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October, 2012

# Response to HCCH Discussion Paper on the Financial Aspects of Intercountry Adoption, with Special Application to the Situation of the United States

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## **Response to HCCH Discussion Paper on the Financial Aspects of Intercountry Adoption, with Special Application to the Situation of the United States**

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The Discussion Paper on the Financial Aspects of Intercountry Adoption very helpfully delineates the diverse ways in which money distorts and corrupts intercountry adoption. The Discussion Paper and related communications also discuss the efforts of the HCCH over more than a decade, including a prior working group, to establish useful information, evidence, and criteria regarding the financial aspects of intercountry adoption (ICA). The materials indicate that prior efforts resulted in tables that were too detailed, leading to poor responses, while also repeating the recommendation of the prior working group that external experts, including “well instructed University students,” collect and analyze data.

I support the recommendation that “external experts” play an important role in efforts to properly monitor and control the financial aspects of intercountry adoption. This need for “external experts” is due not only to the problem of staffing the necessary tasks, but also has significance because of a lack of political will in some nations to control the financial aspects of intercountry adoption. I would argue, for example, that the reason that improper financial gain is “still common” (Discussion Paper, para. 2), is not simply that the problem is complex or that adequate tables, information, or criteria have not yet been developed. The problem, at least as pertains to many nations, is rather one of political will and national policy choices.

To illustrate this problem, I will focus on the United States, both since I know it best, and also because it is the by far the most significant receiving nation, statistically, in the intercountry adoption system. Indeed, the United States has even, although to a much lesser degree, become a significant country of origin as well. In pointing out certain aspects of the law and culture of the United States, I am not seeking to be negative, but simply accurate. Indeed, many in the United States would embrace as positive ideals much of the following description, despite the fact that internationally some may find it troubling.

In focusing on the United States I am not intending to discount the significance of both positive and vulnerable features in the child welfare and adoption systems of other participating nations, about which I and many others have expertise; however, it seems most relevant and feasible for present purposes to focus this response on the United States, since in many years approximately half of all intercountry adoptions involve the United States, and since as a citizen of the United States it is perhaps less of an issue to write about my own country.

### **The United States and Adoption**

Comparative social work analysis has characterized the United States approach to child and social welfare as based on a laissez faire philosophy. Under this approach, individual liberty and family autonomy, as well as the free market and contractual relationships, are fundamental values. From this perspective, adoption, international and domestic, is largely delegated to

private agencies and lawyers, who acting as intermediaries interact directly with the participants. Adoption is based on a series of contractual arrangements between and among the intermediaries and the original and adoptive parent(s). The child can be viewed positively as a kind of a third party beneficiary of these contractual arrangements, although many fear that the child instead becomes commodified into a product in a market for children. There is an ideal of minimal and efficient regulation which will facilitate rather than impede the contractual and private bases for these activities.<sup>1</sup> A social entrepreneurial model allows for a vibrant, private humanitarian sector which combines segments that are officially “not-for-profit” with those that are officially “for-profit.”<sup>2</sup> As will be seen later in this Response, the lines between the officially “not-for-profit” and the “for-profit” segments allow for substantial interaction and even a certain degree of conceptual blurring.

The legal scholarship buttresses this comparative social work approach, observing within the United States a long-term “privatization of family law,” and “parenthood by contract,” in which, through surrogacy, assisted procreation, and adoption, the law increasingly focuses on providing children for adults who want to parent, rather than focusing on meeting the needs of children. In this contractual, free-market context, lawyers often play a key role, serving as well-paid legal “counselors” and intermediaries between relinquishing and adopting parents, or between “intended parents” and surrogates and others who provide for the biological creation of children. Private agencies in this context also operate in a market context where they are under pressures to similarly fulfill the desires of the adults who pay them for their “services.”<sup>3</sup>

