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HANDBOOK ON
GOOD PRACTICES FOR
LAWS RELATING TO
NON-GOVERNMENTAL
ORGANIZATIONS

(DISCUSSION DRAFT)

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ACRONYMS/ABBREVIATIONS¹

GONGO	Government-Organised NGO
MBO	Mutual Benefit Organisation
NGO	Non-Governmental Organisation
PBO	Public Benefit Organisation
QUANGO	Quasi-Non-Governmental Organisation
VAT	Value Added Tax

¹ Copies of the Discussion Draft are available from the World Bank's Environment Department, Social Policy and Resettlement Division (NGO Unit).

HANDBOOK ON GOOD PRACTICES
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HANDBOOK ON GOOD PRACTICES FOR LAWS RELATING TO NON-GOVERNMENTAL ORGANIZATIONS

Introduction.

1. Background to the World Bank's interest in NGOs.

The World Bank, in common with other development agencies, has become increasingly interested in the work of non-governmental organizations (NGOs) over the past decade. The proportion of Bank-financed projects which involved NGOs in one role or another increased from an average of 6% from FY73 to FY88 to 48% in FY96.¹

While early NGO involvement was mostly oriented to more cost-effective or more poverty-targeted service delivery, and was often a very minor aspect of the project in question, in more recent years NGO roles have both widened and deepened. This diversification of roles was described first in 1989 in the Bank's Operational Directive on NGOs.² Subsequent Bank policies stressed the important contribution of NGOs to issues relating to indigenous peoples, resettlement, poverty reduction, and gender.³

This enhanced collaboration (involving, as it does, the government in question) has enabled the Bank to identify important NGO contributions to development beyond their capacity to deliver services. Some NGOs have important specialist knowledge, for example regarding environmental issues. Some NGOs work in close partnership with poor communities and are able both to help foster participatory development approaches and to identify priority concerns of poor people. Other NGOs help strengthen civil society through informing and educating the public, for example concerning their legal rights or entitlements to services or by helping attune government policies and practices to the needs of poor citizens. This diversity has led to expanded forms of cooperation between the Bank and NGOs including government-Bank-NGO collaboration in projects.⁴ It has also contributed to the Bank's policies regarding

¹ Cooperation between the World Bank and NGOs - FY96 Progress Report (1997).

² Operational Directive 14.70, "Involving NGOs in Bank-Supported Activities," August 1989.

³ Ibrahim Shihata, The World Bank in a Changing World, Vol. II, Chapter 6, *The World Bank and NGOs*, 1995.

⁴ Carmen Malena, Working with NGOs: A Practical Guide to Operational Collaboration between the World Bank and NGOs, 1995.

information disclosure and public consultation.⁵ For example, in the preparation of Environmental Assessments (required for all projects which potentially have a major environmental impact), the Bank requires “meaningful consultation between borrowers and affected groups and local NGOs,” based on timely public disclosure of relevant information.⁶

Based on its own experience, the Bank strongly advises governments to involve NGOs in the preparation of National Environmental Action Plans and in designing poverty reduction programs. For this reason the Bank further “encourages governments to be responsive to NGOs that request information or raise questions about Bank-supported activities”.⁷

Involvement of NGOs in Bank-supported activities is also a primary way of achieving *participatory* development, which has been proven by experience to help attain the Bank’s goals of economic and social development. Participation is the term used by the Bank to describe the process by which stakeholders in development – the Bank, the borrower, and those who are directly or indirectly affected by a development project – influence and share control over development initiatives, and the decisions and resources that affect them.⁸ The Bank also advocates participatory approaches to government in the design as well as implementation of the projects it finances, on the ground that this enhances development effectiveness.⁹

In order for the Bank to be able to work effectively with NGOs, and to benefit fully from the contributions they can potentially make to successful development, it is essential in any particular country in which the Bank works that NGOs that are or might be involved in projects financed by the Bank be freely established and operate without undue constraints; that such NGOs be independent of the government; and be transparent and accountable. Only if all segments of society that are or might be involved in projects financed by the Bank can create and operate NGOs freely will the NGO sector reflect the full range of relevant viewpoints and expertise pertinent to a wide variety of development projects. Similarly, NGOs need to have both the full range of powers, privileges, and immunities enjoyed by other juridical persons in the

⁵ Ibrahim Shihata, *ibid.*

⁶ Operational Directive 4.01, Environmental Assessment, September 1991.

⁷ OD 14.70, *ibid.*

⁸ See Participation Learning Group Final Report (World Bank). As the Bank has recognized, *participation* is, in turn, intrinsic to good *governance*, which is essential for successful development. See Governance: The World Bank’s Experience, p. 42 (The World Bank; 1994).

⁹ “Prohibition of Political Activities in the Bank’s Work,” Legal Opinion of the Senior Vice President and General Counsel, presented to the Bank’s Board on July 12, 1995.

society and independence from government. When NGOs are transparent and have well developed mechanisms for accountability (to their beneficiaries as well as to their funders), the integrity of each NGO and of the sector itself is ensured. There is then a greater likelihood that the NGOs represent accurately the views of the poor.¹⁰

The Bank also advocates to member governments that they use participatory approaches in the selection, design, implementation, and evaluation of development programs, on the grounds that this enhances development effectiveness.¹¹ On certain matters, such as the preparation of Environmental Assessments, the Bank requires consultation with local communities and local NGOs. "Such participation and consultation, to be useful at all, require a reasonable measure of free expression and assembly" and hence it would be legitimate for the Bank in extreme cases to deny loans relating to these matters where such freedoms are not afforded.¹²

The Bank's recognition that a strong voluntary sector makes an important contribution to equitable and sustainable development is reflected in its work on "good governance." This work also recognizes that the voluntary sector (including NGOs and other elements of civil society) is much stronger in some countries than in others, for many reasons. "A powerful factor clearly is government hostility or encouragement Government policies determine the enabling environment for NGOs and the roles that they assume."¹³ These policies include rights regarding freedom of speech or association, regulatory policies, fiscal policies, funding and partnership relations, and policies regarding consultations with the public and with NGOs.¹⁴ Some governments welcome certain NGO activities (particularly poverty reduction) but not others – including functions which may be auxiliary to favored activities, such as related advocacy. "Some governments are suspicious of NGOs precisely because of their advocacy for the poor."¹⁵ The Bank advises governments, however, to welcome a wider role for NGOs and to allow and foster "a strong civil society participating

¹⁰ A constant challenge for the Bank and others is to determine whether and the extent to which an NGO really listens to and speaks for those whom it purports to represent and benefit. A related difficulty arises when northern NGOs purport to represent Southern interests.

¹¹ "Prohibition of Political Activities in the Bank's Work," legal opinion by the Senior Vice President and General Counsel to the Bank's Board, July 12, 1995.

¹² Governance and Development, World Bank, p.29, 1992.

¹³ Governance and Development, *ibid.*.

¹⁴ John D. Clark, The State and the Voluntary Sector, World Bank, 1993.

¹⁵ Governance and Democracy op. cit. Supra; Governance in the World Bank's Experience, November 1993.

in public affairs,"¹⁶ because of the capacity of civil society organizations to mediate between individuals and the State, to inform public debate, to perform social functions, and to hold governments accountable."¹⁷

2. Background to the Handbook.

Because of the growing conviction that a healthy NGO sector makes a strong contribution to development, the Bank has initiated various studies of national NGO sectors.¹⁸ This work has frequently identified the imprecision, restrictiveness, arbitrariness, or unpredictable application of laws relating to NGOs as major problems hampering the development of the sector and preventing individual NGOs from achieving their potential. On the other hand, where NGO laws are lax or non-existent, it is easy for unscrupulous individuals to take advantage and to bring the sector as a whole into disrepute.

These studies have led the Bank to be convinced of the utility of a handbook on good practices regarding NGO laws. They have also yielded a body of evidence relevant to such a task. Hence, in 1995, the Bank commissioned a specialist NGO - the International Center for Not-for-Profit Law (ICNL) - to embark on a major study of existing practice, to distill from this important principles for legislation, and to offer lessons of good practice - recognizing that the characteristics of the NGO sector and society vary from country to country, as does the capacity of governments to implement detailed legislation.

This Handbook is the result. The Bank believes that it is timely because many governments - mindful of the increasing prominence of NGOs - are currently introducing laws governing NGOs. Often these laws are oriented towards restricting activities and strengthening government control rather than enabling NGOs to operate independently on the basis of accountability and transparency and encouraging effective self-regulation of the NGO sector. The Bank believes that restrictive NGO laws are inappropriate and would, in the long term, erode public support and confidence in national development objectives. The Bank hopes that this Handbook will prove useful in the drafting and debating of new or revised legislation. The Bank also recommends that

¹⁶ "Prohibition of Political Activities in the Bank's Work", Legal Opinion of the Senior Vice President and General Counsel to the Bank's Board, July 12, 1995.

¹⁷ Governance in the World Bank's Experience, November 1993.

¹⁸ See for example: The Role of NGOs and Community-Based Groups in Poverty Alleviation in Uganda, World Bank, 1994; John D. Clark and Barbara S. Balaj, NGOs in the West Bank and Gaza, World Bank, February, 1996; Pursuing Common Goals (a study of NGO-government relations in Bangladesh), World Bank, 1996; see also John D. Clark, The State and the Voluntary Sector, *ibid*.

governments consult fully with the leaders of major NGOs and NGO networks in the revising of NGO law.

The basic emphasis of this Handbook, therefore, is to argue against stringent government controls (for the reasons stated above) and instead to encourage an unfettering of the NGO sector so that it can enhance its contribution to national development. The Handbook does recommend the introduction of laws where they are non-existent at present, but such laws should be designed to foster an environment of independence, professionalism, and transparency within the sector and enhance the climate for self-regulation.

This Handbook does not present a model law because the legal systems of the world differ in large and small ways, and local traditions of law drafting are also varied. It is intended, however, to set forth principles which would enable any interested and informed reader to evaluate an existing NGO law or draft a better one. Any NGO law should, of course, be suitable to the circumstances of the country and should be prepared in consultation with representatives of the NGO sector.

Although the Handbook applies to NGOs generally, it should be borne in mind that civil society has enormous diversity. Within civil society are advocacy groups, some of them challenging fundamental governmental policies, as well as social service agencies carrying out programs under contract from the same government. There are groups representing minorities and cultural societies; there are women's rights groups and gardening clubs. There are professional societies that look inward to the needs of their members and policy organizations that seek to create a policy dialogue on issues of public importance. Some are large, but many are small. All of them, however, contribute to the general interest society has or ought to have in pluralism, tolerance, the protection of human rights, the alleviation of poverty and suffering, the advancement of science and thought, the preservation and advancement of culture and art, the protection of the environment -- and all of the multifarious activities and concerns that go to make up a vibrant civil society. The aim here is to suggest principles which, if enacted into law, would permit, encourage, and protect, all the diverse organizations that make up civil society. Although the Handbook favors self-regulation, it also recognizes that some degree of state regulation is necessary. That regulation, however, should never jeopardize the independence and freedom of the sector and should in all cases be proportional to legitimate public interests in the operations and activities of NGOs.

The drafters of this Handbook have borne in mind throughout the drafting process the economic and social development purposes for which the Bank is interested in NGOs, as well as the reasons why any country, north or south, poor or rich, democratic or not, should want to have a vigorous, independent NGO

sector. Those considerations, which are set out in this Introduction and in Chapter A, have provided the basis for determining what has been included in the Handbook.

Finally, one point deserves emphasis over all others. Having good laws for NGOs is a necessary but not a sufficient condition for the existence of a strong, independent, accountable, and transparent NGO sector. If such laws exist, it is a virtual certainty that numerous NGOs will spring up and flourish, as the experiences of many countries around the world attest. What is additionally necessary, however, is that the laws be adequately understood by the governmental officials who administer them, the lawyers who advise NGOs, and the judges who hear NGO cases. Understanding is not enough, however, unless it is accompanied by vigorous and fair enforcement. Laws on the books are dead letters until they are brought to life by understanding and enforcement.¹⁹

3. Sources and Methodologies.

This handbook is the fruit not just of the ICNL contract with the Bank, but of many years of research by many lawyers (particularly within the ICNL network). The concepts developed have been vigorously debated at numerous conferences with lawyers, NGO leaders, and government officials throughout the world.

Inevitably, much of the information and experience used draws upon the experience of countries with long experience with NGOs, but careful effort has gone into both analyzing NGO laws from developing countries,²⁰ and to assessing whether long established laws in some regions are culturally relevant elsewhere.

One purpose of the Handbook is to survey the wide range of issues and subjects that should be dealt with in any comprehensive and well crafted set of laws governing NGOs. Some of the principles deal mainly with the procedures that should exist, not the substantive rules of law. In addition, instead of being

¹⁹ Enforcement cannot be fair, of course, unless there are adequate means of administrative and judicial appeal. See Section 2(b).

²⁰ As an integral part of this project, the World Bank and ICNL are developing an archive and database on NGO laws from countries around the world. The database and archive consists of (1) copies of laws governing NGOs (often in both English and the local language; sometimes only in English or only in the local language), (2) draft laws (generally in English), and (3) country reports (generally in English; sometimes in the local language) - i.e., reports prepared by lawyers or other experts in the relevant country describing the NGO laws of that country and how they work. This archive and database is growing rapidly. The intention is that it will be available at the Bank, for use by Bank staff, and at ICNL, where it will be accessible to the public.

any sort of “code”, the statement of good practices and the accompanying discussion sections and examples are intended to explain the nature of the problems and various alternatives for dealing with them. In many instances, practices are so varied and views of informed and reasoned experts so divergent, that no single position is taken; rather, options are described together with their advantages and disadvantages.²¹

The principles reflected in this Handbook represent a system of inter-related and connected principles. Further, The Handbook assumes that the fundamentals of the rule of law have been established. Serious questions can arise in many of the countries of the world, however, about whether it is possible to get all of the principles adopted or whether the underlying legal system reflects the assumptions on which the Handbook rests. For example, what if a government wants to adopt all of the reporting and enforcement rules in Chapter I but not the simple objective registration procedures recommended in Chapter D. Or, what if there is no system of administrative law or no independent judiciary, so that decisions adverse to an NGO cannot be meaningfully appealed? Can those who staff the ministries and agencies that supervise NGOs in a particular country be relied upon to act reasonably, fairly, and wisely?

