

FOCUS ON ADOPTION SUPPORTS BILL #3635 SUBMITTED TO GUATEMALAN CONGRESS

INTRODUCTION

In 1993, the Hague Convention affirmed that intercountry adoption, when completed correctly, is a preferable alternative to institutional care. Unfortunately, implementation of this groundbreaking treaty has not been focused on doing intercountry adoption the right way; Hague implementation has been about preventing intercountry adoption from happening at all. For children the treaty was supposed to protect, the results have been catastrophic.

That adoptions have ground to a virtual halt in Central and South America is evident from the statistics: Before 1993, the majority of non-Korean intercountry adoptions involved children from Central and South American countries, all of which (except Colombia) had adoption processes with significant private sector involvement. Since 1993, with the inception of the Hague Treaty, Central and South American countries (with the notable exception of Guatemala) have all developed “Hague-compliant” legislation procedures that are unduly bureaucratic, underfunded, and have reduced the provision of adoption services to well under 50 children a year. This has occurred in countries where at least 50 % of the population lives in poverty, and there are little or no social welfare services to address the needs of families and children.

With or without intercountry adoption services, a significant number of children in developing countries do not have access to health care, education, or child protection services. Importantly, services to children and families have not significantly improved in *any* of the Central and South American countries that have all-but-eliminated, through “Hague-compliant” but nonfunctional processes, the opportunity for children to be adopted. Over the last 14 years, hundreds of thousands of children who might have benefited from the opportunity to grow to fulfill their human potential in permanent families have instead become statistics, adding to the numbers of children who are living in institutions or on the streets, dying prematurely, forced into slave and sex labor, neglected and abused in families of origin, and part of the vicious cycle of poverty.

Currently, the Guatemalan Executive Branch, UNICEF, the officials at the Hague Permanent Bureau, and the Department of State are all actively promoting the passage in Guatemala of the proposed Ortega Law, bill #3217, which mirrors the dysfunctional laws that have effectively stopped intercountry adoption in other Central and South American countries. Such laws fail to provide prenatal services or access to the system, offer little or no funding for childcare, and lack adequate staffing and funding to promote efficient adoption services. Yes, these laws have stopped questionable adoption practices. But that’s only because they effectively eliminate almost *all* adoption services. Much more important is that these laws have failed to replace the necessary social services provided by the privately driven process. Government and international organizational support for this type of “Hague-compliant” but nonfunctional law is exactly why ethical Guatemalan attorneys and adoption agencies resisted the Hague Treaty in Guatemala.

Focus On Adoption (FOA) supports *functional* Hague compliance. We believe in the standards of accountability called for in the Hague Treaty. But we also believe that adherence to narrow

interpretations of the Treaty, with no concern for the practical impact of poor implementation of adoption services, has not helped the children the treaty is supposed to protect; it has hurt them by making them, and their suffering, invisible.

FOA supports a law proposal (Bill #3635) that would bring functional Hague compliance to Guatemala. Bill #3635 does this by regulating how children come into the “adoption system,” assuring adequate birthparent counseling, mandating transparent fee limits, funding good and professional pre-adoption and adoption services through accredited and supervised providers, and providing for supervised child care and medical care, accurate information, and an expedient complaint procedure. Yet the Department of State, UNICEF, and the Hague Permanent Bureau have virtually ignored Bill #3635. Why? Not because they have identified critical flaws in the bill. No, they ignore it, they say, because it was “written by the attorneys.”

It is time for the inflammatory rhetoric and demonization of private adoption service providers in Guatemala to stop! Bill #3635 addresses the problems in the current system, while maintaining a framework of public-private cooperation, which is the hallmark of the U.S. system as well. Controversy about past practices and practitioners, both in the U.S. and in Guatemala, should not be used as an excuse to ignore Bill #3635, as it provides a clear regulatory framework that upholds the standards and principles of the Hague Convention while providing clear consequences for those who fail to adhere to these standards.

If the Hague is to be considered “The Gold Standard” for intercountry adoption processing, then policy makers have an obligation to ensure that the Treaty is implemented to serve the population it is designed to protect and truly serve the best interests of the child. Bill #3635 does precisely this.

FOA calls on the Guatemalan government, the Hague Permanent Bureau, UNICEF, and the U.S. Department of State to support Bill #3635.

If you are interested in learning more about Bill #3635, please visit FOA’s website at www.focusonadoption.com and click on the link to FOA’s comprehensive analysis of Bill #3635.

Statement of Focus on Adoption In Support of Bill 3635 – A Hague Compliant Framework for International adoption from Guatemala

Focus on Adoption hereby expresses its support for Bill 3635 as the law by which Guatemala can continue to find homes for its children without families through international adoption within a Hague Convention compliant framework. FOA applauds the efforts of the Guatemalan legislature for drafting an innovative proposal that meets the requirements of the Hague Convention, adds needed controls to the international adoption process, maintains and improves the ability to provide social services to children and women without relying on government support, all without erecting barriers that would make international adoption impossible to achieve. Bill 3635 is uniquely drafted to achieve the goal of finding permanent families for children as early in their lives as possible, while protecting children and women from coercion or exploitation due to their vulnerable position. Focus on Adoption urges the adoption community to give serious consideration and support to this groundbreaking legislation that has the potential to serve as the first Hague success story in the international adoption community worldwide.

