The Emerging Law of Introductory Adoptions: An Analysis of the Hague Conference on Intercountry Adoption

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THE EMERGING LAW OF INTERCOUNTRY ADOPTIONS: AN ANALYSIS OF THE HAGUE CONFERENCE ON INTERCOUNTRY ADOPTION

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I. INTRODUCTION

It is now commonplace for prospective adoptive parents to look beyond their own nations in search of adoptable children. Where prospective adopters live, there are too few adoptable children,\(^1\) and in other countries there are too many. Yet many decades after the first well-publicized cases of American adoptions of foreign children,\(^2\) "intercountry adoption" still occurs by ad hoc legal process, sometimes in a legal vacuum.\(^3\)

To fill this void, The Hague Conference on Private International Law has proposed a multilateral treaty, the 1993 Hague Convention

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1. The U.S. shortage of adoptable children is really a shortage of adoptable, healthy, caucasian infants. Most prospective adopters seek infants or very young children, and most either seek children of the same race or are deterred from adopting minority children by racially discriminatory polices of adoption agencies. See Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. PA. L. REV. 1163, 1166 (1991).


3. Id. at 335-76.
on Protection of Children and Co-operation in Respect of Intercountry Adoption, 4 to create rules of procedure, conduct, choice of law, international recognition of adoption decrees, and to establish institutions for international oversight and cooperation. If the U.S. ratifies the Convention, it must also adopt new federal legislation and encourage new state legislation to fulfill some important obligations under the Convention.

One might ask whether the U.S. or the world needs a new international or domestic adoption law. Even without a clear law or policy, intercountry adoption is a routine method of adoption in the U.S. and many other nations. For those who adopt foreign-born children, however, the process is needlessly complex, risky, and uncertain for a transaction in which so much is at stake. 5 Moreover, intercountry adoption by Americans has actually declined recently, as some sending nations 6 have acted to discourage out-of-country placement. 7 Unfortunately, periodic crises and scandals in these countries have fanned the debate whether intercountry adoption serves the best interests of adoptable children or the national interests of their birth lands. 8


5. Most intercountry adoptive families probably experience no significant legal problems, at least on the U.S. side, in completing an adoption. On the other hand, the lack of clear law presents an ever-present risk even for completed adoptions. For example, the Attorney General of the State of Georgia once declared that most, if not all, intercountry adoptions by families in that state were void. Subsequent legislation cured the difficulties he had identified and retroactively validated previous adoptions. See Carlson, supra note 2, at 357.

6. I use the term “sending nation” interchangeably with “nation of origin” to mean a child’s original homeland in an intercountry adoption. While nation of origin is more awkward, it is the term the Convention employs. A “receiving nation” is the child’s destination and the home nation of the adopters.


Some of the opposition to intercountry adoption is blindly nationalist, oblivious to the interests of children, and armed with sensational exaggerations of the extent of illicit baby-selling operations. There are also, however, justifiable grounds for reasonable concern in sending nations. In some sending nations, customary safeguards may be nonexistent, and the international movement of children tends to compound opportunities for corruption and circumvention of the law. Even without these problems, sending nations deserve, and increasingly want, assurance that their children are not cast into an unchannelled stream of commerce but are guarded by law and competent authorities.

The Hague Convention, which received the unanimous approval of the delegations at the Conference, is the most likely means for allaying these concerns. The United States’ ratification of the Convention would fortify pro-adoption forces against their opposition in sending nations. Our failure to ratify the Convention would probably have the opposite effect.

This article will examine the Convention, its benefits and obligations, and the possible means for its implementation in the United States. The starting point is a summary of the basic terms of the Convention, with a special focus on the Convention’s allocation of responsibilities in the adoption process. That summary is followed by an analysis of certain provisions likely to provoke the most controversy in the U.S. These include the Convention’s guarded endorsement of intercountry adoption, its rule restricting direct contact between birth families and prospective adopters, and its requirements for the regulation of adoption agencies. The latter problem is especially controversial because it requires the U.S. to choose from among a variety of

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10. At the conclusion of the Conference the participating states adopted the final act. Those participating states were Argentina, Australia, Austria, Belgium, Canada, Chile, China, Cyprus, the Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay and Venezuela, member states of the Hague Conference, and the invites states of Albania, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Colombia, Costa Rica, El Salvador, Ecuador, Haiti, the Holy See, Honduras, India, Indonesia, Kenya, the Republic of Korea, Lebanon, Madagascar, Mauritius, Nepal, Panama, Peru, the Philippines, the Russian Federation, Senegal, Sri Lanka, Thailand, and Viet Nam. Hague Conference, supra note 4, at 1139.
regulatory schemes with different costs, regulatory burdens, and degrees of federal oversight of local authority. Finally, the article discusses an important problem that has received relatively little attention: the effect of the Convention when the U.S. is a sending nation.

II. BASIC TERMS OF THE CONVENTION

A. The Origins of the Convention

The Hague Conference’s Convention is not the first international law pertaining to adoption. However, it is the first to deal with global intercountry adoption in a significant way. Until recently intercountry adoption seemed too transitory or peculiar and too varied in character to deserve substantial effort at systemization. Thus, before the Convention, international adoption law consisted of vague, hortatory declarations of little practical value and bilateral or regional agreements of limited scope. By 1988, however, when The Hague Conference proposed to draft an international adoption law, it was clear that intercountry adoption was not merely episodic but was a regular and normal phenomena likely to continue in the indefinite future. Moreover, while causes and sources of intercountry adoption will doubtless change from time to time, half a century of experience teaches a number of inherent legal and practical problems that international law can usefully address.

At the outset, The Hague Conference offered some special advantages as an organization for drafting intercountry adoption law. While its earlier conventions relating to child custody and adoption

11. For the first three or four decades after World War II, intercountry adoption was driven by particular crises from one world region to another, from the war in Europe, to the war in Korea, to the war in Vietnam. See Richard R. Carlson, Transnational Adoption of Children, 23 TULSA L.J. 317, 324-31 (1988). Today, the fall of Communism is a crisis contributing to the growth and diversity of intercountry adoption. See Glaser, supra note 8; Hunt, supra note 8.

12. These agreements are summarized in J.H.A. van Loon, supra note 8, at 12-20.

13. At its 1988 session, The Hague Conference directed its Secretary General to initiate work toward a “convention on adoption of children coming from abroad.” van Loon, supra note 8, at 2-20. The Conference envisioned a “convention on international co-operation and protection of children in respect of intercountry adoption” to answer such questions as (1) when is intercountry adoption appropriate; (2) what law should govern the different issues of adoption; and (3) who should supervise the adoption, and how should they do so? Permanent Bureau, Memorandum Concerning the Preparation of a New Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption, The Hague Conference on Private International Law, at 3 (Nov. 1989) [hereinafter Permanent Bureau Memo].
were of limited practical value for the problems of contemporary intercountry adoption,\textsuperscript{14} they provided a minimum foundation of experience. Further, since The Hague is dedicated to private international law, it is particularly suited to accommodate diverse national legal systems to international transactions between private individuals. The Hague Conference's limited membership and commitment also give it a more focused and easily managed agenda than international organizations with broader memberships and mandates, such as the United Nations.

The Hague Conference's limited membership was also a potential disadvantage. Its members include mainly western developed nations, generally the world's receiving nations, plus a handful of less developed nations and non-western nations. Most important sending nations, however, are not members of The Hague Conference. Thus, if the Conference had confined its legislative process to the membership, there would have been little effective representation for the interests of sending nations. In any event, the envisioned convention could not have accomplished its purpose if it lacked the assent of major sending nations. For this reason, the Conference took the unusual step of extending special invitations to many nonmember sending nations.\textsuperscript{15} The resulting deliberative body of greater than sixty national delegations represented all of the currently most important nations in intercountry adoption.\textsuperscript{16}

B. The Scope of the Convention; The Exclusion of Refugees

The Convention applies when spouses or a single person\textsuperscript{17} of one contracting state seeks to adopt a child\textsuperscript{18} who is habitually resident in

\begin{itemize}
  \item[-]\textsuperscript{14} Permanent Bureau Memo, \textit{supra} note 13.
  \item[-]\textsuperscript{15} Letter from George Droz, Secretary General of The Hague Conference of Private International Law, to National Organs of Member Nations and Invitees (Nov. 30, 1989); Permanent Bureau Memo, \textit{supra} note 13, at 1.
  \item[-]\textsuperscript{16} The participating nations are listed in the Preamble to the Final Act of the Seventeenth Session. See \textit{list supra} note 10. Korea first declined to participate in the proceedings, even though it has served as the most important nation of origin for U.S. adopters. However, Korea did ultimately join as an invitee to the Seventeenth Session at which the Conference adopted the Convention. Hague Conference, \textit{supra} note 4, at 1139.
  \item[-]\textsuperscript{17} One of the issues discussed during the proceedings was whether the Convention should approve of adoption by single persons. The final version of the Convention contemplates that there could be an adoption by a single parent. Hague Conference, \textit{supra} note 4, at 1139 (art. 2). However, each contracting state may decide for itself whether a single parent is qualified to adopt.
  \item[-]\textsuperscript{18} The Convention would apply only to the adoption of a child under eighteen years of age. If a child becomes eighteen before the respective central authorities make an Article 17 agreement to the adoption, the Convention would cease to apply. See Hague Conference, \textit{supra} note 4, at 1139.
\end{itemize}
another contracting state. Depending on which and how many nations become contracting states, the Convention could apply to very many intercountry adoptions or to none at all. Fortunately, nearly all major sending and receiving nations participated in the drafting of the Convention.¹⁹ Contracting status is not guaranteed for any of these nations, but the Convention's many compromises reflect the Conference's substantial effort to write an agreement attractive to as wide a circle of nations as reasonably possible.

Of course, the Convention will not apply to any adoptions by U.S. residents unless the U.S. becomes a contracting nation. Even then it will apply only if the other nation in the adoption process is also a contracting nation. However, if other sending and receiving nations become contracting states, the U.S. will have much to lose by rejecting the Convention. Contracting sending nations are very likely to give preference to other contracting nations in adoption placements. It is even possible that some sending nations will prohibit child placement except in other contracting nations.

The Convention does not apply to refugees or internationally displaced children who are not habitually resident in a contracting nation. The Conference initially determined that intercountry placement rules for such children might be a suitable topic for the Convention. On consideration, however, it decided that refugee children present a separate and more complicated problem requiring a very different approach.²⁰ For the present, The Hague Conference has directed its Secretary General to consult with the U.N. High Commissioner for Refugees for the purpose of exploring the desirability of further action regarding refugee children.²¹

The exclusion of refugee children from the scope of the Convention will not prevent the intercountry placement of such children. Refugee children will continue to be subject to intercountry adoption to the extent permissible under current law. Although such adoptions are often subject to the approval of other international institutions such as the U.N. High Commissioner for Refugees, they lack the benefit of the rules created by the Convention.

note 4, at 1139 (art. 3). However, the nonapplicability of the Convention would not, in itself, prohibit the completion of the adoption.

¹⁹. Two exceptions were Paraguay and Guatemala. See list supra note 10.

²⁰. The most obvious complicating factor is that the adoptability of refugee children is chronically uncertain. Conditions created by any given refugee crisis are likely to thwart the collection of reliable documentation about a child's origin.

²¹. Hague Conference, supra note 4, at 1144 (art. 42).
C. Basic Terms: Procedure, Choice of Law, and Recognition

1. The Need for New Rules

Intercountry adoption is increasingly subject to attack. This is particularly true in sending nations due to the lack of any clear expression of legitimacy and the absence of effective legal or institutional restraints against perceived abuses by adopters and adoption agencies. Before the Convention, one could plausibly argue that many intercountry adoptions were in violation of certain United Nations proclamations, which some had interpreted to prohibit intercountry adoption of a child when a local placement alternative existed, including, perhaps, institutionalization. International law was tepid, at best, in endorsing intercountry adoption in any situation, and it imposed no duty on local officials to cooperate in or facilitate a child's placement in intercountry adoption.

The absence of a workable intercountry adoption law in the U.S. has presented another set of problems. Existing adoption laws take little account of the special problems of intercountry adoption. For example, if the adoption of a foreign-born child is to occur in a state court, state laws may still impose the same requirements as would apply to the adoption of a U.S. born child. For example, state law may require the court to make its own determination of the child's adoptability, even though foreign authorities have already freed the child for adoption, and the U.S. court is without any reasonably practical means of interpreting foreign law or investigating the child's circumstances. Moreover, state laws typically have very strict and often unique requirements regarding the procedure and form for a birth mother's relinquishment of her child for adoption, or for notification and relinquishment by a birth father. It is questionable whether a foreign relinquishment should or would satisfy state law.

Similar problems have complicated the readoption technique, a process in which a child is adopted by decree of a foreign court, and a U.S. state court subsequently confirms the adoption by its own decree. A few states have adopted special intercountry adoption laws for either type of intercountry adoption, but these laws are often

22. See infra, notes 54-67 and accompanying text.
23. See infra, notes 54-67 and accompanying text.
26. Readoption is especially important when the nation of origin recognizes and grants only "simple" adoptions which resemble a grant of custody without terminating a child's relationship.
designed on an ad hoc basis to deal with a particular type of problem or crisis, or they are tailored to the procedures of particular sending countries, such as Korea.\(^{27}\) This ad hoc approach is no match for the ever-changing causes, directions, and character of intercountry adoption.