The United States is a long-time member of the Hague Conference on Private International Law (HCCH), having joined in October 1964. The United States was an active participant in the five year effort, from 1988 to 1993, that created the Hague Adoption Convention. The United States delegation for three preparatory sessions, and to the Seventeenth Session of the Hague Conference which ultimately adopted the text, was led by Peter H. Pfund, Assistant Legal Advisor for Private International Law, U.S. Department of State. Mr. Pfund’s 1994 article on the Hague Adoption Convention made clear the central role of the United States on the issue of independent, private, and for-profit providers of adoption services.<sup>4</sup> Pfund noted that this question was “[p]erhaps the most difficult issue considered...” Pfund stated that

“United States’ experts at the Hague Conference were very active in proposing that [independent] adoptions be permitted and covered by the Convention. These experts were concerned that failure to deal with independent adoptions in the Convention might cause some to infer that independent adoptions are not permitted between States becoming parties. This possible inference concerned the U.S. experts because many experts from other countries, and several of the international organizations participating at the Hague Conference, believe that independent adoptions are particularly prone to abuses and bad practices.”<sup>5</sup>

Thus, Pfund made it clear that the United States played a major role in keeping “independent adoptions” as an option for nations adhering to the Hague Adoption Convention. It

seems entirely possible that, absent this role of the United States, that “independent adoptions”--- and especially adoptions arranged by for-profit organizations or individuals---would not have been a part of the Convention, if the United States had not actively negotiated for it.

The definition of “independent” adoptions has long been ambiguous within the United States, and originates in the domestic adoption systems developed in the United States in the twentieth century. Typically, “agency” adoptions are differentiated from “independent” or “private” adoptions, which were sometimes called “gray market adoptions.” The implication of the term “gray market” adoptions was that such practices were closely related to illicit “black market” baby-selling. Yet, over time, so-called “independent” adoptions were seen as having certain advantages over agency adoptions, and were viewed by many as legitimate and even superior, despite the “gray market” language.

In order to understand these distinctions, it is necessary to briefly explain the legal and cultural context of adoption within the United States in the post-World War II era. In the period from 1945 to about 1980 the United States developed a legal theory of “as if” adoption, under which the law created a legal fiction that it was “as if” the child had been born to the adoptive parents and family. The original birth certificate was sealed, and a new birth certificate was issued, listing the adoptive parents as the “birth” parents of the child. Most states prevented all parties, and even adult adoptees, from access to their original birth certificates and records, intending that the adoptee was never to know his or her birth identity, and the original family was never to know the adoptive identity of the child they had relinquished. The all-powerful intermediaries were the agencies, private and public (governmental) which received the child, matching each child with an applicant adoptive family. The agencies conducted “home studies” of prospective adoptive families to see if they were suitable, and often sought a match that would hide the adoption, making it possible for all to literally pretend that the child had been born to the adoptive parents. At the same time, intense social and legal pressures were brought to bear on unwed mothers to relinquish their children, with social workers, psychiatrists, and others using derogatory terms like “sex delinquent,” “imbecile,” or “neurotic,” to express the viewpoint that unwed mothers were inherently unfit to raise their children. Legally, unwed fathers were not fathers for most purposes, and their consent was not needed prior to the child being adopted. Critics call this the “baby-scoop era,” while others more positively view the high adoption rates of this time as the golden era for domestic adoption.

The positive theory of this kind of “agency” adoption was that it operated for the best interests of the child, matching each child with a suitable permanent home. Agency adoptions were intended to be distinguished from already-existing black markets in which babies were sold illicitly for large amounts of money. Thus, agency adoptions were designed to create a bulwark against a black market in adoption that would commodify children for profit. Unfortunately for this effort, however, some of the worst baby-selling and related practices were indulged in by “agencies,” such as the notorious baby-selling activities conducted by Georgia Tann under the auspices of the Tennessee Children’s Home Society from the 1920s until 1950. Even when

agency adoptions were not corrupted in this way, they have been extensively criticized for giving social workers and agencies unbridled powers to select who is fit to adopt which child according to criteria many have viewed as arbitrary or discriminatory. In addition, agencies have been criticized from open adoption and adoptee rights perspectives as enforcers of the as if, closed records system; in practice, such agencies commonly deny adult adoptees and original parents access to records and information about their adoptions.