Background

Guatemala is the second largest sending country for American families who pursue international adoption. In 2006, the U.S. issued 4,135 visas to U.S. families adopting from this country, second only to China. The Guatemalan constitution permits adoptions of its children through the Notarial process which was developed for all Civil Matters which are not litigious as a means of controlling the impact on the courts. Due to the combination of extreme poverty, high birth rates, and the significant absence of social support services for children and families, along with restrictive policies in other countries, the Notarial adoption process has increased the numbers of adoptions each year. Part of the increase can be explained by the expanded (informal) social service delivery system, providing information about adoption options, assistance in getting required documentation and assistance in interfacing with attorneys and the court system in Guatemala City, along with prenatal and postnatal assistance. Guatemala is still suffering the challenge of overcoming the impact of a 36-year civil war. Guatemala reports the regions' highest infant, childhood¹ and maternal mortality rates, highest malnutrition rates, and lowest average birth weights. Over half of all Guatemalans (56% or 6.4 million people) live in poverty. This percentage is higher than in any other Central American country, and devastating for Guatemala's young. Sixty eight percent of children under six (about 1.7 million live in poverty) and over 3 million children in Guatemala suffer from malnutrition. This rate is 50% higher than in any other Latin American country and is among the worst in the world. Some remote communities have malnutrition rates which rival those in impoverished African countries.

Further, Guatemalan women have the highest fertility rate in all of Latin America, averaging 4.8 births per woman. This rate is higher in the poor rural areas (averaging 6 births) compared to the urban regions. Simultaneously, there exist few child welfare programs, few child care programs for working mothers, and little access to public health care systems to support developmental needs. Approximately 30,000 children per year die of preventable childhood diseases in Guatemala. In addition, there are over 30,000 children who are not eligible for adoption who

reside in private, licensed children's homes that receive a significant percentage of their donations from adoption agencies and adoptive parents. The Guatemalan government provides no support to these institutions. This combination of factors has led many Guatemalan women to make adoption plans for their children.

The Current System

The Guatemalan law has developed a unique adoption system that contains numerous protections for birthmothers and children while the Notarial system and interface with agencies simultaneously ensures that children receive permanency in safe and loving homes as early as possible in their lives. The Guatemalan adoption system is privatized, with significant government oversight. Specifically, the Guatemalan adoption system permits a birthmother to relinquish her child by signing a consent directly over to Notary or a children's home. Some birthmothers make this decision during pregnancy, and others thereafter. Consents are always taken only after birth of a child.

Because a privatized adoption system creates opportunities for exploitation by individuals of the desperation of birthmothers, the Guatemala adoption process is subjected to rigorous and extensive review and approval by certain courts and government agencies. Specifically, the Guatemalan Family Court, the Procuraduria General de la Nacion (i.e. "PGN", the Guatemalan Attorney General's office), and the U.S. Embassy and the Department of Citizenship and Immigration Services all review the legality of the process. Further, a birthmother must appear a minimum of four separate times (over a period of weeks to months) during the process to reaffirm her unconditional consent to relinquishment and to confirm her identity and true standing as the child's birthmother. She is permitted to withdraw her consent without consequence at any time until the end of the process. Additional interviews, investigations and details can be sought by the Family Court, PGN and U.S. Embassy/CIS at their discretion.

Scholars who have studied and analyzed international adoption systems worldwide have concluded that the Guatemalan adoption system contains many elements that make it exemplary compared to programs of other countries.ⁱⁱ First, it permits children to be made available for adoption at an early age without erecting mandatory holding periods that steal the most important developmental months and years in a person's life. Second, the system permits each birthmother to exercise her right to do what she believes to be in the best interest of her child while simultaneously affording numerous opportunities for her to change her mind throughout a several month period during the course of an adoption case. Third, the private adoption system provides crucial services to mothers and children that are not otherwise provided, including prenatal healthcare, nutrition, housing for birthmothers who need to leave their communities during their pregnancies, information about their options, assistance with registrations and submission of documents to accomplish their goals, transportation to fulfill their legal obligations, and foster and medical care for children. No foreign adoption system in any other sending country, or any proposal made in Guatemala, has afforded the same protections to children and birthmothers that are given in the current private system.

Problems with the Current System

Critics have raised some valid concerns about the system that require improvement. Specifically, under the current system, birthmothers often come to the attorneys through intermediaries. It is often through the assistance of ethical intermediaries that a birthmother living in an isolated village is able to secure the services that she needs for herself and her child (including prenatal and other medical care, locating an attorney to assist her with her adoption plan, and securing suitable housing during her pregnancy if she is not able to live at home). While many of the intermediaries have historically operated with ethical motivations, the opportunity is present for those with less ethical intentions to exploit the critical role they have in the private adoption process. Allegations have been raised that children are being produced for adoption because of incentives that are offered by the intermediaries. For this reason, the adoption community agrees that reform and oversight of this aspect (how birthmothers get into the “system”) is warranted. FOA believes that the elimination of “agents” or intermediaries has eliminated access to the adoption system for most prospective relinquishing parents in other Latin countries. Therefore, we support a system which provides training, registration, and transparency of services and fees, as well as accountability, to these informal intermediaries in the adoption process.