While most intercountry adoption proceedings in the U.S. result in final adoption decrees likely entitled to full faith and credit throughout the U.S., pre-Convention international law offers no guarantee that other nations must recognize the legitimacy of the adoptions. The absence of clear rules of recognition has presented at least some risk that foreign authorities would choose to disregard an adoption in an issue of custody, property rights, or rights of survivorship.\(^{28}\)

2. The Convention's Solution

Insofar as its effect in sending nations, the Convention's most important features may be the endorsement of intercountry adoption and establishment of duties to cooperate, facilitate, and expedite intercountry adoption. These aspects of the Convention are discussed at greater length below.\(^{29}\)

To resolve procedural problems in intercountry adoption, the Convention offers a logical allocation of responsibility between nations of origin and receiving nations. The basic allocation is the same whether the adopters obtain an adoption decree in the receiving nation or in the state of origin with readoption in the receiving nation.

The institutions or persons that actually perform functions under the Convention will naturally vary according to local law and conditions. Most importantly, the Convention rejects a proposal, once widely favored by other nations, that only public authorities should be involved in the adoption process.\(^{30}\) The U.S. might have found that proposal impossible to accept because private agencies and professionals are presently involved in most intercountry adoptions involving the U.S. The final version of the Convention preserves the essential role of these private agencies.

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with its birth parents. While readoption in the U.S. might be less important in other situations, there are and will continue to be practical advantages to readoption. See id. at 352-53.

27. Id. at 366-71.


29. See infra, notes 44-53, 68-89 and accompanying text.

Appendix A is a list of tasks under the Convention and the types of parties that can or must perform them. Two key tasks worthy of further discussion are first, determining a child's adoptability and second, determining the adopters' suitability to adopt.

The Convention allocates to the nation of origin the responsibility for determining a child's adoptability. Thus, that nation's law and the decision of its competent authorities should fully resolve the question of adoptability with no need for reexamination in the receiving nation. The Convention is necessarily vague about who is a competent authority, a matter which could vary considerably from one nation to another depending on local law and practice. In the U.S., a competent authority would likely be a state court that terminates a child's relationship with its birth parents and frees the child for adoption.

The assignment of the task of determining adoptability to the nation of origin is especially important to the future of intercountry adoption practice in the U.S. as a receiving nation. State legislatures and courts have sometimes resisted the notion that they should rely on the conclusions of a foreign magistrate. The Convention, by virtue of federal supremacy, would preempt a state court's discretion to reconsider the adoptability issue. The Convention, however, also attacks some of the underlying concerns a U.S. court might have about a foreign authority's adoptability determination. Although the Convention does not seek to transplant the most rigorous U.S. requirements for adoptability into international law, it does establish important minimum standards for adoptability. Thus, nation of origin authorities must determine, among other things, that any person responsible for the child has freely given an informed, counselled, and written consent conforming to local law, and that the consent was not induced by payment or other compensation. A birth mother's consent is valid only if she gave the consent after the child's birth. Central Authorities designated by each contracting state will identify the correct institutions for determining a child's adoptability, confirm the child's adoptability, and monitor compliance with the Convention.

31. Hague Conference, supra note 4, at 1139, 1141 (art. 4, 16).
32. Hague Conference, supra note 4, at 1140 (art. 4(c)).
33. Hague Conference, supra note 4, at 1140 (art. 4(c)). With due "regard to the age and degree of maturity of the child," nation of origin authorities sometimes must also ensure the consent of the child according to a similar set of requirements. Hague Conference, supra note 4, at 1140 (art. 4(d)).
34. Hague Conference, supra note 4, at 1140 (art. 6).
35. Hague Conference, supra note 4, at 1141 (art. 16).
A further safeguard is a rule restricting pre-placement direct contacts between adopters and birth parents, a matter discussed in greater depth below.\(^{36}\)

A second key task, investigating the prospective adopters' suitability to adopt, is the responsibility of the competent authorities of the receiving nation.\(^{37}\) Again, the Convention is necessarily vague about who would be a competent authority for this task. Where the U.S. is the receiving nation, the suitability determination will likely be in accordance with current practice. Thus, U.S. adopters would obtain a homestudy approved by an accredited agency or qualified professional in the U.S.\(^{38}\) The U.S. Immigration and Naturalization Service, in concert with state social welfare authorities, would review the adopters' application and homestudy to confirm that the homestudy is favorable and that the adopters fulfill the essential statutory qualifications of the adopters' home state. A state court would have the final authority to approve the adopters' suitability when it finalizes the adoption.\(^{39}\)

Authorities in the nation of origin will continue to have some participation in the decision as to whether adopters are suitable for a particular placement because designated authorities for both nations must actually approve an adoptive placement.\(^{40}\) In other words, an adopter's favorable U.S. homestudy will be no guarantee that foreign authorities must approve an adoptive placement for that adopter. As

\(^{36}\) See infra notes 90-99 and accompanying text.

\(^{37}\) Hague Conference, supra note 4, at 1140-41 (art. 5, 14, 15).

\(^{38}\) For a discussion of the accreditation process, see infra notes 109-156 and accompanying text.

\(^{39}\) There is a potential difficulty in the allocation of this task to the competent authorities of the U.S. receiving state. The Convention envisions that competent authorities will determine the adopters' suitability before there is any direct contact between the child and adopters, and before the transfer of custody or emigration of the child. See Hague Conference, supra note 4, at 1141-43 (art. 17, 19, 29). Under U.S. law, however, a state court is ultimately responsible for this determination at the time it grants the adoption, regardless of whether the state court grants the initial adoption or a readoption. Thus, under current practice and under the Convention, there is the possibility a court could thwart an adoption by rejecting the adopters' suitability at the very last stage. The risk of such an event is probably small, but it causes some agencies to select their venue to avoid judges who are hostile to interracial or intercountry adoption.

One solution to this problem would be a pre-placement judicial determination of suitability by a procedure now available in New York. See N.Y. DOM. REL. LAW § 115-a (McKinney 1988 & Supp. 1994). The court's task after the placement could be limited to reviewing the success of a pre-adoption trial custody period, or considering newly discovered evidence concerning the adopters' suitability.

\(^{40}\) Hague Conference, supra note 4, at 1141 (art. 16, 17, 19).
is presently true, some nations may prohibit or disfavor certain placements based on the comparative age of the parties, marital status, religion, or other factors. Under the Convention, however, the nation of origin authorities may be less likely to engage in their own wide-ranging consideration of the details of the adopters' circumstances. For example, the Convention may be useful in dissuading a nation of origin from requiring adopters to spend a lengthy period of time in that nation pending local investigation of the adopters' suitability.

The same allocation of responsibilities will apply whether the adoption decree is issued by a nation of origin court or by a receiving nation court. In either event, an adoption decree "certified . . . as having been made in accordance with the Convention" will enjoy the recognition of all contracting states. The most important exception to this rule is for so-called simple adoptions, which resemble a mere grant of custody and do not terminate the birth parent-child relationship. However, the Convention provides that if a simple adoption is accompanied by consents satisfying the minimum requirements for relinquishment, the receiving nation may convert the simple adoption into a full adoption, and the new adoption decree will be entitled to all the benefits of recognition under the Convention.

41. Hague Conference, supra note 4, at 1142 (art. 23).
42. Hague Conference, supra note 4, at 1142 (art. 26, 27).
43. Hague Conference, supra note 4, at 1142 (art. 26, 27). The conversion of a simple adoption into a full adoption involves much more than a U.S. court's confirmation of the adoptive family relationship. Because simple adoption does not completely terminate the birth parents' relationship with the child, there is some danger that conversion to a full adoption will upset the parties' original expectations. However, under Article 27, such a conversion is proper only if "the consents referred to in Article 4, subparagraphs c and d, have been or are given for the purpose of such an adoption." Hague Conference, supra note 4, at 1142 (art. 26, 27). Further, Article 4 provides that the party giving consent must have received counsel as to the "effects of their consent" and "whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin." Hague Conference, supra note 4, at 1139 (art. 4). It will be the responsibility of authorities in the nation of origin, and not a U.S. court, to determine whether these requirements are satisfied. See Hague Conference, supra note 4, at 1139-41 (art. 4, 16). However, it will be necessary for the U.S. to authorize the readoption procedure in its implementing legislation. See Hague Conference, supra note 4, at 1142 (art. 27(a)).

It would be more straightforward to provide for a full adoption in the state of origin, but full adoption remains alien to the law and culture of many nations. While the Convention's quick fix solution is less than perfect, it does constitute an improvement over the present legal vacuum in which many U.S. adopters readopt children in the U.S. without any thought of whether the original adoption was full or simple.
III. Controversial Provisions and Their Consequences for the United States

A. The Overall Impact of the Convention on Adoption

1. Will the Convention Require a Ponderous Bureaucracy?

Perhaps the most frequent question about the Convention is whether its effect will be to discourage or impede intercountry adoptions by creating additional rules and bureaucracy. As the preceding discussion of basic terms reveals, the heart of the Convention is not a new layer of regulations or institutions but a clearer identification of authority and responsibility in determining a child’s adoptability, the adopters’ qualifications, and the suitability of the placement. The new central authorities described in the Convention likely serve mainly to monitor procedural problems, encourage cooperation, and advise other actors in the adoption process. In a private agency adoption most of the procedural tasks described by the Convention will still be performed by the agency or by existing public authorities, such as the Immigration and Naturalization Service (INS) and the state courts, much as these tasks are performed today.\footnote{See Appendix A.} Only in independent adoptions will state or federal central authorities make important decisions or grant approvals that otherwise would be made by private agencies, but even in this regard the government’s involvement will be a relatively slight extension of the existing activity of the INS and many state welfare authorities.\footnote{Id.}

2. The Endorsement of Intercountry Adoption

   a. When Should Intercountry Adoption Occur?

   Another answer to the question about the overall effect of the Convention is that this new law constitutes the first authoritative declaration of the virtue of intercountry adoption and the need for expeditious support and cooperation by signatory nations. A common criticism in the U.S. is that the Convention is not bold enough in encouraging intercountry adoption. However, to say that the Convention merely tilts in favor of intercountry adoption is to understate the importance of the Convention’s gains.
The pro-adoption tone in the Convention was far from inevitable when The Hague first embarked on the project. One of the most potentially divisive issues at the outset was whether the Conference should propose a set of rules for determining when intercountry adoption is appropriate for a child. Underlying this issue was a difference in perspective that affected the drafting of many articles of the Convention.

In general there were two camps. Receiving nations such as the United States tended to be most eager to endorse intercountry adoption and facilitate the adoption process. On the other side were those participants and observers who believed the Convention should be primarily restrictive: to eliminate abuses such as baby-selling; to protect a child's right to grow up in the land of its birth, or a nation's right to prevent the loss of its natural resources - children - to other nations; and with the possible effect of reducing intercountry adoption. Nations of origin were especially prone to skepticism or embarrassment about a phenomena frequently mischaracterized by the


47. In fact, the United States is also a sending state because an undetermined number of children are sent from the U.S. to other countries for adoption each year. There does not appear to be any reliable information on the number of such intercountry adoptions out of the United States. However, one estimate puts the number at “a few hundred” every year. Special Commission on Intercountry Adoption, Report of Meeting, The Hague Conference on Private International Law, Doc. No. 17, at 3 (Apr. 24, 1991).

Nevertheless, even as a sending state, the U.S. delegation and observers argued that intercountry placement was often in the best interests of American children, and that an absolute preference for local placement, especially if it favored institutionalization, would undermine the interests of many children. See Gloria F. DeHart, Report, Hague Conference on Private International Law: Special Commission on Intercountry Adoption, 3 (June 6, 1991) (submitted to ABA Section for Family Law).


It would be a gross simplification to say that the U.S. has wholeheartedly embraced intercountry adoption. Because intercountry adoption is nearly always interracial or at least interethnic, the wider public's reception to intercountry adoption has been mixed. See Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. Pa. L. Rev. 1163, 1174-82 (1991).


However, there were also some receiving nations in this camp. See DeHart, supra note 47.
media as exporting babies, and their suspicions were fed by concurrent crises and scandals of baby selling in former Communist and lesser developed countries.

As a practical matter, the goals of regulating and facilitating intercountry adoption need not be incompatible. Facilitating lawful adoption is one likely way of reducing the temptation for illicit activity. Well-crafted regulation could increase confidence in the system and thus promote intercountry adoption. Nevertheless, differences in perspective were especially troublesome because they touched emotional issues of child welfare and national interests, and because they tended to divide the participants roughly into nonmember sending nations invited to the Conference, and receiving nations that were members of the Conference.

The difference in perspective was especially evident in debate over the relative rank of intercountry adoption in comparison with other methods of caring for children. The debate was essentially over the question when there should be intercountry placement, and represented an effort by different groups to generalize about a child's best interests when the child has no family but there are local alternatives to intercountry placement. For example, if an infant could be placed in a suitable family by intercountry adoption or placed in a local orphanage, most child welfare experts would probably agree that intercountry adoption would be in the child's best interests.

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52. During the 1980s there were approximately 170,000 to 180,000 intercountry adoptions around the world. In about 90 percent of these cases, the sending nations were Korea, India, Columbia, Brazil, Sri Lanka, Chile, the Philippines, Guatemala, Peru, and El Salvador. Special Commission on Intercountry Adoption, Report of Meeting, The Hague Conference on Private International Law, Doc. No. 24, at 3 (Apr. 29, 1991).