These problems are very real. It is difficult to offer pat advice for dealing with them. The principles in the Handbook intentionally represent an aspirational set of guidelines rather than practical advice about how to survive in a repressive legal atmosphere. There is no “quick and dirty” set of basic rules that can be recommended for NGOs in a society where the rule of law has not been established. Any such attempt would be too imperfect and incomplete to be recommended. Accordingly, the Handbook recommends what its drafters and reviewers believe is an optimal set of principles that will encourage and protect NGOs while at the same time keeping malpractice and abuse to a minimum. If its recommendations cannot be accepted today by some societies, perhaps they can at least serve to begin a useful dialogue.

As the reader will quickly see, a wide range of relatively technical and complex issues are dealt with in the Handbook. Detailed discussions of some of them – economic activities and taxation of those activities – are dealt with in appendices. Although all of the issues raised in the Handbook deserve attention at some time or another, it is not realistic to think that they can all be dealt with at once, especially in a country that may just be beginning on the road to creation of a vigorous, independent civil society. For such a country, it would be sensible to focus first and foremost on questions of registration (especially

²¹ Although this Handbook deals only with laws dealing with NGOs, many of the standards and best practices are also relevant to laws dealing with other kinds of organizations, such as trade unions, political parties, or churches.

Sections 3, 4, and 7), structure and governance (especially Sections 10 and 11) and reporting (Chapter J). Implementing rules in these areas would enable NGOs to register and begin operations, while also instituting basic monitoring and enforcement mechanisms. As time allows, other rules can be added, such as tax rules, rules governing economic activities, and so forth. The suggestion, in other words, is not that it is adequate to pass laws dealing only with these suggested subject matters, but that they represent an appropriate starting point. The larger process of creating a fully fleshed-out set of laws for NGOs is a longer and more complicated process, and, in truth, one that must be continually open for revision and supplementation, even in the most legally sophisticated societies.

There may well be inadequacies or mistakes in the text. This is a complex and broad field, as well as a rapidly evolving one. The Bank anticipates that - over the course of the next year or so - comments on this "Working Draft", plus additional research, will lead to the publication of a revised final text. Hence, comments on this handbook are extremely welcome.

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Chapter A: The Relationship of NGOs to Society

1. Why Reform Laws Relating to NGOs?

Governments have great power over NGOs through the laws they enact or administer. They can either help or hinder them through the laws and regulations that they use to establish them, to direct their activities, to tax them, to allow them access to funds (public, private, and foreign), to require them to report, to audit them, and to involve them, or refuse to involve them, in Government projects and policies. By passing laws they can repress NGOs or they can encourage them; they can also have great influence in molding the kinds of NGOs they want. For example, some governments, such as those in Ethiopia and Indonesia, encourage service provision by NGOs but discourage advocacy. Laws and regulatory systems can also have a strong influence on NGOs by default, such as if the laws are badly drafted or are laxly or arbitrarily enforced. Repressive laws can suffocate the NGO sector; but if NGO laws or their enforcement are inadequate, misconduct and abuse may become rife and the NGO sector as a whole may be brought into disrepute.²²

2. Reasons Why a Country Should Want to Have a Strong, Vigorous, and Independent NGO Sector.

There are many reasons why countries around the world should want to have laws that assure the existence of a strong, vigorous, and independent NGO sector. To many governments this will seem a counterintuitive assertion. Why should a society allow and protect activities that have not been approved by a democratic process? Why would governments permit and support the existence of organizations that compete with or replace various governmental programs, or that criticize or oppose the policies of the government? Further, where the income of NGOs is exempted from taxation or where contributions to such organizations are made deductible for tax purposes, allowing such organizations to exist involves real, financial cost to the government. Why should any government incur these costs? These are hard questions, and they deserve strong responses.

There are at least six reasons why any society should consider adopting laws that support a vigorous and independent NGO sector: (a) implementing the freedoms of association and speech, (b) encouraging pluralism and tolerance,

²² "Lax enforcement and oversight or differential application can render formal constitutional rights hollow and reduce the prospects for NGO empowerment. In addition, many developing countries have very bureaucratic, centralized governance traditions that can also inhibit the vitality and influence of the NGO sector. These tendencies are simultaneously the cause and consequence of the historical weakness of civil society in many parts of the world." USAID, Core Report of the New Partnerships Initiative, pp.1-9 (Draft, July 21, 1995).

(c) promoting social stability and the rule of law, (d) efficiency, (e) "public sector market failure," and (f) providing support for a market economy. The first three are social or political, while the latter three are economic.²³

a. **Freedom of Association.** Laws permitting NGOs to be established as legal persons play a crucially important role in making the freedom of association, protected by international and constitutional law, real and meaningful. It is by being able to form a tenants' rights association, an organization to promote education for poor women, an environmental protection organization, and so forth, that individuals most fully realize the freedom of association. Further, the freedom of speech – equally protected by international and constitutional law – is for most individuals a freedom that has little meaning unless implemented through laws permitting interest groups to be formed. Most of us are not important enough for our individual voices to be heard, but if we can band together to form, for example, a society for the protection of the rain forest or the rights of ethnic minorities, then our collective voice will be heard. Laws that permit and protect NGOs give real meaning to the freedoms of association and speech. Put differently, the absence of rules permitting formal NGOs to exist might in reality so jeopardize or curtail the right of individuals to associate fully and in meaningful ways that a complaint might be entertained by the Human Rights Committee created under the Covenant. How NGO laws are rooted in fundamental legal norms is both complex and important:

(i) **International Law.** Freedom of Association is one of the least developed of the fundamental principles of international human rights law. Article 20 of the Universal Declaration of Human Rights of 1948²⁴ protects the right of individuals to "peaceful assembly and association," while Article 19 states that "[e]veryone has the right to freedom of opinion and expression" While not a binding treaty, the Universal Declaration has had a powerful impact on the development of international human rights.

²³ Although the Bank's concerns are directed primarily towards economic development, broadly conceived, it must be conceded that economic considerations may not be determinative in shaping the NGO laws of any given country. "The amount of space allowed to NGOs in any given country is determined first and foremost by political considerations, rather than by any calculation of the contributions of NGOs to economic and social development." Michael Bratton, *The Politics of NGO-Government Relations in Africa*, World Development 17(4) (quoted in John Farrington & David Lewis (eds.), *Reluctant Partners: Nongovernmental Organizations, the State, and Sustainable Agricultural Development* (Routledge 1993).

²⁴ Gen. A. Res. 217 (1948). The freedom of association is also implied by the freedom of religion, which is also a right recognized and protected under the Universal Declaration and the International Covenant. Similarly, the right to join a trade union, protected under Article 22 of the Covenant as a civil, not just an economic, right, is another example of the freedom of association.

The International Covenant of Civil and Political Rights of 1966, on the other hand, is a binding multilateral treaty that has been ratified by over 135 countries. Articles 21 and 22 of the Covenant guarantee, respectively, the rights of peaceful assembly and freedom of association.²⁵ Under the Covenant, states party are required to conform their legislation to recognize and protect the rights established in the Covenant. States party are permitted to restrict rights like the freedom of association that are protected by the Covenant only when such restriction is prescribed by law, and then only if the restriction is "necessary in a democratic society" to serve legitimate interests in national security, public safety, public morals or health, or the rights or freedoms of others.²⁶

In countries where the right of freedom of association under the International Covenant is clearly recognized, it is always considered to be a right enjoyed by individuals. Thus, though international law may require any country bound by the Covenant to adopt laws assuring protection for the freedom of association, that does not necessarily mean that laws must be passed allowing formally established NGOs to exist.²⁷ If an association of individuals takes on a permanent or institutional character, however, it can be argued by implication that formal legal status for the organization must be allowed and that the organization thus formed has the right to function freely and effectively, in order to permit ample scope for the individuals involved in the organization to exercise their rights of freedom of association.²⁸

(ii) Regional Covenants. The European Convention on Human Rights of 1950 enshrines the freedom of association in Article 11 and the freedom of expression in Article 10 and creates the Human Rights

²⁵ One of the important adjuncts of the freedom of association is the freedom of *non-association*. Generally speaking, no one can be compelled to join or remain a member of an association.

²⁶ In any particular case the key questions are likely to be, first, whether there really is or was a legitimate threat to national security, public safety, public morals or health, and, secondly, whether the steps taken were reasonable and proportional or unnecessary and excessive.

²⁷ The Human Rights Committee has not issued a general comment on Article 22, and there is little case law. In *M.A. v. Italy* (1984), Communication No. 117/1981, 1 Sel. Dec. of the Human Rights Com. 31-33 (1990), the Committee upheld the right of a state to prohibit formation of fascist political parties.

²⁸ "It is the broad right of freedom of association which is guaranteed by Article 22 . . . the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes." *J.B. et al v. Canada*, Communication No. 118/1982, 2 Sel. Dec. of the Human Rights Com. 38 (1990)(dissenting op. of Rosalyn Higgins, Rajsoom Lallah, Andrea Mavrommatis, Torkel Opsahl and S. Amos Wako).

Commission to enforce the rights protected by the Convention.²⁹ The Council of Europe imposes an obligation on each member state to respect these rights. The African Charter on Human and Peoples' Rights of 1981 provides somewhat ambiguous support for the freedom of association.³⁰ The American Convention on Human Rights of 1969 provides for broad protection of the freedom of association in Article 16, while the American Declaration of the Rights and Duties of Man of 1948 guarantees the "right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union, or other nature." There are no similar regional covenants in Asia or the Middle East.

(iii) Constitutional Protection. The constitutions of virtually all countries guarantee the freedom of association.³¹ In almost all cases, however, the provisions do so with a limitation that individuals are free to associate for "legitimate purposes" or a proviso that the freedom must be exercised "according to law" or some similar phrase, without placing clear limits on what the relevant law can restrict.³²

In sum, laws permitting NGOs to exist and operate freely are indispensable to the full and meaningful implementation of the freedoms of association and speech, and it can be argued that international law imposes an obligation on countries to enact sound NGO laws.

b. Pluralism and Tolerance. There are many differences among the members of any society, and individuals and groups have diverse interests and needs. Laws permitting NGOs allow individuals and groups to pursue their

²⁹ Under Article 25, an NGO may file a petition claiming to be a victim of a violation of the Convention. In *Lavisse v. France*, Appl. No. 14223/88, 70 Decisions & Reports, pp. 218, 237, the European Commission on Human Rights indicated that if an organization was prevented from carrying out its lawful objectives by a refusal to let it register [be established], that would constitute an interference with freedom of association.

³⁰ Article 10(1): "Every individual shall have the right to free association provided that he abides by the law."

³¹ The Saudi Basic Law is an exception; it does not recognize the freedom of association. In the Turkish Constitution, Article 33 provides that associations must receive governmental approval before they may be formed. In the Ukrainian Constitution, Article 36 guarantees freedom of association only to public associations and political parties. In contrast, the Constitution of The Philippines explicitly encourages the development and participation of NGOs at all levels of decision-making in that country. The same is true of the constitutions of Bolivia, Brazil, and Colombia.

³² For example, the Constitution of Egypt provides in Article 55: "Citizens shall have the right to form societies as defined in the law. The establishment of societies whose activities are hostile to the social system, clandestine, or have a military character is prohibited."

individual interests (e.g., sport, folk music, preservation of a particular language or culture) and thus support the development of pluralism and tolerance within society.

It is important to emphasize that pluralism and tolerance are not the same thing as a commitment to democracy. Thus, a country could endorse the creation of good NGO laws in order to achieve the first economic reasons set out below and to permit pluralism and tolerance without committing itself to democracy as a form of political government. In other words, NGO laws are not solely a feature of democratic governments; such laws also have a meaningful role to play in other societies as well.³³

c. Social Stability and the Rule of Law. Unavoidably, there are differences among individuals in any society, and it is inevitable that these differences will find expression in one way or another. This is, essentially, the opposite side of pluralism; not only is diversity desirable, it is unavoidable. In any given society people come from different ethnic backgrounds, speak different languages, and practice different religions. They have different sexes, different ages, and pursue different professions and avocations. These differences will come out, sooner or later, and they will be expressed in a licit or an illicit manner, either legally or illegally. A principal and appropriate role for laws for the NGO sector is to permit and encourage the existence of such organizations and to afford them legal protection while at the same time providing the public with protection against misconduct and abuse by requiring appropriate transparency and accountability, especially regarding the use of public funds or funds donated by the general public, and by encouraging self-regulation within the NGO Sector (see Chapter M). Thus, rather than driving a group underground (in order, e.g., to preserve their language and culture), the laws for the NGO sector allow that group legal existence and the protection of the law, so long as the NGO that the group forms meets generally applicable standards of legality and responsible behavior. The NGO laws, in other words, provide an essential safety valve for social pressures and energies that build up inevitably in any society. The existence of numerous and diverse NGOs is

Egyptian Law 32 of 1964 implements this constitutional provision by stating in Article 2 that, "Every society formed that violates public order or morality, or for an illicit reason or objective, or whose purpose impairs the security of the Republic or the government's republican form or its social system, shall be null."

The German Constitution guarantees the freedom of association to legal entities as long as they operate within the law. See GG art. 19 par.3.

³³ It can be argued that, although democracy is not necessary for the existence of a sound, vibrant, and independent NGO sector, the existence of such a sector is essential to the long term success of democracy. In addition, a strong and vigorous NGO sector may be necessary in a democracy to allow minority groups to escape excessive majoritarianism.

characteristic of peaceful and stable societies where there is ingrained respect for the rule of law.³⁴

d. **Efficiency.** Private, voluntary organizations can often be efficient partners for governments in the provision of public goods and services. In other words, in many cases they can provide such services with higher quality and lower cost than can the government. There are several reasons for this. One is the fact of volunteerism itself. To the extent that individuals devote time and energy to the solution of public problems (e.g., assistance for the elderly or the handicapped) on a free and voluntary basis, there is a cost savings. This kind of relationship to service provision is in sharp contrast to often over-staffed and expensive government bureaucracies.³⁵

More importantly, to the extent that public goods and services are provided by NGOs rather than by a governmental agency, there can be cost savings that result from competition. Although the NGO sector is not the market sector, there is real competition for grants, contracts, and donations. NGOs that demonstrate the ability to deliver high quality goods and services on a cost-effective basis will be preferred by both private and governmental donors.³⁶ As a result, many governments look to NGOs to provide a wide range of basic services³⁷. Finally, there is the factor of market knowledge. A small, locally based NGO may often know the real needs of the people to be served, and how best to meet those needs, than a large and often distant governmental agency.

³⁴ In a democratic society NGOs can provide individuals and groups with the ability to pursue interests or goals not supported by the majority of people and to provide for themselves those goods or services for which the majority is not willing to pay.