Public (governmental) agencies have been dominant in modern adoption processes where children were taken into custody by governmental child protective services (CPS) because their parents were deemed abusive, neglectful, or unsuitable. Even here private, charitable, and religious organizations have played a prominent role historically, sometimes being empowered by the State to play child-protection or child rescue roles. Thus, the concept of an “agency” does not necessarily denote a governmental actor in the history of child welfare in the United States, but can equally refer to a governmental or private entity. The usual assumption however is that where the “agency” is private it has received some kind of permission, license, empowerment, or approval from the government to operate in the field, and is involved in some kind of private-governmental partnership.

Within this context, the term “independent” or “private” adoption is quite ambiguous. Generally, it refers to an attempt to avoid the traditional power of the agencies, whether private or public. It usually does not involve acting without intermediaries at all. The goal usually is to find intermediaries who can give the principals more control and choice, and quicker access to what they seek. For prospective adoptive parents, this has meant access to the kinds of adoptable children they wish to adopt (usually healthy and young and of a selected race and gender) within a reasonable waiting period, perhaps with more information and choice about the children, and without being subject to the seemingly harsh and arbitrary agency viewpoints about who is best suited to adopt which kind of child. For relinquishing parents, this has meant varying degrees of “openness” in adoption, beginning with the capacity to choose the adoptive family themselves out of a larger group of prospective adoptive parents, with the selection process sometimes including interviews with prospective adoptive parents; sometimes it has also involved a greater degree of financial benefit, which is generally couched in terms of financial support during pregnancy. Subsequent to the adoption, openness often includes receiving continuing information and photographs about the children, and most controversially can include continuing contact with the child and adoptive family. Practically speaking, a prime difficulty is that promises of post-adoption openness are often legally unenforceable, and thus can constitute a bait and switch. The kinds of intermediaries involved in these new kinds of “independent” or “private” adoptions are a mix of private attorneys, physicians, social workers, for-profit agencies, and “non-profit” agencies that operate under the more relaxed methods of so-called “independent” adoption.

Demographic realities have resulted in a division in which traditional agency powers over adoption have largely receded in infant relinquishment adoption, while remaining for adoption

from the government's foster care and child protection systems. In a context where only a tiny percentage of single pregnant women, or indeed anyone else, voluntarily relinquish for adoption, there are perhaps hundreds of prospective adoptive parents for every available healthy infant. Under those circumstances, the tiny percentage who voluntarily relinquish have enlarged bargaining power, and can bargain for the degree of openness they seek---as well as often for a significant degree of financial benefit. The relatively large amounts of money involved in such adoptions can push or exceed the line between lawful support and unlawful baby buying. In this largely private world of gray market adoption, adoption intermediaries, including private attorneys and private adoption "agencies," dominate.

By contrast, there are some 100,000 traumatized, primarily much older children eligible and waiting for adoption in the United States in the foster care system, and their adoptions are handled primarily by governmental organizations/agencies. These adoptions remain subject to substantial bureaucratic and governmental processes operated theoretically in the best interests of the child, although by governmental systems that are chronically underfunded and overwhelmed and often criticized as being incompetent and ineffective.

It is these categories and this history that the United States delegation brought to the negotiations and discussions regarding the Hague Adoption Convention. The United States delegation actively and successfully defended the role of the intermediaries who dominated infant relinquishment adoption in the United States to also be active in regard to "Hague" intercountry adoptions. This was not self-consciously a defense of private, non-profit agencies, for such were already considered acceptable to many nations, in United States terms are often considered to be providing traditional "agency" adoption services, and in Hague treaty terms are accredited entities. The distinguishing feature of "independent" adoptions then as conceptualized by Peter Pfund and incorporated into the treaty is their "for profit" status. These "approved persons" constitute agencies, law firms, lawyers, and individuals who operate on a for-profit basis. The United States successfully lobbied for the capacity of for-profit organizations and individuals as intermediaries.

