. permanent resident have two years of residence abroad and legal custody of the child before the adopted child can be eligible for a visa. Once the residence and custody requirements have been met, the child is eligible to apply for a family-based immigrant visa based on the child's relationship with the U.S. permanent resident. This visa category has numerical limitations and the child will have to wait until a visa number comes available for its visa category. If the adoptive parent acquires U.S. citizenship at some point in the process, and the residence and custody requirements have been met, the child becomes an "immediate relative" and may receive an immigrant visa without further delay, assuming there are no other visa ineligibilities. Such cases are not considered Convention adoptions under U.S. law, since the adoptive parent at the time of the adoption was not a U.S. citizen.

A different rule applies to foreign residents who are present in the United States in a diplomatic capacity. These foreign residents may adopt a child abroad and immediately obtain a visa for that child to return to the United States with the parents and remain in the United States for the duration of the parent's diplomatic visa status. The adoptive child does not receive an immigrant visa and does not obtain the ability to reside permanently in the United States. These cases are also not considered Convention adoptions under U.S. law.

Non-US citizens in other non-immigrant visa categories, even those with long-term validity, may adopt abroad under the Convention and return with the child to the United States only under certain conditions. If the child is eligible for a tourist visa, then the child may travel temporarily to the U.S. with the adoptive parents. If the child is not eligible for a tourist visa, then, as discussed above, the non-immigrant visa holder parent must have two years of residence abroad

and legal custody of the child before the adopted child can be eligible for a visa.

15. When foreign prospective adoptive parents are habitually resident in your State and wish to adopt a child from your State (*i.e.*, national adoption), is this permitted and if so, what special requirements are imposed?  
National or domestic adoption is permitted in cases where a foreign prospective adoptive parent is determined to be habitually resident in the United States and is adopting a child in the United States

State of origin question

16. How do you treat the adoption of a child in your State by prospective adoptive parents who have the nationality of your State but who are habitually resident in the receiving State? Does it make any difference if the child is related to the prospective adoptive parents?  
The USCA generally considers a U.S. citizen residing in a Convention country to be resident in the United States if the U.S. citizen is domiciled in the United States or intends to establish a domicile in the United States at any point before the child's 18th birthday.

It is the view of the USCA that prospective adoptive parents who are U.S. citizens

living abroad intend to retain or re-establish a U.S. domicile. Thus,

prospective adoptive parent(s) do not need to submit evidence of intent to retain or reestablish domicile in the United States in order to be considered resident in the United States.

For this reason, a State court may treat an adoption case involving a U.S. citizen currently resident in a Convention country who seeks to adopt a child

resident in the United States as a domestic (non-Hague Convention) case,

since, in the view of the Department of State, both the adoptive prospective adoptive parent and the prospective adoptive child can be considered to be resident in the United States.

However, the USCA also advises such prospective adoptive parents as follows: U.S. citizens living abroad in another Convention country who plan to adopt a child residing in the United States or a third country should be aware that the country where the adoptive parents currently live may require them to follow local adoption laws and procedures as the receiving country in a Convention adoption, in order for the child to enter that country legally. The receiving country may require that an adoption be processed as a Hague Convention intercountry adoption even in cases where the child and the prospective adoptive parents are all U.S. citizens. Adoptive parents' failure to comply with local adoption laws and procedures to which their adoption may be subject could result in the adopted child's inadmissibility to enter the receiving country.

The USCA urges prospective adoptive parents to consult the Central Authority of the receiving country prior to initiating an adoption. Prospective adoptive parents may also contact the USCA to seek assistance in accessing

information from the receiving country to understand the applicable adoption and immigration requirements.

Receiving State question

17. How do you treat the adoption of a child in the State of origin by prospective adoptive parents who have the nationality of that State but who are habitually resident in your State? Does it make any difference if the child is related to the prospective adoptive parents?

As noted above, the nationality of the adoptive parents is only part of the question; the immigration status of the prospective adoptive parents is also of critical importance. Some adoptive parents have dual nationality. If they have U.S. citizenship (in addition to the citizenship noted in the scenario), they may adopt abroad in a Convention country and the adoption will be considered a Convention case, assuming the State where the child resides permits the case to proceed as a Convention adoption. Relative adoptions follow the same rules.

**Certificate of conformity (Art. 23)**

18. Is your State experiencing any difficulties concerning the certificate of conformity which must be issued in accordance with Article 23 when the adoption is completed?

When the final adoption has been completed in the United States – whether the United States is the receiving country or the country of origin -- the USCA issues Article 23 certificates in Convention cases in which the adoption was made in conformance with the Convention. See 22 USC Part 97.

When the final adoption has been completed in the country of origin, the United States has experienced no difficulties receiving Article 23 certificates. The United States is not aware of any difficulties with respect to Article 23 certificates in cases where the final adoptions have been completed in the receiving country.