³⁵ Unfortunately, many government agencies that fund NGOs to provide important social services do not exercise any effective supervision over the quality and effectiveness of the services being provided. See United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), Fiscal Incentives and Other Measures to Support the Growth and Viability of NGOs for HRD, p. 27 (1994)(hereinafter cited as ESCAP, Fiscal Incentives). In Hong Kong, however, NGOs are held to specified standards and the government carefully monitors NGO output and performance as a condition for further grants. Id.

³⁶ Unfortunately, corruption also plays a role in the selection of NGOs in some cases. See ESCAP, Fiscal Incentives, p. 27-28 (1994).

³⁷ In Hong Kong all recognized social welfare, rehabilitation, and community development services run by NGOs are government funded. In India the current national development plan envisages a government-NGO partnership in the implementation of poverty alleviation programs, explicitly recognizing that NGOs can act as catalysts and can organize beneficiaries, involve people in planning and development, and provide the necessary support to make development a reality. By contrast, in Malaysia there is little collaborative government-NGO work and virtually no NGO participation in planning, implementation, or evaluation of national social development programs. "There . . . remains, in general, a dearth of effective working arrangements between government organizations and NGOs in many ESCAP countries [Asia and the Pacific]." ESCAP, Fiscal Incentives, p. 14, 27 (1994).

NGOs, in other words, are often more efficient because they may have superior knowledge of the public needs to be met and may be more responsive in meeting them.³⁸

For all of these reasons, NGOs are often important partners with governments in the provision of needed goods and services³⁹. Accordingly, the traditional tendency to see NGOs and governments as occupying separate "sectors" and being natural antagonists does not reflect reality. In rich and poor countries around the world, NGOs often work in close partnership with local and national governments. For many NGOs this means that governments are the most important source of support and funding.⁴⁰ But it is a truly two-way street. NGOs provide indispensable information to governments and are often the most fruitful source of innovative suggestions for improving social programs. There is also keen interest in many countries in using NGOs to accomplish a transfer of formerly state-operated social and cultural organizations into the not-for-profit sector, and some countries have created special NGO laws for that purpose.⁴¹

It should also be noted, of course, that relations between governments and NGOs are often adversarial or competitive. A principal purpose of many advocacy NGOs is to point out the shortcomings of governments and to advocate for changes in policy. Many governments dislike such criticisms and

³⁸ It is also true that in many instances NGOs are more efficient than private enterprise organizations. Because individuals working for NGOs usually ask and receive less in compensation than those in comparable jobs in the for-profit sector, an NGO's costs may be lower. In addition, many NGOs benefit from the service of volunteers and often receive contributions, in cash and in kind, to support their activities. Finally, an NGO that is exempt from income tax has an advantage over a taxable for-profit entity engaged in the same enterprise.

³⁹ A widely cited example of NGO-government partnership is the Janasaviya Trust Fund in Sri Lanka. Between 1991 and 1994 it pooled money from government and private sources to allocate funds among small projects and grass-roots organizations. Its objectives were to promote employment through rural works programs, affect the human resources development of beneficiaries, support the institutional development of its partner organizations, enhance the nutrition of children, pregnant women, and lactating mothers, and provide credit for income generating projects. ESCAP, *Fiscal Incentives*, p. 37 (1994). See generally, Lester M. Salamon & Helmut K. Anheier, *The Emerging Sector: An Overview* (The Johns Hopkins University Institute for Policy Studies 1993) (hereinafter *Emerging Sector*).

⁴⁰ In Hong Kong most NGOs obtain 70-80 percent of their income from direct public funding. In Singapore the government assists NGOs to recruit staff, allocates disused government buildings at nominal rents, helps NGOs obtain premises within housing estates, and funds up to 50% of capital and operating costs of facilities run by NGOs for social welfare purposes.

By contrast, in countries such as Laos and Mongolia that are going through severe cutbacks in government expenditures, NGOs that have traditionally been funded by the state are suffering badly. ESCAP, *Fiscal Incentives*, p. 28 (1994).

⁴¹ See Karla W. Simon, *Privatization of Social and Cultural Services in Central and Eastern Europe: Comparative Experiences*, 13 B.U.Int'l L.J. 383 (1995).

find various ways, including repressive laws, to silence advocacy NGOs or shut them down. Such tactics are short-sighted. It is in the long term interest of governments everywhere that there be vigorous and responsible debate on governmental policies, at least if the government believes that its goal is to more fully and adequately meet the real needs of the people rather than merely to perpetuate its power. Only through constantly testing various policies in the "market place of ideas" can there be any assurance that governmental policies will improve over time.⁴²

Finally, in many developing countries governments and NGOs are competitors for development assistance money. About US\$2.5 billion per year of official development assistance (ODA) goes through Northern NGOs, and in addition, an increasing number of donors now have programs to fund Southern NGOs directly.⁴³ In many countries the balance between ODA money going to governments and going to NGOs shifts significantly over time, and there is constant competition between the two sectors to obtain a "larger slice of the pie."⁴⁴

e. Public Sector Market Failure. The phenomenon of market failure is well known in discussions of the private, business sector. The law of supply and demand is an extraordinarily powerful force in the production of goods and services in a cost-effective way, a way that usually meets the needs or desires of individuals and organizations with quality and responsiveness. There is often "market failure," however, in the provision of generally needed public goods or services, such as parks or highways. Public goods are necessary because they enhance the quality of life (e.g., parks) or constitute part of the economic infrastructure that is necessary for the business sector to flourish (e.g., highways). An essential role for government is to identify those areas of market failure where there is a real need for public goods, and to meet those needs.

There is a similar kind of "market failure" in the provision of public goods. No matter how intelligent, dedicated, hard-working, and public-spirited the

⁴² "It is important for governments to appreciate . . . that NGOs . . . have a watchdog function, which may place them at odds with government agencies. In fulfilling that function, they can play a valuable role in identifying malfunctions within government agencies whose own internal monitoring systems may not be operating efficiently, and they can provide a vent for discontent when the political process falls short of meeting the people's expectations. In receiving . . . legal status, NGOs are provided with a much-needed formal assurance regarding their political position. That procedure can set the stage for constructive NGO operations, both as "service" and "advocacy" organizations, in a climate conducive of government-NGO cooperation." ESCAP, Fiscal Incentives, p. 16.

⁴³ John D. Clark, NGOs and the World Bank, World Bank 1996.

⁴⁴ This may lead to inappropriate attempts by governments to create special registration and control procedures for development NGOs. See Note 79 below.

officers and employees of any government are, they simply cannot and do not anticipate all of the public goods and services that are desired by the citizenry. For example, there might in some African or Latin American country be a substantial number of citizens who have a passionate interest in Japanese art, and who would be willing to provide substantial funds and services to assure the creation of a museum for Japanese art. It is unlikely that government officials, however, will be able to identify this, or thousands of other desires and interests of society, and meet those needs in a responsive, adequate, and even-handed manner. Laws that permit individuals and groups to come together to meet the gaps created by market failure in the public sector play a vital role in enriching society and assuring that those public goods and services to which individuals are willing to devote their own resources will be provided.

f. Support for a Market Economy. The third economic justification for NGO laws is that they provide indirect support for the success and growth of market economies. There is some evidence that market economies flourish best where social stability, public trust of institutions, and respect for the rule of law exist.⁴⁵ These societal values are fostered by laws for the NGO sector. This view is perhaps best documented in the work of Prof. Robert Putnam of Harvard University. Based on intensive sociological research in the North and South of Italy over a twenty-year period, Prof. Putnam concluded that the best predictor of future economic development is the existence of strong civic traditions of cooperation, social networks, trust, and a commitment to social good – a interconnected set of conditions that he refers to as “social capital.”⁴⁶ In a similar vein, Francis Fukuyama has concluded that, “countries that have vigorous private nonprofit organizations like schools, hospitals, churches, and charities, are also likely to develop strong private economic institutions that go beyond the family.”⁴⁷ In short, this research suggests that encouraging a sound

⁴⁵ For example, there are nearly 200,000 registered charities in England, and over 1,000,000 Section 501(c)(3) “public charities” in the United States.

⁴⁶ Robert D. Putnam, Making Democracy Work: Civic Traditions in Modern Italy (Princeton Univ. Press; 1993):

“[C]ivics helps to explain economics, rather than the reverse. . . . [C]ivic traditions turn out to be a uniformly powerful predictor of . . . socioeconomic development. . . . [C]ivics is actually a much better predictor of socioeconomic development than is development itself. . . . In summary, economics does not predict civics, but civics does predict economics, better indeed than economics itself.” [pp. 154-157.]

⁴⁷ Francis Fukuyama, Trust: The Social Virtues and the Creation of Prosperity, p. 49 (1995). It may be that the rapidly growing economies of East Asia offer evidence that Western style democracy and concern for human rights are not necessary for economic growth. It is quite a different matter, however, to argue that economic development can be successful without social stability, public trust of institutions, a wide array of informal networks, and the rule of law – key civic virtues that are nurtured by an active NGO sector.

NGO sector may help to strengthen economic growth and eliminate burgeoning economic impediments to solving important social problems.

Chapter B. Definitions and Terminology.

Discussion. Although the following definitions may be consulted at any time and need not be read through from beginning to end, it is recommended that definitions (a), (b), (c), and (h) be read before the substantive chapters of the Handbook, for they contain important distinctions and concepts that are assumed throughout the Handbook. It should also be noted that there are important linkages between definitions (d), (e), and (f), between (l) and (m), and between definitions (i), (j), and (k). The definitions have not been alphabetized because doing so would scatter these related concepts, and any definition can easily be found in the Table of Contents. Finally, throughout the Handbook definitions and good practices are placed in italics at the beginning of each section. They are explained and developed in the discussion sections which follow. This structure has been chosen so that a reader who fully accepts a given good practice or is not interested in it can skip to the next section.

Section 1: *Definitions and Terminology.*

(a) *Nongovernmental Organization (NGO).* As used in this Handbook, “nongovernmental organization” (NGO) refers to an association, society, foundation, charitable trust, nonprofit corporation, or other juridical person that is not regarded under the particular legal system as part of the governmental sector and that is not operated for profit – viz., if any profits are earned, they are not and cannot be distributed as such. It does not include trade unions, political parties, profit-distributing cooperatives, or churches.

Discussion: “NGO”, is not a legal term. It is used here because it is the term almost universally used by the World Bank, the United Nations, and other national or multinational bodies when referring to non-governmental, not-for-profit entities that are engaged in development or advocacy activities.

Looking at the field more broadly, there is no agreed terminology for describing the NGO sector. The French refer to the *économie sociale*, the British to *public charities*, the Japanese to *koeki hojin*, and the Germans use the term *Vereine*, which simply means associations.⁴⁸ In addition to talking about NGOs, Americans talk about *nonprofits*, *not-for-profit organizations*, *exempt organizations (EOs)*, and *private voluntary organizations (PVOs)*. CIVICUS, the global organization promoting citizen participation, has begun using the term “civil society organization” or “CSO.”⁴⁹ It is not possible to reconcile these terms,

⁴⁸ See *The Emerging Sector*, op. cit. supra, p. 3.

⁴⁹ Adil Najam of the Massachusetts Institute of Technology has compiled a list of 45 terms that have been used in the literature in the field to describe NGOs. See Appendix V.

or even to find a common denominator. All that is possible is to be clear how the term chosen here is used – i.e., what it includes and what it does not include.

When the Bank uses the term “NGO,” it is usually referring to the myriad of organizations, some of them formally constituted and some of them informal, that are largely independent of government and that are characterized primarily by humanitarian or cooperative, rather than commercial, objectives, and that generally seek to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development.⁵⁰ In the Bank’s usual usage, the term “NGO” refers especially to organizations that work in the areas of relief, development, and advocacy and that depend at least in part on voluntary donations and service.⁵¹ In the Bank’s normal usage many entities that are generally considered part of the nonprofit sector – such as nongovernmental universities or research institutes – are not treated as NGOs.⁵² *The Handbook does not adopt the usual meaning of “NGO” as used by the Bank.*

As used here, the term “NGO” refers only to formally organized and legally established entities – entities that are recognized as legal persons or juridical entities in the legal system under which they were established.⁵³ It does not include any organization that is classified under the laws of the particular jurisdiction as part of government. It does not include any organization that is organized or operated primarily for private profit. It does not include any organization that is permitted, by the relevant laws or its own internal operating rules, to distribute profits and earnings as such. It does not include private trusts set up to benefit members of the family of the person establishing the trust. It does not include trade unions, political parties, profit-distributing cooperatives,⁵⁴ mutual insurance companies, or churches (though it may include social service

⁵⁰ See OD 14.70, Involving Nongovernmental Organizations in Bank-Supported Activities, ¶ 2 (August 1989).

⁵¹ See, NGO Unit, The World Bank’s Partnership with Nongovernmental Organizations p. 6 (The World Bank; draft of January 1996).

⁵² See OD 14.70, *op. cit. supra* n.50.

⁵³ As discussed further in Section 3(a), there are good reasons for establishing an NGO as a juridical entity – and for not doing so. Many, perhaps most, organizations that are colloquially referred to as “NGOs” are never established as legal persons. They depend for legal protection, not on NGO laws – which are the subject of this Handbook – but on general laws protecting individuals, including their rights to freedoms of assembly, association, and speech.

⁵⁴ This is not to suggest that for-profit cooperatives are not important legal vehicles for social and economic development projects.

agencies, schools, and the like that are organized or controlled by churches).⁵⁵ The basic reason for excluding these organizations is that in most legal systems they are governed by separate laws because of special issues and concerns relevant to, for example, trade unions, political parties, or churches.⁵⁶ An additional reason to exclude categories of cooperatives and mutual insurance companies is that they typically permit the distribution of profits; the most important defining characteristic of NGOs is that they are precluded from distributing profits. See Section 15.

Despite the usual usage of the Bank, the term NGO is used here to include social clubs, professional associations, trade associations, educational organizations, museums, or many of the kinds of organizations that constitute what has traditionally been called the "nonprofit" sector, the "independent" sector, the "third" sector,⁵⁷ or what is increasingly being referred to as "civil society."⁵⁸ It is used to include mutual benefit organizations as well as public benefit organizations, and it is not limited to development organizations or those concerned with minorities, the environment, or the poor.⁵⁹

⁵⁵ The term "church" is used to refer to an organization whose principal purpose is to promote, encourage, or organize religious worship or religious education.

⁵⁶ For example, the laws of Ecuador distinguish between juridical persons subject to general NGO laws (corporations and foundations) and those governed by specialized laws (communes, comunidades campesinas, unions and professional organizations, cooperatives, mutual associations, stock trading associations, credit unions, political parties, public universities).