The U.S. Department of State has stated that this aspect of the Guatemalan adoption system violated Article IV of the Hague Treaty, which will soon officially govern adoptions between the U.S. and Guatemala. The Department of State has stated when Hague becomes effective, it will not continue to process cases from Guatemala under the current system because it violates Hague Treaty- Article IV.ⁱⁱⁱ FOA believes that Bill 3635 satisfies the requirements of Article IV and the other provisions of the Hague Treaty in a manner that should continue allowing children from Guatemala who need families to find safe and loving homes in the United States.

Bill 3635 – Ground-Breaking Proposal for International Adoption from Guatemala

The adoption community agrees that the Guatemalan adoption system requires regulation that will ensure that consistent critical services are provided to birthmothers and children while ensuring that those who provide critical adoption services are properly trained, regulated and accountable for their actions. Bill 3635 addresses that concern with an innovative framework with a unique opportunity for success, when compared to other developing countries, whose legislative frameworks - while Hague compliant - have no means of providing adoption services to the majority of families and children who need them, because of inadequate infrastructure, staffing and funding.

Bill #3635 can assure that necessary services which are now provided privately will continue to be provided, though with more oversight and consistency. In essence, it maintains the best aspects of the Guatemalan adoption process, while regulating, in conformity with the Hague Treaty and other elaborations of “best practices”, all aspects of adoption services and those who provide adoption services, along with providing transparency of fees.

Bill # 3635 provides for Establishment of a Central Authority, governed by representatives of all branches of the Government, along with representatives of the Bar Association and the Pediatric Association. It establishes Offices within the Central Authority to fulfill every function required by the Hague Convention and to promote smooth expediting of adoption services: Office of Orientation, Office of Counseling, Office of Temporary Care, Office for Women in Conflict with Pregnancy, Office of Accreditation, Office for Medical Services, Science, and DNA, Office for Supervision and Complaints, Office of Records and Coordination
It also provides for a funding model which does not depend on Government funding or Political will to assure functioning, as the Accredited bodies will pay for services as used.

This is a summary of how this will work:

The Central Authority, the INFA, will be setting up the Office of Accreditation to accredit the various roles that adoption service providers perform. Another Office for Women in Conflict With Pregnancy will be establishing accreditation standards and supervising Social Assistance Centers, who along with the Office for Women in Conflict with Pregnancy will be providing prenatal services to birthmothers (including prenatal medical care, housing when necessary, and practical assistance when needed). After the child is born and the mother continues a desire to relinquish, she does a preliminary relinquishment to an Accredited Notary, who is registered with the Social Assistance Center, in accordance with the Civil Code of the Guatemalan Constitution.

(1) The accredited foreign agencies will provide funding for the Social Assistance centers with the applications of prospective adoptive families who have been met the preadoption standards of both countries.

(2) The child will be placed in custodial care of a licensed children's home or a registered and trained foster family (both will be trained and registered by the Department of Temporary Care which is part of the Central Authority.)

(3) The Representative from the Social Assistance Center (who has met the accreditation criteria of the Office of Accreditation, which is part of the Central Authority) or an approved agent will bring the relinquishing parent to the Central Authority for Orientation and Counseling. (a) *Orientation* will consist of a complete description of parental rights and responsibilities, as well as clarification about the facts that the child will be adopted, will be adopted by a family living in another country, and that the adoption will terminate all parental rights and responsibilities. These Orientation sessions can be scheduled daily, be done by film and sound tracks in most languages spoken by relinquishing birthparent (s) (b) *Counseling* will consist of a meeting with a Court Social Worker to assure that the parent(s) are competent and have not been coerced, and to determine if the parent(s) have a preference for the child to be adopted by relatives or Guatemalan citizens; and a meeting with a Psychologist to provide counseling as needed, as well as obtain a family and individual(parental) history and provide a report which becomes part of the child's record.

(4) the child is examined by an accredited pediatrician and a Medical Report and laboratory tests(developed by the Office of Medicine, which is part of the Central Authority) becomes part of the child's record.

- (5) the parent(s) and child receive DNA testing, as supervised by the Central Authority, to determine that they are parent and child, as well as other identification criteria (pictures, fingerprints, footprints, cornea scanning etc.)
- (6) Once DNA confirms that the child and parent(s) are child and parent, the birthparent(s) comes before a Judge to relinquish.
- (7) The Judge takes the intention to relinquish, assures that all preliminary steps have been followed, that a transparent record of all expenses has been provided by the Social Assistance center, that the parent(s) have received orientation and counseling, the psychologist's report includes all required birth family information, that there is a DNA match, and the Judge issues a Certificate of Adoptability.
- (8) Referral of a child : After all of the above steps are completed and there is a documentation (a)child's medical and pictures (b)birthparent(s)certified relinquishment before a Judge (c) psychologist's report of birth family and parental history (d)DNA match, (e)A certificate of adoptability issued by the Central Authority, Only then can the child be referred to an adoptive family, who has met all of the prerequisites of their country of origin as well as requirements of the Guatemalan government. The child can be referred by an *Accredited Social Assistance Center* Notary, and Lawyer to an agency who has affiliated to support the Center, which has taken the initial intent to relinquish and assumed responsibility for care of the child.
- (9) When the adoption completes all of the legal steps as are current in the Law, the Central Authority issues a *Certificate of Adoption* which is required by Hague authorities, so the child's visa or passport process can be completed.