19. What problems occur when a certificate is not delivered or is incomplete? What solutions does your State apply in such cases?

In cases where the United States is the receiving country and the final adoption has been completed in the country of origin, if an Article 23 certificate is not delivered or is incomplete, the processing of the child's immigration to the United States cannot proceed. U.S. consular officers must receive a satisfactory Article 23 certificate before the child's immigration to the United States can be processed. See 22 CFR Part 42. In these situations, consular officers would work with the relevant accredited or approved adoption service provider to ensure that a complete Article 23 certificate is provided.

Receiving State question

20. Does your State require any formal procedure for the recognition of an adoption decree that was made in a State of origin?

Pursuant to Section 301(b) of the IAA Convention adoptions that have been certified by the U.S. Central Authority "shall be recognized as a final valid adoption for purposes of all Federal, State, and local laws of the United States." In the case of adoptions where the children are immigrating to the United States, USCA certification takes place just prior to issuance of an immigrant visa in every Convention adoption case at the appropriate U.S. Embassy or Consulate abroad. In the case of adoptions where children are emigrating from the United States, the USCA certifies the adoption upon application to the USCA in the United States following adoption in a U.S. State court.

### **Co-operation or development aid projects in the State of origin**

#### State of origin Questions

**NB: The 2009 Questionnaire on Accreditation (Prel. Doc. No 1) at Section K (questions 71-73) also dealt with this issue. States which completed that Questionnaire could refer to their responses to avoid repetition here.**

21. Is it mandatory in your State for receiving States to undertake co-operation or development aid projects as a condition for engaging in intercountry adoptions?

No, U.S. law does not require receiving states to undertake co-operation or development aid projects as a condition for engaging in intercountry adoptions with the United States as the country of origin.

22. Who chooses or initiates co-operation or development aid projects? What involvement, if any, do the authorities in the State of origin have with the projects?

The United States, when acting as a state of origin, does not participate in co-operation or development aid projects.

23. Can you provide examples of good and bad practices?

The United States, when acting as a state of origin, does not participate in co-operation or development aid projects.

### **The practical operation of the Convention and related challenges**

24. Please indicate what are the main challenges (*e.g.*, problems, abuses) faced by your State for the effective implementation and operation of the Convention.

In the view of the United States, the largest challenge for the effective implementation and operation of the Convention is the difficulty on the part of some parties to the Convention to establish effective child welfare and adoption infrastructure before they engage in Convention adoption cases. In some States, the Convention enters into force before they are ready to provide Convention safeguards or adjust their adoption processes to conform to Convention norms. The result can be a long and agonizing process of corrective action and capacity building in which the State, its Convention partners, and the adoption community in general become highly frustrated. This could be avoided if States would wait to join the Convention or to participate in Convention adoptions until they have in place the minimum structures and processes required to ensure Convention

safeguards. An important part of this process is determining the number of adoptable children in need of intercountry adoption and how the State plans to meet that need through collaborative relationships with accredited bodies and public authorities.

25. Do you have any other comments about the operation of the Convention? Adoption trends in some States have emerged that run contrary to some of the norms of the Convention. An example of this is a growing preference on the part of birth parents for open adoption, in which the birth parent plays a large role in the selection of an adoptive family and in which an ongoing relationship between the birth family and the adoptive family is encouraged. While this trend may not be seen in some States or in some cultural settings, it is gaining acceptance in others. Legislatures and other rule making bodies may not be keeping pace with this trend in some cases such that the laws do not yet expressly permit practices that have become common. As we consider the validity of the Convention in those settings in which open adoption is becoming more common, it would be well to anticipate how an open adoption as defined here could be fully consonant with Convention norms and practices.

### **Surrogacy and intercountry adoption**

26. Have you experienced any problems concerning the interplay between the 1993 Hague Convention and cross-border surrogacy arrangements? One issue that has arisen in the area of Assisted Reproductive Technology (ART), which includes surrogacy, involves how to determine the legal relationship of the respective parties to the child born as a result of ART. In most cases, the law of the country in which the birth occurred would apply in determining the legal relationship of a surrogate mother and the prospective parents to the child. If the birth occurs in the United States, the legal relationships of the parties to the child would generally be determined by the law of the U.S. state in which the child was born. Confusion may arise in cases in which a surrogacy agreement is entered into according to the law of the U.S. State of residence of the surrogate mother, but the child is ultimately delivered in, or is subsequently transferred to, another U.S. State or foreign country which has different rules governing surrogacy.

Another issue is whether and to what extent the Convention is relevant in the case of a child born to a surrogate in one Convention country and the intended and commissioning parents wish to transfer the child to another Convention country. The USCA works with other Central Authorities to analyze such cases and reach an appropriate solution.