



## **INTERNATIONAL CENTER FOR CIVIL SOCIETY LAW**

### **Comments of the International Center for Civil Society Law (ICCSL) on**

### **Draft Law on Non-profit Legal Entities for Mongolia**

**June 2005**

**Introduction.** The International Center for Civil Society Law (ICCSL) is pleased to have been invited to make comments on the proposed law for “Non-profit Legal Entities” for Mongolia, as requested by the Working Group (WG) headed by M. Turbayar of the Ministry of Justice. These comments have been prepared by Dr. Leon Irish with instrumental assistance from Prof. Karla Simon.

ICCSL was founded by Dr. Leon Irish and Prof. Karla Simon in 2003 to continue work they had initiated with their founding of the International Center for Not-for-Profit Law (ICNL) in 1992. Having left the management of ICNL in 2003 in order to widen the scope of their activities to include all aspects of civil society law, Dr. Irish and Prof. Simon are working on ICCSL technical assistance projects<sup>1</sup> principally in Asia and Africa

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<sup>1</sup> ICCSL has been working since 2003 on projects in the following countries: Bangladesh, Cambodia, China, East Timor, Ethiopia, Ghana, Japan, South Africa, South Korea, Viet Nam, and Zimbabwe. Dr. Irish and Prof. Simon have each worked on laws for civil society in over 40 countries, including Mongolia. Dr. Irish was the principal lawyer for the World Bank’s Social Sector Privatization Project in Mongolia in 1997-1998, and he and Prof. Simon

ICCSL's other principal activity consists of research and publication. ICCSL publishes the quarterly INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW (IJCSL) and the monthly IJCSL-NEWSLETTER. These are unique publications in terms of their scope and editorial development. They are available on the ICCSL website at [www.iccsl.org](http://www.iccsl.org) (currently down for repairs) and the Catholic University of America website at [www.law.cua.edu/students/orgs/IJCSL/](http://www.law.cua.edu/students/orgs/IJCSL/). Plans exist to bring IJCSL into hard copy publication during this calendar year. ICCSL also publishes other papers and reports.

In light of the breadth and depth of their experience in this field since the early 1990's, Prof. Simon and Dr. Irish are known as leading international experts in the field. They are also the co-authors, with Robert Kushen of the Open Society Institute (OSI) of the OSI GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS, which is available at [http://www.soros.org/resources/articles\\_publications/publications/lawguide\\_20040215](http://www.soros.org/resources/articles_publications/publications/lawguide_20040215). This document was translated into Mongolian this year at the request of the WG.

**General Comments.** The draft law submitted to ICCSL for comments is very comprehensive, which is both a virtue and a problem. It seeks to include and clarify virtually all issues relevant to the legal regulation of not-for-profit organizations (NPOs) in Mongolia. This is good in some ways, because it does provide needed clarification of relevant issues and brings all the basic laws regulating NPOs, with the exception of tax laws, into one document.

As written, however, the draft law includes more than it perhaps should from two legal standpoints –

- It includes provisions that should probably be in other laws, such as the tax laws, the freedom of information legislation, and the administrative law; and
- It provides too much detail on some issues, such as internal governance, thus taking away too much flexibility for organizations to adopt procedures suitable to their needs and imposing unrealistic demands on smaller organizations. In addition, it might be better to provide much of the material in the draft law in regulations, forms, or guidelines issued either by the Registrar of Legal Entities or the Council to Support Public Benefit Activities. These forms of guidance are much easier to supplement or modify in light of experience.

Further, as a general drafting matter, we would urge that the WG consider the following:

1. One of the challenges in drafting an "omnibus law" such as this, which provides rules for both associations and foundations as well as special provisions for public benefit organizations (PBOs), is that such a law is inevitably long and complex. It would help any reader, and assure consistency throughout the law, if it provided definitions of all special terms up-front, alphabetically, including, for example, the definition of public benefit activities, which is found in Chapter 5, the definition of "Governing Board," etc.
2. Provide better internal cross-referencing.
3. Provide for the involvement of the State Attorney General in litigation involving NPOs, especially grievances of "interested persons." See for example, the Revised Model Nonprofit Corporation Act § 1.70 (1987), [http://www.muridae.com/nporegulation/documents/model\\_npo\\_corp\\_act.html#1.70](http://www.muridae.com/nporegulation/documents/model_npo_corp_act.html#1.70).<sup>2</sup> This will reduce the possibility of frivolous litigation.
4. Provide in separate legislation for better tax rules (ICCSL has already been asked by the Tax Working Group to provide assistance in this regard).
5. Provide special rules for small organizations, exempting them from many of the more burdensome provisions of the law.

In the following sections we address specific issues article by article in the existing draft. The comments are generally in the form of suggestions or questions for the Working Group. We would be happy to engage with the

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<sup>2</sup> "Section 1.70. Attorney General.

(a) The attorney general shall be given notice of the commencement of any proceeding that this Act authorizes the attorney general to bring but that has been commenced by another person.

(b) Whenever any provision of this Act requires that notice be given to the attorney general before or after commencing a proceeding or permits the attorney general to commence a proceeding:

(1) if no proceeding has been commenced, the attorney general may take appropriate action including, but not limited to, seeking injunctive relief.

(2) if a proceeding has been commenced by a person other than the attorney general, the attorney general, as of right, may intervene in such proceeding."

WG further in developing answers to these questions or a modified draft, and we would also be prepared to provide examples of language from other laws or model laws, in this regard.

### **Specific Comments.**

**Preamble?** It is customary in the common law for legislation to have a preamble stating the basic purposes of the law, but it is uncommon to have such a preamble in the civil law. A preamble can provide useful guidance to administrators, judges, and citizens in determining how to interpret and apply a law. The civil law reluctance to include a preamble is braking down. Attached as EXHIBIT L are examples of preambles from the Hungarian Law on Public Benefit Organizations and a draft Foundations Law for Indonesia. Consider adopting a preamble for this law.

#### **Article 2 -**

**Section 2.2 --** Consider omitting this provision. There is a general doctrine of law in Mongolia that determines the relationship of all provisions in legislation that are inconsistent with international law or treaties to which Mongolia is a state-party. That doctrine, which probably makes international law and treaties superior, at least if the latter are self-executing, does not have to be stated here, and trying to state or summarize it here may result in a rule that is inconsistent with the general doctrine.

#### **Article 3 -**

**Section 3.1 -** As worded, this provision would be possible to establish a nonprofit organization that does not have the form and structure stipulated in this law and escape its provisions. You probably want this law to apply to any foundation or association, by whatever name described, that is established or operating in Mongolia, whether or not it has been formed consistent with this law and whether or not it has the form or structure provided for in this law. That way all nonprofits can be held to the requirements and standards of this law.

**Section 3.2 -** Consider simplifying this provision by stating merely that this law does not apply to political parties, trade associations, etc. In addition, why should trade associations be exempted? Is there adequate legislation that does apply to them?

**Section 3.3 --** Consider adding the following phrase at the end: "to the extent not inconsistent."

#### **Article 4 -**

**Section 4.1.2 --** Consider adding that there also may be no liquidating distributions from PBOs to private shareholders or individuals per Art 24.