Bill 3635 Complies with the Hague Treaty

FOA has compared the provisions of Bill 3635 to the primary provisions of the Hague Treaty, as defined by the Department of State. See "U.S. Law, the Hague Adoption Convention, and Guatemala 5/16/07 (available on the State Department Website). Below is that comparison.

1. Guatemala must have a Central Authority. (Convention, Article 6). Specifically, Article 6 provides that

"(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities...." Hague Treaty, Article 6(1). Bill 3635 creates a central authority that brilliantly balances highly trained representatives of the public, private and professional sectors of Guatemala uniquely situated to make determinations as to the best interest of children. Specifically, Bill 3635 proposes to create a central authority called the "Institute of the Child and Adoptive Family" (also may be shortened to "The Institute" or "INFA"), an autonomous, decentralized body managed by a board of directors that is composed of highly trained representatives from the 3 branches of the Guatemalan government, the legal community, the medical community, and the Attorney General of human rights.^{iv} The Institute will be responsible for performing directly all Hague Central Authority functions^v through its numerous specialized departments^{vi} led by highly qualified and trained staff,^{vii} or through other providers whom they accredit.^{viii} This structure corresponds precisely with the requirements of the Hague Treaty.^{ix}

Some who have reviewed Bill 3635 have criticized the unique structure of the Institute for not being a wholly government entity. FOA has researched whether the central authority must be part of the government, and has determined that there is no express requirement that the central authority must be a government entity. To the best of our knowledge, this requirement is not contained in the Hague Treaty or in the Hague Guide to Good Practice. On the contrary, the Guide to Good Practice leaves open the opportunity for non-government entities to serve in this role, stating that while the government is “usually” the best location, the determining factors in selecting the central authority are “strong links to the justice and the care and protection system of the Contracting State.... [the ability to facilitate] co-operation between the Central Authority, the courts, the child protection network, child care institutions, relevant non-government organizations and social care professionals and the legal profession [and that] these links [are] essential for the effective operation of the Convention.”^x

Bill 3635 proposes a central authority that meets all of these requirements. The Institute is operated by a board of directors from three major areas of government – the executive branch, the judicial branch, and the attorney general, along with representation from the legal, medical and human rights professions.^{xi} This system contains ties throughout the judicial system and other government offices, ties to the child protection system, strong links to care and protection of children, links to the child protection network and orphanages, expertise from the social and legal profession, and would promote cooperation among these offices. It further offers the benefit of checks and balances among the different members of the Board, ensuring that too much power does not rest within one government office or one individual, thus reducing the opportunity for corruption or abuse of power.

By maintaining the private Notarial process, the parental rights granted in the Constitution are maintained. Furthermore, the private system will fund the Central Authority and its functions, guaranteeing that necessary services will be provided along with proper regulation of those services.

2. Has Guatemala enacted legislation to enable it to meet its Convention obligations? The Department pointed out that legislation is necessary to set and enforce most of the Convention’s requirements in Guatemala. Because Guatemala does not have any enforceable legislation, regulations, procedures, or policies to implement the Convention, it cannot carry out its Convention obligations. Bill 3635 is the first step towards enacting that legislation that complies with the Hague Treaty. Legislation does not get approved and passed overnight, as demonstrated by the United States’ efforts to pass Hague-compliant legislation. This process took 7 years. Implementation thereafter is a step-by-step process with each step only able to begin after the prior step is finalized and passed. Regulations can only be passed after such legislation is approved, a process that also requires time and effort. The United States took 6 years after the IAA passed to finalize its regulations, and the process of implementation is still ongoing. Certainly, Guatemala has made major strides in a short time to enact Hague-compliant legislation, particularly compared to the timetable of the United States. Furthermore, until March of 2006, Guatemala internally considered itself a non-Hague country, as its Constitutional Court had overturned the President’s accession in 2003. Until March of 2006, when the Department of State declared that they were considering Guatemala a “Hague country” and obligated to meet

conditions of the Treaty, there was little incentive to develop Hague compliant legislation by a stipulated date, though there have been competing legislative initiatives to reform the system.

3. Does Guatemala have a structure to investigate extended family placement or domestic adoption? (Convention, Article 4). The Department of State calls for a system of domestic placement of a child within the country of origin to be explored before intercountry adoption is considered. Guatemala does have domestic adoption law, which is the same legal process as the intercountry process. Since there is currently no child placement process except for the Notarial process, and all child care in Guatemala is privately funded, the children's homes initiate legal abandonment procedures for those children who are removed from birth families because of abuse or neglect, orphaned, or anonymously abandoned. Although this is not part of Bill 3635, the implementing regulations are likely to address the issue of exploring domestic placements in further detail. Indeed, the U.S. regulations implementing the IAA contained this detail with respect to cases where U.S. children emigrate to foreign countries.^{xii} The regulations will most likely incorporate a system whereby the Institute staff can maintain and review a domestic adoptive family registry prior to matching a child for international adoption. Parental choice and rights can determine this for children who are being relinquished, if the relinquishing parent(s) state that they want relative adoption or domestic adoption to be explored prior to ICA. Parental rights to privacy and choice, now guaranteed by the Constitution, should be honored. Unlike other law proposals, Bill #3635 does not take this Right and Choice away from biological parents considering a relinquishment plan. The consequences of doing so and insisting on finding relatives for the child are profound and are likely to lead to anonymous abandonment, infanticide, or other risks to the child and possibly the birthmother. An expedited abandonment process should enable many children who are now institutionalized to have the opportunity to be adopted by Guatemalan families, if available, or through the Intercountry process.