⁵⁷ The business sector being regarded as the first sector and government as the second; some argue that there is a fourth sector, comprised of the family and informal community relationships and groupings (e.g., neighborhoods, bridge clubs, etc.).

⁵⁸ Hence the term "civil society organization" or "CSO." Many object, however, that such a usage improperly limits the concept of civil society to include only formal not-for-profit institutions and not other formal and informal entities that mediate between and among individuals, the state, and the for-profit sector. See, e.g., John Keane, *Democracy and Civil Society*, London (1988).

⁵⁹ The definition used here is similar to, but not the same as, the definition used in the Johns Hopkins project to "map" the nonprofit sector. That study includes only organizations that are (i) formal, (ii) private, (iii) non-profit-distributing, (iv) self-governing, (v) voluntary, (vi) nonreligious, and (vii) nonpolitical. See *The Emerging Sector*, op. cit. supra n. 39 at pp. 14-16. To note a few of the differences, the Johns Hopkins definition would include organizations that have "some institutional reality" and that do not in fact distribute profits; the definition used here would include only organizations that are established juridical entities and that are prohibited by law from distributing profits as such. Additionally, the definition used here would not require an element of voluntariness, in the sense of working without pay.

(b) Mutual Benefit vs. Public Benefit.

(i) A fundamental distinction between types of NGOs that is relevant to the legal benefits and burdens placed upon them is whether an NGO is organized and operated primarily for the mutual benefit of a defined group of individuals (often the members of a membership organization) (an MBO) or primarily for the benefit of the public or some segment thereof (a PBO).

Discussion: Although the broad distinction between activities undertaken for the mutual benefit of members and activities undertaken for the public good is clear, it can be very difficult to apply the distinction in particular cases. Some guidelines may be suggested. First, if PBOs are identified, all other organizations can be classified as MBOs.

Second, the way to determine whether an organization is a public benefit organization is to determine whether the purposes and activities of the organization are such that they affect or are intended to affect the interests of the public or a significant portion of it.

Some other useful points can be made. Although it is generally beneficial to society that there are singing groups and sailing clubs, such organizations are MBOs not PBOs. In other words, the fact that it is good for society that there are membership organizations does not make those organizations entities that serve the public good in the sense meant here.

With respect to PBOs, it is well established in societies around the world that an organization serves the public good if it serves some definable segment of the public. Thus, an NGO set up to care for crippled children in a suburb of Colombo is a PBO.

One problem that is a difficulty in many countries, particularly common law countries whose NGO laws stem from the English Statute of Elizabeth of 1601, is whether NGOs that provide benefits primarily or exclusively to a rich elite deserve treatment as a PBO. For example, is an opera company whose patrons are the rich or a museum that caters to the artistic tastes of the elite an organization serving the public interest? Passionate views have been expressed on both sides of this issue, but no position is taken on it in this Handbook.

(ii) It is appropriate to confer greater benefits (e.g., the tax deductibility of donations) upon PBOs, and to impose greater burdens on them (e.g., requirements for greater financial reporting and disclosure).

Discussion. For example, Argentina allows tax deductions for contributions to foundations that have a public benefit purpose, but also imposes greater burdens in the form of requirements for financial reporting and disclosure.⁶⁰

(c) Membership and Non-membership Organizations.

(i) A membership NGO is one in which the highest governing body consists of the members of the organization. A membership organization usually has a board of directors or similar body the members of which are elected by, and are accountable to, the membership.

(ii) A non-membership organization is one in which the highest governing body is a board of directors or similar body. Although vacancies on the board of directors may be filled by the remaining directors, or by nomination by others (e.g., the founders), the board itself is not accountable to a higher organ of the organization.

Discussion: The association is the basic form of membership organization under civil law systems. Under common law systems membership organizations may be called “associations,” “societies,” or other similar names. In many civil law systems a “foundation” is the basic form for a non-membership organization, and there is often no requirement under laws on foundations for the foundation to have any significant endowment or patrimony or to engage principally in grant-making.⁶¹ Under common law systems non-membership NGOs are typically organized as “nonprofit corporations,” “charitable trusts,” “limited liability companies,” “friendly societies,” or similar entities.⁶² In many common law systems nonprofit corporations may be organized as either membership or non-membership organizations. Under common law systems the term “foundation” is usually reserved for organizations that have a significant endowment and that engage primarily in making grants for public benefit

⁶⁰ See Ley 19.836, Arts. 23-27.

⁶¹ A foundation under most civil law systems may be what is referred to in the United States as an “operating” foundation. Under some civil law systems (e.g., Germany), a foundation may be established for private purposes as well as public ones. Some civil law systems (e.g., Argentina) require that a foundation’s initial endowment be sufficient to accomplish its objectives.

⁶² For example, under the laws of the Gambia, like those of many other countries in the British Commonwealth, an entity formed to promote commerce, art, science, religion, charity, or any other useful object, and which intends to apply its profits, if any, or other income to promoting its objects and not to pay any dividends, may be established as a not-for-profit limited liability company. In Japan, which is a civil law country, *koeki hojin* – public interest corporations – include incorporated nonprofit foundations and associations.

purposes or in operating a major facility (e.g., a museum) for the benefit of the public.

There is a fundamental structural difference between a membership organization and a non-membership organization. A membership organization is generally subject to additional supervision or review -- i.e., by the membership -- and is arguably entitled to a lower level of scrutiny or supervision by the government because of that internal supervision. In reality, however, members often do not exercise adequate scrutiny over the affairs of an association.⁶³ Moreover, the public does have an interest in the governance and operations of membership organizations formed for a public purpose or the activities of which affect the public interest.

Although a membership organization may be an MBO or a PBO, it is typical for a group that forms an NGO to pursue subjects or activities for collective or mutual benefit to establish the organization as a membership organization. Although a non-membership organization may be an MBO or a PBO, it is typical for an organization that is interested in pursuing activities for the benefit of society as a whole or some defined portion of it to be established as a non-membership organization.

Laws governing membership organizations stipulate the minimum number of individuals or organizations that must come together to form a membership organization. Because requiring a large number (e.g. 21) impedes the formation of membership organizations, most modern laws allow associations to be formed by a relatively small number of persons (e.g. 3-7). Although most modern laws governing membership organizations allow such organizations to be formed by non-natural persons (e.g., other legal entities), many existing laws do not. Under these latter laws it is either difficult or impossible to form "umbrella" or "peak" organizations that can provide services to and speak on behalf of like-minded organizations. (See Section 3(e) below.)

Laws governing non-membership organizations typically allow a small number of individuals or organizations (e.g., 1 or 3) to form such an organization.⁶⁴ Such laws also often allow non-membership organizations to be

⁶³ In England an independent inquiry on governance conducted for the National Federation of Housing Associations (the "Hancock Inquiry") concluded that "the accountability impact of membership structures is largely illusory, and we recommend that Associations develop shareholding membership mechanisms that are more explicit about their purpose." See Lawrence Holden, "Charities and Governance: A Study in Evolution," 4 Charity Law & Practice Rev. 27, 39 (1996).

⁶⁴ It typically takes more individuals to form an association. For example, under Egypt Law 32, it requires at least 10 people to form an association, while in Romania 21 are required. In El

created by will or other testamentary act. Virtually all endowed and grant-making organizations are established as non-membership organizations, and many of them come into existence by testamentary act.

(iii) *The question of whether the highest governing body of an organization should be the assembly of members or a self-perpetuating board of directors is an issue that should be kept separate from the issue of whether the principal purpose of the organization is to serve the mutual benefit of a defined group of individuals or a public purpose.*

Discussion. These issues are frequently confused in civil law systems. See Section 1(b) supra.

(d) Law. *A general and binding legal rule enacted and published by the parliament or other competent legislative body.*

(e) Decree or Order. *A binding rule adopted and published by an executive agency of the government, such as the council of ministers or a minister of a cabinet department.*

(f) Rule or Regulation. *Written instructions made available to the public by an executive ministry or an independent agency of the government.*

Discussion: Government officials are typically required to follow pertinent rules or regulations, and a ruling may be binding with respect to the person to whom or with respect to whom it is issued. Typically, however, rules and regulations interpret and apply laws, decrees, and orders and do not themselves constitute law. Courts often defer to the expertise of an agency that has issued a rule or regulation and follow it in the adjudication of a litigated case, but often courts will disregard a rule or regulation regarded by the court as outside the scope or meaning of the law in question. On some occasions legislatures will delegate to executive ministries or agencies the authority to create new and binding legal rules through the promulgation of regulations.

(g) Governing Documents. *The legally operative documents that, when accepted by the appropriate agency, court, or ministry, establish the organization and define its rights, duties, and powers, set out the governance structure, and otherwise define the legal parameters within which it operates.*

Salvador, a minimum of 20 persons are required to establish an association, while in Ecuador 5 are enough. In India, Pakistan, and Nepal 7 persons are required.

Discussion. In common law systems the term “statute” is used to refer to a law or piece of legislation that has been acted by a parliament or other legislative body. Distinctions are often drawn between laws that exist merely as statutes and those that have been “codified” into a body of permanent rules dealing with a particular subject (e.g., taxation).

In sharp contrast, civil law systems use the term “statute” or “statutes” to refer to the governing documents of an organization, not a piece of legislation passed by a parliament. Legislation may be codified into a code, such as a Labor Code, or the Civil Code, but it is referred to as law, not as statutes.

In common law systems the governing documents of an NGO – those which, when properly filed with the appropriate governmental ministry or agency, give it existence as a recognized legal person and which set forth its purposes, powers, limitations, and so forth. – are variously referred to as the “charter,” the “articles of incorporation,” the “deed of trust,” and other terms. (These governing documents are often supplemented by “by-laws,” which can be amended or supplemented without re-establishment.) The common law never uses the term “statute” or “statutes” to refer to the governing documents of a legal entity.

There is no common terminology and no way to reconcile the different terms used to refer to the governing documents of an NGO. For purposes of this Handbook the term “governing documents” is used throughout.

*(h) **Establishment.** The formal legal process by which an NGO becomes a legal person.*

Discussion. In common law systems the term “incorporation” is often used instead of “registration,” which is the common civil law term. The term “establishment” is used here to refer to both processes – namely, the process by which formally notarized or witnessed documents are filed according to prescribed procedures with a designated office or agency of the government or a court. When the filing is accepted, the NGO comes into existence as a legal person.

Many common law systems permit the establishment of NGOs in the form of a trust by private act, without a formal filing with any court or government agency. Some civil law systems (e.g., Bolivia, Brazil, Italy, and the Netherlands) permit the formation of a legal person by notarial act, without a formal filing with any court or government agency.⁶⁵ There does not seem to be any legal system

⁶⁵ Entities formed by notarial act may acquire legal personality but not have limited liability. This is the case in Brazil. Perhaps the most liberal law is found in South Africa, where a

under which significant tax preferences are conferred upon an NGO without a filing with the tax authorities or other appropriate agencies of the government. The principal advantage of a system that requires filing with an agency of government to create a legal entity is that acceptance by that agency assures that the establishment has been successful. It is always possible that an entity formed by private or notarial act will subsequently be held by a court not to have been properly formed, and therefore never to have come into existence.

"Establishment" as used here refers to the coming into existence of an NGO as a formal legal entity. It should be noted that establishment laws often require certain formal acts to have been performed (e.g., a meeting of the founding members and adoption by them of the governing documents) before a formal filing can be made.⁶⁶

Other formal transactions between NGOs and government agencies should be distinguished from the establishment process. For example, a trust or society will not be recognized as a "charity" under English law until it has been formally "registered" with the Charity Commission. Similarly, a not-for-profit corporation will not be recognized as a Section 501(c)(3) public charity in the United States until its filing with the Internal Revenue Service has been accepted, and even then the status is provisional until the end of a three-year

voluntary association may be formed without registration or a notarial act and yet acquire both legal personality and limited liability without any formal process.

⁶⁶ The legal life of an NGO typically has various stages, as represented on the following chart:

Formation	Application	Establishment	Existence	Termination	Liquidation	Dissolution
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Under most NGO laws, the entity must be formed before an application for establishment can be filed. Typically this means that the founders must have an organizing meeting and a board of directors must be chosen. Once the NGO has been formed, an application can be filed. Obviously, some time elapses between the filing of an application and the acceptance by the agency handling establishment, though this time should be kept as brief as possible. As a legal matter, the organization acquires existence as a legal entity only when the application has been approved and, in many systems, only when the name of the organization is formally enrolled on a register of NGOs. Once enrolled, the legal existence of the organization may date back for some purposes to the date of its creation or to the date that the application was filed. For example, a lease for office space signed after creation but before establishment may be regarded as the legal obligation of the NGO once it has been formally established.

For many NGOs existence is perpetual. For those that come to an end, there are typically three stages. First, a decision is made (voluntarily or involuntarily) to terminate the organization. Following that decision, there is usually a period of liquidation during which the affairs of the NGO are wound up. Once all of the activities and obligations of the NGO have been concluded or discharged, the NGO is dissolved and its remaining assets distributed according to law. Throughout this period from termination through liquidation to dissolution, the NGO continues to have legal existence, though often with truncated powers.

Obviously, different legal systems use different terms for the stages described above. The purpose here is merely to convey the concepts, which are found in most legal systems.

testing period. Although these filings are important, they are not the acts that create the entity as a legal person, and the term "establishment" will be used here to refer only to that process.

(i) Termination. *Decision to end the formal status of an NGO as a legal person, either by voluntary act of the highest body of the NGO, or by governmental action or decree. See footnote 66.*

(j) Liquidation. *The process of winding up the affairs of an NGO that is being terminated. See footnote 66.*

(k) Dissolution. *The point in time when an NGO that has been terminated and has been in the process of liquidation finally ceases to exist as a legal person. See footnote 66.*

(l) Board of Directors. *The body of elected or appointed individuals that sets policies for an NGO and exercises regular oversight and supervision of its finances, operations, and activities. Both membership and non-membership organizations may have boards of directors; the latter must.*

Discussion. In common law countries many NGOs are formed as trusts and the board which sets policy and exercises oversight is called the board of "trustees." In many systems "directors" are full time officers of the organization. In many civil law systems legal persons often have both a "management" board composed usually of full time officers and a "supervisory" board that meets periodically.⁶⁷ This two-tiered structure is usually required with respect to for-profit entities but may not be for NGOs (e.g., Poland). Many membership organizations do not have a board.⁶⁸ The officers running the organization report directly to, and are supervised and controlled by, the assembly of members, which meets periodically. At the same time, many membership organizations, especially larger ones, have a board of directors which sets policy

⁶⁷ Under the Argentine law for foundations, governance and administration must be entrusted to a Council of Administration. This Council must have at least 3 members, but members can be public institutions or NGOs, not just individuals. An Executive Committee is also required. Ley 19.838, Art. 10. Under the Social Welfare Agencies Regulation and Control Ordinance of 1961 in Pakistan, a 15 person management committee must be appointed.