Attached as EXHIBIT K is a provision I recently drafted for another nonprofit law.

**Section 4.5** – Consider replacing “benefit of the public” with “public benefit activities as defined in Article 59.” Find a place, here or elsewhere, to clarify that an organization can be a PBO so long as it operates for the benefit of a significant portion of the public; it need not benefit the entire public.

**Section 4.7** – An important issue is whether to limit PBO status to those organizations that “exclusively” engage in public benefit activities (PBAs).<sup>3</sup> In our experience, it is desirable to do so, principally because regulation of organizations that only partially engage in PBAs creates regulatory difficulties and complexities. If you decide to require that PBOs be devoted exclusively to PBA, it should also be stated or understood that non-PBA activities may be engaged in but only to an insignificant extent. It would be good to provide a cross-reference too definition of PBA in Art 59.

**Section 4.8** – To be sure that you catch all non-PBOs, including those that may be providing public benefits other than those listed in Article 59 and which do not serve the mutual interests of a particular group, consider defining all associations that are not PBOs as being “others” or “non-PBOs.”

**Section 4.9** – Why are foundations required to be PBOs? This is inconsistent with the German civil code tradition (which is the prevalent tradition in Asia); the German law permits both public benefit and private benefit foundations. Although there are other countries, (e.g., Poland) that do require foundations to be PBOs, it is extremely useful to have a nonprofit organizational form that does not have to be a PBO but the highest governing body of which is a board of directors. A principal reason is that when an association becomes large, governance by members becomes difficult, cumbersome, and sometimes virtually impossible.

**Section 4.10** – Consider limiting this provision to PBOs.

#### **Article 5** –

**Section 5.1.1** – Must the legal entity founder be resident in Mongolia or may it operate through a branch in Mongolia? For example, you would probably want to permit the Ford Foundation or the General Electric Corporation to be able to set up a foundation in Mongolia even though they are not resident there. In addition, consider allowing units of the government to set up

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<sup>3</sup> For example, Section 510(c)(3) of the Internal Revenue Code of the U.S. restricts public charities to those that: “[are] organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, . . . . (Emphasis added.)

nonprofit entities. For example, it might be useful if the police departments in all 19 Aimags could form an association to educate members, share experiences, and advocate for their interest. Cf. Section 38.4.

## **Article 6**

**Section 6.1** – Are NPO radio and television stations contemplated?

**Sections 6.2 & 6.3** – If governmental units are not legal entities, consider adding a prohibition on using the names of the State, ministries, etc. (E.g., the “Ministry of Justice Foundation.”) Section 6.3 could be eliminated if you took the phrase at the end of it – “without their approval” – and added it to the end of section 6.2. In addition, consider requiring every foundation to use “Foundation” in its name and every association to use “Association.”

## **Article 8**

**Section 8.1** – Consider allowing organizations to use a variety of names for their CEO. Some will like “Executive Director,” others “President,” “Managing Director,” etc. Any changes here need to be coordinated with Section 37.1

**Section 8.2** – Consider broadening this provision. Every legal entity, including each nonprofit organization, should be required to have a legal representative upon whom anyone can serve legal documents. The name and contact of this person should be made public by the organization and posted on the public register of organizations. Service on this person should constitute service on the organization, whether the organization actually receives it or not. The legal representative should be a citizen and resident of Mongolia. An officer of the organization, e.g., the Secretary, can be a legal representative.

**Section 9.5** – Since a branch or rep. office is part of the nonprofit entity, it does not seem necessary to have a separate board or a power of attorney. For example, the board of the nonprofit organization should be able to make decisions and exercise oversight over branches or rep. offices, just as it does for the main office and operations.

**Section 9.7** – The two halves of this section would be better placed in separate sections.

**Article 10** – The specificity of this may seem desirable, but when you try to list everything, there is always the risk that you will leave something out. Here there is no mention of written agreements with independent consultants, just employment contracts. Surely that does not mean that an organization cannot enter into such contracts or hire short-term employees without written agreements. Why not simply say that NPOs may engage in

all legally permitted activities to the extent that they are not inconsistent with their not-for-profit purposes?

**Sections 10.2.1, 10.2.2, 10.2.5 & 10.2.6-** There is no need to say that nonprofit organizations must comply with other laws that apply to them, and there is the risk that what is said here will leave something out.

**Section 11.1 -** There should be public notice of the registration of a new nonprofit entity, just as there is of its liquidation. See Section 23.1. Will the government make the public announcement, or must the organization pay to do so?

**Article 12 --** Not necessary. It is always good practice to put into legislation only provisions that need to be there.

**Article 13 -**

**Section 13.1.1 -** What does it mean to say that the “business activity must not exceed the scope of the main activity?” This may be an infelicitous translation, but the point must be that business activities must not predominate; if they do, the entity must be required to register as a for-profit entity. Further, if you decide on the preferred approach discussed under Section 4.7 above, viz., to require that each PBO engage exclusively in public benefit activities, then the only business activities will be those that support or advance the PBO purposes of the organization, though they could be the predominate activity. As to non-PBOs, they should be allowed to engage in business activities unrelated to their main purpose so long as the business activities are not the primary activity.

**Section 13.2 -** It is cumbersome and unnecessary to require that each type of business activity be spelled out in the charter, which would have to be amended each time a new business is set up. It should be enough to have a general provision in the charter authorizing such business activities as the board may from time to time establish. For PBOs there should be a further provision in the charter limiting business activities to those that advance or further the purposes of the organization.

**Article 14 -** Although we know that is a civil law custom to do so, we do not understand why the income of an NPO should be defined in this law, especially when adding “other sources” at the end means that all sources are OK. If you are going to list the various sources, you should include grants or donations from international organizations, foreign or domestic donors, and other legal persons.

**Article 15 -**

**Section 15.1.1 -** Should this be clarified, as suggested in comment to 4.1.2?

**Section 15.1.3** – What does this refer to?

**Section 15.1.4** -- How about wholly owned subsidiaries? Without a guaranty from the parent it may be difficult for a new subsidiary to borrow money

**Article 16** –

**Section 16.1** – If the definition of authorized bodies (meeting of members, Governing Board, etc.) were set out up front, as part of the definitions, then this could include a cross-reference. With respect to membership organizations that are not PBOs, this seems correctly to provide that annual activities reports must only be made internally.

**Sections 16.2.3 -16.2.7** – These relate to finances and belong in Article 17.

**16.2.4 & 16.2.6** -- This would be a good place to say that the names or identities of donors do not need to be disclosed, even to members. Donor privacy is very important. Does this as drafted violate any privacy laws in Mongolia?

**Section 16.5** – This kind of transparency is desirable for PBOs, but undesirable for other nonprofit organizations. Imagine a small gardening or horse-breeding association in a rural Aimag. Such organizations, like private companies and individuals, are entitled to their privacy. Any report that they file with the government should be confidential. Further, it is probably sufficient to require PBOs to file activity and financial reports that are made available to the public. Third parties should not have the right to come and inspect the operations and activities of a PBO, although, of course, they could be invited.

**Article 17** –

**Section 17.2** – Consider eliminating the requirement to file quarterly reports, at least for all but the largest organizations. Quarterly reports are burdensome. Annual reports should generally be enough.