53. See list of participating nations cited supra note 10.

Naturally, there is risk in any attempt to generalize about children's best interests. Every child and his situation are unique. A statement that intercountry adoption is better than in-country institutionalization can only be a generalization. There may be some children for whom intercountry adoption is inadvisable. Older children who have acquired a deep sense of cultural and community identity might be poorly suited for intercountry adoption. For such children, institutionalization or other local alternatives, such as foster care or some other variant, might be the preferred method of care.

One could argue that the international legal community should not even attempt to legislate specific rules for setting the priority between local institutionalization, local foster care, local adoption, and intercountry adoption, and that each child's placement must be an individualized decision based on a flexible and open-ended consideration of that child's best interests. Nevertheless, when The Hague began its work toward a new Convention, it confronted a fait accompli. The United Nations had already adopted a rule for intercountry adoption. The U.N.'s approach to the problem was not one The Hague could ignore.

b. The United Nation's Rule

The U.N. General Assembly's most important statements regarding intercountry adoption are contained in a 1987 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, and a 1989 Convention on the Rights of the Child. While these documents made some progress in favor of adoption in general, they were either inconclusive or restrictive, depending on interpretation, in their attitude toward intercountry adoption.


The U.N.'s pronouncements were most favorable in stating a general preference for adoptive or other family placement over institutional placement. Under the U.N. Declaration and Convention, care by an institution is appropriate only if necessary for a child’s care.

A more controversial matter has been the rank of intercountry adoption in this system of preferences. Not surprisingly, the U.N. Resolution and Declaration state a preference for placement in a child's birth land versus placement in another country. Article 17 of the Declaration provides “if a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.” Article 21 of the U.N. Convention also adopts this principle with comparable language.

This order of preference probably would not have engendered serious controversy if the choice were simply between intercountry adoptive placement and adoptive placement in a child’s birth nation. A general preference for local adoption probably reflects the interests of the interests of the child in maintaining family relations, which is a basic human need.


Neither document recognizes any particular superiority of full adoption over other types of family placement (such as foster family placement), because not all member nations had or were prepared to create laws or systems for adoption. Thus, for example, Article 20 of the U.N. Convention includes among appropriate methods of care foster placement and *kafalah*, as well as adoption. U.N. Convention, supra note 55, Annex at art. 20. Article 21’s principles for adoption apply only to those nations “that recognize and/or permit the system of adoption . . . .” U.N. Convention, supra note 55, Annex at art. 21.


58. The U.N. Convention states “inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.” U.N. Convention, supra note 55, Annex at art. 21.

59. Even this statement of preference would be troubling if it prevented a child's adoption by close relations in another country. For example, would the U.N.'s approach prevent adoption by an aunt or uncle who happened to live in a different country? However, Article 20 of the U.N. Convention, read in conjunction with other provisions, suggests it was not intended to apply to such choices. Article 20 describes adoption as “alternative care” for a child “permanently deprived of his or her family environment.” U.N. Convention, supra note 55, Annex at art. 20. Other provisions of the U.N. Convention suggest that family environment connotes extended family. See also U.N. Declaration, supra note 54, Annex at art. 5 (“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family . . . .”); U.N. Declaration, supra note 54, Annex at art. 8 (“States Parties shall undertake the right of the child to preserve his or her . . . family relations . . . .”).
or inclination of most nations including the U.S., regardless of international law. After all, intercountry adoption occurs on a large scale only when a nation of origin lacks a sufficient number of prospective adoptive parents to provide for all its adoptable children. If a nation has a sufficient number of prospective adoptive families, and especially if it has an abundance, it is likely to prefer internal placement in order to favor its own residents who wish to adopt, to prevent domestic controversy, and to strengthen and extend the power of local authorities to supervise child placement.60

The troubling aspect of the U.N.'s rule is that it favors foster care and possibly even suitable institutionalization over intercountry adoptive placement.61 While a preference for local foster care might seem innocuous at first blush, the concept of foster care covers a very wide range of placement conditions even in countries such as the U.S.62 In some other countries it may be the equivalent of involuntary servitude.63

A general preference for local institutionalization would be even more clearly misplaced, but the U.N. documents could be interpreted to include such a preference. The Declaration provides that intercountry adoption may be considered only if a child "cannot in any suitable manner be cared for in the country of origin,"64 and the U.N. Convention tracks this language.65 Could institutionalization be a suitable means of care? If so, some nations might be persuaded to discourage intercountry placement even for a child with little or no

60. The recent decline in Korean intercountry placements exemplifies this tendency. Tamar Lewin, South Korea Slows Export of Babies for Adoption, N.Y. TIMES, Feb. 12, 1990 at B10.
61. Jonet, supra note 56, at 93.
62. Some commentators have recently suggested that foster care in the U.S. is often worse than institutionalization. See Joyce Ladner, Bring Back the Orphanages; They're Better for Kids Than Addicted Parents and Heartless Foster Care, WASH. POST, Oct. 29, 1989, (Outlook), at 1.
63. Elizabeth Bartholet, International Adoption: Current Status and Future Prospects, 3 THE FUTURE OF CHILDREN 89, 97 (1993). Even in the U.S. there has been some history of foster placement as a system of cheap labor. See Hugh Dellios, Riders of the Orphan Trains Finally End Their Silence, CHI. TRIB., Apr. 4, 1993, (Tempo), at 1 (describing the orphan trains that continued until the 1920s as a means for quickly placing large numbers of New York children among families in the Midwest); Thomas Morgan, Orphans Return to City They Left on Sad Trains, N.Y. TIMES, Nov. 20, 1990 at B3.
other hope of local adoptive or foster placement. Indeed, opponents of intercountry adoption have frequently asserted the U.N.'s vague rule as support for their arguments against intercountry adoption.

c. The Hague's Approach

When The Hague Conference's Special Commission on Intercountry Adoption convened in 1990 to draft preliminary Conclusions for the Convention, there was wide agreement that the Convention must deal in some fashion with the U.N. position, although there was much less agreement regarding the merit or actual location of the U.N.'s position. Some argued that The Hague Convention should implement a restrictive version of the U.N.'s preference for local placement, while others contended that the U.N.'s effort to prioritize methods of placement was not practical as a statement of law and deserved no more than a reference out of respect for the


An alternative interpretation is that the U.N. Declaration's preference for family placement would override the country of origin preference if family placement were not possible in the country of origin. See U.N. Declaration, supra note 64, Annex, at art. 4. According to this interpretation, institutionalization is never suitable except as the last resort.

Finally, it may be that the U.N. failed to resolve the order of preference between institutionalization and intercountry adoption, recognizing that no set of generalizations about child placement can serve the best interests of every child. A multitude of variable factors, such as the age of a child, often affect what is best for a child. For example, institutional care might be preferable to intercountry adoption for an older child, especially if the child has substantially matured in a particular locale and culture, and depending on the degree of local stigmatization, for persons without families. On the other hand, infants and very young children are much more likely to receive better care from a qualified adoptive family elsewhere than from a local institution. For infants and very young children, institutionalization is probably never suitable except as the last resort.


Intercountry adoption has been a frequent issue of local politics in sending nations. See Richard R. Carlson, Transnational Adoption of Children, 23 TULSA L.J. 317, 334 n.99 (1988); Gabrielle Glaser, Booming Polish Market: Blond, Blue Eyed Babies, N.Y. TIMES, Apr. 19, 1992, at 19.


70. See Pfund, supra note 67 (describing the position of Defense of Children International at the Hague).
U.N. Still others, especially among U.S. delegates and observers, sought a more positive statement in favor of intercountry adoption. That the Convention ultimately restated placement choices in new terms favorable to intercountry adoption was pleasantly surprising.

Initial efforts toward such a restatement had seemed to encounter much resistance. The Hague's Special Commission, appointed to create an agenda for the Convention, first proposed a half-modification, placing intercountry adoption ahead of institutionalization but behind foster care. The Permanent Bureau's subsequent illustrative draft articles seemed to go further, placing intercountry adoption ahead of both institutionalization and foster care. However, as the Special Commission moved from preliminary observations and conclusions to more detailed preliminary drafts, it took a more cautious approach, perhaps out of concern that some sending nations would not agree to

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73. "[A] child's best interests are in general best served if the child is raised by his or her own parents or, alternatively, by a foster or adoptive family in the child's own country; intercountry adoption is to be seen as a solution of a subsidiary nature for ensuring the welfare of the child." *Permanent Bureau, Conclusions of the Special Commission of June 1990 on Intercountry Adoption, The Hague Conference on Private International Law, Prel. Doc. No. 3, at 13 (Aug. 1990).

The Special Commission observed that adoption between relatives was a special problem which "will merit closer study." *Id. at 23. See also *Special Commission on Intercountry Adoption, Report of Meeting, The Hague Conference on Private International Law, No. 32, at 2 (May 3, 1991).


75. *Id. at 7. The Illustrative Draft Articles would have permitted intercountry adoption if "the competent authorities of the State of origin . . . determined that no suitable alternative exist[ed] for the adoption or the placement for purposes of adoption in the State of origin." *Id.
language appearing to promote a greater role for intercountry adoption. Thus, the Special Commission's 1991 Final Working Document and the Drafting Committee's Tentative Draft Convention deleted much of the earlier pro-adoption language, and substituted the U.N.'s original, vague statements regarding intercountry adoption. The Tentative Draft also deleted any mention of "facilitating" the adoption process among the purposes and goals of the Convention.

This shift in approach in The Hague alarmed the U.S. delegation and many U.S. observers, some of whom questioned whether the U.S. could agree to a Convention that perpetuated the U.N.'s potentially pernicious attitude toward intercountry adoption. In subsequent negotiations, the U.S. delegation worked to restore the more favorable language and to gain a pro-adoption perspective.

That these efforts eventually succeeded is probably a reflection of the Conference's major non-legislative achievement in restoring a

76. For example, beginning with the Illustrative Draft Articles, the drafters emphasized the need for safeguards and omitted any mention of facilitating the process. Id.; see also Peter Pfund, Memorandum: Proposed Agenda for Meeting of Study Group on Intercountry Adoption at 2 (Jan. 9, 1992).


79. The Preamble of the Final Working Document recited the U.N.'s approach, that "intercountry adoption may offer the advantage of a permanent family to a child, where the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin." Final Working Document, supra note 77, at 2. Article 4, paragraph b, of the Final Working Document was especially troubling, because it indicated that the appropriate authorities might need to apply this statement of preference on an individualized basis for every child as a condition for intercountry placement. Final Working Document, supra note 77, at 3.

The Drafting Committee's Tentative Draft offered some evidence of a shift back toward a family placement preference, but the preference, if intended, was not very clear. The Preamble of the Tentative Draft began with an identical statement of preference for local placement. Tentative Draft, supra note 78, at 7. However, a revised version Article 4, paragraph b would have required only "due consideration" for "possibilities for placement of the child within the State of origin," as a condition for intercountry placement. Tentative Draft, supra note 78, at 9.

80. Tentative Draft, supra note 78.

sense of trust between nations of origin and receiving nations. The Conference was not only an opportunity to develop confidence-building rules, it was also a forum for mutual education about the situation of children without families and the virtues of adoption. The final version now clearly favors intercountry adoption over all other alternatives except in-country adoption, and it encourages a more favorable and cooperative attitude toward intercountry adoption.82

Thus, the Convention’s Preamble declares that a child “should grow up in a family environment.”83 Contracting nations should seek this objective first by “appropriate measures to enable the child to remain in the care of his or her family of origin.”84 If preservation of the family of origin is not possible or appropriate, and “a suitable family cannot be found in his or her State of origin,” then intercountry adoption “may offer the advantage of a permanent family” for the child.85

The final version of the Convention also rejects arguments that preference for local placement should be absolute, by not requiring local authorities to make exhaustive and time-consuming investigations of all local adoption alternatives before an intercountry adoption is allowed. In choosing intercountry adoption, local authorities need only give due consideration to the possibility of local placement.86 Local adoption is to be preferred only if there is a suitable adoptive family available in the child’s country of origin.87 However, when intercountry adoption is in the child’s best interests,88 the respective contracting nations “shall . . . facilitate, follow and expedite proceedings with a view to[ward] obtaining the adoption.”89

The latter statement, for the very first time in international law, recognizes a duty to cooperate and eliminate undue delay in intercountry adoptions. Together with the endorsement of intercountry adoption, these provisions constitute a clear rebuttal of restrictive interpretations of the earlier U.N. documents. While it would be difficult to predict the magnitude of the practical effect of these

84. Hague Conference, supra note 4, at 1139.
85. Hague Conference, supra note 4, at 1139. An effort to amend this language to re-establish an express preference for local foster care failed. Peter Pfund, Assistant Advisor for Private International Law, U.S. State Department, Remarks at Study Group Meeting (Nov. 4, 1993).
86. Hague Conference, supra note 4, at 1139 (Article 4(b)).
87. Hague Conference, supra note 4, at 1139 (Preamble).
88. Hague Conference, supra note 4, at 1139 (Article 4(b)).
89. Hague Conference, supra note 4, at 1140 (Article 9(b)).
provisions, at the very least they may encourage a more liberal attitude toward intercountry adoption in many current or potential sending nations. Furthermore, they negate the international law-based arguments of the opponents of adoption.