Some find the acceptance of "for profit" entities in a purportedly humanitarian field like intercountry adoption to be shocking. This response to the discussion paper will look briefly at the extent, rules, and significance of the for profit sector in intercountry adoption in the United States. At this stage, however, it is critically important to make a broader point, which is that in the United States "non-profit" adoption agencies often function more like for-profit businesses than like the old style "agencies" of the past. Market forces related to adoption have pushed many---probably most---non-profit private adoption agencies into the role of finding children for their paying clients. Since so many such agencies are financially dependent on doing adoptions in order to pay their executives and staff, they must find ways of both attracting prospective adoptive parents as clients, and also in obtaining access to children. Thus, what is significant about the United States adoption culture is not just the existence of for-profit entities, but also the

extent to which purportedly “non-profit” entities operate in a market environment and under market pressures and in fact exhibit market behaviors.

Given this history and legal and child welfare culture, it should not be surprising that United States law does not provide an effective, legal basis for limiting the amounts of money involved in intercountry adoption. For example, in terms of ratification and implementation of the Hague Adoption Treaty, the relevant statute (Intercountry Adoption Act of 2000, or IAA), implementing regulations, accreditation system, and the attitudes of the leading government actors, do not provide a basis for limiting the amounts of money involved in intercountry adoption. Indeed, there is an ideological belief that it would be inappropriate to provide such financial limits. I have repeatedly and over many years raised with Central Authority and other government officials, and important stakeholders, the necessity of providing limits on the amounts of money sent by United States agencies to persons or organizations in nations of origin in relationship to intercountry adoptions. These are the responses I have received:

- a. The Intercountry Adoption Act does not provide a statutory basis for limitations on the amounts of money sent by United States agencies in relationship to intercountry adoptions.
- b. Although amendments to the Intercountry Adoption Act are being considered, there is no political interest from any significant persons or organizations for providing statutory authority for such limitations.
- c. Limitations on price, cost, and payments are not a good form of regulation, and therefore it would not be good policy to provide specific monetary limits on intercountry adoption.

Under these circumstances, it would not matter how effectively this working group or any other entity defined appropriate financial limitations on ICA. Absent some kind of external pressure or change of policy, the United States government is not going to adopt such limitations.

This policy stance of the United States is particularly significant since approximately half of intercountry adoptions involve the United States. Thus, the practices and stance of the United States have a systemic impact.

### **The Problem of Reasonable Compensation in relationship to for-profit and non-profit agencies**

An additional issue relates to the criteria and enforcement of the “reasonable” compensation requirements and standards of the Treaty. First, as a policy matter, the implementing regulations of the United States gut this requirement by norming reasonable compensation against intercountry adoption compensation levels, rather than against other kinds of social services, human services, or humanitarian work. See 22 C.F.R. section 96.34. Thus, according to the legal standard currently applicable in the United States, if actors related to intercountry adoption are paid many times more than actors involved in other child welfare, human welfare, or humanitarian acts, the higher compensation scales for intercountry adoption becomes normative and permissible. This allows a systemic bias and incentive toward intercountry adoption to exist, incentivizing both abusive practices and also systemic violations of the Convention’s subsidiarity principles.

Second, the inclusion of for-profit entities (approved persons) in the United States system makes the concept of reasonable compensation difficult to define and enforce. The implementing regulations make the for-profit status a relevant consideration in determining the reasonableness of compensation, allowing the implication that for-profit entities can have higher “reasonable” compensation levels. See 22 C.F.R. section 96.34(e). Although there are only 7 approved persons, which is small compared to approximately 200 nonprofit accredited entities, their role is still potentially significant, particularly as related to particular kinds of adoptions. Thus, the for-profit entities are particularly significant in linking to certain nations of origin, as well as playing an apparently significant role in outgoing adoptions in which the United States acts as a country of origin.