**Article 18** –

**Generally** – Do these provisions need to appear in this law?

**Section 18.1** – What does it mean to act “independently from the state,” especially when 18.3 calls for cooperation with the state and 18.4 allows nonprofits to participate in drafting government decisions. With respect to 18.4, consider eliminating it or at least not make participation in drafting a legal right of nonprofits. Finally, not all GONGOs are bad. The Smithsonian Museum in Washington is a good example of a nonprofit organization set up and funded by the US government (and others) which is a nonprofit of outstanding quality and integrity. Especially if good fiduciary duty and

conflict of interest rules are established. See EXHIBIT C. A GONGOs can play a useful role.

**Section 18.2** – Is this not provided for in the freedom of information law? Consider deleting this as not necessary here.

**Section 18.5** – Why are non-profits limited to expressing their views on matters concerning their main activity? Once formed a nonprofit organization has freedom of expression as stated in the International Covenant of Civil and Political Rights. For example, any nonprofit should be allowed to sign a petition even on matters not related to its main activity. Consistent with the discussion under Section 4.7 above, however, any activities other than those that advance or further the organization’s purposes can only constitute an insignificant portion of the total activities.

**Article 19** –

**Generally** – This provision is little confusing, in part because of terminology. Under Section 11.1 an organization acquires legal capacity when it is registered by the state, but here an organization is “established by adopting founding documents,” and in Section 25.4 it is “established once it has made the resolution to establish.” See also, Section 38.5. It is also confusing because there is no provision for an registered association as such. In German law, for example, associations may be informal (formed only by resolution) or they may register themselves. It would be better to clarify that foundations may register in order to become legal entities and that unless they do they are not legal entities that are entitled to limited liability and the right to sue or be sued in their own name. Informal association would nevertheless be entitled to operate in the association’s name and carry out lawful activities, though the members would be personally responsible for its contracts, debts, and delicts. Finally, the “19.1” is inessential for there is only one provision here.

**Article 21** –

**Section 21.2** – You should also prohibit reorganizing a PBO into a non-PBO.

**Section 21.3** – The “exit tax” on leaving PBO status should be provided for in the tax law and only cross-referenced here.

**Articles 22 & 23** – Why not just amend the bankruptcy law to cover nonprofits? It surely has more clearly elaborated procedures. Obviously, you could make some of them inapplicable if they would not be appropriate. And, again, there could be a cross reference here to the bankruptcy law.

**Article 24** –

**Section 24.1** – Why can a purely private association not distribute assets to its members on dissolution? The example we give in the Guidelines is a sailing club, which dissolves and distributes the sail boats and any cash remaining to

its members on dissolution (after payment of creditors). This should clearly be permitted.

**Sections 25.2.3 & 38.1.4** - These provisions might be clearer if they called for the election of officers and the members of the governing board.

**Section 25.4** - See comment with regard to Article 19 above.

**25.5** - Here or somewhere it should be said that the members may establish such conditions and limitations for membership as are not inconsistent with law.

**25.6** - There is no need to force the liquidation if the membership falls below three. Attached as EXHIBIT B is an example of the kind of provision (developed under a law requiring a minimum of 7 members) that each association could be allowed to use. The same sort of provision, of course, should be available to foundations if their board falls below the minimum number.

**Sections 26.1.2, 26.1.8, & 27.1; 31.1, 31.1.4, & 31.1.7** - A supermajority (e.g., 2/3's) should be required for these very important decisions. Also for merger or acquisitions, which should be added to the list.

**Section 26.1.5 & 30.3** - Large associations should be required to have a Supervisory Body.

**Section 26.2** - People who only read the foundation provisions will never find the second sentence of this section.

**Section 27.3** - Should be coordinated with Section 25.5, and see the comment above with respect to that provision.

**Section 27.5, 28.1, & 28.3** - It would be better practice to allow a member to be dismissed with or without stated cause but only by a supermajority (e.g., 2/3's). It is often awkward to state the reasons for dismissing a member, and stating them can trigger disputes or even lawsuits (e.g., for libel). Also, though a member should be allowed to respond to any charges, he should not be allowed to participate in the decision on his own dismissal. That would be a conflict of interest. Finally, dismissal should not be limited to "grounds provided by law." An association enjoys the freedom of association, which includes the freedom not to associate for any reason not prohibited by law.

**Sections 30.1 & 31.2** - Should the rule not be the exact reverse? Small associations should not have to have a governing body, but large ones should be required to have one. All associations should be required to have an annual general meeting of members. The distinctive characteristic of

associations is that they are governed by their members, so there should be no exceptions to the requirement to have an AGM.

**Section 31.5** – Consider amending this to say “provisions of the charter or resolutions adopted by the AGM or the governing board, if any.”

**Section 32.1** – It would be better practice to require a meeting of all members at least once a year and to allow a special meeting to be called by 30% of members. Two-thirds is too high a hill to climb.

**Section 32.3** – Consider making it permissible to announce an AGM in public media but requiring that written notice be sent to each member in connection with every meeting.

**Section 32.4 & 33.6** – It is often impossible to get all documents to members 30 days ahead of time. In recent work I did, I provided 30 days for notice of the meeting, 5 days for receipt of documents to be considered, and the possibility that a majority at a properly convened meeting could waive the absence of timely notice or receipt of documents.

**Section 32.5** – Rather than having to rush off to court, members who did not receive notice on a timely basis should be allowed to attend the meeting only for the purpose of objecting to the occurrence of the meeting (i.e., his presence cannot be counted for quorum purposes). Also, consider dropping the second sentence. The courts are better suited to sorting out the question of who should pay expenses on a case-by-case basis.

**Section 33.1 & 33.6** – Consider allowing an association to permit participation at an AGM by interactive telephone or video. The law should also either permit or prohibit proxies. If allowed, they should be required to be in writing and limited to one issue or one meeting. Consider deleting Section 33.6, and there is no “33.1.7.”

### **Article 33 –**

**Section 33.2** – See comments above about requiring supermajorities on some issues. Also, consider permitting large associations to provide for smaller quorums. For example, some laws permit a large association to be quorate if 25 or 30 percent of members show up. (This is one of the governance problems of large associations, which makes it highly desirable to allow for non-PBO nonprofits where the highest governing body is a governing board. If there is a strong feeling that “foundation” can only be used to refer to PBOs, consider using another name for these non-PBO, non-membership organizations – e.g., “nonprofit corporations.”)

**Section 33.3** – Should it not be possible for an association by special charter provision to establish classes of membership with unequal voting rights or

chambered voting? E.g., some members could be give double voting power, or passage of a resolution could require a majority vote by each chamber.

**Section 33.4** – No member at an AGM and no member of the governing board should be allowed to vote on any issue involving a conflict of interest, such as dismissal of a member or compensation of a board member. Members and directors should also realize that they are under fiduciary rules. Attached as EXHIBIT C is a provision that I recently drafted for another law.

**Section 33.11 & 50.5** – Consider requiring every nonprofit to have at least four officers, a CEO, a vice-CEO, a Secretary, and a Treasurer. Then spell out the duties of each. Attached as EXHIBIT D are provisions I recently drafted for another project.