B. Independent Adoption and the No Contact Rule

U.S. observers also closely followed the issue of whether the Convention should include a rule prohibiting direct contact between prospective adoptive parents and prospective adoptive children or their birth families. The issue of direct contact pertains principally to the opportunity of prospective adoptive parents to act without an agency as an intermediary, to travel overseas to locate an adoptable child, and to deal directly with the child's birth parents or guardian for the relinquishment and adoption of the child. The continuing opportunity for such independent adoptions has been important to many who fear that intercountry agencies will arbitrarily or unfairly disqualify some prospective adopters, charge excessive amounts for the cost of placement services, or neglect many children in need of families if agencies are solely responsible for arranging adoptions.

On the other hand, a no contact rule is important to many nations of origin and other adoption-interest groups that worry about the potential for undue encouragement of relinquishment, illicit payments, or other improprieties in direct dealings between adopters and birth parents or guardians. Many other nations also have a particularly strong tradition of delegating the matching process exclusively to public authorities or licensed agencies.

The issue of a no direct contact rule has also been controversial domestically in the U.S., even for purely domestic adoptions. State legislatures have taken a variety of approaches to the problem. Many


state laws make it impractical for adopters to seek out adoptive children without an agency within those states. Nearly all states, however, permit a birth parent or birth relative to seek adopters without the assistance of an agency. Moreover, an adopter residing in any state can avoid local restrictions by seeking potentially adoptable children in a state, such as Texas, where the law does not forbid such searches.

Resolving the issue of direct contacts was not essential to the creation of an international law of intercountry adoption. There is nothing to prevent any nation from prohibiting such contacts by the unilateral enactment of national law. But there are at least two possible reasons for incorporating a no direct contact rule in international law: to establish a default rule that will apply in situations such as the Romanian adoption crisis, when social or legal revolution render the law uncertain, incomplete or ineffective; and to bolster the effectiveness of a sending nation’s prohibition, by gaining a receiving nation’s commitment to enforce the rule against its own residents. Furthermore, including some restriction in the Convention might also have been an important sign of good faith by receiving nations to sending nations.

The Hague’s final solution incorporates a compromise that restricts direct contacts without wholly preventing or prohibiting parent-initiated adoptions. As a result the rule probably does not change the restrictions adoptive parents would face even without the Convention. Article 29 states the rule as follows:

92. See also, JOAN HOLLINGER, ADOPTION LAW AND PRACTICE § 3.04 to .05 (5th ed. 1993 & Supp. Sept. 1993). States that do not absolutely prohibit adoptive placement by unlicensed intermediaries may nevertheless prohibit the collection or payment of any fee for unlicensed placement services. On the other hand, when lawyers or other professionals provide both placement services and non-placement professional services in the same transaction, it may be very difficult to distinguish the placement portion of the fee from the professional services portion.

93. Id. at §§ 1-A.01 to .51, 3.02. During the 1980s, independent or non-agency placements constituted nearly one-third of all domestic placements involving non-relatives. See, BUREAU OF STATISTICS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 373, table 599 (1992).

94. In Texas, for example, in-state and out-of-state adopters routinely appeal to birth mothers or relatives by advertising in the classified advertising sections of Texas newspapers. A recent issue of the Houston Post included the following advertisement in the Adoptions section:

As our parents did for us, we will provide your newborn infant with love, guidance, security, a wonderful family life, and a good education. We are a happily married, financially secure couple who can make this difficult time easier for you. Full-time Mom will be at home with your child. We are willing to meet. Legal and confidential. Medical/Legal Expenses paid.

HOUSTON POST, November 12, 1994, at D12.

95. See, for example, the experience in Romania as described in Kathleen Hunt, The Romanian Baby Bazaar, N.Y. TIMES, Mar. 24, 1991, § 6 (Magazine), at 24.
There shall be no contact between the prospective adoptive parents and the child’s parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a to c [official determination that the child is available for intercountry adoption], and Article 5, sub-paragraph a [official determination that the prospective adopters are eligible to adopt], have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin. 6

The actual impact of Article 29 may prove to be very slight. By its terms the rule depends on local law. Thus, to a certain extent Article 29 merely affirms the obvious: each nation can decide for itself whether to permit direct contacts, and, if so, under what circumstances. 97 With or without the Convention, many sending countries may be expected to arrive at their own decision, superseding Article 29. For example, a nation could decide to permit direct contact without any restrictions, thus nullifying Article 29 when that nation is the prospective adoptive family’s nation of origin.

If a nation has failed to legislate or decide in any regard concerning direct contacts, the Convention might prohibit direct contacts except those in accordance with Article 29. Many nations may also be persuaded to view Article 29 as the endorsed standard, and choose to purposely incorporate it into their national law. In these instances, however, Article 29 would only prohibit direct contacts between adopters and birth parents or individual guardians until appropriate authorities have determined a child adoptable and the prospective adopters qualified. As a practical matter, prospective adopters will likely have obtained a determination of their suitability before they arrive in a sending nation, whether or not they enlist the aid of an agency. 98 After this determination, they may then contact local agencies, orphanages, or other institutions - but not individual guardians or parents - with regard to children who may be or become available for adoption. 99 They may even contact individual guardians of children as

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96. Hague Conference, supra note 4, at 1142 (Article 29).
97. See, Peter Pfund, Memorandum to Members of the Study Group on Intercountry Adoption, at 60-64 (Mar. 4, 1992) (on file with the author).
98. Under the Convention as under current law, prospective adopters must have an approved homestudy before they can fulfill the U.S. immigration requirements for intercountry adoption.
99. See also Pfund, supra note 97, at 63-64. The no contact rule applies only to contacts with parents or other persons responsible for a child. The Convention differentiates between such persons who are individuals, and institutions or bodies, which are not subject to the no contact rule.
to whom a court or other authority has already made a determination of adoptability.

There is another important type of direct contact that Article 29 does not prohibit and that the Convention explicitly condones. Under Article 22, depending on local law, an adopter could enlist the aid of a non-agency facilitator who is a local professional authorized to provide adoption assistance. Non-agency professionals might include local lawyers, doctors, or religious officials. If local law permits, the Convention would allow local professionals to act as intermediaries who may match adoptable children with adopters.

Thus, parent-initiated or independent adoption will depend upon the amenability of local laws and regulations of non-agency professionals and whether overseas guardians, such as an orphanage, are willing and able to obtain adoptability determinations in advance and to deal directly with individual adopters. Of course, the possibility of independent adoption has always depended on local law, custom, and practice, and such will continue to be the case with or without the Convention.

C. The Regulation of Intercountry Adoption Agencies

The Convention provision most likely to generate enduring controversy in the United States is the Article 10 requirement of an accreditation process for intercountry adoption agencies. Few would dispute that adoption agencies should be subject to some degree of government oversight and regulation, but no consensus exists about the best weight or distribution of regulatory authority. Some have suggested that the U.S. should use the Convention as an opportunity to build a new, stronger, and more vigilant regulatory authority. While this argument has some appeal, there appears to be little support for the creation of a self-sufficient federal bureaucracy to regulate adoption agencies, even if limited to the regulation of intercountry agencies. In an era of fiscal frugality and distaste for centralization, any proposal for a federal takeover or duplication of functions already performed by the states will be met with extreme

100. Hague Conference, supra note 4, at 1140 (Article 10). The accreditation requirements would affect only the right to provide intercountry adoption services, and not, as some have suggested, domestic adoption services. Some of the confusion over the Convention's effect on domestic adoption services probably stems from widespread discussion of the usefulness of Convention or federal implementing standards as a model for state regulators. However, such change will occur, if at all, because state regulators choose it, and not because it will be required by the Convention or any likely version of federal implementing legislation.
skepticism. Some smaller agencies also fear that a centralized regulatory process might be captured by larger, better established agencies that would manipulate the process to promote exclusionary standards inhibiting competition or diversity.\footnote{101}{See U.S. Dep't of State, Advisory Committee on Private International Law, Minutes of the 4th Meeting, at 6 (Oct. 4, 1993) (on file with author).}

On the other hand, it may be impossible to implement the Convention without some degree of federal participation in the licensing process. At the very least, federal involvement must include encouragement and guidance to state licensing authorities because the Convention prescribes accreditation standards that no state presently achieves.\footnote{102}{See infra notes 109-56 and accompanying text.} A more difficult question is the extent to which federal authorities should share responsibility for enforcing compliance with the Convention's minimum accreditation standards. The answer depends in part on the current status and prospective reliability of local licensing.

\section*{D. The Requirement of a Licensing Scheme}

Implementation of the Convention's accreditation requirements need not impose a substantial new regulatory burden. Nearly every U.S. jurisdiction has a licensing or other approval system on which to build,\footnote{103}{I include systems such as that of New York, which does not license adoption agencies but which grants nonprofit corporate charters to adoption agencies meeting certain criteria. The criteria resemble the licensing standards of other states, and a charter, like a license, is subject to revocation or non-renewal. See, e.g., N.Y. Not-For-Profit Corp. Law § 404(b) (McKinney 1970 & Supp. 1994).} and which may serve as the foundation for accreditation under the Convention. Naturally, the quality and method of regulation varies from jurisdiction to jurisdiction. My own survey of published regulations does not conclusively establish whether any state has the ability to effectively administer and enforce its published licensing standards. Nevertheless, a few simple objective observations are possible. In all licensing jurisdictions license terms range from one to five years.\footnote{104}{See Appendix B.} Licensing authority is backed by the power to conduct on-site inspections and require disclosure of records and information.\footnote{105}{Id.} Finally, licenses are subject to mid-term revocation.\footnote{106}{Id.}

Hawaii appears to be the most important exception, although there may be some regulation by local welfare authorities in that state.
There are also a number of jurisdictions influenced by the United States that take entirely different approaches to the regulation of child placement activities. For example, in the Virgin Islands the local social welfare agency appears to be responsible for all placements for adoption. Therefore, there is no need for a licensing process. In the Mariana Islands, there does not appear to be any regulation of child placement services.

E. The Convention’s Accreditation Requirements

Presently in the United States, agencies that provide intercountry adoption services are licensed by the states or local jurisdictions. In general, local regulations make no distinction between intercountry adoption agencies and those that act on a purely intrastate basis. If an agency has authority to place children with families within the same country, it can also place children from another hemisphere.

The lack of a separate regulatory track for intercountry adoption agencies might be of no consequence if local licensing standards were on par with the Convention’s minimum standards, but they are not. Every U.S. licensing jurisdiction falls short in one way or another.

The Convention requires signatory nations to accredit agencies specifically for intercountry adoption services, and it establishes additional minimum standards as follows:

1. The agency must demonstrate its competence to perform tasks under the Convention;
2. The agency must “be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.”

109. One possible exception is the State of Washington, which requires that “an agency providing . . . intercountry adoption . . . shall have supervisor staff having specialized training.” Washington Dep’t of Social and Health Services, Minimum Licensing Requirements for Child-Placing Agencies, § 388-73-214 (Nov. 1987). The Washington regulations do not indicate what would constitute such specialized training.
110. Hague Conference, supra note 4, at 1140 (art. 11(a)).
111. Hague Conference, supra note 4, at 1140 (art. 11(b)).
3. The agency must be non-profit;\textsuperscript{112}
4. Agency personnel must not receive "remuneration which is unreasonably high in relation to services rendered;"\textsuperscript{113} and
5. The agency must "be subject to supervision . . . as to [its] composition, operation and financial situation."\textsuperscript{114}

Most U.S. agencies routinely engaged in intercountry adoption would easily qualify under these requirements. Nevertheless, an agency's possession of a license under the current system is not the equivalent of accreditation under the Convention, and it is possible that some currently licensed agencies might not qualify for accreditation.

1. Demonstration of Competence

Existing licensing schemes require agencies to demonstrate their competence to provide adoption services by the combination of all the other types of requirements described below, including staffing requirements, education and experience requirements, and continuing education requirements. The Convention would add an additional requirement for intercountry accreditation: an agency must prove a special competence for intercountry adoption services in particular. Presently, none of the states require such a demonstration.

To add such a requirement to existing licensing schemes could be relatively simple. In addition to the usual educational and experience requirements,\textsuperscript{115} licensing authorities could require that personnel for intercountry services must have some combination of intercountry experience and education, or that they be subject to supervision by a person having these qualifications. The educational requirement could be fulfilled by attendance at intercountry adoption training programs in the existing network of continuing professional education. A more rigorous, but also more costly requirement, would be satisfactory performance on a written test like those used by some state bars in certifying attorneys for specialization.

The issue of grandfathering experienced adoption professionals will doubtless arise in the imposition of new training requirements. The best approach, however, would be to require some minimum level of new training without exception. If and when the U.S. implements

\textsuperscript{112} Hague Conference, \textit{supra} note 4, at 1140 (art. 11(a)).
\textsuperscript{113} Hague Conference, \textit{supra} note 4, at 1140 (art. 32(a)).
\textsuperscript{114} Hague Conference, \textit{supra} note 4, at 1140 (art. 11(c)).
\textsuperscript{115} \textit{See infra} note 117 and accompanying text.
the Convention, the rules will change and past experience might not be a suitable guide for future practice. Thus, even the most experienced professionals should obtain training in the rules of the Convention regardless of whether they are excused from training in other matters of intercountry adoption.

2. Qualified Staffing

Convention Article 11(b) requires that accredited bodies "be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption." As noted above, Article 11 requires more than proof of one's credentials of training or experience in adoption in general, as opposed to specific training or experience in intercountry adoption. Accrediting authorities must implement additional intercountry adoption training requirements for those agencies that choose to pursue intercountry adoptions.