I have found that tracking the compensation levels of owners and important personnel at for-profit entities (approved persons) is extraordinarily difficult. Based on my research, but without claiming to describe any particular actual individual or entity, I will discuss a hypothetical approved person in the United States in order to make these difficulties more concrete. I’ll call this hypothetical for profit entity/approved person by the name “Smith Adoptions.” The hypothetical principal/owner of Smith adoptions is an attorney, a common pattern in for-profits, and also significant in terms of the historical and present role of attorneys in adoption services in the United States; this hypothetical individual will be called Smith. Smith operates, alone and/or in conjunction with others, three entities: the for-profit adoption agency (Smith Adoptions), a for-profit law firm, and a non-profit charity/foundation. In terms of accountability, it is significant that the public has no access to the finances of either the for-profit adoption agency or the law firm, and only limited access to the finances of the non-profit.

Based on common practices within the United States, it is apparent that the combination of entities could be used to operate for Smith’s financial benefit. Thus, Smith may direct financial benefit to himself/herself in a number of ways: as director/employee of the adoption agency, as director/employee of the related non-profit, as an attorney charging the agency or charity for legal services, as owner of the profits of the adoption agency or as owner/co-owner of the profits of the law firm, and through financial transactions between any of the entities and Smith’s family members. In addition, where there are real property arrangements shared between the entities, as may be common practice in the United States, it is possible for Smith to benefit from real property transactions amongst these entities without necessarily reporting anything as compensation.

In effect, Smith may choose forms of compensation with the greatest advantage, whether under tax law, or as a matter of creating an impression of charitable intent. Since a for-profit of course may legitimately generate profits, Smith could of course personally benefit from profits produced by Smith Adoptions, without disclosing the amounts to the public. Alternatively, however, Smith could also forego significant parts of some of the more obvious ways of obtaining personal financial benefit, such as profits or direct employment with Smith Adoptions or the non-profit entity, and still obtain very high compensation by other means. Thus, Smith could truthfully state on public web sites that he/she does not take any salary from the for-profit agency, and donates significant percentages of the for-profits entity, and still receive extremely high financial gain from the combination of entities through other means beyond salary or profits, such as providing legal or other services to the for-profit agency or nonprofit, or through property or other transactions. Since Smith does not necessarily fully disclose to the public in detail all financial arrangements among the three entities, there is also very little public accountability regarding Smith’s actual levels of financial benefit. Under such circumstances,

one would have to gain access to much otherwise private data, and do an in-depth accounting, in order to ascertain how much financial benefit Smith ultimately has from his/her work in intercountry adoption.

Thus, a particular dilemma in the instance of the hypothetical “Smith Adoptions” is the intertwined relationship between the non-profit charity and the for-profit agency and law firm. For example, hypothetically it would be possible for the non-profit run by Smith to make grants to clients of Smith Adoptions, to help them pay the fees for intercountry adoption due to or passed through Smith Adoptions. To the degree those funds are donated profits from the for-profit agency, that agency is likely obtaining a tax benefit for discounting their very substantial adoption fees through the channel of a donation to the charity. To the extent the funds come from outside donations, outsiders have been induced in essence to subsidize the very substantial fees of the for-profit agency.

In addition, hypothetically the non-profit run by Smith could use some of its funds to help pay the costs of temporary trips for orphans to the United States. This hypothetical refers to a practice in which children are brought to the United States for a period of time and live with host families, in the hope that they will make contact with prospective adoptive parents who may seek to adopt them after they return to their nation (often Ukraine). If the for-profit agency donates funds to subsidize these trips, the agency is essentially getting a tax benefit for activities which could be seen as a kind of marketing for their for-profit agency; if outsiders donate for this purpose, Smith has succeeded in inducing charitable donations from others for what in effect is a part of the marketing costs of the for-profit agency. (In calling this “marketing” I do not intend to enter into the debate over the ethics of bringing “orphans” to the United States for these temporary trips, nor indicate whether or not the practice is ultimately beneficial to children; I simply note that from a business standpoint that bringing the children to the United States where prospective adoptive parents will meet them is potentially a highly effective method of marketing the services of intercountry adoption.)

