24-Nov-2003

Comments on and Recommendations for Amendments to the Law of Mongolia on Non-Governmental Organizations

ICNL is pleased to provide the following comments with respect to amending the present Law on No-Governmental Organizations. These comments summarize the more detailed observations made in extensive discussions with representatives of both the Ministry of Justice and the NGO sector during the recent visit of ICNL's President, Stephan Klingelhofer, to Mongolia in early November 2003. We will, of course, be pleased to provide longer explanations of our views if requested by anyone using these comments in connection with the efforts to update the present law governing civil society organizations.

It should be noted at the outset that the present law, while flawed in certain respects, has served the people of Mongolia well since its adoption in 1997, and has contributed substantially to the growth of an independent civil society sector in Mongolia. As agreed among the interested parties in early November, the essential principles contained in that seminal legislation should be retained, even as certain changes are enacted and implemented to assure continued strength and growth in the sector. Accordingly, the following comments address specific provisions and issues that, in our judgment, would best be dealt with in revisions to the present law. While there may be several additional amendments that would or should be incorporated as well, we are in these comments limiting ourselves only to certain most significant items:

- **Art. 3. Framework – Sec. 1**. We suggest adding *cooperatives* to the list of organizations not covered by this law (but instead by individual laws).
- **Art. 4. Definitions – Sec. 1**. We would include the "non-distribution" of profits principle in this initial definition, thereby explicitly recognizing that these organizations are "not-for-profit." We suggest adding a phrase (similar to Art. 20., Sec. 2) that provides that a "'non-governmental organization' means an organization in which no profits, earnings, or revenues, as such, shall be distributed, directly or indirectly, to any person involved as a member, founder, manager, employee, or director of such organization …."
  Sec. 2. We note that the definition of "public benefit organization" is appropriately inclusive, and properly contains a "catch all" provision to permit addition of categories as they may emerge.
- **Art. 5. Rights of Individuals …. – Sec. 6**. The issue of rights of foreign citizens to establish non-governmental organizations in Mongolia needs to be clarified. Is it intended that branches or offices of foreign NGOs themselves may be established in Mongolia, or simply that foreigners residing in the country may create such organizations. We would suggest that, given the benefit to Mongolia in terms of funding from abroad, as well as technical assistance and in-kind investment, the establishment of foreign organization branches and offices should not be discouraged.
- **Art. 8. Compulsory Dissolution**. We suggest strongly that here, as elsewhere in the law, where penalties for failure to comply are provided, the law should offer an appropriate opportunity for the organization to take action to correct the deficiency, or to be fined, or some other penalty issued, before resorting to the ultimate penalty of dissolution. Moreover, the right of appeal to an independent court is essential to the application of the rule of law to NGOs.

- **The Governance Provisions of Chapter Two** – While in general these provisions appear adequate, they will require refinement when specific *forms* of NGOs are established.
- **New Sections Providing for Adoption of Forms**: membership (Associations) and non-membership (Foundations). To address these forms we recommend that the drafters consider comparative law materials earlier provided by ICNL. The drafters should keep in mind however, that there is no model law, and that they should critically utilize information provided in laws of other countries, to make sure that these provisions meet Mongolian needs.
- **Associations**: For the purposes of regulating associations let us suggest provisions of the Estonian Law on Associations which allows individuals and or/legal entities to establish and to be members of associations. We would also like recommend the Bosnia and Herzegovina Law on Associations and Foundations, Montenegro Law on Non-governmental Organizations, and Bulgarian Law on Non-governmental Organizations.
- **Foundations:** For foundations we would recommend that the drafters consider provisions in Estonian and Armenian laws on foundations, and in the German code. The provisions in the German code might not be sufficiently detailed enough, however, and would require additional provisions to make sure that the implementers and citizens understand how a foundation is established and operated. The provisions of German, Estonian, and Armenian laws are broad and flexible enough to allow a broad range of non-membership entities, including entities similar to ICNL ("Centers"), endowed foundations, and the entities that only provide services and fundraise to fund these services, as well as entities whose only activities are comprised of making grants out of their own endowments. The drafters may wish to consider amending provisions of the civil code to allow not only public benefit activities, but also a broad range of foundations, and to insure that the civil code provisions comply with the provisions in the new law.
- **Special Consideration for "privatized" Health Care and Educational Institutions.** To address the drafters' concerns regarding privatized institutions in the area of health care and education, we firmly believe that the organizational form of a foundation can be considered. However, special rules might apply to such foundations where the founders and/or public are concerned about preserving the use of property for original purposes, and where such property is substantial. Concerns about the proper use of the privatized property granted to such foundations can be addressed through special law provisions which allow for greater government involvement at the time of establishing an original board, replacing members of the board and making changes to the by-laws, distributing property at the time of liquidation, and even authorizing certain transactions, for example with the land and other real estate or securities that have been granted to the foundation by the original founder. Some special rights might be reserved to the founder, for example to initiate an external audit at its own expense, or to apply to the appropriate government authority requesting an action (i.e., to initiate an audit, to make changes to the board, etc.), if there is a legitimate concern that the property might not be used for the original purpose. We recommend developing and using these provisions for foundations which received privatized property from the government as an endowment. The drafters may also wish to permit other founders to use these provisions if they are concerned about preserving the use of the endowed property for an original purpose.