Article 11 is not only concerned with specialized training. It also appears to require a more general foundation in education and experience in adoption and social work. Presently, nearly all states require agency management and staff to meet varying educational and experience requirements. A few also have separate professional licensing programs for social workers, including adoption specialists.

116. Hague Conference, supra note 4, at 1140 (art. 11(b)).
117. State educational and experience requirements usually include a range of minimum education and experience requirements for different classifications of personnel. The primary differences between the states lie in the number of years or specificity of experience that are required for different personnel.

Arkansas's scheme is typical. An "administrator," who is responsible for an agency's general management and administration, must have a master's degree in social work or a related field and two years experience in a child placement agency, or a bachelor's degree in social work or a related field and four years experience in a child placement agency, including two years in an administrative capacity. A "supervisor" of child placement services must have a master's degree in social work or a related field and one year's experience in a human services field, or a bachelor's degree in social work or a related field and two year's experience in a human services field. A "child placement worker," who works under the direction of a child placement supervisor, must have a master's degree in social work or a related field or a bachelor's degree in social work or a related field and one year's experience. ARKANSAS DEP'T OF HUMAN SERVICES, Div. OF CHILDREN AND FAMILY SERVICES, MINIMUM LICENSING REQUIREMENTS FOR CHILD PLACEMENT AGENCIES 13-15 (1988).

Other states require more years of experience, more specifically related experience, or possession of a state license or certification in social work. ALABAMA DEP'T OF HUMAN RESOURCES, MINIMUM STANDARDS FOR CHILD PLACING AGENCIES 10-12 (4th ed. 1989); S.D. ADMIN. R. 67:42:09:03.

With regard to ethical standards, most but not all states require employment and criminal background checks of varying depth for some or all agency personnel. A few states have also adopted codes of ethics for agencies and agency personnel. Another method of assuring ethical practices by agencies is to establish a highly visible and effective process for receiving, investigating andremedying complaints, a matter addressed further below.

3. Non-Profit Objectives and the Problem of Unreasonable Remuneration

Convention Article 8 requires contracting nations to prevent “improper financial or other gain” by persons involved in the adoption process. The possibility of improper gain by adoption agencies in particular is further addressed in Article 11(a), which requires that an accredited body “shall pursue only non-profit objectives.” Finally, Article 32 permits the payment or receipt of “only costs and expenses, including reasonable professional fees of persons involved in the adoption,” and it prohibits a director, administrator, or employee of an agency from receiving “remuneration which is unreasonably high in relation to services rendered.” Whether existing licensing regulations will assure compliance with these Convention provisions remains a question.

The answer could be more complicated than one might guess, depending on how exacting the definition of profit or improper gain. The vast majority of U.S. adoption agencies are probably non-profit in the sense that they do not exist for the purpose of earning a profit for owners or investors. Yet it may be in the interest of an agency or its managers to charge adoption fees in excess of actual or reasonable service costs. Agency managers may be tempted to earn the

120. See, e.g., Utah Dep’t of Human Services, Office of Lic., Child Placing Agency Rules § A (1991); Utah Admin. R. 501-7(21) (1991). Utah’s rules include prohibitions against favoritism in services for the agency's staff and board, paying or receiving referral fees, and steering clients to private practices in which the agency’s staff or consultants are engaged. They also prohibit board members from having certain financial interests in the agency. See also Wyoming Dep’t of Family Services, Standards for Certification of Providers of Substitutecare Services for Children 79 (Feb. 1991).
121. See infra notes 140-56 and accompanying text.
122. Hague Conference, supra note 4, at 1140 (art. 8).
123. Hague Conference, supra note 4, at 1140 (art. 11(a)).
124. Hague Conference, supra note 4, at 1143 (art. 32).
equivalent of a profit or dividend by taking surplus agency funds in the form of inordinate salaries for themselves. This possibility undoubtedly lies behind the Convention's prohibition against unreasonable remuneration. Another motivation for fees in excess of costs is that an agency may use the extra earnings from adoption services to subsidize other services or activities, or to cover the cost of fiscal mismanagement.\footnote{In Arizona, for example, a report by the local Department of Economic Security revealed that nonprofit agencies, as well as for-profit agencies, sometimes charge inordinate fees and engage in other unsavory fee collection practices as a result of fiscal mismanagement. See Kim Sue Lia Perkes, \textit{DES Report: Ban Upfront Adoption Fees}, \textit{Arizona Republic}, Aug. 12, 1992, at B-1; \textit{Agency for Adoptions Loses License}, \textit{Orlando Sentinel}, Apr. 9, 1988, at D7.}

The difficulty of identifying improper financial gain by adoption agencies is illustrated by the multitude of approaches U.S. jurisdictions take to this problem. At the outset, the states may be divided into two general categories. First, most states either explicitly authorize or fail to clearly prohibit for-profit adoption agencies.\footnote{These jurisdictions include Alabama, Alaska, Arizona, Arkansas, Colorado, Hawaii (which does not regulate agencies), Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See citations in Appendix B.} Second, several states clearly limit child placement activities to non-profit organizations.\footnote{For examples, see California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Maine, Maryland, Massachusetts, Montana, Nevada, New Jersey, New York, Texas, Utah, Vermont. See citations in Appendix B.} The potential complexity of the problem is best illustrated by the latter group of states. While most attack the issue by a simple requirement that agencies must be non-profit, others prevent profit by judicial or administrative regulation of fees.\footnote{For examples of this approach, see the following states' regulations: District of Columbia, Florida, Maine, Maryland, Nevada. Some, such as Alabama, do not clearly prohibit profit but do regulate fees. See citations in Appendix B.} However, among the latter group there is no consensus about how to regulate fees. Some permit an agency to calculate its average cost for all adoptions in order to establish a uniform base fee, and a few have endeavored to draft guidelines for what costs might appropriately be
included in such a calculation. Some permit, and others require, an agency to establish a sliding scale fee based on adoptive parent income, so that wealthier parents subsidize poorer parents. It appears that only one state specifically prohibits an agency from using adoption service income to support other social services.

The difficulty of regulating fees and costs is one good reason to favor a simple approach. Another reason, and a possible explanation for the states' relative indifference toward agency salaries, is that nonprofit status and agency salaries are already subject to the restrictions of the Internal Revenue Code. Under the Code, a non-profit entity may be exempt from taxation if no part of its net earnings inures to the benefit of any individual. Compensation that is unreasonable may violate this requirement and deprive the agency of its exempt status. Moreover, the Internal Revenue Service may view the payment of unreasonable compensation as a diversion of agency profits, and it might deny the agency any deduction for the payments. The presence of these tax implications provides agencies with at least some incentive for caution.

Moreover, inter-agency competition may be better than government regulation for inhibiting excessive fees. The intercountry adoption field is already dominated by nonprofit agencies whose fees are probably lower than those of any prospective profit-seeking agency. As long as adoptable children are plentiful in sending nations and adopters have sufficient choices among non-profit agencies, there will be little room for any agency to increase its fees to support excessive costs, let alone profits.

Competition will not suffice to restrain all agencies if the opportunities for intercountry adoption decline drastically and adopters become willing to pay exorbitant fees to any agency that claims the means to place a child quickly. Such may have happened in the

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130. See, e.g., Md. Regs. Code, supra note 129.
135. Corrupt practices by adoption agencies are not always the result of the profit motive. Occasionally, a non-profit agency engages in illegal or unethical fee practices in a struggle to
domestic adoptions field, where fees are comparatively much higher, and it might someday happen in the intercountry adoptions field. Even now, prospective adopters deemed unsuitable by many agencies or sending nations, because of age, non-marital status, or other factors, may be the driving force behind unusually high intercountry adoption fees charged in nations that have no age or marital status requirements.

The typical state non-profit requirement, supplemented by Internal Revenue Service rules, might be sufficient to comply with the Convention's minimum obligation to prevent improper financial gain. However, very modest additional measures would better secure U.S. compliance with the Convention. For example, regulators should require disclosure of fees and compensation, and make further inquiry of particular adoptions or agencies that depart significantly from the average. Many states already require written and detailed agency fee schedules to permit adopters to compare fees and to prevent unexpected charges or increases in fees. Unfortunately, it appears that licensing authorities in most states do not routinely review or compare agency salaries and benefits, and many lack sufficient regulatory authority to investigate or restrain unreasonable compensation.

An additional modest measure to strengthen the prohibition of improper gain would be to incorporate some of the ethical standards a few states require of agencies and agency personnel. For example, licensing authorities should consider prohibiting various types of self-dealing, conflicts of interest, or receipt of an applicant's charitable donation — which may be the equivalent of a premium fee in exchange for favorable treatment.

4. Supervision of Agencies

Convention Article 11(c) requires that accredited bodies "be subject to supervision . . . as to their composition, operation and financial situation." This requirement appears to have two separate aspects.

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overcome a shortage of finances for its operations. See, e.g., Kim Sue Lia Perkes, DES Report: Ban Upfront Adoption Fees, ARIZONA REPUBLIC, Aug. 12, 1992, at B-1 (describing an investigation of troubled for-profit and non-profit agencies in Arizona).

136. See id.


138. For an example of such an approach, see MINN. STAT. ANN. § 317A.907(6) (West Supp. 1994).


140. Hague Conference, supra note 4, at 1141 (art. 11(c)).
First, it seems to require standards for agency organization, membership, finances, and management. Second, it requires ongoing supervision of agencies, so that the initial licensing process is not the only point of regulatory oversight.

The first requirement, standards for organization, finances, and management, is largely, if not entirely, fulfilled by every jurisdiction that licenses adoption agencies. Licensing jurisdictions uniformly require at least some form of managing hierarchy and supervision, with different educational and experience requirements for each level, and specified levels of supervision, minimum funding, annual audits, and specified filing, documentation, personnel and casehandling practices. The rigorousness of state standards for these matters varies widely, but the Convention does not specify any minimum standards in this regard.

A more complicated question is whether current regulations comply with the Convention’s more general requirement that accredited bodies must be subject to supervision of their composition. The majority of states require licensed agencies to be incorporated, or at least subject to oversight by an independent board of directors or advisors, but a substantial minority of states permit individuals or partnerships to own and operate agencies, often without a board.

141. Nearly all of the licensing jurisdictions listed in Appendix B have all or most of these rules.

142. Joan Hollinger, Adoption Law and Practice § 3.04[4] (5th ed. 1993 & Supp. Sept. 1993). Some, such as Iowa, require a governing board, but prescribe minimal rules for the board’s composition or operation. Iowa Dep’t of Human Services, Licensing and Regulation of Child Placing Agencies (1992), to be codified at Iowa Admin. Code r. 441-108.1 to 441-108.11 (board’s membership must be such as to provide for continuity; board to meet regularly). See also Wyoming Dep’t of Family Services, Standards for Certification of Providers of Substitute Care Services for Children 79 (1991) (requiring only that agency must have a governing body).

143. See West Virginia Dep’t of Human Resources, Licensing Requirements for Child Placing Agencies 9 (1992) (“If a child placing agency is owned by a sole proprietor, the responsibility imposed on a governing body by this subsection shall be borne by that proprietor.”); Virginia Dep’t of Social Services, General Procedures and Information for Licenses § 2.1 (1989) (an agency may be an individual or a partnership without a governing board). See also Alabama Dep’t of Human Resource, Minimum Standards for Child Placing Agencies 6 (4th ed. 1989); Alaska Admin. Code, tit. 7, § 51.110 (July 1989); Arizona Dep’t of Economic Security, Adoption Agency Licensing Standards R6-5-7024 (1987); Arkansas Dep’t of Human Services, Div. of Children and Family Services, Minimum Standards for Child Placement Agencies 10-11 (1988); Colorado Dep’t of Social Services, Rules and Regulations for Child Placement Agencies § 7.710.21 (1991); Conn. Gen. Stat. Ann. §§ 17-49b-14 and 17-49b-24 (West 1992 & Supp. 1994); Delaware Dep’t of Services for Children, Youth and Their Families, Del.: Requirements for Child Placing Agencies 5 (1986); Maine Dep’t of Human Services, Rules Providing for the Licensing of Child Placing Agencies With and Without Adoption Programs 12 (1989); Michigan Dep’t of Social Services, Licensing Rules for Child Placing Agencies (1980); Mississippi Dep’t of Human Services 2-3 (1992); Montana
While the Convention does not clearly require any particular organizational form, except that an agency must constitute a "body," it is possible that individuals cannot qualify as accredited agencies under the Convention. It is also questionable whether the most informally organized agencies are subject to supervision as to their composition.

The safest approach would be to limit accreditation to formal institutions, or at least those with independent boards of directors. While the existence of an independent board is no guarantee of management competence, it can enhance the agency's continuity, financial stability, and ethical and legal behavior. The need for this precaution is even greater for the additional risks and complexities of intercountry adoption.

An even more difficult issue is whether existing licensing authorities provide sufficient or competent ongoing supervision of licensed adoption agencies. In general, licensing authorities have three occasions for reviewing agency compliance; the initial licensing process, relicensing, and investigation of complaints.

The initial licensing process is usually the occasion of the most intense examination. Thus, many regulators report that the time and effort required of them in initial licensing is substantially greater than.