⁶⁸ Under Article 588 of the Civil Code of Ecuador, the majority of members which are eligible to vote comprise the "sala" or legal meeting of the "corporacion." Under the Civil Code of Paraguay, an association is run by one or more directors designated by the Assembly of members. See Art. 105. Under Article 106 interested parties may petition the courts to fill vacancies among the directors, and the courts may appoint non-members if it concludes that no members are competent to serve.

and supervises the management of the organization. Typically, such a board of directors is elected by the assembly of all members.⁶⁹

As used here, "board of directors" is used to include a board of trustees. It is not used to refer only to full time officers of the organization, but includes the volunteer directors who meet periodically (e.g., a few times a year) to set policy and exercise oversight.

(m) General Assembly of Members. The legally required meeting of the members of a membership organization, usually annually or biennially, at which basic policies for the organization are set or changed, the board of directors is elected, and so forth.

(n) Endowment. A sum of money owned and invested by an NGO to enable it to carry out its purposes. Income from the endowment (e.g., dividends and interest) may be spent on the operations or programs of the NGO, but it is generally required that the endowment must be maintained intact perpetually for the long term support of the organization.

Discussion. In civil law systems the term "patrimony" is often used instead of "endowment." In order for the real value of an endowment to be maintained in an inflationary economy, some of the income earned on the endowment must be reinvested. In some countries (e.g., the United States) laws require that an amount equal to a minimum percentage (e.g., 5%) of the endowment of a grant-making foundation must be distributed annually, in order to assure that foundations are not used as vehicles to accumulate huge fortunes on a tax free basis with little or nothing spent on public benefit purposes.

(o) Subsidiary. A separate legal entity owned or controlled by one or more other legal entities.

(p) Affiliate. A separate legal entity that is linked to another legal entity through the common ownership by a third legal person, or one that shares a common name, directors, and/or adherence to a common set of standards with one or more other organizations.

(q) Branch. A separate office of a legal entity, often in a foreign country, which does not constitute a separate legal entity.

⁶⁹ Under Article 10 of the Civil Code of Chile, the members of the Board of Directors of an association are elected at the annual meeting of the Asamblea General Ordinaria. Under Article 14 the function of the Directors is to direct the corporation and administer its assets; report to the Asamblea General Ordinaria; submit to the approval of the Asamblea General Ordinaria proposals, a budget, and any other business matters which are necessary for the functioning of the corporation.

(r) Tax Preference. *Advantageous treatment under one or more tax laws.*

Discussion. Having exempt status under an income tax law is a tax preference. If donors to NGOs receive deductions in computing their tax liabilities, or credits against the taxes they would otherwise owe, these are also tax preferences. An NGO that is exempt from taxes on real property or is zero rated for purposes of the value added tax (VAT) receives a tax preference.

Chapter C: Relationship of NGO Laws to Other Laws.

Section 2: Relationship of Laws Governing NGOs to Other Laws in a Legal System.

(a) Rights, Remedies, and Sanctions. *NGOs should have the same rights, privileges, powers and immunities generally applicable to legal persons, and they should be subject to the same civil law and criminal law prohibitions, procedures, and sanctions that are generally applicable to legal persons.*

Discussion. Upon establishment an NGO acquires “legal personality” – it becomes a “juridical person.” What this means is that it has the right to enter into contracts, hire employees, lease machinery and equipment, rent office space, maintain bank accounts, and so forth, in its own name and on its own account to serve its declared purposes. Similarly, like other legal persons an NGO should be allowed to enter into a partnership or joint venture, so long as doing so is consistent with the purposes and powers of the organization. These are the rights, privileges, and powers of other legal persons in any legal system.⁷⁰ Of course, special rules are often enacted for NGOs because of their special needs and characteristics.

The acquisition of legal personality generally means that it is the NGO that is liable for the contracts, leases, employment relations, and so forth that it enters into. The NGO is no longer a collection of individuals each of whom is responsible for legal obligations that are incurred. In other words, the new legal entity acquires “limited liability.” It is the new juridical person – the NGO – that is responsible, and the individuals are not. Of course, individuals involved with an NGO may become liable for their own acts or omissions, see Section 12, but *the fundamental feature of establishing an NGO as a legal person is that it is the organization, and not those that founded it or act as its officers, directors, and employees, that becomes responsible for its legal undertakings and liabilities.*

It is not generally necessary to have special rules for NGOs; they need simply to have the same legal rights as other legal persons. Similarly, NGOs should be subject to the same duties, sanctions, and penalties that apply to other legal persons. For example, NGOs would generally be subject to the same

⁷⁰ In some civil law jurisdictions it has been felt to be appropriate to limit the amount of property that may be owned by a legal entity to that which is needed for it to fulfill the limited mandate for which it is formed. For example, in Mauritius an NGO may only own property that is necessary for its operations; the consent of the legislature is required to own or acquire additional property. In Madagascar donations and legacies to an NGO must be approved by the Council of Ministers, and an NGO may not possess property not necessary for the completion of its nonprofit purposes. Restrictions on the ordinary rights and powers of NGOs that go beyond ordinary civil law rules and that are designed to inhibit the activities of NGOs are not good practices.

employment laws as other legal entities. Thus, an NGO's employees might be entitled to legally required minimum wages, have the right to form unions and to strike, and be subject to various employment based taxes.

(b) Administrative and Judicial Review. *All acts or decisions affecting NGOs should be subject to the same rights of administrative and judicial review that are generally applicable to legal persons. Specifically, decisions to refuse to establish an NGO, to impose fines, taxes, or other sanctions on it, or to dissolve or terminate it, should be appealable to independent courts.*

Discussion: The rule of law is essential for the development of any modern society and economy. Essential to the development of the rule of law is the right of all legal persons in the society, including non-natural persons such as NGOs, to appeal decisions affecting them to independent courts. Not all legal systems have an independent judiciary. Not all legal systems have good systems of administrative law that allow decisions taken by governmental ministries, agencies, and courts to be appealed. This is a general problem, not one specific to NGOs. In fact, there should be no need to have any provisions in the NGO laws dealing with these issues, for they should be provided for in the general laws governing the judiciary and administrative appeals. It is important to stress, however, that arbitrary and unfair decisions affecting NGOs -- such as a wrongful refusal to establish an NGO -- will occur in any system that does not permit administrative decisions such as those to be appealed to independent courts.

(c) Special Issues of Federal Systems. *In any federal system careful consideration must be given to which sets of legal rules governing NGOs should be enacted and administered at the national level and which at the state, provincial, or local level.*

Discussion: Constitutions typically determine which areas and subject matters are within the jurisdiction of each level of the government. There is great variety in how constitutions allocate jurisdiction over NGOs in legal systems around the world, but generally it is better to have the essential requirements for NGOs established at the national or federal level. One reason is to assure national standards that are not subject to the vagaries of local politics. Another is to avoid "forum shopping" by NGOs -- the practice of selecting the local jurisdiction with the most lenient or advantageous laws. For example, in the United States the State of Delaware has aggressively sought to establish itself as having the best incorporation laws, thereby inducing many entities that do not operate in Delaware to establish themselves there. This has generated significant revenues for Delaware. As another example, the Duma of the City of Moscow recently enacted a special certification law for charities that may attract

Russian NGOs to seek to be established under it.⁷¹ Forum shopping may permit unfair advantages to rich or well-connected NGOs, and should be discouraged in order to create a more level playing field. On the other hand, regional diversity within a country may be a reason to allow differences in establishment requirements or procedures.

Whether a country has a federal system or not, there are always local governments with authority over various local taxes, licenses, and so forth. Again, diversity among local laws will create opportunities for NGOs to choose one jurisdiction over another. For example, an NGO might choose to locate in a city that offers exemption from real property taxes rather than in one that does not.

It is important in any system with laws at both the national and the local level for there to be mechanisms to promote coordination between the lawmakers at the various levels, so that contradictions are minimized and important issues do not “fall between the cracks.” Periodic conferences or joint commissions are possible mechanisms. Legal scholars can play an important role by delineating areas where laws conflict or where there are “holes” in the system.

(d) Conflicts of Laws Problems. Although important, these issues are outside the scope of this Handbook.

Discussion. Many NGOs, especially those involved in development, participate in transnational transactions. For example, many are funded through international grants or contracts. For others, termination might require reversion of assets to a like-minded organization in another country or to a foreign donor. When these problems arise, there can be questions about whether the laws of the country in which the NGO is located or those of the foreign jurisdiction should be applied. These problems, although important, are beyond the scope of this Handbook. Moreover, in most legal systems there are general conflicts of laws principles that apply to NGOs just as they do to other legal persons.

⁷¹ When NGOs can be established at either the federal or local level conflict and confusion often arise. This has proven to be the case in The Philippines and El Salvador, both of which permit NGOs to be established at either the national or the local level (in El Salvador under special municipal code provisions).

Chapter D. Legal Existence of NGOs.

Section 3: Establishment (Registration or Incorporation).

(a) *Laws governing NGOs should be written and administered so that it is relatively quick, easy, and inexpensive to establish an NGO as a legal person. Establishment should also be allowed for branches of both foreign and domestic NGOs.*

Discussion: The presumption behind all NGO laws should be that individuals, groups, and legal persons are *entitled* to form associations for any legal, nonprofit purpose. Establishment of an NGO should be voluntary, not mandatory. It should generally be possible for all natural and legal persons in a society to form an NGO through a relatively quick, easy, and inexpensive process. In addition, generally applicable laws should make it clear that establishing an NGO is a voluntary act and that all individuals are free to exercise their freedoms of speech, assembly, and association without creating a formally established NGO.⁷²

There are particular benefits that typically can be obtained only by becoming a legal person. When an NGO is established it becomes a separate legal person.⁷³ That generally means that the NGO and not its members, officers, directors, or employees, is liable for its debts, contracts, and obligations. See Section 12. It is also often the case that only an established NGO is eligible for government grants or tax breaks.

Many small NGOs choose not to be formally established. Although there are clear advantages to legal personality, in some countries those advantages are not great for small organizations, and they do not want the burden of filing annual reports and the possibility of legal harassment that can accompany formal legal status. Some NGOs may choose to register as private companies, cooperatives, or other legal entities if they believe this serves their purposes

⁷² This is made explicit in the 1901 French law which still applies in a number of African countries.

Important legal issues arise in connection with the exercise of the freedoms of association and speech by individuals on an informal basis and without the formation of a separate legal entity. For example, so-called "hate speech" may be banned or parade permits may be denied to groups opposing governmental policies. These are difficult, complex, and crucially important issues in any society, but they are beyond the scope of this Handbook.

⁷³ Not every apparent NGO is a separate legal person. In Mauritius individuals may form an association of 'droit commun' without seeking approval from the government, but such an organization does not have legal personality separate from its founders. In France 'societe de participation' can be formed without formal establishment or even anything in writing, but it is not regarded as a separate legal person.

better. To the extent that they are successful in doing so they forgo any special privileges afforded to—and special burdens imposed upon—legally established NGOs. Unless stated otherwise, the rest of this handbook relates to organizations legally established under laws designed especially for NGOs.

The process of establishing an NGO should be no more difficult or cumbersome than the process of establishing a for-profit entity. In many systems the most feasible way to provide for the establishment of an NGO is to make it part of the establishment law and process generally applicable to the creation of other legal persons.⁷⁴ Allowing individuals freely and easily to form NGOs is seen by some as part of the general trend towards deregulating societies.⁷⁵

If the founders of an NGO must appear personally before the establishing agency, rather than being able to become a legal person by mail, offices performing that function should be located at convenient places throughout the country. In most countries, personal appearance is neither required nor permitted, and this is the preferable approach.

A foreign NGO should be allowed to become a legal person and receive the same rights, powers, privileges, and immunities enjoyed by domestic NGOs as long as the foreign NGOs activities are consistent with the *ordre public* of the host country. The rules for foreign NGO establishment should generally be the same as for domestic NGO establishment. See Section 35. Similarly, there should be no special rules or limitation for NGOs that include foreign nationals on their board or staff.

It should generally be permissible but not necessary for a foreign NGO to establish a new and separate entity -- e.g., a subsidiary or affiliate. Typically, if a foreign NGO establishes a branch in another country, rather than a subsidiary or affiliate, all of its assets will be liable for any of its debts or claims in that other

⁷⁴ In some countries it is simply not clear what law governs the establishment of NGOs. For example, in Sri Lanka NGOs can register under the Voluntary Social Service Organizations (Registration and Supervision) Act of 1980, but no penalties are stipulated for failing to register under this law. NGOs have also been established under the Companies Act, the Mutual Societies Ordinance, the Trust Ordinance, and under provisions of the Ministry of Finance permitting registration as an "approved charity." The result is that no government agency has a comprehensive list of NGOs operating in Sri Lanka. ESCAP, *Fiscal Incentives*, p. 17 (1994). This publication also notes that "60 per cent of grass-roots organizations exist only on paper" and recommends that the problems of disjointed registration be solved "by introduction of more effective registration [establishment] procedures." *Id.*

⁷⁵ "In the context of devolution and decentralization of government authority and responsibilities underway in many developing ESCAP countries [Asia and the Pacific], NGOs increasingly are turning their attention to active collaboration with local government." ESCAP, *Fiscal Incentives* p. 44 (1994).

country. If it establishes a subsidiary or affiliate as a separate legal person, only the assets of that subsidiary or affiliate will be liable for the debts and claims of that subsidiary or affiliate unless it is deemed to be controlled by the parent NGO.⁷⁶

There are also situations in which it is advantageous for a domestic NGO to register a branch in a city or locale other than where its principal office is. E.g., it may wish to do so - so that it can receive service of process in the distant location for a claim arising there rather than being served at its headquarters. This branch would typically not be treated as a separate legal person. See Section 1(o), (p), and (q) for the definition of subsidiary, affiliate, and branch. Subsidiaries are established as separate legal entities; branches are simply other offices of an established NGO.

(b) The establishment of an NGO should require filing a minimum number of clearly defined documents and should be a ministerial act involving a minimum of bureaucratic judgment or discretion.

Discussion: Probably the single most frequent complaint about NGO laws in countries around the world is that they confer too much discretion on government officials to decide whether to permit the establishment of an NGO.⁷⁷ Sometimes this is because the legal provisions referring to establishment of NGOs do not contain clear definitions of the kinds of organizations that may be established. Sometimes this is because there is no way to appeal an erroneous or arbitrary refusal to establish an organization.

