

# Agreements and other arrangements between States

Fact Sheet No 4 for the 2015 Special Commission meeting

For discussion on Thursday 11 June 2015

## AGREEMENTS AND OTHER ARRANGEMENTS BETWEEN CONTRACTING STATES

### Background

A number of Contracting States to the 1993 Hague Intercountry Adoption Convention (“1993 HC”) have concluded bilateral agreements,<sup>1</sup> memoranda of understanding,<sup>2</sup> or other arrangements<sup>3</sup> between them in relation to intercountry adoption. Some States also report being party to agreements on intercountry adoption matters on a regional basis.<sup>4</sup>

Although there is no obligation under the 1993 HC to enter into such agreements and arrangements,<sup>5</sup> for practical reasons some States require that a formal or informal procedure be established with another State before intercountry adoptions can proceed between them<sup>6</sup> because the 1993 HC provides only a basic framework for co-operation.

It is important to differentiate between agreements under Article 39(2) of the 1993 HC (“Article 39(2) agreements”) concluded between Contracting States and other types of arrangements concluded between them.

Some States have raised questions about the advantages and disadvantages of Article 39(2) agreements in particular, questioning the need for them and noting their potential risks.<sup>7</sup>

Therefore, this Fact Sheet tries to clarify some issues and propose some ways forward.

### What are the objectives?



Ensure that agreements and other arrangements between Contracting States improve the application of the Convention in their mutual relationships



Achieve consistent notifications to the depositary by States of any agreements concluded under Article 39(2) of the Convention

### Key rules and requirements in relation to agreements set out in the 1993 HC include:

- ❖ The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument (Art. 39(1)).
- ❖ Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations (Art. 39(2)).
- ❖ Such agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21 (Art. 39(2)).
- ❖ The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention (Art. 39(2)).
- ❖ Any Contracting State may declare to the depositary of the Convention that it will not be bound to recognise adoptions made in accordance with an agreement concluded by application of Article 39(2) (Art. 25).

## Article 39(2) agreements

Agreements under Article 39(2) of the 1993 HC should improve the application of the Convention as between the relevant Contracting States.<sup>8</sup> Such agreements may derogate only from specific articles of the 1993 HC (see green box above).<sup>9</sup>

States which have concluded agreements in accordance with Article 39(2) are required to transmit a copy to the depositary of the 1993 HC.<sup>10</sup>

Any Contracting State may declare to the depositary that it will not be bound to recognise adoptions made in accordance with an agreement concluded under Article 39(2).<sup>11</sup>

It is not clear how widely Article 39(2) agreements are being used. A recent study indicates that their usage may not be as widespread as had been thought.<sup>12</sup> To date the depositary has received no copies of such agreements.

## Other understandings or arrangements

Although Article 39(2) refers only to agreements, States report the conclusion as well of other understandings or arrangements relating to intercountry adoption.

Some working arrangements may be established with a minimum of formality.<sup>13</sup> They must respect the provisions of the 1993 HC but they would generally not be subject to the reporting requirement in Article 39(2), and thus declarations made under Article 25 would not apply to them.

## Article 39(2) agreements and other arrangements

### Content and functions

At this time, it is not clear how the content of Article 39(2) agreements and other more informal arrangements may differ. Further studies on this may be needed.

Article 39(2) agreements or less formal arrangements can serve various functions, *e.g.*:

- Establish procedures for the transmission of files between the two States concerned.<sup>14</sup>
- Specify the responsibilities of particular organisations or bodies in each State.<sup>15</sup>
- Specify the types of documents that must accompany an application to adopt.<sup>16</sup>

- Limit the number of foreign accredited bodies operating in States of origin.<sup>17</sup>
- Regulate post-adoption reporting.<sup>18</sup>

### Benefits

Benefits of Article 39(2) agreements and other arrangements include:

- They provide an opportunity to address issues that are not covered in detail by the Convention.<sup>19</sup>
- They can promote transparency of internal procedures.<sup>20</sup>
- They can help to clarify and streamline the intercountry adoption process, and to reinforce the child's rights.<sup>21</sup>

### Risks

Some of the general risks associated with Article 39(2) agreements and other arrangements are:

- ☐ They might supplant rather than supplement the Convention.<sup>22</sup>
- ☐ They might not always be consistent with the Convention.<sup>23</sup>
- ☐ They may solidify a partnership between States such that intercountry adoption may be expected even if it is not necessary.<sup>24</sup>

Some of the specific risks associated with Article 39(2) agreements are:

- ☐ Article 39(2) agreements are allowed to derogate from the provisions of Articles 14 to 16 and 18 to 21 of the 1993 HC (Art. 39(2)). This may carry the risk that not all safeguards of the 1993 HC will be applied to intercountry adoptions undertaken under such agreements.
- ☐ Contracting States may declare to the depositary that they will not be bound to recognise intercountry adoptions made in accordance with an agreement concluded in accordance with Article 39(2) (Art. 25). Therefore, intercountry adoptions done under Article 39(2) agreements would not benefit from automatic recognition in all States Parties to the Convention.