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144. Several states authorize the licensing of an unincorporated agency operated by an individual, provided the agency also has the oversight of a governing board. See, e.g., RHODE ISLAND DEPT FOR CHILDREN AND THEIR FAMILIES, CHILD PLACING REGULATIONS 9 (1987). The establishment of a board might be sufficient to qualify the agency as a body.

If the U.S. chose to do so, it could provide a separate listing system for individuals to perform intercountry child placing services under Article 22. See infra notes 164-171. Thus, an agency that does not qualify as a body might not be foreclosed from providing most of the same services, depending on federal implementing legislation.

145. In most states public oversight is also bolstered to a very modest extent by the requirement of an independent board of directors for each agency. See supra notes 142-43 and accompanying text.
in relicensing. All licensing jurisdictions provide for follow-up inspection or review, but the rigorousness of the authorities' examination at relicensing varies widely, and relicensing intervals range from one year to five years.

Some observers have questioned whether the existing licensing and relicensing schemes are as effective as they appear on paper. A regulatory authority that is woefully understaffed cannot properly supervise existing agencies, nor can it offer timely approval for new ones, regardless of the quality of its written regulations. My own very informal survey of state regulators provides at least some ground for caution.

Roughly two thirds of the regulators questioned specifically responded to inquiry whether they believed their resources were sufficient for their present tasks. Half of these were confident, and the

146. See, e.g., Letter from Cecil D. Andrus, Governor of Idaho, to Richard R. Carlson (Mar. 9, 1992) (one day for initial license, approximately sixteen hours for renewal); Letter from Robert E. Bree, Director, Michigan Division of Child Welfare Licensing, to Richard R. Carlson (Mar. 27, 1992) (three days for initial license; one to two days for renewal); Letter from Gary Stangler, Director, Missouri Department of Social Services, to Richard R. Carlson (Feb. 6, 1992) (sixteen hours for initial license, eight hours for renewal) (All correspondence on file with the author).

147. See Appendix B.

148. Most licensing authorities have the power to grant temporary or provisional licenses to agencies not yet fully in compliance or not yet completely inspected. See, e.g., Colorado Dep't of Social Services, Rules and Regulations for Child Placement Agencies § 7.710.34 (Mar. 1991); Delaware Dep't of Services for Children, Youth and Their Families, Del.: Requirements for Child Placing Agencies § 10M-24 (1990); Georgia Dep't of Human Resources, Rules and Regulations for Child Placing Agencies (Feb. 1984).

149. Alabama: Letter from Charles Cleveland, Commissioner, Department of Human Resources (Feb. 11, 1992); California: Letter from James Brown, Chief of Adoptions Branch, Department of Social Services (Feb. 20, 1992); Indiana: Letter from Marilyn Scales, Family and Social Services Administration (Jan. 9, 1992); Kansas: Memorandum from Donna White, Secretary of Social and Rehabilitation Services, to Joan Finney, Governor, (Feb. 4, 1992; Maryland: Letter from Stephanie Pettaway, Adoption Program Specialist, Department of Human Resources (Mar. 18, 1992); Montana: Letter from Betsy Stimatz, Program Officer H, Department of Family Services (June 15, 1992); Nevada: Letter from Wanda Scott, Social Service Specialist, Department of Human Resources (Nov. 19, 1992); New York: Letter from Joseph Semidei, Deputy Commissioner, Department of Social Services (Feb. 20, 1992); North Carolina: Letter from Robin Peacock, Program Manager for Adoption Services, Department of Human Resources (Feb. 29, 1992); Ohio: Letter from Annette Justice, Chief of Adoption Services Section, Department of Human Services (Feb. 19, 1992); Oklahoma: Letter from Benjamin Demp, Jr., Director, Department of Human Services (Feb. 11, 1992); South Carolina: Letter from Kathleen Hayes, Executive Assistant, Division of Adoption and Birth Parent Services (April 19, 1992); Tennessee: Letter from Robert A. Grunow, Commissioner, Department of Human Services (March 3, 1992); Texas: Letter from Burton Raiford, Interim Commissioner, Department of Human Services (Feb. 7, 1992); Utah: Letter from William S. Ward, Deputy Administrator, Department of Human Services, Division of Family Services (Jan. 21, 1992); Wisconsin: Letter from Gerald Whitburn, Secretary, Department of Health and Social Services (Jan. 16, 1992); Wyoming: Memorandum from Kathleen Petersen, Division of Youth Services, Department of Family Services (June 15, 1992).
balance ranged from guarded\textsuperscript{150} to distressed\textsuperscript{151}. It would be dangerous to infer too much from these responses because a regulator's satisfaction may have less to do with comparative resources than with comparative aspirations. For example, the response from Maryland indicated satisfaction with regulatory resources,\textsuperscript{152} but Maryland law requires reinspection only once every five years, in contrast to the usual one year interval for most other states.\textsuperscript{153}

A third occasion for regulatory oversight is the investigation of complaints against an agency. Ideally, the process for receiving, investigating, and remedying complaints or reported violations should be highly visible and accessible to agency clients and personnel. Unfortunately, only a few states have clearly established any formal processes for investigation by public authorities.\textsuperscript{154} A few require only that private agencies create processes to investigate themselves.\textsuperscript{155}

\textsuperscript{150} Alaska: Letter from Vicki Koehler, Adoption Coordinator, Alaska Department of Health and Social Services (Apr. 12, 1992); Arizona: Letter from Linda Moore-Cannon, Director, Department of Economic Security (Feb. 27, 1992); Delaware: Letter from Mary Ball Morton, Administrator of Interstate Compacts, Department of Services for Children, Youth and Their Families (Jan. 27, 1992); Florida: Letter from Lawton Chiles, Governor (Jan. 31, 1992); Georgia: Letter from Martin Rotter, Director, Office of Regulatory Services (Jan. 31, 1992); Maryland: Letter from Gary Strangler, Director, Department of Social Services (Feb. 6, 1992); New Mexico: Letter from Richard W. Heim, Secretary, Human Services Department (Jan. 28, 1992); Pennsylvania: Letter from Warren Lewis, Director, Division of State Services, Department of Public Welfare (Jan. 29, 1992); South Dakota: Memorandum from Department of Social Services, Office of Child Protection Services (undated, received Feb. 1992) (All correspondence to the author, Richard R. Carlson and on file with author).

\textsuperscript{151} Arkansas: Letter from Pat Page, Assistant Director of Field Operations, Department of Human Services, Division of Children and Family Services (undated, received Feb. 1992); Idaho: Letter from Cecil D. Andrus, Governor (Mar. 9, 1992); Indiana: Letter from Robert E. Bree, Director, Division of Child Welfare Licensing (Mar. 27, 1992); Nebraska: Letter from Mary Dean Harvey, Director, Department of Social Services (Jan. 14, 1992); New Jersey: Letter from Octavia Melendez, Assistant Section Chief (Mar. 24, 1992); Oregon: Letter from Barbara Roberts, Governor (Apr. 15, 1992); Vermont: Letter from Cynthia Walcott, Adoption Coordinator, Department of Social and Rehabilitation Services (Mar. 26, 1992); Virginia: Letter from Larry D. Jackson, Commissioner, Department of Social Services (Feb. 7, 1992); Washington: Letter from Diana Roberts, Director, Division of Children and Family Services (Jan. 17, 1992) (All correspondence to the author, Richard R. Carlson and on file with author).

\textsuperscript{152} Letter from Stephanie Pettaway, Adoption Program Specialist, Maryland Department of Human Resources, to Richard R. Carlson (Mar. 18, 1992) (on file with author).

\textsuperscript{153} MD. FAM. LAW CODE ANN. §§ 5-501 to 5-520 (1991 & Supp. 1994). I was generally unsuccessful in obtaining other objective measures of existing regulatory capacity. I inquired about budgets allocated to agency regulation and personnel assigned to licensing and oversight functions, but most of the answers I received were uninformative for purposes of comparison. Many responding agencies spread their budgets and personnel over many social service functions without any specific allocation for licensing functions.

\textsuperscript{154} Good examples may be found in the statutes or regulations of New York and Wisconsin. See citations in Appendix B.

\textsuperscript{155} These include Delaware, Georgia, and Michigan. See citations in Appendix B.
These many variations in the quality and method of state regulation would not necessarily violate either the express terms or the spirit of the Convention. The Convention provides in the most general terms only that there must be a competent authority that can provide ongoing supervision. Arguably, all U.S. licensing jurisdictions satisfy at least a minimal version of this standard. Whether minimal compliance is an appropriate U.S. response to the Convention is a question at the heart of debate over the means for implementing the Convention.

F. How Should the U.S. Accredit Intercountry Adoption Agencies?

By its terms, the Convention would permit the U.S. to assign complete responsibility for accreditation either to the federal government or to state and local jurisdictions. As a practical matter, however, federal and state authorities will almost certainly need to share this responsibility. Creation of an independent federal bureaucracy to accredit intercountry adoption agencies would duplicate existing state licensing systems at a cost that would be difficult to justify. However, existing state bureaucracies may be insufficiently motivated to fulfill federal treaty obligations at the expense of local goals, poorly-equipped to interpret and implement international law, and without any satisfactory means to monitor the overseas activities of adoption agencies.

Thus, at the very least, a federal central authority must provide advisory assistance to state licensing authorities by educating state officials about the terms of the Convention and, perhaps, by supplying model licensing standards. The federal central authority would also assist the intercountry adoption process, where necessary, by coordinating and facilitating communications between foreign and state adoption officials.

This federal guidance scheme has the virtue of minimizing costs and preserving the predominant role of state authorities in the licensing process. But restricting the federal government to a purely advisory role is ill-advised for a matter affecting U.S. international relations and treaty compliance. Authorities in other nations will tend to view the U.S. as one nation rather than as fifty-plus jurisdictions, and one U.S. jurisdiction's regulatory failure may have repercussions

156. Hague Conference, supra note 4, at 1140 (art. 11).
157. Hague Conference, supra note 4, at 1140 (art. 6).
In addition, jurisdictions with the very weakest regulatory oversight may become havens for agencies disqualified from practicing in other states.

Another risk is that some U.S. jurisdictions will simply choose not to provide the accrediting scheme required by the Convention. A non-licensing jurisdiction, such as Hawaii, will not necessarily create and finance a new licensing scheme simply because the U.S. ratifies the Convention. Nor is there any guarantee that licensing jurisdictions will accept new costs and responsibilities under the Convention, or that they will make the necessary adjustments in timely fashion. Even now, some adoption professionals complain that licensing departments that exist on paper may lie dormant for extended periods during funding or personnel shortfalls, or that licensing officials may be predisposed against intercountry adoption and uncooperative in dealing with intercountry adoption agencies.\(^{159}\)

Thus, a system that relies entirely on the states to implement Article 10 cannot serve as an adequate guarantee of U.S. obligations under the Convention. At a minimum, there must be federal authority to review state licensing systems and distinguish states that comply from those that do not. Further, the Federal government should have a greater range of options than merely declaring that some states are outside the Convention. A patchwork of Convention states and non-Convention states will confuse foreign authorities and be a grave disservice to prospective adopters and agencies in states that are disqualified.

Federal oversight over state social welfare regulation has many precedents from which to choose. For example, to encourage state and local officials to carry out certain social welfare policies, the federal government has offered financial assistance contingent on compliance with federal standards.\(^{160}\) Federal review of state social welfare

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\(^{158}\) This risk is all the greater if the federal government grants extra credibility to state accreditations by providing a universally recognizable federal or U.S. accreditation document to agencies accredited by state authorities.

\(^{159}\) See U.S. DEP’T OF STATE, ADVISORY COMMITTEE ON PRIVATE INTERNATIONAL LAW, Minutes, 4th Meeting (Oct. 4, 1993) at 5 (on file with author).

Non-implementation in a particular jurisdiction would leave the residents of that jurisdiction without the opportunity for intercountry adoption. One possible solution would be for prospective adopters in a non-accrediting jurisdiction to enlist the services of an agency in another, accrediting jurisdiction. The accredited agency would then provide for placement with the adopters via the Interstate Compact on Adoption. Some state regulations already provide for application of the Compact by out-of-state agencies or in any intercountry adoption. See ALASKA ADMIN. CODE tit.7, § 51.110 (July 1989).

programs has included not only review of substantive rules and standards, but also review of the adequacy of local funding and personnel.\textsuperscript{161}

Admittedly, there are practical difficulties in such an approach. It is unlikely that the federal government will offer significant new financial assistance for local implementation of the Convention. Thus, it may be necessary to require Convention implementation as a condition for existing funding for other, unrelated social welfare programs. Moreover, inducing local compliance by financial incentives always risks leaving federal authorities with a difficult choice if local officials fail in some degree in their duty. Should federal authorities risk a worse crisis by actually terminating contingent financial assistance for that jurisdiction? If a state’s accreditation scheme is disapproved, what will take its place?

A different incentive, also with some precedent in existing federal regulation, is to offer the opportunity for local control, combined with the threat of federal control.\textsuperscript{162} The instinctive drive to preserve local control is often sufficient to induce local authorities to carry out federal policy, especially where the cost to local government is not substantial. Of course, this scheme depends on the existence of a reserve federal authority and a willingness to exercise authority when local officials fail. Some states with very weak or nonexistent licensing programs may, in fact, choose the less expensive course and defer to federal control.

Since some federal oversight of state accreditation programs is essential in any event, a residual federal authority to grant accreditation need not be substantially more intrusive or costly. Indeed, there are special advantages in reserving to federal authorities the ultimate power to accredit agencies in all U.S. jurisdictions.