However, it must be emphasized that such provisions would not be reasonable for all foundations. Those foundations where the founder would rather rely on the board than agree to expand government's authority over the foundation should be freed from the additional requirements. For foundations established resulting privatization of institutions in social areas, we recommend to consider provisions of the Czech law on foundations, which were granted shares of privatized enterprises, and where the government

established special rules to preserve the use of the privatized property for designated purposes. Obviously the issue to be considered by the drafters is which government body should be granted any authority to supervise over and monitor activities of such foundations. Another issue to consider would be the name for such foundations.

- **Special Consideration for "Privatized" Health Care and Educational Institutions: Option:** Another suggestion we might have is to allow these institutions as "non-commercial companies" (joint stock or limited liability). Czech Law on Public Benefit Companies provides an example of appropriate legal provisions.
- **(former Chapter 3) Registration.** We understand that the registration provisions are now contained in the newly enacted law on Registration of Legal Entities, which we have not seen. Without reviewing the provisions, we are unable to comment on their adequacy in terms of international good practices in the instance of the non-governmental organizations covered by this law.
- **New Section providing special provisions for "public benefit organizations" –** We have suggested that the drafters use the Bulgarian Law on Legal Persons with Non-Profit Purposes be used as a structural model, with provisions applying to all organizations and to specific forms of organizations precede provisions dealing with the specific characteristics of those of the aforementioned organizations which seek special treatment as "public benefit organizations." The latter category, by their nature as providing special services or other benefits to the general public or a significant portion of it, would be offered certain privileges or other advantages, such as tax benefits for themselves or their donors, opportunities to receive government grants or to compete for government contracts. Such benefits, while referred to generically in this section of the law, would be specifically provided in the laws pertaining to their subject matter (e.g., tax benefits in the tax code, etc.). Further, because they are eligible to receive certain benefits from the state, "public benefit organizations" would, depending on their size and activities, be required to provide additional information and would be subject to additional scrutiny in the public interest. *We have furnished the drafters and the sector examples from other countries and a model act to provide guidance on structuring this provision.*
- **Art. 19 Income --** The list of sources of income should explicitly include foreign sources, grants and donations. We note with strong approval the inclusion of "economic activities" as one of the permissible sources of revenue. Whether or not such activities need be directly "mission related" is a matter of policy. However, we note that such a reasonable limitation does in fact require a determination on someone's part as to whether the activity is in fact "mission related" – and is therefore subject to abuse of discretion. Moreover, the question of taxability of such activities is properly a matter to be determined in tax legislation drafted to parallel the provisions of this law. *We have made available information on the various policy determinations required to decide how to tax economic activities, and to what degree such activities need be mission related.*
- **Articles 21 and 22 –** We are advised that these articles are intended to be removed from this law, and the subject matter to be included in the tax code. *We have provided some information on international good practices with respect to taxation of civil society organizations and their donors, and would be pleased to provide technical assistance in this matter.*
- **Article 24. Administrative Sanctions** -- Here as in Article 8 (above) we suggest consideration of inclusion of intermediate penalties in the event of a breach, particularly opportunities to take corrective action within a defined period of time, particularly where the breach has been non-willful.
- **Article 25**. **Foundations –** This Article should be removed, replaced as it is by new provisions dealing with Foundations (above.)