Similarly, hypothetically Smith’s nonprofit could spend charitable funds to assist orphans in sending nations from which Smith Adoption (the for-profit agency) may obtain children. It is entirely possible that this charitable spending in effect underwrites what would otherwise be costs associated with Smith Adoption’s for-profit adoption programs in those countries.

Under these hypothetical interactions and activities among the different entities, where the nonprofit succeeds in obtaining outside donations beyond those that come from the for-profit agency, Smith would have succeeded in getting others to donate in order to essentially subsidize the for profit business, allowing Smith Adoptions to offer discounted prices and do adoption marketing and access children without having to pay all of the associated costs. Similarly, to the degree that the funds spent by Smith’s nonprofit would come from donations from Smith’s for-profit agency, Smith likely would be getting a tax deduction for in effect discounting fees for selected clients, doing adoption marketing, and for some of the costs of establishing and running their programs in the sending nations.

Significantly, from the viewpoint of the United States, it appears that Smith’s nonprofit activities are equally permissible regardless of whether or not they benefit the activities of the for-profit agency. Indeed, even if Smith’s charitable activities are entirely undergirding the work of the for-profit adoption agency, this would largely be seen positively as a form of social entrepreneurial activity within the United States. As noted above, within the United States, even non-profits in the field of adoption “are usually nonprofit organizations operating for-profit

ventures to generate revenues.”<sup>6</sup> Thus, combining separate for-profit and non-profit entities toward the same combination is just another way of doing what is typical within the United States.

In the context of the United States, it is difficult under these circumstances to know whether our hypothetical individual, Smith, is earning nothing, or millions of dollars, from intercountry adoption. (The possibility of millions of dollars is not out of line, as the United States government estimated that one agency, Seattle International Adoptions, Inc., received over 9 million dollars over a four to five year period from Cambodian adoptions, the individuals involved retaining a substantial portion of it in profits: this was in the context of the criminal investigation and conviction of Lauryn Galindo. In mentioning this actual situation, it is not intended to indicate that the hypothetical Smith is involved in any kind of wrongdoing under United States law, but rather to indicate that under some circumstances intercountry adoption can generate large amounts of money.)<sup>7</sup> Thus, Smith’s capacity to present himself or herself simultaneously as a for-profit attorney, director of a for-profit agency, and director of a non-profit charity, with little public accountability as to the handling of the finances of these interconnected entities, makes the very concept of reasonable compensation illusory. To the degree that Smith Adoptions chooses to do only non-Hague adoptions (the majority of international adoptions to the United States), there would be little or no scrutiny of his/her finances in many states. Since Smith Adoptions is a Hague approved person in the United States, the United States government does have the opportunity to review the finances of that entity. Given that the United States has outsourced the accreditation and oversight function primarily to a non-profit agency (the Council on Accreditation, or COA); and given that COA uses a peer review system of accreditation that relies on volunteers who usually work for other agencies; there would seem to be little likelihood that the finances of the three intertwined entities would be reviewed in sufficient detail to determine the actual financial benefit obtained by Smith; even if such information was established, there is little or no indication that there are any concrete limitations that would be applied.