## Ideas for the way forward

### Clarifying what is an Article 39(2) agreement

#### WAY FORWARD:

- ✓ The Special Commission may wish to discuss whether clear guidance can be developed to assist Contracting States in differentiating between Article 39(2) agreements and other arrangements that do not rise to that level. It is important to clarify whether Article 39(2) applies or not in a given case (*i.e.*, whether notification of the depositary is required, and whether other States may decline to recognise adoptions made under the instrument).
- ✓ Whether an instrument creates binding obligations might be one factor to consider.

### Respecting the limits of Article 39(2) agreements between Contracting States

#### WAY FORWARD:

- ✓ Agreements concluded under Article 39(2) should improve the application of the 1993 HC.
- ✓ Such agreements must respect the “basic procedural requirements of the Convention”,<sup>25</sup> and the “fundamental rules of this Convention shall not be affected” by such instruments.<sup>26</sup>

### Reporting of Article 39(2) agreements

#### WAY FORWARD:

- ✓ States should comply with the requirement to transmit to the depositary a copy of all Article 39(2) agreements between Contracting States.

## Background

A number of Contracting States reported that they have concluded, or had concluded in the past, bilateral agreements with non-Contracting States of origin,<sup>27</sup> in which they seek to apply and enforce the standards of the 1993 HC.<sup>28</sup>

## The main risks

While efforts to apply the 1993 HC’s standards to these adoptions are to be encouraged, there is some evidence that the 1993 HC’s safeguards have not been properly incorporated into some of these bilateral agreements in the past.<sup>29</sup>

Moreover, there is a risk that such bilateral agreements:<sup>30</sup>

- ☐ could have the negative effect of reducing the incentive for the non-Contracting State to join the 1993 HC;
- ☐ might be tailored to fit non-Hague systems without appropriate safeguards; and / or
- ☐ might not be comprehensive or detailed enough to cover the necessary requirements.

A recent study concludes that the disadvantages of such agreements outweigh the advantages, and that such agreements should be considered only if there are very strong reasons to do so in a particular case.<sup>31</sup>

## Ideas for the way forward

- ✓ Previous Special Commissions have repeatedly said that in their relations with non-Contracting States, Contracting States should apply, as far as practicable, the standards and safeguards of the Convention.<sup>32</sup>
- ✓ Contracting States should encourage their non-Contracting State partners to work toward joining the Convention.

## AGREEMENTS WITH NON-CONTRACTING STATES

## Questions for participants to consider in preparation for the Special Commission meeting

In light of the above, participants are kindly requested to consider the following questions for discussion during the Special Commission meeting:

### Possible questions

- Has your State entered into agreements under Article 39(2)? If so, what is the content of these agreements and how do they improve the operation of the 1993 HC?
- Does your State have other arrangements with other Contracting States on intercountry adoption matters? If so, how do they improve the operation of the Convention?
- Does your State have bilateral agreements or other arrangements with non-Contracting States? If so, do they incorporate the standards and safeguards of the Convention?

### Further Reading

*All documents mentioned below are available on the Hague Conference website < [www.hcch.net](http://www.hcch.net) > in the specialised "Intercountry Adoption Section".*

- Guide to Good Practice No 1, Chapters 7 and 8
- Responses of States to the 2014 Country Profiles, Parts II and XIII
- Previous Special Commission "Conclusions and Recommendations" from 2000 (No 11), 2005 (No 19) and 2010 (Nos 36 and 37)
- Explanatory Report on the 1993 Convention, paragraphs 557-577

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<sup>1</sup> 2014 Country Profile for States of origin (“2014 CP SO”), Question 3: Latvia, Philippines, and Viet Nam; 2014 Country Profile for receiving States (“2014 CP RS”), Question 3: Australia, Denmark, France, Germany, Luxembourg, Slovenia, Sweden, Switzerland and United Kingdom (Scotland).