**Articles 34 and 36** –

**Generally** – These articles contains too much detail, which may inhibit and constrain associations. Why must a small association have a “Governing Board?” Why must a GB have five members? Why must their terms be four years? Why must the GB meet 4 times a year? All of these should be permitted should not be something required by law. Nonprofit organizations are very diverse, and they need flexibility to set up the structures and rules that best fit their situation. If this much specificity is provided, why not provide specificity about staggered terms for GB members, not permitting a majority of the GB or the officers to be from one family? Much of this could go into regulations or self-regulatory guidelines.

**Section 33.6 & 36.5** – “Overwhelming majority” is too vague. It should be something precise, like 2/3’s or 3/4’s.

**Section 35.1.4** – Substantial membership fees can be an important, or even the sole, source of income for an association. In other cases, the main source of income will be something else, but even then it is useful to require nominal membership fees and take away, first the vote, and then the membership of a person who does not pay them. Attached as EXHIBIT F is an example of provisions I recently drafted.

**Section 35.1.6 & 51.4** – A decision without a meeting should be allowed only upon the unanimous written agreement of all members.

**Section 36.4** – It is not possible to meet by telegram. Telephone attendance should be permitted only if it is interactive – i.e., both those present and those on the telephone can hear each other and be heard.

**Section 36.8** – This is not consistent with 34.4. It is good practice to set a minimum number for a governing board – 5 is fine -- but to allow for larger boards. Even very large boards can work if they have Executive Committees

to handle matters in between board meetings. Large boards allow an organization to add members who bring stature and luster to the organization, or needed skills, while a smaller group handles the affairs of the organization.

**Article 37 –**

**Section 37.1 --** Why must an association have a governing board or even officers? Small associations may want to operate informally by agreement among the members. It would be appropriate, though, to require a board and officers when the organization gets to a certain size.

**Section 37.2 –** The Board should not have the power to limit or exempt the CEO. This is an invitation to abuse.

**Articles 38 – 42 –**

**Generally –** These articles deal with the formation of foundations and are generally quite well thought-out. It is especially useful to have clear rules about how a foundation set up by a will is to be established. But some queries follow:

**Section 38.3 –** This provision seems unnecessary in light of Article 41.

**Section 39.1.5 –** Many Mongolians do not have passports.

**Section 39.3 --** Why must a foundation be endowed to the extent of 10,000,000 tuaregs? Many countries in Central and Eastern Europe have an un-endowed foundation form, called a fund, which they find useful. Having no specific endowment requirement is useful if a foundation is going to be an an non-PBO foundation or an operating foundation (such as our organization, ICCSL) rather than a grant-making foundation.

**Article 40 --** What difference does it make whether someone who contributes assets to a foundation is or is not a founder? If founders have no property rights in foundations, see Sections 40.3 & 40.4, then the fact that a grandparent is a founder and a grandchild is not should make no difference. The contribution of an endowment to a foundation should be irrevocable, and the endowment thereafter should be subject only to the proper decisions of the foundation. See Section 40.5.

**Section 42.3 –** See Section 2(f) in EXHIBIT D, attached.

**Section 42.4 –** Consider inserting a default registration provision like that described in EXHIBIT E attached.

**Article 44**

**Generally** – There does not seem to be a great deal of difference between a “private foundation” and a “public foundation,” and I could not find any provision where the distinction is used. In China, the rules for “public” foundations exist principally to regulate public fund raising by non-association entities. In the United States the distinction between a public charity and a private foundation makes a big difference. A “private foundation,” generally speaking, is an organization that meets the charity standards of Section 501(c)(3), does not receive more than one-third of its income from public sources, and is not controlled, directly or indirectly, by substantial contributors or members of their families. Again very generally, these private foundations – such as the Ford or Gates Foundations -- are subject to special restrictions and reporting requirements. (The actual rules are elaborate and highly technical. What is said here is only meant to convey the basic concept.) At this stage of Mongolia’s development I am not sure that there is a need for special rules for “private foundations.”

#### **Article 47**

**Section 47.2** – Cross-reference to Articles 54-55. More importantly, a Supervisory Body should be mandatory only when a foundation reaches a certain, fairly large size.

#### **Articles 48 and 50**

**Generally** – Again with respect to foundations, why all this specificity about numbers and times of meetings, etc.? See comments above in connection with Articles 34 and 36 More specifically . . . .

**Section 48.1** – Why must members of the governing board of an association have terms of four years (unless provided otherwise), whereas every member for a foundation must have a term of four years? More flexibility is needed. More importantly, a rigid rule of four-year terms does not work as a practical matter. Some members should have different length terms in order to get the terms staggered, and the term of a member elected to fill the seat of someone who dies or retires should be just the remainder of his term. Even more importantly, four years should be the maximum, and it is good practice to provide that a member can not serve more than two consecutive terms unless he steps out for a year. The better practice with respect to terms is to make them all one year. This way the AGM or governing board can get rid of a non-performing or troublesome member by just letting his term expire rather than having to go through the often traumatic process of voting him out. If one year is chosen, it would make sense to allow consecutive terms without limit or limit each member to no more than 6 years without stepping out for at least a year, letting organizations choose one or other of these rules. The rules should not be written, in other words, to permit leaders to entrench themselves forever. Each organization needs some healthy turnover.

**Section 48.2** – Why must Associations have no more than five members of the governing board (A. 34.4), whereas foundations must have no more than three? Further, although it is good to specify a minimum number of members of the governing board (with a possible exception of a start up organization – e.g., an association with only three members cannot very easily have a five member board – and five is a good minimum. However, larger boards should be permitted because it is then possible to get a variety of skills and viewpoints on the board. Some organizations have very large boards, but large boards tend not to exercise meaningful oversight. Although a minimum is important, it may be desirable to let each organization decide how big its board can be. Finally, it would be good to provide that a majority of the members of the board and officers of a PBO cannot be related by blood or marriage.

**Section 48.3** – The term conflict of interest is used, but it is no where defined. Suggestions as to how to define it can be found in Chapters 4 and 5 of the GUIDELINES. An example of possible conflict of interest and fiduciary duty provisions is attached as EXHIBIT C. One possible exception should be made. The CEO should be a non-voting member of the governing board, so that the board cannot act without knowledgeable input from the staff. The CEO would have to recuse himself, of course, from any discussion of his salary, etc.

**Section 48.6 & 48.7** – These provisions are unusual and probably undesirable. It is difficult at any given time to spell out specifically what the criteria for board members should be, they change over time, and the board may use different criteria in selecting members at the same time -- e.g., put one member on because of his social standing and another because of his financial acumen.

**Section 48.8 & 48.9** – Please reconsider this provision. The board itself should have the authority and responsibility for disciplining or dismissing a board member who is non-performing or mis-performing. The courts should be a last resort and should be available to the parties only if there is an actionable wrong (e.g., a libel).

#### **Article 49**

**Section 49.1** – Consider requiring a supermajority (e.g., 2/3's) for 49.1, 49.2, and 49.1.7. Consider adding, mergers, acquisitions, and amendments to the Charter or the Bylaws to this supermajority list.