It should be permissible to establish an NGO to engage in any legally permitted activity that is not primarily intended to make profits, unless that activity is regulated under a special law, such as a law for political parties, religious organizations, or trade unions⁷⁸ Registration should not be disallowed

⁷⁶ There may be a difference between contract law and negligence law in this regard.

⁷⁷ For example, an NGO can be established in Argentina, Ecuador, Japan, Malawi, the Republic of Korea, and Taiwan only if the appropriate ministry decides that the objectives for which the NGO is being formed are for the welfare of the public. In Vietnam, under a presidential decree dating to 1957, associations must receive permission to be established "to protect the establishment of associations with legitimate purposes and protect and consolidate the people-oriented democratic system." Under Law 32 and Presidential Decree 932 of 1966, Egypt requires an NGO to obtain approval from the Ministry of Social Affairs, the ministry with jurisdiction over the NGOs proposed field of activity, and the State Security Department, though all decisions are subject to judicial appeal.

⁷⁸ "To ensure that NGOs function effectively, it is necessary for governments to restrain themselves from the temptation of seeking to influence or otherwise involve themselves too closely in NGO affairs. . . . It is therefore in the interest of governments to encourage the

for legalistic or technical reasons. For example, an organization intended to raise money to support the work of community service organizations was recently denied registration in Poland because it was established to help other organizations help people, not to help people directly. The presumption should always be in favor of establishment, and there should be adequate provision for appeals from adverse decisions.

There are decisions affecting NGOs that properly require government officials to exercise judgment and discretion. For example, difficult definitional issues are almost unavoidable in deciding whether to confer special advantages – e.g., tax exempt status – on an NGO. Does organization X principally serve a public purpose (i.e., is it a PBO) or is it principally serving the interests of its members (i.e., an MBO)? These determinations can best be made separately from the establishment process itself. For example, the tax laws should establish clear, broad standards for determining eligibility for exemption. The tax authorities should adhere to the clear meaning of the statutory standards when making decisions in individual cases, and any refusal to grant exemption should be appealable to independent courts.

The principal documents that should be required to be filed in establishing an NGO are the governing documents of the organization. The governing documents should, within the strictures of the NGO laws, adequately state the nature and purpose of the organization, provide for an adequate governance structure, state the powers and limitations of the organization, identify the founders, directors, and officers, state the location of the principal headquarters, and identify a legal representative.

The bureaucratic process as well as the filing requirements should be simple, with a minimum number of levels of review.⁷⁹ And again, any review

activities of NGOs without restricting their independence of action." ESCAP, Fiscal Incentives p.4 (1994).

⁷⁹ In a number of African countries (e.g., Ethiopia, Kenya, Madagascar, Rwanda, Uganda, and Zimbabwe) special regulatory regimes have been or are being set up for development NGOs. They are required to register with an existing ministry or a new commission, which must approve its activities. Although justified on the grounds that it is necessary to coordinate development to avoid duplication and conflict, these regimes are in reality thinly disguised schemes to exercise a high level of control over development NGOs, presumably to assure that they do not compete with the government for development assistance funds. The situation is vividly illustrated by the examples of Uganda and Ethiopia: In Uganda an NGO cannot be registered until its written work plan has been approved by local officials, the District Administrator, two sureties acceptable to the National Board for NGOs, and two "promoters." Once these approvals have been obtained, the workplan must also be approved by the Minister of Planning and Development. In Ethiopia the Relief and Rehabilitation Commission (RRC) will not allow the establishment of an NGO unless there is a need for the organization. If the RRC determines that an NGO is no longer useful in a certain geographic area, it can require it to move to another. A

should involve a minimum of bureaucratic judgment or discretion. It should never be *necessary* for an NGO to go to the legislature, or any arm of the legislature, to be established (although there is no reason why legislatures cannot create semi-autonomous NGOs). The government ministry or agency responsible for the establishment of NGOs should publish rules, regulations, and forms that explain the establishment process. It should provide assistance to NGOs that are seeking formal legal status, and it should be required to provide a written statement of reasons for any refusal to establish an NGO.

It is ordinarily not necessary to require proof that the organization has the financial wherewithal to accomplish its stated purposes.⁸⁰ If it does not, it will fail. If it does, either at the time of establishment or later, it may succeed. It is also not necessary for a government official to decide whether there is a need for the organization to exist or not. If the organization is able to raise funds and provide the intended goods and services, it will have proved that there is a need for it. If it is not, it will fail. In general, the "market place" for NGOs and NGO funding will decide whether there is a need for a new organization; no bureaucrat should be called upon or empowered to make these decisions.

Finally, rather than requiring an NGO to renew its legal status periodically, as is required in some countries, it is preferable that the legal life of an NGO be perpetual until and unless the NGO ceases to function, as evidenced, for example, by nil activities and the failure to file annual reports for a period of two years or more.⁸¹ The dis-establishment of NGOs that are defunct for extended periods of time frees up names that might be usefully used by others, precludes the public from being misled into believing that a nominally established NGO has meaningful existence, and rids the legal landscape of unused legal shells. Similar rules are typically applied to for-profit legal entities, and those for NGOs should be no different in substance. The officers of a dis-

detailed workplan and agreement must be approved by the RRC before the NGO can be established.

Outside of Africa special regimes have been established or are being established for humanitarian relief organizations in Croatia and Bosnia.

⁸⁰ Some legal systems allow some kinds of NGOs to exist only for specialized purposes. For example, it might be permissible to use the foundation form only to establish a grantmaking entity. In such cases, it might not be unreasonable to require a minimum endowment or patrimony for the establishment of a foundation, so long as there were other forms of legal entity available for those who wanted to form NGOs for other purposes.

⁸¹ As stated in Section 3(d) below, the founders of an NGO should be allowed to choose a limited life for the NGO if they wish to. For example, individuals who establish grant-making foundations sometimes stipulate that all of the funds must be disbursed within a stated number of years (e.g., 50) of the creation of the foundation.

established NGO, of course, should be free to seek its re-establishment at any time.⁸²

(c) The establishment rules should set reasonable time limits within which the establishment agency must act (e.g., 60 days), and it is generally a good practice to provide that failure to act within the required time results in presumptive approval.

Discussion: Providing for presumptive approval if there is no action within a reasonable period of time precludes officials overseeing establishment procedures from using delay as a means of effectively denying establishment to an organization they do not favor.⁸³ Of course, the time clock should not start running until the application is complete and in good order, but establishment officials should not be allowed to use hypertechnical flaws in the filing as a basis for regarding it as incomplete. If the establishment agency believes that creation of a particular NGO is not permitted under the law, it should so rule and let the final decision be taken through appeal to the courts.

(d) NGOs should be allowed to have perpetual existence (or limited existence, if chosen by the founders).

Discussion: Some states in India require NGOs to apply annually for continued existence. In Rwanda establishment can last no longer than three years, and initial establishment is for only one year. In Kenya an NGO must renew its establishment and pay a establishment fee every 5 years. These are not good practices. Such limitations generate unnecessary paperwork and bureaucratic review and control. The state should assure that NGOs meet their obligations, not by annual re-registration to maintain their existence as a legal person, but, rather, through meaningful annual reporting requirements, backed up by an effective audit process. See Sections 23 - 29.

⁸² In Egypt an NGO is automatically dissolved if the general assembly has not convened for two consecutive years.

⁸³ Under the NGO laws in Kenya there is no prescribed time for responding to an application for establishment. Under Chinese law approval or rejection must occur within 30 days of receiving the application, but the law does not call for approval by default if the ministry has not acted at the end of the 30 days.

A time limit was instituted in Cameroon in 1990, but NGOs established by the lapse of time after filing their establishment papers have found it difficult to prove their existence to donors, which typically want to see an official paper declaring the NGO established.

(e) Both natural and legal persons should be entitled to create NGOs.

Discussion: All existing NGO laws allow individuals to establish an NGO, but many laws do not allow other legal persons, such as corporations or associations, to establish an NGO. It is highly desirable to allow legal persons to establish NGOs. This permits like-minded NGOs to form umbrella groups to pursue matters of mutual interest. For example, an association of NGOs can provide useful services and training to members, or it can articulate the interests of the membership. As another example, many for-profit corporations allocate some of their profits to improve the communities in which they operate. It is often easier for a corporation to fund community projects if it can establish a foundation with a separate staff for that purpose. Public law entities should also be allowed to create NGOs, subject to the concerns discussed in Section 37. For example, the arts agencies of various municipal governments should be allowed to form an association to articulate their common interests to the national government and to provide services and training to members.⁸⁴ Of course, an association of foundations or of municipal arts agencies is an association for legal purposes, not a foundation or a city government. In Brazil, Germany, and Russia, political parties are allowed to create foundations.

Generally speaking, there is no reason that foreigners should not be allowed to form an NGO on the same terms as a citizen. See Section 35. Similarly, consideration should be given to allowing minors to form NGOs, especially NGOs to pursue the special interests or perspectives of young people. Of course, it might be inappropriate to allow very young children, e.g., those under 12, to be founders or members of NGOs.

(f) Individuals should be allowed to create an NGO (e.g., a foundation) by testamentary act (e.g., by a will).

Discussion: This is an important way in which the law can encourage private property to be left for a public purpose. In many industrialized countries, individuals with large fortunes enjoy them during their lifetimes and then leave some or all of their assets for charitable purposes at death. Although many testamentary gifts are made to existing NGOs, experience in many countries indicates that many individuals prefer to make testamentary gifts to organizations they create themselves by testamentary act. Although the best known NGOs that are created in this fashion -- e.g., the Ford Foundation or the Gulbenkian Foundation -- were created by fabulously wealthy individuals, even

⁸⁴ In Vietnam the Civil Code permits legal entities to be formed by "individuals, economic organizations, political organizations, socio-political organizations, social organizations, socio-professional organizations, social funds, welfare funds or upon decisions of the authorities." How this will translate into authority for NGOs to found other NGOs remains to be seen.

individuals of modest wealth engage in this practice. The tax laws can provide powerful incentives for these purposes.

(g) Both mutual benefit and public benefit organizations should be allowed to exist.

Discussion: Although the NGOs that the Bank is primarily interested in are those formed to pursue a public purpose, such as the alleviation of poverty or enhancement of the environment, in most modern societies individuals are allowed to form NGOs to pursue issues and activities that are primarily for their mutual benefit. For example, most professional societies are formed to provide services, facilities, or training to members. Many advocacy NGOs are really associations of like-minded individuals or NGOs and are set up to advocate policies of immediate benefit to members.

Of course, the question of whether mutual benefit organizations should have all of the benefits and privileges (e.g., the right to receive tax deductible contributions) extended to a public benefit organization is a different question, and it should not be confused with the question of whether mutual benefit organizations should be allowed to be created.

(h) As a general matter, membership in a membership organization should be voluntary, viz., no person should be required to join or continue to belong to an organization.

Discussion. Although an individual (or other legal person) should be allowed to withdraw from a membership organization for any reason, it is reasonable to make that person liable for any share of the organization's debts or liabilities that accrue up to the date of withdrawal, so long as all other members during that period are liable on the same terms and conditions.

In certain situations it may be appropriate to make membership in an organization compulsory. For example, if the government delegates to a professional society (e.g., a legal, medical, accounting, or other professional society), the power and responsibility to license members for the practice of that profession, and to discipline malpractice, then it would be appropriate to require membership in that society as a condition of practicing the profession in question.

Section 4: Responsible Governmental Agency. *The agency vested with the responsibility for establishing NGOs should be adequately staffed with competent professionals, it should be even-handed in fulfilling its role, and its decisions not to establish an NGO or to terminate one should be appealable, both administratively and to an independent court.*

Discussion: There is considerable variety among legal systems in the kind of agency that is empowered to establish NGOs. In some countries NGOs cannot be established until they receive the approval of the ministry with jurisdiction over the subject matter of their proposed activity. Actual establishment may occur at a single place, such as a court, but ministerial approval must first be obtained. Thus, health NGOs must be pre-approved by the Ministry of Health; cultural NGOs by the Ministry of Culture, and so on. There are at least three significant drawbacks to this system: (i) different ministries tend to develop different standards for approval, some of them being quite lenient and others being quite strict; (ii) because NGO review duties are spread among many ministries, no ministry develops real expertise in dealing with NGOs; dealing with NGOs is essentially a sideline of each ministry; (iii) particular ministries may oppose the establishment of NGOs that take an approach to issues within their general jurisdiction that is at odds with policies being pursued by that ministry, and (iv) some organizations have difficulty finding a ministry that will claim jurisdiction over their proposed activities. For example, a canoeing club might not be able to convince the Ministry of Sport that its proposed activities constitutes a sport or the Ministry of the Parks that it is relevant to maintaining parks and wilderness areas. Finally, as discussed in Section 3(b) *supra*, so long as the proposed activities are not illegal, there is no need for a ministry to determine whether an NGO is competent to perform the activities it proposes or whether those activities are desirable. The "market place" for financial support and interest by members or the public can better determine whether or not the NGO fills a felt need better than can a bureaucrat with little or no practical knowledge of the proposed activity.

Some countries, especially civil law countries emerging from periods during which there was great distrust of government, vest establishment responsibilities in the courts. Judges tend to be careful and fair in administering laws and to avoid bringing personal or political judgments to decisions such as whether to establish an organization or not. This is not uniformly true, however, and there are other considerations. In many countries in which courts make establishment decisions there is no requirement that a refusal to establish an NGO be accompanied by a statement of reasons that can be appealed to a higher court. This problem can be remedied by appropriate rule or amendment of the law.

Another problem cannot be fixed so easily. Courts are not staffed and judges are not trained to provide supervision and oversight of NGOs. It is not sufficient to have a good system of establishment. It must also be supported by a meaningful enforcement program. Ministries and other agencies are structured, trained, and staffed to investigate complaints or monitor compliance with the laws. For example, in many of the offices of the attorneys general in the

various state governments in the U.S., there are special sections or units devoted to enforcing NGO laws. Courts are not equipped to perform these tasks; they are trained and staffed to adjudicate cases that others bring before them. If courts are used for establishment purposes, then one or more other agencies must be vested with authority to supervise and enforce the law governing NGOs, thus fragmenting jurisdiction over NGOs.