By instituting the social service policy of concurrent planning, along with recognizing that the best interests of the child are to join their permanent family as early in their lives as possible, there are clearly more children needing families than Guatemalan families waiting and eligible to adopt those children. There should be no "holding period" where a Guatemalan family would be sought for the child. This requirement or standard in the Hague Treaty, which is taken from the Convention on the Rights of the Child, is controversial at best. It is not substantiated by research that children adopted domestically fare better than children adopted internationally. There is far more known and researched about Intercountry Adoption and other forms of care for children since 1986, when this principle was stated as part of the CRC, and since 1993 when the Hague Treaty was written.

Within the Hague Guidelines for Good Practices, this is addressed by considering "the best interests of the child" to be the prevailing first principle. This allows an international treaty to be flexible and responsive to changing social conditions and prevailing child welfare philosophy.

For example:

- It is now agreed that ICA is a better option than institutionalization (which was not true in 1986).

- The Social Service system of “Concurrent Planning” is now a part of many State’s placement policies for children, whereas it was just beginning to be practiced in 1993.

4. Does Guatemala have competent, public authorities handling the determination that the child is eligible for an intercountry adoption and ensuring that birth parents are counseled? (Convention, Articles 4 and 5). The Convention requires that competent authorities (i.e., public bodies) determine that the child is eligible for intercountry adoption and that birth parents are counseled. Public authorities must also determine that the adoption is in the child’s best interest. As described by the Department of State in its notice dated May 17, 2006, currently in Guatemala, private, for-profit adoption service providers match children with prospective adoptive parents before any government authority reviews the child’s eligibility. The current Guatemalan system contains no requirement of counseling for birth mothers.

Bill 3635 addresses and corrects this problem directly. The birthparent must be counseled by a professional social worker and psychologist who can inform them of their options, the impact of their decision to place for adoption and evaluate their mental capacity to understand the decision they are making.^{xiii} Thereafter, they issue a report on their findings and with respect to the child they document: (a) Information concerning the identity of the child, his/her adoptability, his/her social means, his/her personal and family evolution, his/her medical history and that of his/her family, if they were known, as well as particular needs; (b) Indication that they have taken an account of the educational conditions of the child, as well as his/her ethnic, religious and cultural origin; (c) Indication that they have obtained the foreseen consents in articles 41 and 42. After the birthparents undergo that counseling, they must present themselves directly to the Institute to give their consent and ratify their decision before a judge.^{xiv} (article 42) The judge will then determine whether the child is adoptable. Based upon the results of that judicial determination, the Institute can issue a certificate of adoptability.^{xv} It is also worth mentioning that the consent can only be given after the child is born.^{xvi}

This procedure follows precisely what the Hague requires in Article IV,^{xvii} and, indeed, is equally or more restrictive than the system enacted here in the United States for emigration cases. Specifically, a U.S. birthmother must receive counseling on the impact of the consent and be informed of the ensuing termination of her parental rights, consents must be in writing, comply with state law, be given freely and without financial inducement, and be executed after birth. Hague Regulation 96.55(c). The agency must also perform a child background study on the child and make findings on the child’s adoptability, background, social environment, family history, medical history, and special needs, if any. Thereafter, the accredited agency seeks a court order confirming the child’s eligibility for adoption and other requirements, and thereafter transmits all of this information to the U.S. Central authority, Hague Regulation 96.55(c) to seek a Hague Adoption Certificate or a Hague Custody Declaration. Hague Regulation 97.2. The U.S. Hague Emigration Regulations create a praiseworthy system that accommodates all of the requirements of the Hague Treaty, the internal laws of the country, while balancing the benefits afforded by the private sector with public oversight. Ultimately, the child background study and the Hague standards must be verified by a U.S. judge who determines that the child is adoptable.^{xviii} Like the system in the United States, a birthparent that wishes to place a child for adoption may make this choice, provided that she is free of coercion. Both the proposed

Guatemalan adoption system and the U.S. emigration system permit her to make an adoption plan within a Hague framework.

5. Does Guatemala prohibit improper payments and regulate permissible fees in the adoption process and enforce both? (Convention, Article 32). The Convention prohibits any improper financial or other gain in an intercountry adoption and allows adoption service providers to charge only costs and expenses, including reasonable professional fees. Bill 3635 proposes to address this requirement. Specifically, the bill provides that the payments that are made for an adoption will be subject to the following dispositions: (a) Nobody can obtain inadequate material benefits, as a consequence of an intervention relating to an international adoption; (b) They will only be able to reclaim and pay costs and spending, including the reasonable professional fees of the people that are involved in the adoption; (c) The directors, administrators and employees of organisms that are involved in the adoption cannot receive disproportioned remunerations in relation to the services provided.^{xix}

Fees paid to service providers, including all of those with whom the birthmothers have contact, must be done in accordance with a contract for services with an accredited body that is subject to the limit of reasonableness for professional fees.^{xx} Specifically, all people who provide services for an accredited entity must operate under a contract with that entity. Fees to be paid to intermediaries can only be reasonable professional fees.