#### **Article 50**

**Section 50.1** – Requiring quarterly meetings for every foundation is too rigid. Requiring 2-4 meetings each year would allow more flexibility.

**Section 50.3** – This is a very good provision, although a more precise number (e.g., 2/3's) should be used rather than “overwhelming” majority, which has no precise meaning and would be the source of many disputes.

**Section 50.5** – Why not require foundations to have a permanent Vice Chairman, Secretary, and Treasurer, with their minimum duties spelled out? See EXHIBIT D attached.

#### **Article 51**

**Section 51.1** – Consider letting board members participate by interactive conference telephone or video.

**Section 51.2** -- Those who read only the Association provisions will never find the second sentence of this provision.

**Section 51.3** – Consider revising this provision. First, the first sentence should be modified to add “except the Chairman, who shall have a casting vote as provided in Section 51.2.” As to the second sentence, it is actually desirable to let members have the option of abstaining. There are many times when a member cannot support a position being taken by the majority, but does not want to stand in their way. As for the majority, it is then able to say that there was not a single negative vote with respect to that resolution.

#### **Article 52 –**

**Section 52.1** -- The long-standing tradition in the not for-profit, charitable sector is that board members should be volunteers who serve without compensation. It is OK to reimburse actual expenses, to permit compensation in cases where one or more board members are called upon to devote a great deal of time, or when the board member is providing special services to the organization, perhaps as an accountant or an attorney (though then there is a conflict of interest question, which must be dealt with – see Section 2(a) of EXHIBIT C. See EXHIBIT G for an example of a provision covering these points which I recently drafted for the bylaws of a PBO. Finally, it could be permissible to permit members to be compensated for service as members of the board in a non-PBO organization.

**Section 53.2** – Consider revising or eliminating this provision. Mongolian contract law and its tort or delict law already provides rights and remedies for third parties injured by a foundation, so there is no need to summarize their here, and dangerous to try to do so, for you might get something wrong. On the merits, the established approach in most legal systems with respect both to contracts and delicts is that the organization is liable to the third party, but has a right over against any member(s) of the board who acted improperly to cause the harm to the third party. The way in which organizations protect themselves against these kinds of liabilities in developed countries is to buy insurance for the errors and omissions of its officers and directors. Such

insurance is probably not yet available in Mongolia, but it would be appropriate to allow (and guide) organizations in indemnifying any officer or director for harm done to a third party unless it was the result of his gross negligence or willful conduct. Attached as EXHIBIT I is a provision dealing with indemnification that I recently drafted for the bylaws of a PBO. From it you can see the sort of issues that come up and could, if you chose, draft provisions permitting organizations to adopt such rules. (Rule one, though, is that an organization cannot validly indemnify a member or officer for gross negligence or willful conduct.)

### **Articles 54, 55, and 56**

**Generally** – What is the relationship between the Governing Board and the Supervisory Board? Must one of the SB members be an external (not an internal) auditor? Are there essentially three different bodies – GB, SB, and external auditor (if so, this would be like the pending proposals in Japan). All this needs to be clarified in some detail. Attached as EXHIBIT J are two excerpts from the definitions in the Guidelines that may be helpful. There is a great deal of terminological confusion in this area. “Audit Commission” is the more normal term for what you are calling the “Supervisory Board,” (though Hungary uses the term this way,) and “Supervisory Board” usually refers to the body that sets policy and provides oversight. (This is the German civil law tradition.) When the word is used that way, the body that is in charge of day-to-day operations is referred to as the “Governing” or “Management” Board. The exhibit shows you the terminology we chose to use, but there is no right or wrong about this. The external auditor is separate from all these, and, because of expense, should not be required for any but the largest PBOs. You can, of course, choose whatever titles work best (in Mongolian!), but it is important that the concepts be clear in the law. As a general matter, no member of management can sit on the board that provides policy and oversight (other than the CEO, who should be a non-voting member), whereas Audit Committees (your Supervisory Board), are often limited to board members who are not officers. An Audit Committee can also, and under some laws must, be comprised at least partially of external members.

**Section 54.4** – It is unrealistic to expect any but the very largest organizations to be able to hire a full-time CPA. At most, PBOs should be required to have an external audit by a CPA after they have become large. Small and medium sized organizations simply cannot afford the fees of a CPA.

**Section 55.1.3** – It would be unusual to have the Audit Commission or Supervisory Board evaluate the CEO. Usually this is done by the whole board (annually) or by a special committee of the board.

**Section 56.1** – Again, only the largest PBOs should be required to have an external audit. Most NPOs simply cannot afford the cost.

**Article 57 & 58** –Please reconsider these articles. You can avoid courts having to deal with frivolous lawsuits(e.g., by unhappy former employees) by requiring the State Attorney to be involved in the process of bringing actions against foundations for special inspections, etc. More importantly, it is very unusual to give a third party the right to inspect the financial books of any organization. Of course, any third party with a cause of action should be able to proceed against an organization in court and be entitled to all appropriate discovery. And, at least with respect to PBOs, the public (without having to show any special “interest”) should be allowed access to the activity and financial reports (with confidential information redacted) of the organization. But to give any person, whether he has an “interest” or not, the right to inspect the financial reports of an organization would be most unusual.

## **CHAPTER FIVE.**

By in large this chapter is excellent. Do I detect correctly that it was heavily influence by the Model Provisions for PBOs with respect to which we were the leaders? If so, I am both pleased and proud. I have a few comments.

**Section 59.1.2** – It should also be possible to create a foundation or PB association to support a public school or to provide education required by the official curriculum. Thus, parents may want to set up an NPO to provide music or language instruction not paid for by the state. And, in most developed countries there are private schools that follow the curriculum established for public schools by the Ministry of Education so that education at them counts as satisfying the standards for public schools.

**Section 59.1.4** – Consider adding “historical preservation.”

**Section 59.1.5** – If it is not clear in Mongolian, you may want to add “promotion of a clean, sustainable, environment.”

**59.1.11** – Consider tightening this wording up. As drafted it would cover commercial legal services (clearly of great public benefit) at prices below the market. Perhaps it should only be for legal services that support or advance public benefit activities.

**Section 60.1.1** – Here, again, you may want to provide that PBA’s must be the “exclusive” purpose of the organization. See comments above under Section 4.7.

**Section 60.2.1** – Consider this rewrite: “for the public or some significant segment of the public.”

**Articles 61 – 63**

**Generally** – The creation of a “Council to Support Public Benefit Activities” is something we always advocate. In fact, it is in accordance with trends in both common law (Scotland, New Zealand, and Northern Ireland) countries but also increasingly in civil law countries (Japan).

**Section 61.1** --Please reconsider whether the Council should have both an advocacy and a regulatory function. These roles are often in conflict. In the ordinary course of things, the NPO sector will form one or more umbrella bodies which will advocate the interests of their members. The Council should focus on regulation, supervision, certification, and education.

**Section 61.2** -- The proposed legislation would create a system that is too cumbersome for a country with a population that is as small as Mongolia’s. The decision to have 19 different councils (one for each Aimag and the Capital City) is just too much and will make inter-agency coordination far too difficult. It would be far preferable to have one national Council.