It should be emphasized that the above is not intended to indicate that the hypothetical individuals Smith or Smith Adoptions, nor any other particular individuals or adoption agencies, whether for profit or nonprofit, currently operating in the United States, is doing anything illegal in the context of the United States. To the contrary, the hypothetical Smith and Smith Adoptions represent one possible variant within the broader pattern of the privatized, social entrepreneurial practice and culture of the United States in relationship to adoption. Indeed, persons and entities like Smith and Smith Adoptions could be seen by some as exemplary social entrepreneurs and experts in intercountry adoption. In addition, a fundamental point is that current regulations in the United States make both transparency and limits regarding intercountry adoption very difficult to achieve.

Some of these difficulties are also applicable to the much larger number of accredited, non-profit entities in the United States. It is commonplace knowledge that it is possible to earn hundreds of thousands of dollars annually through work in the non-profit sector in the United States. Thus, the non-profit label is no guarantee that unreasonable compensation or earnings are not involved. In addition, the non-profit sector offers opportunities for individuals directing non-profits to derive substantial financial benefit through structuring service contracts or property transactions between themselves (or their relatives) and the non-profit entity, which can be difficult to evaluate without careful auditing.

Of course there are likely many people working in non-profit adoption agencies who are only modestly compensated. However, given the modest pay scale for social workers and other child welfare workers in the United States outside the context of intercountry adoption and private adoption, the earnings of a significant portion of those involved in intercountry adoption is comparatively beneficial. The concept of “reasonable” compensation within the United States is thus based on viewing intercountry adoption through the lens of the tradition of gray market, independent, or lawyer-arranged private adoption, rather than through the lens of the public adoption system. This creates the irony that many earn a proportionately high income from intercountry adoption doing adoptions from developing nations, often through intercountry adoption programs that lack a consistent financial family preservation or re-unification program. This is one reason that adoptions between wealthy and developing nations commonly cost in the range of \$20,000 to \$50,000. And again, under current legal standards in the United States, so long as high compensation rates for work in the non-profit intercountry adoption sector is prevalent in a significant number of agencies, such high compensation rates will be considered reasonable compensation.

The role of very large numbers of private adoption agencies (whether labeled for-profit or non-profit), is deeply embedded in adoption practice in the United States. The negative aspects include the creation of a kind of market-based competition for children with the most adoptable characteristics (young, healthy, and female), in a manner that can inadvertently lead to child trafficking while undercutting the subsidiarity principle. The positive aspects include a vibrant, innovative, social services sector: a kind of social entrepreneurial enterprise where the private social services and humanitarian entities sometimes can accomplish things that the public sector acting alone would not. Whatever the positive or negatives, there is extreme resistance to bringing financial limitations to this sector, which commonly views profits as an opportunity to expand into new service areas.

### **The United States as a Nation of Origin**

It is a surprising fact that the United States sends a significant number of children to other nations for intercountry adoption.<sup>8</sup> Although the outgoing adoptions comprises a comparatively small number compared to the number of incoming adoptions, the situation with outgoing adoptions presents additional concerns regarding the financial aspects of intercountry adoption.

One view in the United States, perhaps implicitly accepted by some nations that accept adoptive placements from the United States, is that the choice of the original/birth parents to place the child outside of the United States to a significant degree trumps the subsidiarity principle. This concept that parents have a right to select an intercountry adoptive placement, in defiance of the subsidiarity principle favoring domestic adoptive placement, cannot be easily reconciled with the Hague Adoption Convention. Beyond the legal issue, there is the question of why parents would choose such out of nation placements. It is often claimed that a primary motivation relates to race. A significant proportion of outgoing cases involve children who are of a “minority” (non-white) race in the context of the United States, and/or who are bi-racial. Given the difficulties with racism in the United States, it is often claimed that some birth/original parents may believe that their children will experience less racism outside of the United States.<sup>9</sup> This kind of viewpoint is not unprecedented in an intercountry adoption context, as it was used as a reason for sending mixed race South Korean children whose fathers were white or African-American United States soldiers to the United States for intercountry adoption.