In some countries a single ministry is put in charge of establishing and supervising NGO's. This has the advantage of centralizing expertise about NGOs in one agency. Sometimes the approach taken by such a ministry to NGOs is too colored by the other principal mission of the ministry. For example, a ministry of justice might be excessively concerned with unimportant details and a ministry of the interior might be excessively concerned about security risks. In some cases, however, this problem has been avoided and the approach has been successful. For example, although the principal rule-making and enforcement with respect to NGOs at the federal level in the United States is done by the Internal Revenue Service, the specialized department developed for this purpose – the Exempt Organizations Branch – has lost the usual tax collectors' attitude and has built a staff and a set of rules and procedures that are generally very supportive of the legitimate activities of NGOs.

It may be possible to solve these problems of expertise, regulatory capacity, and bias through the use of a specialized agency in which there is meaningful participation by NGOs and the public. Taking the English Charity Commission as a model, a number of countries are considering establishing a specialized agency to establish NGOs, to supervise their compliance with law, to impose sanctions in the case of violations of the law, and to provide education, training and assistance. Such an agency can be headed by a commission that is comprised of officials drawn from a variety of ministries and even the parliament, to assure that the diversity of governmental viewpoints is reflected. It can also have members chosen from or by the NGO sector, including donor NGOs and the general public. In Kenya NGOs are established and regulated by the Non-governmental Organizations Coordination Board. Seven of its 23 members are representatives of the NGO sector. Adverse decisions of the Board are subject to both administrative and judicial appeals. The possibility of establishing a single agency to oversee NGOs is being actively considered in Bulgaria, El Salvador, Senegal, and South Africa.

By housing all functions relevant to NGOs in a single agency, it is possible to develop expertise in a staff whose only function is dealing with NGOs. The existence of a single agency eliminates the all too frequent phenomenon of inter-agency conflict or inconsistency. What the agency learns through enforcement of the laws can inform its establishment rules and procedures, and vice versa. Such an agency can also improve the

understanding of laws affecting NGOs and the professionalism of NGOs by conducting voluntary courses and training sessions. Making the decisions of such a specialized agency reviewable by courts should reduce or eliminate the two largest dangers of such an agency, viz., that it would be too heavy-handed and intrusive in regulating the sector, on the one hand, or too lenient on the other.

Consolidating regulatory authority over NGOs in a single agency or commission, however, involves serious risks. Power can be, and often is, abused. Indeed, the impetus behind many new "NGO laws," which establish separate commissions to regulate NGOs, has been a desire to obtain greater control over what they do. For example, some critics have argued that the commissions in Kenya and Uganda have exercised excessive bureaucratic control over NGOs, and the proposed commission in Hungary has been opposed by NGOs that see it as adding to the bureaucracy they face. Even the Charity Commission in England was seen by many NGOs until recently as being too legalistic and out of touch with the sector.⁸⁵ Apparently, in the state of Maharashtra in India, the Charity Commission exacts an annual fee from NGOs but does not even maintain a current roster of NGOs.

There is no necessarily right answer to the question of where to place authority for establishment of NGOs. Perhaps the answer in the end is that any particular arrangement can be made to work well by able people of good will, and any particular arrangement can also be administered badly or incompetently. In the end, the problems of establishment can best be solved by having establishment criteria that are as few, simple, and objective as possible.

Section 5: Amendments to Established Status. *It should be possible for an NGO to amend its governing documents without having to entirely re-establish the organization.*

Discussion: Under the laws of some countries it is necessary to completely re-establish an organization if any amendment is made in its name, its purposes, the location of its home office, and so forth. This is unnecessary and burdensome. It should be possible for the NGO simply to file papers

⁸⁵ Indeed the Australian Industry Commission, which conducted a major review of the charitable sector in Australia, rejected the Charity Commission model on the basis that:

"[T]here is not a convincing case for the establishment of a national monitoring agency.... Many of the perceived benefits, such as greater uniformity of regulation, greater coordination and consistency in the collection of information, may be achieved more simply and cheaply through greater inter-governmental cooperation and through more specific regulatory measures." Industry Commission, Charitable Organizations in Australia, Report No. 45 (1995).

indicating the nature of the amendment with the appropriate establishment agency.

It should be possible for an NGO to amend its governing documents to change its activities or purposes, and the same approval processes that apply to the initial establishment should be required to be followed. For example, if infantile paralysis is eliminated as a disease in a particular country, an NGO that was originally set up to fight that disease might want to amend its charter so that its purpose becomes seeking to prevent hereditary diseases in children. Although changes like this should be allowed and even encouraged, the laws of some countries (e.g., Japan and Nepal) make it almost impossible to amend the purposes of an NGO.

There should be some restrictions on the ability to change purposes. For example, if the legal system of the country confers special benefits (e.g., tax breaks) on one class of organizations (e.g., PBOs or a subclass of PBOs), then the law should preclude changing the purposes or activities of the organization to those of another type of organization (e.g., an MBO) if the result would be to divert money or assets derived from public contributions, government grants, or significant tax preferences to the benefit of members of the organization. See Section 18.

Finally, to assure that assets that have been derived as a result of tax privileges or donations by the public are not converted to private use, an NGO should generally not be allowed to convert to for-profit status. The NGO should be required to terminate, with its assets distributed according to law. See Section 9. The individuals involved can then establish a new for-profit entity.

Section 6. Amendment in the Event of Impossibility. *There should be a procedure for amending the governing documents of an organization even if the organization cannot do so by its own independent action.*

Discussion: Sometimes an organization finds that it cannot make a desired amendment. For example, an NGO created by a will or other testamentary document may be directed to engage in some activity that is no longer possible or legal, such as making an award each year for outstanding contributions to preventing accidents by horse-drawn vehicles in a city that no longer permits such vehicles, or awarding scholarships to students of a particular ethnic group in a country that now forbids ethnic discrimination. As another type of example, in its original governing documents an organization may have deprived itself of the power to ever engage in a particular kind of activity or to be structured in a particular kind of way, but the passage of time has made the proscribed activity or structure desirable. In cases such as these it should be possible to go to court to get judicial permission to amend the governing documents to allow activities as close as possible to those desired by

the testator (e.g., outstanding contribution to preventing automobile accidents) or to permit the desired activity or structure if all members of the organization desire the change.⁸⁶ In the common law systems such changes are possible under the doctrine of *cy pres*.

It is also appropriate for the laws to specify a procedure to deal with an entirely different problem – a situation where the governing body of an NGO has reached a stalemate or deadlock. For example, if the board of directors is evenly split on an important issue affecting an NGO and repeated attempts to resolve it are unsuccessful but a resolution is necessary for the survival or further activity of the organization, the NGO (or at least one set of the divided board members) should be allowed to go to a court to seek guidance.

Section 7. Public Registry. Whether NGOs are established in one or many locations, and in addition to any local registries, there should be a single, national registry of all established NGOs that is accessible to the public.

Discussion: NGOs that seek grants, contracts, tax preferences, or other concessions, should be required to register so that agencies of the government can determine what NGOs have been established and what their purposes, powers, and limitations are. Any individual or business organization doing business with an organization (e.g., leasing it space, selling goods, accepting employment) should be able to determine whether it has been established as a recognized legal person. In addition, it is important that the public have access to this information. For their own protection, citizens need to be able to check whether a purported NGO that seeks their support is really established or not. Further, if the public has access to the registry of NGOs, it can provide additional and useful oversight, and bring to light possible problems that may have been overlooked by the government.

In a federal system where establishment is done at the state or provincial level, with each state or province having its own establishment laws, it may be possible to have a consolidated register only at the state or provincial level.

To facilitate the interests of both the government and the public, there should be, where possible, a single national register.⁸⁷ It may well be appropriate to permit NGOs to be established in various locations around a particular country, and to maintain public registers in each such location, but all

⁸⁶ The law of Mauritius provides the opposite. When the purpose for which a foundation was established can no longer be given effect to, there is an automatic reversion of the donation to the founder or his or her heirs. In Taiwan the assets revert to the state.

⁸⁷ National official registries are set up in Egypt, Syria, and the United Arab Emirates. See Amani Kandil, *Civil Society in the Arab World*, CIVICUS p.32 (1995).

local establishments (and terminations) should be consolidated periodically into a national register open to all. Through this register, or local registers, it should be possible to get not only the name and address of an established organization, but also a copy of the governing documents of the organization and other documents filed in connection with establishment.

Section 8: Mergers and Split-ups. *There should be clear rules allowing, but not compelling, NGOs to merge or split up. Mergers may be limited to organizations involved in similar endeavors.*

Discussion: The decision by an NGO to merge or split up into separate NGOs should be the voluntary decision of that NGO.⁸⁸ It is appropriate to require a decision of this magnitude to be made by the highest governing body of the NGO (e.g., the assembly of all members or the board of directors) and to require a vote by a super majority of that body (e.g., two-thirds or three-quarters).

Section 9: Termination, Liquidation, and Dissolution.

(a) Voluntary termination. *An NGO should be permitted to terminate its activities and liquidate its assets upon the decision of its highest governing body.*

Discussion: Although an NGO should be allowed to decide whether to continue in existence or not, in some countries an NGO cannot terminate without the permission of the government (e.g., Bangladesh, Ecuador, Pakistan, and Sri Lanka). In the case of NGOs that have received government funds, public donations, or significant tax preferences, it is appropriate for the law to provide that upon termination and dissolution the remaining assets of the organization must go to another NGO with a similar purpose or to the government, and that those assets may not revert to the founders, officers, or directors. For example, when an NGO is dissolved in South Africa, its net assets must go to an NGO with a similar purpose, and if the dissolved NGO had tax exempt status, so too must the NGO that receives the dissolved NGO's net assets. See Section 18.

(b) Involuntary termination. *The supervising agency or court should be allowed to terminate an NGO's existence only for the most flagrant of violations, or repeated failure to comply with certain rules (e.g., persistent failure to file required reports). Except in the case of flagrant fraud or other abuse, NGOs should ordinarily be permitted to correct infractions rather than suffering involuntary termination; where corrections do not occur, termination may be warranted.*

⁸⁸ Under Law 32 in Egypt, however, the Ministry of Social Affairs can decree that two or more NGOs should be amalgamated if they operate in the same field.

Discussion. If one or more ministries or agencies of the government is given discretion to terminate an NGO, seize its assets, or take over its operations, the possibility of that happening has a chilling effect on the independence of NGOs. In order to assure a vigorous and independent NGO sector, the law should provide for warnings before sanctions are imposed and for intermediate sanctions (e.g., fines, suspension of government grants or contracts) for various types of violations, as well as the ultimate sanction of termination.⁸⁹ Termination of legal existence, or the freezing of assets or assumption of control of an NGO, should be used only as a last resort. It should be possible for the government to take one of these actions only for the most serious and blatant violations, and then only if the NGO has been given an opportunity to correct its behavior.⁹⁰ There should be a right of judicial appeal from a decision to terminate an NGO, and termination should not become effective until the appeal is completed or the time for appeal has lapsed.

⁸⁹ The Internal Revenue Code in the United States has recently been amended to provide for a penalty tax if a "disqualified person" (e.g., an officer or director) of a public charity or a social welfare organization (i) receives unreasonable compensation, (ii) sells, purchases, or transfers property to or from the organization other than at fair market value, or (iii) enters into a financial arrangement under which he or she receives a percentage of the organization's revenues. A disqualified person is subject to an initial penalty tax of 25% of the amount involved, and a 200% tax if the violation is not corrected. See Section 4958 of the Internal Revenue Code. Prior to the enactment of these intermediate sanctions, the only sanction for abuses of this kind was disqualification of the organization (i.e., loss of tax exempt status), a sanction that was rarely used because of the disproportionate and often misdirected impact of the sanction.

⁹⁰ By contrast the NGO Coordination Board in Kenya, which has jurisdiction over NGOs, can cancel or suspend the charter of any NGO on 14 days notice for any breach of the terms and conditions according to which it was established, without having to allow correction and without first using intermediate sanctions. In Egypt the Ministry of Social Affairs can dissolve an NGO for any legal violation or cancel any decision of an NGO's board of directors that it believes violates Law 32 - albeit that NGOs may appeal against such decisions to the administrative courts. No appeal is allowed in Bangladesh from a decision to terminate an NGO, although a proposal to allow appeals is pending.

Chapter E. Structure and Governance.

Section 10: Minimum Requirements of Governing Documents. *The laws governing NGOs should require certain minimum provisions in the governing documents of an NGO, such as that the highest governing body (assembly of members or board of directors) must meet with a given frequency, that the governing body is the sole body with power to amend the basic documents of the organization or decide upon merger, split up, or termination, that it must approve the financial statements of the organization, and so forth.*

Discussion. The governing documents of an NGO should be required to state the purpose(s) of the organization and set forth the basic governance structure. For example, they should identify the highest governing body of the NGO (assembly of members or board of directors) and stipulate the minimum number of times it must meet. The basic powers of the highest governing body should be spelled out, together with any restrictions on its power to delegate duties to others. For example, the governing documents might appropriately reserve to the highest governing body the right to amend those documents or to merge or terminate the organization. Any restrictions imposed by law on the organization, such as a prohibition on the distribution of any profits, should be stated in the governing documents. Doing so ensures that the board of directors, which is typically composed of individuals who are not conversant with NGO law, has ready access to, and hence at least constructive knowledge of, the limitations imposed by law on the organization.

The minimum contents of governing documents vary from country to country and local tradition will play a large role in determining what kinds of provisions must be included in the governing documents.⁹¹ Usually the founders are given considerable discretion to determine, for example, what the voting rules of the organization are, so long as they are spelled out.

Often it is necessary, in order to obtain tax preferences or receive a grant from a donor, to have certain limitations or prohibitions in the governing documents. For example, the purposes may have to be limited to public benefit activities and there might have to be prohibitions on the distribution of profits.

⁹¹ Under Article 60(1) of the Bolivian Civil Code, the statutes of an association must contain the objective of the association, the endowment, the source of its donations, and the framework for the management and administration of the same. Article 60(2) provides that the statutes must determine the condition for the admission and exclusion of members and the rights and obligations of members and the procedures for terminating the association. The Civil Code of Ecuador gives members of an association great leeway in drafting the statutes of the organization, but once adopted, the statutes must be followed, and punishments are provided for deviations from the statutes.

These provisions generally have to be put in the statute. These are not strictly speaking legal requirements, but they must be satisfied in order to obtain certain benefits.

Section 11: Optional Provisions and Special Requirements. *Laws governing NGOs should give an NGO (through its founders or its highest governing body) broad discretion to set and change the governance structure and operation of the organization.*

Discussion. The highest governing body of an NGO should be allowed, consistent with the terms of the governing documents, to adopt rules, regulations, bylaws, or resolutions that govern the details of the operation of the organization. It should also be able to increase or decrease the number of directors from time to time, perhaps within limits specified in the statute, and to create or eliminate officerships.