**Section 61.3** -- Although the Council should not be too big – 9 is a good number – it should have NPO representation. The great political strength of a Commission is that each ministry that is heavily involved/interested in the not-for-profit sector (e.g., Social Welfare, Education, Revenue, etc.), or even the parliament, can have a seat on and a voice in the Commission. If the membership also includes one member from the PBO sector, one member from the non-PBO sector, and one member to represent the interests of the public (which are not always the same as either those of the government or the not-for-profit sector), then the whole cross-section of views can be heard. Even more importantly, the government members can not (without accountability) act arbitrarily or in a discriminatory way. The new Charities Commission in New Zealand is fully worked out and may be a good model. See <http://www.charities.govt.nz/>.

**Section 63.3** – This is good as far as it goes, but consider adding name confusion (Article 6) to the list. Also, it would be very good if the law, the explanation of the legislation, or the initial regulations stated unequivocally that PBO status (or registration) cannot be denied on the grounds that there is no need for the organization, that it does not have sufficient financial resources to carry out its mission, or that there is already an organization doing what it says it wants to do.

**Section 63.4** –The phrase “does not duly perform its duties” is very vague and open. It could be used by bureaucrats to crack down on unpopular organizations.

**Article 64** –

**Sections 64.1 and 64.2** – These provisions should probably be placed in the tax laws, with a cross reference here.

**Section 64.3** – The restriction contained here is more sensible than restrictions to 10% or so, found in other countries. However, the limit is too low for an organization in its first or last years of existence, when it may be spending all or most of its money setting itself up or winding down. Consider making exceptions for the first and the last 12 months, with authority in the Commission to extend the period for good cause shown.

**Sections 64.5 and 64.6** – It may be possible to combine these provisions into one. This is what Section 6.2(A) of the Guidelines says on this subject:

Civic organizations are key participants in framing and debating issues of public policy, and just as is true for individuals, they should have the right to speak freely on all matters of public significance, including existing or proposed legislation, state actions, and policies. Likewise, civic organizations should have the right to criticize or endorse state officials and candidates for political office. There should be no restrictions on the right of civic organizations to carry out public policy activities, such as education, research, advocacy, and the publication of position papers.

Please consider revising these sections to more nearly conform to the Guidelines.

**Article 65** -- This article should state which existing Mongolian laws it replaces. It also should have transition rules for existing NPOs. They should be allowed to retain their present legal status and be given, say, two years to amend their charters and seek registration under the new law, both as legal entities and as public benefit organizations. Three practical problems are (1) how long should existing organizations be given to re-register, (2) how should the ordinary time limits for handling registration be extended to allow the authorities enough time to process the large number of re-registrations that will be filed just as the deadline is reached, and (3) should priority be given to new registrations. Attached as Exhibit H is a draft provision from another law which might provide useful guidance.

Respectfully submitted by ICCSL

Leon Irish, President

**EXHIBIT A**

Section 1. No distribution of profits. No person shall receive at any time, directly or indirectly, any net earnings or pecuniary profits from the operations of the Corporation; provided, however, that this shall not prevent the payment to any person of reasonable compensation or reasonable expenses for services actually rendered to or for the Corporation in furtherance of any of its purposes.

Section 2. Use of profits. Any net profits earned from any economic or business activity must be used or set aside for one or more of the not-for-profit purposes of the Corporation, except that ten percent of such profits may be reinvested in the economic activity or used for repair and maintenance relating to it.

**EXHIBIT B**

- Section 8. Procedures if members drop below seven (7).
- (a) If the number of members falls below seven (7), the remaining members can call a special meeting for the sole purpose of admitting enough additional members to bring the number back up to seven (7).
  - (b) As soon as the number of members is again seven (7), they may convene a members meeting at which any business can be conducted, including the addition of more members.
  - (c) During the first sixty (60) days during which the Corporation has less than seven (7) members, the Corporation can carry on its regular business, but it shall not have the power to undertake any major new program, acquisition, activity, or policy, nor to cancel or eliminate an existing one.
  - (d) After the first sixty (60) days during which the Corporation has less than seven (7) members, the Corporation must cease all activities other than efforts to find additional members. If it is unable to find additional member, the Corporation must be terminated and dissolved in another sixty (60) days.

## EXHIBIT C

### **ARTICLE VII: FIDUCIARY DUTIES AND CONFLICTS OF INTEREST**

Section 1. Fiduciary duties. Each member, officer, or employee of the Corporation shall act with care, prudence, and loyalty in all matters relating to the Corporation, and shall maintain the confidentiality of any trade secrets or other confidential information.

Section 2. Compensation.

- (a) Any member or Officer who receives compensation, directly or indirectly, from the Corporation for services is prohibited from participating in the discussion or vote on matters pertaining to his compensation.
- (b) Limit on community benefit DC-N. The value of any compensation and benefits paid to any employee, agent, or Officers of a community benefit DC-N [a PBO] shall not exceed the compensation and benefits paid by the Government of Ghana for comparable work.

Section 3. Expenses. Members, Officers, and employees are entitled to reimbursement of actual expenses incurred on behalf of the Corporation.

Section 4. Excess personal benefit. Any person with substantial influence over the organization who benefits improperly from any dealing or transaction with the organization shall be liable to pay back to the organization twice the amount of the improper benefit and any profit he made on it. A "person with substantial influence" includes but is not limited to a person who is, or within the past five (5) years was, an Officer of the Corporation.

Section 5. Possible conflict of interest. A member, Officer, or employee of the Corporation has an actual or possible conflict of interest if he may benefit directly or indirectly from a sale, purchase, lending, payment, investment, or comparable transaction or arrangement involving the Corporation.

Section 6. Disclosure of possible conflict. Any member, Officer, or employee with an actual or possible conflict of interest must disclose the transaction or arrangement and all material facts to the Executive Committee [governing board], which shall decide whether to address the matter or refer it for decision to a meeting of members.

Section 7. Decision with respect to possible conflict of interest. The Executive Committee or the members, as the case may be, shall decide by a majority vote without participation by any Officer or member who is possibly involved in the transaction or arrangement, to proceed with the transaction or arrangement only if (1) a more advantageous transaction or arrangement is not reasonably possible under circumstances and (2) the transaction or arrangement is in the Corporation's interest and is fair and reasonable.

Section 8. Remedy. If a member, Officer, or employee does not properly disclose a possible conflict of interest, or if an actual conflict of interest or excess benefit transaction occurs, the Executive Committee or the members, as the case may be, shall take appropriate corrective or remedial action, which may include requiring the resignation of the Officer or employee and/or seeking restitution of lost benefits or improper profits.

Section 9. Written record. The minutes of the Executive Committee or the meeting of members, as the case may be, shall reflect the decision of the Executive Committee or the members as to whether a conflict of interest in fact existed, the names of the persons who were present for discussions and votes, the content of the discussions, and a record of any votes taken in connection with the proceedings.

**EXHIBIT D**

**ARTICLE IV: OFFICERS**

Section 1. Officers.