A more direct federal role in accreditation might work as follows. First, federal authorities would approve local licensing systems according to Convention standards. If a local jurisdiction’s system is approved, an adoption agency’s presentation of a license from that jurisdiction would constitute prima facie evidence that the agency

\textsuperscript{161} See 45 C.F.R. §§ 301.1, 305.20 (1993) (regarding approval of state plans for enforcement of child support obligations).

\textsuperscript{162} There are many variations on this approach. For example, the Occupational Health and Safety Act delegates to state authorities the responsibility for enforcing workplace safety standards, provided state enforcement programs satisfy the U.S. Department of Labor. 29 U.S.C. §§ 651-78 (1988 & Supp. 1993). Otherwise, enforcement is by the Federal Occupational Safety & Health Administration. \textit{Id.}
qualifies for intercountry accreditation. In most such cases, accreditation would be routine, but federal authorities might choose to engage in further review based on additional information or challenges from other parties.

If a local jurisdiction’s licensing scheme is not approved, an intercountry agency from that jurisdiction would require some other evidence of its qualifications for accreditation. Federal authorities might provide their own investigation of the agency’s application, but they might also accept some other form of prima facie evidence. Such evidence might include accreditation by an approved private association, or even by approved public authorities of other jurisdictions willing to provide the service for a fee.

This more direct role for the federal government would require the cost of federal review for every intercountry agency accreditation. In the vast majority of accreditation cases, however, it is likely that federal approval would be based on a simple confirmation of a local license or accreditation by an approved private association. On the other hand, federal accreditation would also have an added advantage for adoption agencies, because foreign officials are more likely to recognize and accept a standard U.S. accreditation document than an accreditation of a local jurisdiction.

G. Qualified Individual Professionals

In addition to permitting accredited private adoption agencies to perform many central authority functions, the Convention permits a contracting nation to declare that individuals and bodies specially listed by that nation are qualified to perform any central authority function except the taking of applications by prospective adopters. This provision appears to contemplate that listed individuals or bodies will include those of traditional professions, such as the legal or social services professions.

163. One private organization that accredits adoption services is the Council on Accreditation of Services for Families and Children, headquartered in New York.

Regarding the constitutionality of delegation of regulatory functions to private associations, see Cospita v. Heckler, 742 F.2d 72 (3d Cir. 1984) and Evanston Ins. Co. v. Merin, 598 F.Supp. 1290 (D.N.J. 1984). In general, such a delegation is constitutional provided that responsible public authorities retain oversight powers and ultimate authority over the process.

164. Hague Conference, supra note 4, at 1142 (art. 22(1),(3)). However, the preparation of Article 15 and 16 reports about a child or prospective adopters must be performed under the responsibility of accredited agencies or public central authorities. Hague Conference, supra note 4, at 1142 (art. 22(5)).

165. Among the qualifications for such individuals or bodies is that they must meet “requirements of . . . professional competence.” Hague Conference, supra note 4, at 1142 (art. 22(2)(a)).
The possibility of such a special listing system has several implications for the U.S. First, depending on the manner of its implementation, it might provide an alternative avenue for a placement agency to obtain authorization under the Convention. While the usual Article 10 accreditation provisions apply to "bodies," suggesting organizations of more than one person, many U.S. states permit the ownership and operation of adoption agencies by individual proprietors. These individual agencies, even if they qualify as nonprofit, might not be eligible for accreditation as bodies under the Convention. If the U.S. decides to permit such agencies to provide intercountry services, Article 22 would appear to be the appropriate means.

Second, and more likely, the U.S. could use a special listing system under Article 22 to authorize the performance of non-childplacing professional services by individuals not associated with accredited agencies. Presently every state permits lawyers, social workers, and other types of individuals to perform non-placement tasks that include Central Authority or accredited agency functions under the Convention. For example, a homestudy or similar report might be prepared by an individual social worker. Similarly, certain counseling, preparation of documents, or assistance with immigration matters might be provided by an individual lawyer. As long as the services in question do not involve actual placement or matching of children with adopters, the professional need not obtain a child placing license, even in a state that prohibits unlicensed child placing services. In other states that permit placement activities by unlicensed intermediaries, the intermediary cannot charge any fee for the placement.

Implementation of an Article 22 listing system for social workers would be particularly useful as an aid for independent or parent directed adoptions lacking the assistance of an accredited agency. Even licensed agencies often rely on social workers hired as independent contractors to conduct homestudies. There appears to be no good


166. See supra note 144 and accompanying text.

167. If the U.S. adopts this option it must also decide whether to subject such agencies to independent boards of directors or advisors, which is a measure some, but not all, states presently require. See supra note 142 and accompanying text.

168. Joan Hollinger, Adoption Law and Practice § 3.01[4] (5th ed. 1993 & Supp. 1993). Admittedly, the distinction between placement activities and non-placement activities is not always clear, especially where the services are by a lawyer combining non-placement legal services for a fee, and free placement services. Id. at § 3.04[3].
reason to subject these professionals to the institutional forms of a licensed or accredited agency.

It is less clear whether a special listing system is necessary for lawyers. Where the U.S. is the receiving nation, most of a lawyer’s routine activities in an adoption will not be central authority tasks under the Convention and will require no new regulation. Thus, the Convention would require no new authorization for a lawyer to represent adopters in an adoption proceeding, to represent the adopters before the Immigration and Naturalization Service, or to advise adopters how to proceed in an independent adoption. The lawyer could not provide placement services, except in the unlikely event he was specially authorized by the nation of origin. However, the lawyer could be accountable for some central authority functions under the Convention. For example, he might assume the responsibility under Article 18 to “obtain permission for the child to leave the State of origin.” He might also take responsibility for the child’s transfer under Article 19 or provide information under Article 20. A lawyer’s acceptance of responsibility for these tasks might eliminate the necessity for a designated public central authority for these tasks in independent adoptions. It seems doubtful, however, that U.S. adopters or their lawyers will see any particular advantage in such an assignment of responsibilities and liabilities. Lawyers may prefer simply to advise and represent, without the burden of seeking special authority or accepting special responsibility. If so, there is no reason for the U.S. to specially list lawyers.

IV. THE UNITED STATES AS A NATION OF ORIGIN

Nearly all debate surrounding the Convention has concerned the obligations the U.S. would have as a receiving nation. It is likely, however, that the U.S. is also a nation of origin, albeit on a much smaller scale. Unfortunately, it is impossible to know the significance of child emigration for adoption in other nations, because the U.S. lacks exit controls to monitor such a phenomena. Thus, if nonresidents adopt a child in the U.S., or obtain appointment as a child’s guardian and take the child to their home nation for the purpose of adoption, there may be no record of the child’s intercountry adoption or departure from the United States.

169. Hague Conference, supra note 4, at 1141 (art. 18).
171. Hague Conference, supra note 4, at 1141 (art. 20).
While there are no statistics or reliable estimates of child emigration from the U.S. for adoption, there are at least anecdotal reports of such emigration and there are many reasons why such emigration is likely to occur. Because of the opportunity for independent adoption, nonresidents may seek to adopt in the U.S. much as residents of more restrictive U.S. states may. There are also likely to be instances when nonresidents wish to adopt a related U.S. born child. In these and many other possible situations where the U.S. is a nation of origin, the Convention will apply.

Nation of origin duties need not be burdensome for the U.S., but the U.S. must make certain decisions about methods of implementation. For example, the Convention will require the U.S. to accredit agencies that arrange adoptions of U.S. born children with non-U.S. residents. Other important matters will be implementation, or rejection, of a no contact rule, rules relating to a birth parent's relinquishment, and monitoring of the intercountry adoption process.

A. Accreditation of Agencies and Professionals

Just as the U.S. must create a system for accrediting agencies serving U.S. adopters, the U.S. must also accredit agencies that perform central authority functions on behalf of non-U.S. residents who adopt U.S. born children. Does this mean that a non-accredited agency would violate the Convention if it happened to place a U.S. born child with nonresidents?

The answer to this question appears to depend on the circumstances. Adoption agencies sometimes act as guardians for children available for adoption, and as such they may stand in the same position as a birth parent or other guardian under the Convention. In other words, an agency could agree to place an available child with nonresident prospective adopters, just as a birth mother can place her child with the adoptive family of her choice. However, any central authority functions, such as the investigation of the child's background, the investigation of the prospective adopters, the official approval of the placement, and other important actions under the

172. Intercountry adoption between developed countries, especially neighboring ones, clearly does occur on a minor scale. For example, U.S. residents brought 5 Canadian-born children to the U.S. for the purpose of adoption in 1989. See United States Immigration and Naturalization Service, Statistical Yearbook 29 (1989).

173. See supra notes 109-56 and accompanying text.

174. See supra notes 90-99 and accompanying text.
Convention, must be performed only by an accredited agency or other central authority.\footnote{There is also possibility of a special listing for authorized professionals under Article 22. See \textit{supra} notes 164-71 and accompanying text.}

B. \textit{Should the U.S. Adopt a No Contact Rule?}

The Convention would restrict contacts between prospective adopters and a child or the child's birth parents prior to other important stages in the adoption process, except under conditions required by the nation of origin.\footnote{See \textit{supra} notes 90-99 and accompanying text.} In the U.S. many states permit independent or non-agency adoptions in which there is no licensed intermediary between a birth parent and the adopters, and in which direct contacts are quite likely.\footnote{See, e.g., \textit{JoAN HoLLINGER, ADOPTION LAW AND PRACTICE} § 3.04[1] (5th ed. 1993 & Supp. 1993). \textit{See also supra} notes 92-94 and accompanying text.} Moreover, even in agency adoptions U.S. law may permit a child's placement with a prospective adoptive family before all necessary relinquishments have become binding.\footnote{\textit{HOLLLINGER}, \textit{supra} note 177, at § 3.03[3][a][1].}

Fortunately, the Convention permits nations of origin considerable latitude in dealing with independent adoptions.\footnote{\textit{See supra} notes 44-53 and accompanying text.} It requires only that a nation of origin must choose whether and how to limit direct contacts.\footnote{See Peter Pfund, \textit{Intercountry Adoption: The 1993 Hague Convention: Its Purposes, Implementation and Promise}, \textit{28} FAM. L.Q. 53, 63-64 (1994).} In other words, the U.S. must decide either to condone direct contacts and independent adoption in conformity with local law, or to create new conditions for independent adoption by non-U.S. residents.\footnote{In the absence of some definite action by the U.S. in regard to the direct contacts rule, the Conventions appear to supply a default rule prohibiting direct contacts. For a justification for default, see Kathleen Hunt, \textit{The Romanian Baby Bazaar}, \textit{N.Y. TIMES}, Mar. 24, 1991, § 6 (Magazine), at 24.}

Given the difficulty the independent adoption issue has already presented for U.S. lawmakers, and the multitude of approaches the states have chosen, it is questionable whether implementation of the Convention will be an occasion for developing a broad new federal policy toward independent adoption. Congress might well choose simply to defer to the states by requiring that direct contacts conform with local law. On the other hand, given the special circumstances and complexities of intercountry adoption, there may be some special conditions appropriately required for direct contacts by non-U.S. residents. For example, because of the need to monitor the progress of

\begin{footnotesize}
\item[175] There is also possibility of a special listing for authorized professionals under Article 22. See \textit{supra} notes 164-71 and accompanying text.
\item[176] See \textit{supra} notes 90-99 and accompanying text.
\item[177] See \textit{e.g., JOAN HoLLINGER, ADOPTION LAW AND PRACTICE} § 3.04[1] (5th ed. 1993 & Supp. 1993). \textit{See also supra} notes 92-94 and accompanying text.
\item[178] \textit{HOLLLINGER}, \textit{supra} note 177, at § 3.03[3][a][1].
\item[179] \textit{See supra} notes 44-53 and accompanying text.
\item[181] In the absence of some definite action by the U.S. in regard to the direct contacts rule, the Conventions appear to supply a default rule prohibiting direct contacts. For a justification for default, see Kathleen Hunt, \textit{The Romanian Baby Bazaar}, \textit{N.Y. TIMES}, Mar. 24, 1991, § 6 (Magazine), at 24.
\end{footnotesize}
adoptions under the Convention, it may be advisable to require nonresidents to file an application or statement of intent with an appropriate authority before any direct contacts, if only to assure that the applicants can receive information about requirements for intercountry adoption. Also, because the process for determining and confirming the adopters’ qualifications will be more laborious for nonresidents than for residents, it may be appropriate to require nonresidents to obtain such confirmation in advance of direct contacts. Otherwise, the period between the first direct contacts and final approval of the adoption may be exceptionally long and stressful for the parties, and if the adopters are rejected the child’s final placement will have been needlessly delayed.

C. The Adopters’ Qualifications

In the United States, adopters’ qualifications are based on fulfillment of specific state requirements, usually very simple and objective, and by a much more extensive investigation by a social worker. Although final approval of the adopters is in the hands of the court, judges typically rely almost entirely on the advice of the investigator.