<sup>2</sup> 2014 CP SO, Question 3: Lesotho and Viet Nam; 2014 CP RS, Question 3: Ireland, Luxembourg, Monaco and Netherlands.

<sup>3</sup> 2014 CP SO, Question 3: Haiti; 2014 CP RS, Question 3: Australia.

<sup>4</sup> 2014 CP SO: Moldova; 2014 CP RS: Germany.

<sup>5</sup> Report of the 2005 Special Commission on the Practical Operation of the 1993 Hague Convention, para. 126; see also Guide to Good Practice No 1, “The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention”, 2008, (“Guide to Good Practice No 1”), Chapter 8.2.2, para. 452.

<sup>6</sup> *Ibid.* States that require a bilateral agreement or memorandum of understanding/agreement include: Burkina Faso, Guatemala, Latvia, Panama (with non-Contracting States), Philippines, Slovakia and Viet Nam (2014 CP SO, Question 40 d)); Luxembourg (2014 CP RS, Question 36 d)).

<sup>7</sup> Questionnaire No 1, Prel. Doc. No 1 of July 2014 (“Q1”), Question 10 (b): Denmark, Norway and Sweden, Question 18 (c): Sweden.

<sup>8</sup> Art. 39(2) of the 1993 Hague Convention.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Art. 25 of the 1993 Hague Convention. 18 States have made Art. 25 declarations: Armenia, Australia, Azerbaijan, Bulgaria, Canada, China, Croatia, Denmark, France, Greece, Italy, Liechtenstein, Luxembourg, Montenegro, Panama, Switzerland, United Kingdom, and Venezuela.

<sup>12</sup> Myndigheten för internationella adoptionsfrågor (MIA, the Swedish Central Authority), “Commission Concerning Bilateral Agreements on Intercountry Adoption – Report to the Government”, 2015 (hereinafter “Swedish Report”), pp. 17-22.

<sup>13</sup> Guide to Good Practice No 1, *supra*, note 5, Chapter 8.2.2, para. 452.

<sup>14</sup> *Ibid.*, Chapter 7.2.6, para. 365.

<sup>15</sup> *Ibid.*, Chapter 8.2.2, para. 452.

<sup>16</sup> *Ibid.*

<sup>17</sup> Swedish Report, *supra*, note 12, p. 23.

<sup>18</sup> *Ibid.*

<sup>19</sup> Report of the 2010 Special Commission on the Practical Operation of the 1993 Hague Convention (“2010 Special Commission Report”), para. 73.

<sup>20</sup> *Ibid.*

<sup>21</sup> Swedish Report, *supra*, note 12, p. 27.

<sup>22</sup> Report of the 2000 Special Commission on the Practical Operation of the 1993 Hague Convention, para. 105.

<sup>23</sup> 2010 Special Commission Report, *supra*, note 19, para. 73.

<sup>24</sup> Swedish Report, *supra*, note 12, p. 29.

<sup>25</sup> Guide to Good Practice No 1, *supra*, note 5, Chapter 8.1.1, para. 443.

<sup>26</sup> G. Parra-Aranguren, Explanatory Report on the 1993 Hague Intercountry Adoption Convention, in Hague Conference on Private International Law, Proceedings of the Seventeenth Session (1994), tome II, Adoption - co-operation, The Hague, SDU, 1994, pp. 539 to 651, para. 573.

<sup>27</sup> 2014 CP RS, Question 3: Australia, Denmark, France, Slovenia, and Switzerland; for an in-depth discussion of bilateral agreements concluded with Vietnam, see N. Cantwell, *The Best Interests of the Child in Intercountry Adoption*, Innocenti Insight, Unicef, Florence, 2013, p. 44-45 (hereinafter “Unicef Report”).

<sup>28</sup> Q1, Question 6: Australia, Latvia and Slovenia. Question 9: Italy (EurAdopt), Question 18 (a): Spain.

<sup>29</sup> *E.g.*, see the discussion in ISS, *Adoption from Viet Nam: Findings and recommendations of an assessment*, 2009, p.39 concerning the bilateral agreements several receiving States signed with Viet Nam in 2004 / 05. Upon later inspection by ISS, it was found that those agreements did not address key aspects of the 1993 Hague Convention safeguards.

<sup>30</sup> UNICEF Report, *supra*, note 27, p. 44.

<sup>31</sup> Swedish Report, *supra*, note 12, p. 3.

<sup>32</sup> Conclusions and Recommendations of the following meetings of the Special Commission: 2000 (Recommendation No 11), 2005 (Recommendation No 19) and 2010 (Recommendations No 36 and 37).