- (a) The Corporation shall have at least four Officers, a President, a Vice-President, a Secretary, and a Treasurer.
- (b) A majority of the officers must at all times be unrelated by blood or marriage.
- (c) The members at a duly convened meeting may from time to time create other Officers, who shall have such authority and perform such duties as the members may from time to time determine.
- (d) Other than the President and the Vice-President, officers may be, but do not have to be, members.
- (e) Officers shall be elected or reelected at the annual meeting for one (1) year terms, which shall expire at the next succeeding annual meeting of the members.
- (f) Each officer shall hold office until the expiration of his term and until his successor shall have been duly elected or until he shall resign or be removed.
- (g) An officer may resign at any time by giving written notice of his resignation to the President or Secretary, which shall take effect at the time received unless another later time is specified in the notice.
- (h) Any officer may be removed at a duly convened meeting with or without stated cause by a vote of two-thirds (2/3) of all members present.
- (i) The members may fill a vacancy in any office for a term that shall expire at the next annual meeting.
- (j) Officers shall be eligible for reappointment without limit.

Section 2. Duties and responsibilities: The duties and responsibilities of officers are as follows:

- (a) The President shall -

- (i) Convene and preside at all meetings of members,
  - (ii) Report on the finances, operations, and prospects of the Corporation at each meeting of members,
  - (iii) Be responsible for the day-to-day operations of the Corporation,
  - (ii) Carry out any duties prescribed by the members, and
  - (iv) Perform such other duties as are necessarily incident to the office, or
  - (v) Delegate some or all of these duties from time to time to another Officer.
- (b) The Vice-President shall -
- (iii) Perform the duties of the President when the President is absent, and
  - (ii) Perform such other duties as the members may from time to time assign to him.
- (b) The Secretary shall -
- (iv) Keep records of members' actions, including overseeing the taking of minutes at meetings of the members, sending out notices of meetings, maintaining corporate records, and so forth,
  - (ii) Assure that all legally required reports and returns are filed on a timely basis,
  - (iii) Perform all other duties which are incident to the office of Secretary; and
  - (iv) Perform such other duties as the membership may from time to time prescribe.
- (c) Assistant Secretary. The President or the members may from time to time delegate the duties of the Secretary, generally or individually, to an Assistant Secretary or other person.
- (d) Document retention. The Secretary shall assure that the Corporation (i) permanently retains its Constitution and any amendments thereto and the minutes of all meetings, (ii) retains financial records for at least six (6) years, and (iii) retains all other documents and records for at least three (3) years.
- (e) The Treasurer shall -
- (i) Maintain adequate and correct accounts which disclose with reasonable accuracy, at any time, the financial

position of the Corporation at that time, which accounts shall in particular contain -

- (A) entries from day to day of all sums of money received and expended by the Corporation, and the matters in respect of which the receipt and expenditure takes place, and
  - (B) a record of the assets and liabilities of the Corporation,
- (ii) Receive and collect all moneys due and payable to the Corporation,
  - (iii) Oversee the proper payment of all bills owed by the Corporation,
  - (iv) Submit to the members at least annually a budget for the coming year,
  - (v) Submit to the members at least annually a report of all receipts and disbursements and a balance sheet showing the assets and liabilities of the Corporation for the prior year, which the members may require to be audited by a firm of certified public accountants of its own selection,
  - (vi) Perform all other duties that are incident to the office of Treasurer, and,
  - (vii) Perform such other duties as the members or the President may from time to time prescribe.
- (f) Bank account. The Corporation shall at all times maintain all monies other than small amounts needed for day-to-day operations in one or more bank accounts.
- (g) Assistant Treasurer. The President or the members may from time to time delegate the duties of the Treasurer, generally or individually, to an Assistant Treasurer or other person.
- (h) Signature authority. Each check, draft, contract, or other document involving a payment or obligation in excess of the \_\_\_\_\_ shall require the signature of two Officers.

**EXHIBIT E**

The District official has 60 days after receipt of a completed application in which to approve the documents and issue a Certificate of Incorporation. If he does not act within 60 days, the corporation is automatically incorporated and a regular certificate of incorporation must be issued promptly to the applicants. If the official refuses for any reason to incorporate the proposed for-profit district corporation, he must state his detailed reasons in writing. The applicant group (or any members of it) may appeal to the Appeals Committee of the District and, if they are not satisfied with the decision of that committee, to the appropriate official or committee in the Ministry of Manpower and Local Government. Judicial appeal is also available.

**EXHIBIT F**

Annual dues:

- (a) The amount required for annual dues shall be \_\_\_\_\_ each year, unless otherwise agreed by a majority vote of the membership at an annual meeting.
- (b) If a member has not paid all current or past due annual dues and special assessments, if any, he may not vote at a meeting of the membership.
- (c) If a member fails to pay his annual dues or special assessments, if any, for three consecutive years, he shall cease to be a member.

Special assessments. From time to time a special assessment may be imposed equally on all members by a 2/3's vote of members present at a duly convened meeting.

**EXHIBIT G**

Compensation. Upon the decision of the Board of Directors, reimbursement of expenses of attendance, or a reasonable fixed sum for expenses of attendance, may be provided to one or more of the Founders, Directors, or Officers with respect to any duly convened meeting of the Board, any committee of the Board, or any assignment given to her by the Board or a committee. Individuals shall not be compensated for service as Founders or Directors. Officers of the Corporation shall ordinarily not be compensated for their work as such unless they are employed on a substantially full time basis, and then only if it does not constitute an "excess benefit" under Section 4958 of the Internal Revenue Code of 1986, as amended (the "Code"). The Board of Directors shall have the power, in rare and unusual circumstances, to pay one or more members of the Board of Directors a reasonable fixed sum for attendance at one or more meetings of the Board. No such payment or lack thereof shall preclude a Founder, Director, or Officer from serving the Corporation in another capacity and receiving reasonable compensation therefore, so long as the Board of Directors shall have approved such compensation, or so long as any such compensation shall have been approved in advance by the Chair and the Vice-Chair, with notice to the full Board.

**EXHIBIT H**

Article 50  
Existing Foundation

- 50.1 Upon the entry into force of this law, each Foundation that had previously -
- (a) registered with the District Court and was publicized in the Supplement to the State Gazette of the Republic of Indonesia; or
  - (b) registered with the District Court and obtained permission from the relevant authorities to operate;
- shall continue in existence and be treated as a Foundation that has acquired status as a legal Person under this Law, provided that within three years from the effective of this Law,
- (c) each such Foundation shall amend its Founding Instrument and Statute, or equivalent document(s), to conform with the provisions of this Law; and
  - (d) each such Foundation shall file with the Ministry. An application for status as a Foundation with status as a legal person under this Law
- 50.2 The Ministry shall give priority under Chapter VII to registration applications by new organizations for status as a legal person under this Law.
- (a) For Foundations in existence upon the entry into force of this Law, the time limit under Article 28 for consideration of applications shall be the greater of -
    - (i) sixty (60) days from the filing of an application for status as a legal person under this Law, or
    - (ii) three hundred and sixty-five (365) days from the effective date of this Law.
  - (b) With respect to applications for certification of status as a Public Benefit Organization under Article 42m paragraph 1 the Public Benefit Commission shall consider applications in the order filed, and the time periods for consideration of each application under Article 42., paragraph1 clauses (a) and (b) shall be the greater of -
    - (i) the time periods provided Article 42, paragraph 1, clauses (a) and (b), or
    - (ii) three hundred and sixty-five (365) days from the effective date of this Law.