This issue of “agents” was addressed in the Guide to Good Practices, where it described “agents” as follows: “generally, these agents are not official employees of the service provider, and are often residents of the areas in which they work.” This suggests that if the intermediaries were either employees of the accredited entity or operating under a contract to that entity, and paid a reasonable professional fee for service, this should be acceptable. Certainly this model is acceptable here in the U.S. with birthmother counselors, and is utilized for domestic and emigration/international cases.

The proposed bill # 3635 proposes that the INFA (Central Authority) have an office for Women in Conflict with their Pregnancy, which would delineate standards of services and regulations to accredit entities to provide these services: prenatal services, including housing, nutrition, medical care and safe delivery services; and postnatal services, including access to the Central Authority, assistance in family planning, education and training to support family integration.

6. Does Guatemala have a system to accredit adoption service providers? (Convention Article 22(1))

If a Hague Convention country permits non-public entities to perform the Central Authority functions in

Articles 15 to 21 of the Convention, such as providing adoption services, those non-public providers must be accredited. Guatemala does not currently have a system for accrediting adoption service providers.

However, bill # 3635 does provide for an Office of Accreditation in the Central Authority. Regulations to accredit adoption service providers will be established and monitored by that office. Funding for accreditation will be paid by those applying for it.

Furthermore, Bill # 3635 also provides for an Office for Supervision and Complaints. The law provides an explanation of the scope of this office's responsibilities, which gives almost immediate and systematic redress of many grievances now unable to be addressed, with clear consequences for ethical or legal abuses, as well as regulatory abuses.

ⁱ An average of 52 Guatemalan children under 5 die each year for every 1000 live births, compared to 16/1000 in Costa Rica, 34/1000 in El Salvador, 44/1000 in Honduras, 48/1000 in Nicaragua and 8/1000 in the U.S.

ⁱⁱ One advocate of the Guatemalan adoption system has been Professor Elizabeth Bartholet. Elizabeth Bartholet is the Morris Wasserstein Public Interest Professor of Law at Harvard Law School, and Faculty Director of the Child Advocacy Program (CAP) which she founded in the fall of 2004. She teaches civil rights and family law, specializing in child welfare, adoption and reproductive technology. Before joining the Harvard Faculty, she was engaged in civil rights and public interest work, first with the NAACP Legal Defense Fund, and later as founder and director of the Legal Action Center, a non-profit organization in New York City focused on criminal justice and substance abuse issues. Bartholet graduated *cum laude* from Radcliffe College in 1962, and *magna cum laude* from Harvard Law School in 1965. Professor Bartholet's publications include: *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (Beacon Press, 1999); *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* (Beacon Press, 1999); "Where Do Black Children Belong? The Politics of Race Matching in Adoption," 139 Penn L. Rev. 1163 (1991); "Beyond Biology: The Politics of Adoption & Reproduction," 2 Duke J. Gender L. & Pol'y 5 (Spring 1995); and "Application of Title VII to Jobs in High Places," 95 Harv. L. Rev. 945 (1982). Professor Bartholet has won several awards for her writing and her related advocacy work in the area of adoption and child welfare. Other awards include a "Media Achievement Award" in 1994 and the Radcliffe College Humane Recognition Award in 1997.

ⁱⁱⁱ Article IV provides as follows: An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –a) have established that the child is adoptable; b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests; c) have ensured that (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and(4) the consent of the mother, where required, has been given only after the birth of the child; and d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,(2) consideration has been given to the child's wishes and opinions, (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and (4) such consent has not been induced by payment or compensation of any kind.

^{iv} See Hague Article 6 – 3635 **Article 6.-Designation of Central Authority. Institute of the Child and Adoptive Family**, that which functions as an autonomous entity, decentralized, of public right, with judicial personality, whose finality is to give fulfillment to the established functions for the Central Authority by the *Convention for the Protection of the Child and the collaboration of material of International adoption*, which is denominated "**Institute of the Child and Adoptive Family**" and for the effects of this law, are also denominated "**The Institute**" or by the initials "**INFA**", and will have its residence in Guatemala City, and establishing offices in all of the departments of the Republic. For the effects of the verification of the adequate fulfillment of the international legislation and the formulation of political accords, it will be supervised by the three organisms of the State, in the manner listed in