There is a troubling intersection between money and the outgoing cases from the United States. First, it appears that the for-profit entities (approved persons) are disproportionately involved with these cases. Second, the opportunity for significant financial gain from these cases, and the financial motivation to place outside of the United States, are substantial. Within the United States private adoption agencies frequently charge much less for the placement of African-American or bi-racial children than for white children. By contrast, it appears that by sending minority-race children in intercountry adoption there are possibilities of intermediaries, attorneys, and agencies earning many times more, since the fees for these adoptions can be quite high. In a context where the counseling that relinquishing birth parents receive in the United States is quite mixed in quality and objectivity, and revocation of consent periods in many states are very short, there is a grave concern that children are being sent internationally more for financial reasons than for reasons connected to the best interests of the child.

### **A Way Forward: A Possible Role for Independent Experts and Entities in Relationship to the Financial Aspects of Intercountry Adoption**

This paper is not intended to diminish the legitimacy of seeking accurate information about costs, expenses, and compensation in intercountry adoption. This is a useful step. However, to the degree that this step is made dependent on the actions of Central Authorities, there may be inherent difficulties and limitations. Thus, the first working group suggested the involvement of external experts, including “well-instructed University students.” In addition, it would seem useful to look beyond the task of gathering data to ask how to accomplish the ultimate goal of providing limitations on the financial aspects of intercountry adoption in service of the basic principles of the Hague Adoption Convention and the Convention on the Rights of the Child (CRC). Here, once again, the role of external experts may be critical, given the political will and policy choices of some nations that disfavor financial limitations. In addition, even in nations that theoretically embrace significant financial limitations, there may be serious problems in defining and implementing such norms.

The HCCH lacks the capacity to monitor intercountry adoptions, including the financial aspects of intercountry adoption. However, the considerable influence and prestige of the HCCH could be used to legitimize the work of a network of independent experts in monitoring intercountry adoptions. It may be possible to make this network linked either to experts at Universities and/or to other independent organizations, such as child welfare NGOs. I would suggest that the Permanent Bureau along with others, including this expert committee, explore the possibility that financial and other aspects of intercountry adoption be more systematically subject to some kind of accountability structures outside of and beyond the Central Authorities.

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<sup>1</sup> See generally Jonathan Dickens, *Social Policy Approaches and Social Work Dilemmas in Intercountry Adoption*, in *Intercountry Adoption* (ed. Judith L. Gibbons & Karen Smith Rotabi Ashgate 2012), at pgs. 29-42.

<sup>2</sup> See Mary Katherine O'Connor & Karen Smith Rotabi, *Perspectives on Child Welfare: Ways of Understanding Roles and Actions of Current USA Adoption Agencies Involved in Intercountry Adoption*, in *Intercountry Adoption* (ed. Judith L. Gibbons & Karen Smith Rotabi Ashgate 2012), at pg. 77.

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<sup>3</sup> See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443.

<sup>4</sup> See Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 *Family Law Quarterly* 53 (1994).

<sup>5</sup> *Id.* at 60.

<sup>6</sup> O'Connor & Rotabi, *supra* note 2, at 77.

<sup>7</sup> See David M. Smolin, *Child Laundering*, 52 *Wayne Law Review* 113, 140 (2006).

<sup>8</sup> For reasons unclear to this author, the numbers of children reported by Canada as coming from the United States are many times larger than the numbers that the United States reports sending to Canada, creating continuing uncertainties as to the actual numbers, even after ratification and implementation of the Hague Adoption Convention by the United States. Compare [http://adoption.state.gov/content/pdf/fy2010\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2010_annual_report.pdf); [http://adoption.state.gov/content/pdf/fy2011\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2011_annual_report.pdf); and <http://www.familyhelper.net/news/111027stats.html> .

<sup>9</sup> For an overview of some of the issues concerning outgoing cases from the United States, see Dana Naughton, *Exiting or Going Forth? An Overview of USA Outgoing Adoptions*, in *Intercountry Adoption* (ed. Judith L. Gibbons & Karen Smith Rotabi Ashgate 2012), at pg. 161-171.