Under the Convention, determination of the adopters’ qualifications is a responsibility allocated to the receiving nation. Thus, adopters will be unable to proceed either in a U.S. or foreign court without confirmation of their qualifications by appropriate authorities in the receiving nation. The Convention’s allocation of responsibility satisfies the receiving nation’s interest in assuring the qualifications of its own residents, but it does not address the nation of origin’s interest in this matter. The question remains, when the U.S. is the nation of origin, should a court accept the adopters’ approval by foreign authorities or require additional approval in conformity with local law.182

Of course, under present law or the Convention standing alone there is no reason why a U.S. court or prospective central authority must be bound by the recommendation of a foreign social worker, foreign central authority, or foreign court. Indeed, several adoption

182. The same issue is presented if a U.S. central authority must approve a child’s placement and/or emigration for eventual adoption in a foreign court. Should the central authority base its decision solely on the recommendation of foreign authorities, or should it require further investigation by a local social worker?
codes in the U.S. would appear absolutely to require yet another report by an investigator qualified under local law.\textsuperscript{183} Should a law implementing the Convention eliminate the additional investigation?

Continuation of existing requirements for additional local investigation appears to be inevitable. Homestudies in other nations are often much less rigorous than in the U.S. and the Convention offers no guarantee of improvement of foreign homestudy standards. Thus, the U.S. should protect its interests in the placement of U.S. born children by permitting the continuation of local homestudy requirements. For children actually adopted in the U.S. in anticipation of emigration, it appears no additional federal legislation will be necessary to continue local requirements, except perhaps to confirm explicitly that U.S. courts are not bound by foreign recommendations. However, if a child will emigrate for the purpose of adoption in a foreign court, the U.S. may need either state or federal legislation to withhold approval of the child’s placement and emigration until an appropriate authority in the U.S. has confirmed that the adopters’ qualifications are satisfactory.

D. \textit{Determination of the Child's Adoptability}

The Convention allocates to the nation of origin the responsibility for determining a child’s availability for intercountry adoption. This determination involves something more than a finding that a child is available for adoption in the general sense. Even if the child is clearly adoptable by U.S. residents, intercountry adoption would require a competent authority to consider local placement opportunities and find that intercountry placement is in the child’s best interests.\textsuperscript{184} There is no indication as to who would serve as the competent authority for this purpose in the United States.

A few states now authorize a judge or adoption agency to make similar determinations whenever nonresidents seek to adopt a locally-born child.\textsuperscript{185} These jurisdictions sometimes mandate a strong preference for local placement even before placement in another U.S. jurisdiction. Such preferences for local placement appear to be consistent

\textsuperscript{183} \textit{Joan Hollinger, Adoption Law and Practice} § 4.05[1][c] (5th ed. 1993 & Supp. 1993).

\textsuperscript{184} Hague Conference, \textit{supra} note 4, at 1139 (Preamble).

\textsuperscript{185} See, e.g., FLA. STAT. § 63.207 (West 1992) (prohibiting out-of-state placement except by a licensed agency or by the Fla. Dep’t of Health & Rehabilitative Services); S.C. CODE ANN. § 20-7-1647 (Law. Co-op 1993) (allowing adoption of resident children only by residents, except in unusual or exceptional circumstances).
with the Convention, provided the law favors adoption and permits out-of-state placement in a child’s best interests.¹⁸⁶ Many states, however, appear to have no procedure for, or restrictions against, out-of-state placement.¹⁸⁷ In any event, local laws of any sort would be ineffective standing alone, because there are no federal exit controls to prevent a child’s removal from the U.S. for the purpose of adoption elsewhere.

Thus, federal implementing legislation must create some system for restricting the emigration of children in violation of the Convention or local law. Given the practical difficulties and improbability of effective enforcement of exit controls at U.S. borders, enforcement of U.S. rules on emigration for adoption will depend substantially on Convention compliance by foreign adoption tribunals. Of course, the need for such cooperation by foreign authorities to protect U.S. born children is an additional argument in favor of the Convention.

A separate problem involves confirmation of the Convention’s minimum standards for a child’s relinquishment for adoption. U.S. adoption law typically requires that a birth parent’s relinquishment must be in writing, that the relinquishment must be after the child’s birth, and that the relinquishment must not be caused by improper inducements or duress.¹⁸⁸ The Convention has similar but not necessarily identical requirements. For example, the Convention would require certain counselling for birth mothers, guardians, and older children.¹⁸⁹ The surest method of implementing these requirements would be to amend local laws, where necessary, to conform with the Convention, at least for intercountry adoptions, and for the appointed central authorities to confirm compliance when they approve the child’s placement, emigration, and adoption.

Finally, a child is not available for adoption under the Convention if a birth parent’s or guardian’s relinquishment was induced by payment or compensation of any kind.¹⁹⁰ Nearly all states have some rule restricting such inducements,¹⁹¹ but their rules are often surprisingly deficient and possibly inadequate to satisfy the Convention. For example, many states expressly authorize adopters to pay a birth parent’s reasonable living expenses during pregnancy, but fail to provide

¹⁸⁶. See supra notes 44-53 and accompanying text.
¹⁸⁸. Id. at § 2.11.
¹⁸⁹. Hague Conference, supra note 4, at 1140 (art. 4(c)(1), 4(d)).
¹⁹⁰. Hague Conference, supra note 4, at 1140 (art. 4(c)(3)).
¹⁹¹. HOLLINGER, supra note 187, at § 3.05[3].
clearly that such payments or benefits must not be contingent on the birth parent’s relinquishment of the child. In the absence of clear statutory direction, state courts have sometimes relied on criminal sale of children laws and ancient common law rules as evidence of a public policy against unreasonable or contingent payments or benefits to birth parents. Nevertheless, existing state laws are not sufficiently clear across the board to assure compliance with the Convention or protection of U.S. interests in the emigration of U.S. born children. Implementing legislation should therefore include the prohibition against improper financial inducements as a matter of federal law.

V. CONCLUSION

The Hague Convention offers important advantages to the United States. For adoption agencies and prospective adopters, the Convention may encourage other nations to accept adoption more willingly as an alternative for millions of children without families. For those who do adopt from other nations, the Convention offers the security of international and federal legal recognition of their adoptive families. These benefits come with the cost of additional institutions to facilitate and monitor the process, a cost which ultimately must be borne by adoptive families, agencies or taxpayers. But a careful sharing of responsibility between local and federal authorities and the use of existing state and federal institutions can keep the Convention’s price within an easily justifiable range.

192. Hollinger, supra note 187, at § 3.05[3].
APPENDIX A

Duties and Tasks

Determine that child is adoptable, and that consent and counseling requirements are fulfilled. (Article 4)

Determine that prospective adopters are "eligible and suited to adopt." (Article 5).

Promote cooperation among competent authorities, share information about adoption laws and statistics, share information about the operation of the Convention, and eliminate obstacles. (Article 7).

Prevent improper financial gain in connection with an adoption; deter other practices contrary to the Convention. (Article 8).

Collect, preserve, and exchange information concerning the child and the adopters, as necessary to complete the adoption. (Article 9(a)).

Who Is Responsible?/Comments

“Competent authority” in nation of origin. In the U.S., a state court determines a child’s adoptability in a voluntary or involuntary termination of the birth parents’ relationship to the child. Some specific determinations required by Article 4 (e.g., that intercountry adoption is in the child’s best interests) are not routine for state courts under current law and practice. However, it appears that such additional determinations could be made by other public officials, or even by accredited private agencies, depending on the manner in which the U.S. implements the Convention. See Articles 16, 22.

“Competent authority” in receiving nation. In accordance with the existing scheme (U.S. as receiving nation), the INS could perform this task by requiring a favorable homestudy by an accredited agency or professional, and by correspondence with state officials to verify fulfillment of basic state eligibility requirements.

“Central authorities” in the respective nations. In the U.S., there will almost certainly be a central authority within the federal government to perform these functions, but it could share responsibility with other “central authorities” within Article 6.

Federal and/or state central authorities, with the assistance of the usual federal and state law enforcement officials.

Federal and/or state central authorities, accredited adoption agencies, and public officials (e.g., court clerk, child welfare official, public records clerk).
Facilitate, follow, and expedite adoption proceedings. (Article 9(b)).

Promote the development of adoption counselling and post-adoption services. (Article 9(c)).

Provide evaluation reports about experience with intercountry adoption. (Article 9(d)).

Reply to another nation’s request for information about a particular adoption. (Article 9(e)).

Accredit intercountry adoption agencies. (Article 10, 11).

Receive adopters’ application for intercountry adoption. (Article 14).

Confirm adopters’ suitability, prepare report regarding adopters, transmit report to a central authority in the nation of origin. (Article 15).

Federal and/or state central authorities, accredited adoption agencies, other public officials involved in the adoption (e.g., a judge, court clerk, child welfare official).

Federal and/or state central authorities, accredited adoption agencies, other public officials. (e.g., family and child welfare agencies). In the U.S., most state family and child welfare agencies are already performing this task by requiring adoption agencies to provide counselling services, although they do not always require post-adoption counselling services.*

Federal and/or state central authorities, accredited adoption agencies, other public officials involved in adoption. In the U.S., it would be especially useful to have a federal central authority serve as a clearinghouse for the collection of data and preparation of summaries and reports.

Federal and/or state central authorities, accredited adoption agencies, and other public authorities (e.g., a court clerk).

See section III(E) of this article.

State or federal central authority, accredited agency or professional. In the U.S., the INS already receives the equivalent of such an application when prospective adopters petition on behalf of a prospective immigrant adoptive child.

State or federal central authority, agency/professional performing CA tasks.** The INS now requires a favorable homestudy by an accredited agency or professional, and confirms eligibility under state law by contacting state family welfare officials. This procedure would appear to comply with the Convention.
Confirm child's adoptability, prepare report and transmit report to central authority of receiving nation. (Article 16).

Determine whether the particular placement is in the child's best interests; give due consideration to the child's upbringing and ethnic, religious and cultural background. (Article 16).

Approve transfer of custody to prospective adopters (in nation of origin) pending immigration and/or adoption). (Article 17).

Take all necessary steps to obtain permission for the child's departure from nation of origin, and entry and permanent residence in receiving nation. (Article 18.)

State or federal central authority, agency/professional performing CA tasks.** If the U.S. is a nation of origin, these tasks will likely be performed by a state child welfare agency, accredited private agency, or social worker. A lawyer might be responsible for transmitting the report.

Federal or state central authority, accredited agency or professional performing CA tasks.** In the U.S., this task will likely be performed by a state child welfare agency, accredited private agency, or professional (such as a social worker, or for some tasks, a lawyer). In the case of an independent placement (without an agency) of a U.S. born child, the U.S. will need to authorize its federal or state central authorities to perform this task directly or through a professional, such as a social worker.

This task is important only when prospective adopters will have custody of the child in the nation of origin before the adoption. The approval depends on a number of specific determinations listed in Article 17. Where the U.S. is a receiving nation, the most important item will be a determination that the child will be eligible to immigrate to the U.S. as a permanent resident. The INS is naturally suited to this task, because it already makes the same determination as a precondition for a prospective adoptive child's entry to the U.S. Other items, such as approving transfer of custody and agreeing that an adoption should proceed, are responsibilities of the agencies/professionals performing CA tasks** in the adoption. In an independent (nonagency) adoption by U.S. residents or of a U.S. born child, a federal or state central authority will need to approve the transfer of custody.

If the requirements of Article 17 are not yet fulfilled (because the adopters did not receive custody in the nation of origin), the requirements of Article 17 apply at this point.
Assure that pre-conditions for child’s transfer to receiving nation, and to custody of prospective adopters, are satisfied before such transfer. Article 19(1).

Primary responsibility for this task would rest with the agency/professional performing CA tasks with respect to the adoption.** However, Article 18 may also impose a duty on other government “central authorities” to provide appropriate assistance to facilitate the child’s transfer in an agency or independent adoption.

Ensure that transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents. Article 19(2).

Primary responsibility will rest with the agency/professional performing CA tasks** in the adoption. In the case of an independent adoption, it is unclear how central authorities in either nation can fulfill this duty except by inquiring about the adopters’ travel arrangements with the child (perhaps at the point of approving custody), and/or by obtaining the adopters’ agreement to adhere to certain conduct in the transfer.

Exchange information with other central authority regarding the status of the adoption. (Article 20).

Primary responsibility will rest with the agency/professional performing CA tasks** in the adoption. In the case of an independent adoption, where the U.S. is the receiving nation, the federal or state central authority will need to be available to assist the nation of origin in determining the status of the adoption. Whenever the U.S. is the nation of origin, and especially in the case of independent adoptions, a U.S. federal or state central authority might rely on Article 20 to follow the progress of the adoption.

Responsibility in case of failed adoption; temporary care; new adoptive placement. (Article 21).

Primary responsibility will rest with the agency/professional performing CA tasks** in the adoption. In a new adoptive placement, the receiving agency or professional must act in consultation with the central authority of the nation of origin.


**Under Article 22, many of the procedural tasks assigned to the “central authorities” in Articles 14 through 21 may also be performed by an accredited private or public intercountry adoption agency, or by certain types of professionals. By “CA tasks” I mean one of the procedural tasks a signatory nation may permissibly delegate to such agencies and professionals.
### Appendix B

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<th>State/Juris.</th>
<th>Regulatory Authority/ Licensing Standards</th>
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<td>Alabama</td>
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Virginia


Virgin Islands

V.I. CODE ANN. tit. 3 § 431(b) (Supp. 1993).

Washington


West Virginia


Wisconsin

WIS. STAT. ANN. §§ 48.60-.78 (West 1987 & Supp. 1993); WIS. ADMIN. CODE §§ HSS 54.01-.06 (May 1993).

Wyoming