what is referred to in the annual report of this institute; **Article 7.-Organization.** The sectors of the Institute are: (a) The Board of Directors; (b) The Management; and, (c) The directors of each department; **Article 8.-Attributes of the Board of Directors.** The Board of Directors is the supreme authority of the Institute and, consequently, the general direction of the activities corresponds to it; **Article 9.-Integration of the Board of Directors.** The members of the Board of Directors will hold their position for a period of seven years, and the same should be integrated by seven official members and seven substitutes, designated in the following way: (a) One official and one substitute for the Secretary of Social Wellbeing of the Presidency of the Republic; (b) One official and one substitute for the Attorney General of the Nation; (c) One official and one substitute for the Judicial Organism; (d) One official and one substitute for the School of Lawyers and Notaries of Guatemala; (e) One official and one substitute for the School of Physicians and Surgeons of Guatemala; (f) One official and one substitute for the Attorney General of Human Rights; **Article 10.-Requirements to become a member of the Board of Directors.-** To become a member of the Board of Directors for the Institute of the Child and the Adoptive Family requires: (a) To be a natural Guatemalan, older than 35 years of age, of the secular state and an exercising citizen; (b) To have an academic grade of Licensed or its equivalent, given by a University in Guatemala; (c) Possess honorability and independence of recognized criteria; (d) To have at least 8 years of professional graduation; (e) In equality of conditions, will give preference to those who are adoptive fathers or mothers. **Article 23.-Directors of the departments of the Institute of the Child and Adoptive Family.** The directors will fulfill the following requirements: (a) Be a natural Guatemalan, of the secular state and exercising citizen; (b) Have an academic grade of Licensed, given by a university in Guatemala; (c) Possess honorability and independence of recognized criteria; (d) Have at least 15 years of professional graduation; (e) In equal conditions, will give preference to who are adoptive

^v **Article 21.-Functions of the Institute of the Child and Adoptive Family.** The Institute of the Child and Adoptive Family will have in their charge the following functions, which will be controlled by the corresponding department: a) provide information about the legislation of Guatemala in the material of adoption and other general information, such as statistics and forms in Spanish and in English; b) Share information with other Central Authorities concerning the norms that regulate the international adoption in Guatemala and in the measure possible, reduce obstacles for the application of the norms that are facilitated; c) Take appropriate actions to prevent inadequate material benefits in relation to an adoption, understanding themselves as such, bribing, corruption and the illegal extortion; d) Receive, be it by themselves or through accrediting organisms, the applications of parents that wish to give their children in adoption and promote the counsel and orientation in the material of adoption, as with children older than 12 years of age, when he/she is given in adoption; e) Receive the applications of Directors and or legal Representatives of the Public and Private children's homes, that would have within their population, boys and girls who judicially have declared that their rights have been violated, for the placement of families that can adopt him/her; f) Supervise the recollection of samples for the practice of the DNA test between mothers and children and bring a control of the results in coordination with the central authorities of other countries through their diplomatic representation; g) Receive personally or through accredited organisms, the applications of people residing outside of the country that wish to adopt one or more Guatemalan children ;h) Accredite the organisms that are involved in the process of adoption, according to their special professional preparation, as well as entities of social assistance and particular individuals that give assistance to mothers in conflict with their pregnancy and to the parents of children at risk of abandonment and those particular individuals or legal representatives that temporarily care for those children, while a permanent family is found for them through the process of adoption; i) Respond to the applications of information motivated by particular situations of an adoption, formulated by other central authorities, by public authorities or by accredited organisms; j) Extend the certificate of adoptability of the boys, girls and adolescents whose biological parents have given their consent for the adoption and have fulfilled the necessary requirements to declare them adoptable; k) Extend the certificate of adoptability of the boys, girls and adolescents whose rights have been violated according to a JUDICIAL DECLARATION, in those cases that exists the corresponding application by the Director of the Children's Home or Public or Private Orphanage, after having met the requirements that the current law establishes or the rules of the Institute; l) Approve and send the report of the child who will be adopted to the central authority of the country of habitual residence of the adoptive parents; m) Conduct investigations in the case of complaints in the process of adoption, to assure that

the they are being followed conforming to the highest standards of professional ethics, and at the same time, provide the parents of the child as well as those adopting him/her, the mechanisms so that they can express the complaints that they have against the individuals or institutions that are involved in the process, with the goal of resolving the problems that present themselves and to assist so that the adoption can be finalized without obstacles; n) Establish the necessary controls concerning the personnel of the Institute of the Child and the Adoptive Family, to prevent inadequate material benefits in relation to the adoption and to impede every practice that is contrary to the objectives to the current law.

^{vi} **Bill 3635 Article 22.-Departments of the Institute of the Child and Adoptive Family.** The Institute will be organized by departments, which will be the following: (a) Department of orientation and certification of adoptability; (b) Department of accreditation of organisms; (c) Department of supervision of processes of adoption; (d) Department of supervision of temporary care of children in process of adoption; (e) Department of Registry of Processes of Adoption; (f) Department of treasury and finances; (g) Department of information

^{vii} **Bill 3635 Article 23.-Directors of the departments of the Institute of the Child and Adoptive Family.** The directors will fulfill the following requirements: (a) Be a natural Guatemalan, of the secular state and exercising citizen; (b) Have an academic grade of Licensed, given by a university in Guatemala; (c) Possess honorability and independence of recognized criteria; (d) Have at least 15 years of professional graduation; (e) In equal conditions, will give preference to who are adoptive fathers and mothers.