## EXHIBIT I

### ARTICLE VII: INDEMNIFICATION

Section 7.01. Power to indemnify. To the extent permitted by law, the Corporation shall have the power to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of the Corporation) by reason of the fact that --

- (a) she is or was a Director, Officer, advisor, employee, or agent of the Corporation, or
- (b) she is or was serving at the request of the Corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise,

against expenses (including attorney's fees), judgments, fines, or amounts paid in settlement actually and reasonably incurred by her in connection with such action, suit, or proceeding, provided that --

- (a) in connection with a non-criminal proceeding, she acted in good faith and in a manner she reasonably believed to be in or not opposed to the best interests of the Corporation, and
- (b) in connection with any criminal action or proceeding, she had no reasonable cause to believe her conduct was unlawful.

Section 7.02. Effect of settlement, judgment, etc. The termination of any action, suit, or proceeding by judgment, order, settlement, or conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that --

- (a) in connection with a non-criminal proceeding, the person did not act in good faith and in a manner which she reasonably believed to be in or not opposed to the best interests of the Corporation, or
- (b) in connection with any criminal action or proceeding, she had reasonable cause to believe that her conduct was unlawful.

However, no indemnification shall be made --

- (a) in respect of any non-criminal claim, issue, or matter as to which such person shall have been adjudged to be liable for negligence

or misconduct in the performance of her duty to the Corporation, or

- (b) in respect of any criminal action or proceeding as to which she shall have been adjudged to be guilty,

unless and only to the extent that the court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability or guilt, and in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnification for such expenses as such court shall deem proper.

To the extent that a Director, Officer, advisor, employee, or agent of the Corporation has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to herein or in defense of any claim, issue, or matter therein, she may be indemnified against expenses (including attorney's fees) reasonably incurred by her in connection with such action, suit, or proceeding.

Section 7.03. Board action required. Except when the Board shall have decided upon a standing order of indemnification pursuant to the last sentence of Section 7.06 hereof, any indemnification or advance against expenses under this Article (unless ordered by a court) shall be made by the Corporation only upon a determination that indemnification of the Director, Officer, advisor, employee, or agent is proper in the circumstances because she has met the applicable standard of conduct set forth in this Article. Such determination shall be made (i) by the Board of Directors by a majority vote of a quorum of Directors who were not parties to such action, suit, or proceeding, or (ii) if such a quorum is not obtainable, or, even if obtainable, a quorum of disinterested Directors so directs, by independent legal counsel in a written opinion.

Section 7.04. Advances against expenses. Expenses incurred in defending a civil or criminal action, suit, or proceeding may be paid by the Corporation in advance of the final disposition of such action, suit, or proceeding as authorized by the Board of Directors in the specific case, but only upon receipt of a written undertaking by or on behalf of the Director, Officer, advisor, employee, or agent to repay such amount with or without interest unless it shall ultimately be determined pursuant to this Article that she is entitled to be indemnified by the Corporation.

Section 7.05. Continuation of indemnification. The indemnification provided by this article shall continue as to a person who has ceased to be a Director, Officer, advisor, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person.

Section 7.06. Indemnification insurance. The Corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a Director, Officer, employee, or agent of the Corporation, or is or was serving at the request of the Corporation as a Director, Officer, advisor, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against any liability asserted against her and incurred by her in any such capacity, or arising out of her status as such, whether or not the Corporation would have the power to indemnify her against such liability under applicable rules of law or the provisions of this Article. The Board of Directors may provide and limit the indemnification provided by the Corporation to the coverage and the amount provided for in any such insurance.

## EXHIBIT J

### **Audit Commission**

A small group of members of the Governing Board (e.g., 1-3) who are given the responsibility of overseeing and investigating the activities and finances of an organization and who report at least annually to the Governing Board on whether the organization is in compliance with laws, its governing documents, resolutions, etc.

### **Supervisory Board**

The highest governing body in an organization with a two-tier governance structure.

### Discussion

Some civil law jurisdictions not only permit but also require a two-tiered governance structure for foundations in which a Supervisory Board has final responsibility for policy decisions of the organization (e.g., financial decisions) and for such matters as voluntary dissolution, etc. The Governing Board has responsibility for oversight of day-to-day management decisions. Laws ordinarily provide that members of the Governing Board may not be members of the Supervisory Board.

EXHIBIT K

ARTICLE VIII: PROHIBITION AGAINST SHARING IN CORPORATE EARNINGS

Section 1. No distribution of profits. No person shall receive at any time, directly or indirectly, any net earnings or pecuniary profits from the operations of the Corporation; provided, however, that this shall not prevent the payment to any person of reasonable compensation for services actually rendered to or for the Corporation in furtherance of any of its purposes and/or provision for reasonable expenses to the extent permitted under these Bylaws.

Section 2. Dissolution. No person shall be entitled to share in the direct or indirect distribution of any corporate assets upon the dissolution of the Corporation. The Founders and all Directors and Officers shall be deemed to have expressly consented and agreed that upon dissolution or winding up of the affairs of the Corporation, whether voluntary or involuntary, the assets of the Corporation then remaining shall be distributed, transferred, conveyed, delivered, and paid over to such charitable or other institution, one or more—

- (a) which is organized and operated for purposes substantially similar to those of the Corporation,
- (b) which qualifies as an exempt organization within the meaning of Section 501(c)(3) of the Code, and
- (c) upon such terms and conditions and in such amounts and proportions as the Founders, or, after there are no longer any Founders, the Board of Directors may impose and determine.

## EXHIBIT L

### Hungarian Law on Public Benefit Organizations

In order to preserve the domestic traditions of non-governmental and not-for-profit organizations, to increase their role in society, to make their public benefit operations and management more transparent, to promote their activities performed in the field of public service and to settle their relationship with the state budget, Parliament enacts the following Act:

### Draft Indonesian Law on Foundations

#### WITH THE BLESSING OF ALMIGHTY GOD THE PRESIDENT OF THE REPUBLIC OF INDONESIA

- Considering:**
- (a) That the establishment of Foundations in Indonesia until now has been based only on societal custom and there have existed no laws regulating Foundations; V
  - (b) That Foundations have developed rapidly and their diverse activities, objectives, and goals often have an impact on the public;
  - (c) That the participation of Foundations in social and economic development in Indonesia should be encouraged and protected;
  - (d) That the freedom of association as guaranteed in the Constitution and in the International Covenant of Civil and Political Rights should be implemented, protected, and encouraged;
  - (e) That the laws should assure that Foundations have the greatest possible freedom and independence of action consistent with social order and responsibility;

- (f) That clear rules and mechanisms should exist to assure the transparency and accountability of Foundations that affect the public;

**In View of:** Article 5, clause (1) and Article 20, clause (1) of the 1945 Constitution.

**With the approval of the**

HOUSE OF REPRESENTATIVES OF THE REPUBLIC OF INDONESIA

**Has resolved too enact: A LAW CONCERNING FOUNDATIONS**