^{viii} **Bill 3635 Article 24.-Accredited Organisms.** Are entities that perform one or more of the functions related to international adoption, by delegation of the Institute of the Child and Adoptive Family, through the procedure of corresponding accreditation. **Bill 3635 Article 25.-Functions that accredited organisms can exercise:** (a) Meet, conserve, or share information relating to the situation of the child and of the future adoptive parents, in the measure necessary to be able to realize the adoption; (b) Facilitate, follow and activate the procedure of adoption; (c) Provide medical and humanitarian assistance to women in conflict with their pregnancy and parents of children at risk of abandonment or in the process of adoption; (d) Promote the development of the counseling services in material of adoption and for the follow up of the adoptions; (e) Share general reports of evaluation about the experiences in material of international adoption; (f) Give information with respect to the processes of adoption under its care, to the Central Authority and to the accredited organisms of other countries; (g) Provide temporary care to boys, girls and adolescents whose parents or caretakers have given over, as well as boys, girls or adolescents whose rights have been violated, according to a judicial declaration, while the procedures of adoption are being processed.

^{ix} **Hague Treaty Article 9** - Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to – a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption; b) facilitate, follow and expedite proceedings with a view to obtaining the adoption; c) promote the development of adoption counseling and post-adoption services in their States; d) provide each other with general evaluation reports about experience with intercountry adoption; e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

^x Hague Guide to Good Practices, 2005 (Chapter 4, subsection A (pp. 26-33)).

^{xi} **Bill 3635 Article 9.**

^{xii} See 22 CFR 97.3; 22 CFR 96.54

^{xiii} **Bill Article 38.-Evaluations.** The numbered documents received, the parents and the child will be evaluated by the following professionals, who will work with the organisms accredited by the Institute: (a) A doctor, who will relate the medical history of the parents and predecessors, will order an analysis and laboratory exams necessary to establish the state of health and will supervise the DNA tests for the corresponding analysis to the laboratories that the central authorities from the other countries would indicate through the diplomatic representations. (b) A social worker that will inform the parents of the consequences of giving their consent, in virtue of the adoption, of the rupture of the judicial links between the child and his family of origin when it relates to adoptions of children older than ten years of age, these will also be heard and will be counseled and informed of the consequences of the adoption and will accept the opinion with respect to this; the social worker will give his/her opinion in regards to the socio-economic of the parents and their motivations for giving their child in adoption. (c) A psychologist to establish that the decision to give their child in adoption is a decision free of pressure and that the parents have the mental capacity to make a decision and they have made the decision free of pressure and voluntarily. **Bill 3635**

Article 39.-Reports of the Evaluations.-In the report that is provided by each one of the professionals mentioned, will be inserted a frontal photograph and in color, of the parents as well as the child and will give copies of the documents that accredit the identity of the parents in the birth certificate of the child and the results of the evaluations will be sent to the accredited organism to provide services of social assistance where they were remitted, as well as the Institute of the Child and Adoptive Family in a period of no more than five days. In the case of dealing with the boys, girls or adolescents whose rights have been violated, according to a judicial declaration, the report will be turned to the boy, girl or adolescent, only and the DNA exam will not be necessary.

^{xiv} **Bill 3635 Article 41.-Consent for the Adoption.** After the physical, psychological and socio-economic evaluations, the parents that wish to give their child in adoption will present themselves to the Institute of the Child and Adoptive Family, to give their consent for the adoption of their child in the department of Orientation of the Institute. In the case of dealing with the boys, girls or adolescents whose rights have been violated according to a judicial declaration, the consent will be given by the Director or Legal Representative of the Temporary Children's Home where he/she is found. **Bill 3635 Article 42.-Rafication before the Judge.**-When the child has been assigned to an adoptive family, his/her parents or director of the Children's Home will ratify their consent before the corresponding Family Judge, manifesting in an expressed, irrevocable and written way, their consent for the adoption. The judge, within the next three days, will dictate a resolution declaring the child in question, in a condition of adoptability.

^{xv} **Bill 3635 Article 43.-Certificate of Adoptability.**-Upon being notified of the judicial resolution that declares the adoptability of the child, the Institute of the Child and Adoptive Family will issue a certification that will state: (a) That the parents of the minor in question have been adequately counseled and informed of the consequences of their consent, in particular in relation to the rupture, in virtue of the adoption, of the judicial bond between the child and his/her family of origin; (b) That the parents have given their consent freely, in the form legally foreseen and that the consent has been given in writing; (c) That the consent has not been obtained through a pay or compensation of any class and that such consent has not been revoked; (d) That the consent of the parents has been given only after the birth of the child.

^{xvi} **Bill 3635 Article 43(d).**

^{xvii} **Hague Article IV** provides as follows: An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –a) have established that the child is adoptable; b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests; c) have ensured that(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and(4) the consent of the mother, where required, has been given only after the birth of the child; and d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counseled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,(2) consideration has been given to the child's wishes and opinions, (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and (4) such consent has not been induced by payment or compensation of any kind.

^{xviii} See 22 CFR 96.53, 54; 22 CFR 97.

^{xix} **Bill 3635 Article 59.-The spending, costs and professional fees.**

^{xx} **Bill 3635 Article 60.-Fees to people related with the adoption process.**-The people who provide services related to the adoption processes will celebrate a contract of services with the accrediting organism that requires its services and its remuneration will be made according to the norms of article 59 of this law.