The general point is that a basic structure be set out in the governing documents outlining the purposes and governance of the organization. Since organizations change and grow over time, there also needs to be flexibility on non-essential matters. It should not be necessary to amend the governing documents to make relatively small changes in the organization (e.g., creating a finance committee or adding two new seats to the board).

Section 12: Liabilities of Officers and Directors.

(a) Laws governing NGOs should provide that officers, directors, and employees of an NGO should not be personally liable for the debts, obligations, or liabilities of the NGO.

Discussion. Of course, officers or directors may by private contract become liable for the debts or obligations of an NGO, such as when a director guarantees a loan incurred by the NGO. Further, individuals remain responsible for their individual acts even when the organization they work for has derivative liability. For example, if an employee of an NGO injures a third party while negligently driving his or her car, under some legal systems the NGO employing that person may be responsible for the harm caused if the employee was driving in the course of or arising out of his or her employment. (The doctrine of *respondeat superior*.) The fact that the NGO was derivatively liable, however, would not relieve the individual of liability as well.

(b) Officers and directors should be liable to the organization and/or to injured third parties for willful or grossly negligent performance or neglect of their duties.

Discussion: In the usual case the improper act or omission of an officer or director injures a third party, who sues the NGO. If the NGO is required to pay, it should have a right to sue the officer or director for dereliction of duty. Many systems allow the claim by the NGO against the officer or director to be tried in the same suit as the claim by the third party. The officer or director should not be liable if he or she acted reasonably and in good faith.⁹² To prevent an injured third party from being without remedy if the NGO has been terminated or become bankrupt, the third party should have the right to sue the offending officer or director directly.

Section 13: Duties of Loyalty, Diligence, and Confidentiality.

(a) The law should provide that officers and directors of an NGO have a duty to exercise loyalty to the organization, to execute their responsibilities to the organization with care and diligence, and to maintain the confidentiality of non-public information about the organization.

Discussion: This rule is similar to the rule for officers and directors of other legal persons. It may be provided for in a law separate from the law governing NGOs, or simply be an established doctrine in the legal system.

(b) The NGO itself, or any affected person in the society, should be allowed to sue for redress of any violations of these duties.

Discussion: In addition to NGOs having the right to sue to protect their interests or seek redress, in some systems the public prosecutor or state attorney general has the right to sue on behalf of the NGO. Since many NGOs are small, weak, and unable to look after their own rights, especially when it comes to bringing legal actions, this is a desirable feature of a legal system.

The question of when a person is sufficiently affected by a violation of an officer or director's duty is one of "standing." A lawsuit may only be brought by someone who has "standing" to do so. Standing rules differ among legal systems, but most systems require that a plaintiff show a direct and personal interest before he or she can initiate a lawsuit.

Standing rules are also crucially important to the ability of NGOs to use lawsuits for advocacy purposes. For example, an NGO might want to challenge a legal restriction that impedes the ability of women to obtain access to bank loans or limits their ability to engage in business. Unless the NGO has

⁹² By contrast, under the laws of Uganda an officer concerned with the management of an NGO can apparently be held personally liable for the payment of a government fine levied on the NGO, and can also be jailed for up to twelve months for failure to pay it.

"standing" under the rules of the particular society, however, it would not be able to bring such a lawsuit. Accordingly, in many legal systems the NGO must find a particular woman or group of women to challenge the restrictions, and provide the legal representation that they need to do so.

Section 14: Prohibition on Conflicts of Interest.

(a) Careful consideration should be given to the extent to which the law should provide that officers, directors, and employees of an NGOs must avoid any actual or potential conflict between their personal or business interests and the interests of the NGO; laws affecting conflicts of interest for officers and directors of for-profit entities may be adapted to apply to NGOs.

Discussion: Because of the many differences between the structures and activities of NGOs, and because of the innumerable ways in which individuals may be involved with an NGO and also with another entity that relates to that NGO in some way, it is nearly impossible to stipulate with specificity the kinds of conflicts that should be avoided.⁹³ One possible approach is to prohibit conflicts of interest in general terms and allow courts to determine on a case-by-case basis whether there has been a violation. It would also be possible to require NGOs to adopt specific conflict of interest provisions in light of their particular facts and circumstances. In some legal systems the obligation to avoid or correct a conflict of interest is an established doctrine of law that has general application to anyone in a fiduciary position, and thus no special rules are required for NGOs.⁹⁴ Finally, in some legal systems it might be appropriate to spell out the difference between MBOs and PBOs and require a higher standard of conduct for officers and directors of PBOs.

⁹³ Apparently to prohibit conflicts of interest, laws in some countries prohibit a member of the board of directors of an NGO from being on the board of another NGO in a similar field. Although sitting on the boards of competing organizations can place a director in a conflict of interest, the fact that two organizations operate in the same field does not make such conflicts certain. And, when conflicts arise, the cure is often to have the individual disclose the conflict to both organizations and recuse himself from any decisions as to which there might be a conflict. Resignation is a last resort. The absolute prohibition rule is a good example of an overly simplistic approach to a subtle and complicated set of problems. The pending foundation law in Peru, by contrast, reflects a much more sophisticated approach in its attempt to delineate situations that may create conflicts.

⁹⁴ For example, in a number of countries laws require any person elected or appointed to a high position in the government to resign from any position as an officer or member of the board of directors of any organization, whether for-profit or not-for-profit, which might be affected or benefited by the decisions that person might make while in office. Whether required by law or not, this is a salutary practice and precludes a kind of conflict of interest that is all too common in many countries.

b) Potential conflicts may be avoided through recusal procedures.

Discussion: For example, if an individual sits on the boards of two NGOs that occasionally compete for government contracts, the individual could, with the knowing consent of each organization, recuse him- or herself from any decisions by either NGO relevant to the particular government contract, and avoid sharing any information learned from one NGO about it with the other.

(c) An NGO should be entitled to sue for redress of any harm caused by a conflict of interest.

Chapter F. Prohibition on Direct or Indirect Private Benefit.

Section 15: Prohibition on the Distribution of Profits. *Laws governing NGOs should provide that no net earnings or profits of an NGO may be distributed as such to any person.*

Discussion: As discussed in Section 19, NGOs should be allowed to engage in economic activities so long as the principal purpose of the NGO is to pursue a public purpose or the mutual benefit of its members. If an NGO does derive net profits from an economic activity, they must be used for the public or mutual benefit purposes for which it was formed, and they must not be distributed to any person. Thus, it is permissible if earnings and profits from an economic activity allow an MBO to provide higher and greater benefits to members, but it should be impermissible for any NGO to distribute profits as such – e.g., dividends or excessive compensation.

The law should prohibit either the direct or indirect distribution of net earnings or profits. For example, putting a child or spouse of the president on the payroll of an NGO when that person performs little or no useful work is simply an indirect way to distribute profits to the president. On the other hand, not all economic transactions with key individuals are impermissible. For example, if the founders of an NGO loaned it money in the early days, it would be permissible for the NGO to repay the loan with interest when it is able to do so.

This principle – the principle of non-distribution – is the single most important feature distinguishing NGOs from for-profit entities.

Section 16: Prohibition on Private Inurement.

a) The laws governing NGOs should provide that officers or employees of an NGO may be paid reasonable compensation for work actually performed for an NGO, plus reimbursement for reasonable expenses and reasonable fringe benefits. Directors would generally not be compensated.

Discussion: What constitutes reasonable compensation, reasonable expenses, and reasonable fringe benefits may be possible to determine only in facts and circumstances of a particular situation.⁹³ More importantly, it would

⁹³ "Reasonable" is a term widely used and understood in the English language and in common law countries. It is not a term that has an established use in civil law systems. In those systems, the better term would probably be the local language equivalent of "usual and customary." This is just one example of how difficult it is to translate the concepts expressed in this Handbook into other languages.

generally be inappropriate for any agency of the government to intrude into the affairs of an NGO to determine what is "reasonable" compensation, expenses, or fringe benefits, or to set maximum salary scales. Legitimate concerns about such matters are best left to self-regulatory mechanisms such as those discussed in Chapter M and Appendix 2.

Despite the frequent reference to NGOs as the "voluntary" sector, and though many NGOs receive valuable assistance from volunteers, it is quite permissible for employees of an NGO to be paid a reasonable salary and to receive the normal employee benefits (e.g., paid vacations, health and pension benefits, if not provided by the government). There is a strong and salutary tradition, however, that salaries in the civic sector are typically less generous than those in the for-profit sector. There is also a strong tradition that members of the board of directors of an NGO should serve on a voluntary basis and without compensation, and this tradition should be maintained and strengthened. It is appropriate where feasible and when they have limited personal means to reimburse members of the board for reasonable expenses incurred in their work as members of the board.⁹⁶ When a member of the board of directors, with the prior approval of the board, performs special tasks for the organization (e.g., as a lawyer or technical specialist), it is appropriate to pay that person reasonable compensation for the work performed.

In the case of some NGOs, however, where directors are required to attend frequent meetings and devote many hours to their responsibilities for the organization, it may be appropriate to pay reasonable compensation. On all questions of this sort the overriding principle is the best interests of the NGO. Sometimes conserving funds is in the NGO's best interest. Sometimes paying higher compensation to attract the most able individuals is in the NGO's best interest.

For many NGOs the issue of unreasonable compensation is never presented, for they either lack resources to pay excessive salaries and benefits, or they have strongly internalized the tradition of compensating and rewarding employees on a modest scale. In the interests of good governance and the integrity of the sector, however, it is good practice for any NGO to adopt and publicly declare a policy permitting the payment of only reasonable compensation, expenses, and fringe benefits.

It is not uniformly the case, however, that NGOs exercise restraint and follow good practices in the area of compensation. In some industrialized

⁹⁶ In some cultures it is acceptable for members of the board of directors to receive a "per diem" or "gratification" payment for attendance at board meetings, without the necessity of demonstrating actual expenses.

countries where national wealth is great and the resources of many NGOs are ample, there is a growing tendency for NGO salaries to approach salaries in the for-profit-sector. Further, in any country it is possible for NGOs to be abused, and excessive compensation or compensation for work not performed is a popular abuse. Accordingly, it is strongly recommended that laws governing NGOs, the activities of which significantly affect the public interest, require public disclosure of the compensation of (i) the highest paid individuals employed by the NGO and (ii) any compensation, as an employee or otherwise, paid to a member of the family of a founder, officer, or director of the NGO. In most countries the antiseptic effect of public disclosure will cause most NGOs to exercise restraint on these sensitive issues.

(b) The laws governing NGOs should provide that the assets, earnings, and profits of an NGO may not be used to provide special personal benefits, directly or indirectly, (e.g., scholarships for relatives) for any person connected with the NGO (e.g., officer, director, employee, founder, or donor).

Discussion: It is difficult to craft precise rules in this area because the variety of ways in which officers and directors might seek to obtain improper benefits from an NGO are legion and various. Moreover, it is often difficult to detect or correct abuses. For example, if an MBO provides special health benefits to all members it may be permissible for the president to receive those benefits as well. However, if an MBO provides special benefits for any member that has a rare illness or disease, but only the president has that illness or disease, providing the benefit to him or her may constitute an improper personal benefit. This is an area where it may be necessary to put general standards in the law and let the regulatory agency and the courts apply them on a case-by-case basis.

(c) In the case of an MBO, benefits may be made available to members if they are available on a nondiscriminatory basis to all members (e.g., special educational materials or insurance plans).

Section 17: Prohibition on Self-Dealing.

(a) Laws governing NGOs should provide that any transaction (e.g., sale, lease, or loan) between an NGO and any person connected with it (e.g., officer, director, employee, founder, or donor) must be consummated, if at all, at arms'-length and for fair market value.

Discussion: "Self-dealing" is a term coined in common law systems to describe situations where those in a position to influence or control an organization cause it to undertake a transaction that constitutes an unreasonable benefit to the individual, often to the detriment of the

organization.⁹⁷ For example, the founder of an NGO might cause it to purchase an asset from him or her at an inflated price, or purchase an asset from the NGO at a price that is only a fraction of its real price. Such transactions are similar in purpose and effect to an influential person causing an NGO to pay excessive travel and entertainment expenses for the president. They drain assets out of the NGO, tarnish the image of the sector, and should be prohibited. Self-dealing is a form of conflict of interest. See Section 14.

If a transaction involving self-dealing is proposed for an NGO, there should be full disclosure in advance of all material facts concerning the transaction to the Board, and the interested director, officer, or employee should be excluded from the discussion and decision on the matter. The basic principle is that a person affected by a decision to be taken by an NGO should not be present during the discussion and decision-making, so that there will be a minimum of constraints to candid consideration of issues, and those making the decision will not be inhibited from taking the right decision by the presence of the person who is affected by it.⁹⁸

(b) It may be appropriate to prohibit entirely certain kinds of transactions that have a very high potential for abuse.

Discussion: Some types of transactions are by their nature of so little relevance to the mission of an NGO and so likely to involve abuse that they should be prohibited altogether. One example might be loans by an NGO to an officer or director. Another might be the sale of assets between an NGO and one of its officers or directors when it is difficult to determine the fair market value of those assets.

(c) An NGO should be entitled to sue for redress of any harm caused by self-dealing.

Discussion: Restitutionary remedies have been worked out carefully in most legal systems. Generally speaking, they involve putting the parties back to where they would have been, as nearly as may be, had the transaction in question not occurred. This may involve rescission of the transaction plus transfer to the NGO of any profits made by the offending individual while he or she held the asset.

⁹⁷ For example, the laws of Malawi allow a trustee to purchase something from the NGO of which he is a trustee only if the price is certified to be the best available in the market.

⁹⁸ Similar procedures are ordinarily followed where a board member is reelected to the board.

Section 18: Prohibition on the Reversion of Assets.

(a) Laws governing NGOs should provide that no PBO should be permitted to distribute assets to its members, officers, directors, employees, donors, or founders upon the liquidation or termination of the NGO.

Discussion: The law should permit an NGO, in its governing documents or by resolution, to designate another similar NGO to which any assets remaining after the payment of all debts and obligations should go. In some situations, large donors may have imposed a contractual obligation that funds received from it be returned in the event of termination. A good practice is for an NGO to select another NGO engaged in the same or a very similar kind of activity to receive its assets upon termination. In the absence of any such designation, at least in the case of a PBO, the assets should revert to the government or a government fund that provides grants to NGOs.

Depending upon the other rules chosen in a particular country, it may be necessary to protect against the danger of “downstream” terminations. For example, consider a possible case in a country that accords greater benefits to PBOs than to MBOs. If a PBO in this country received substantial public donations and government tax breaks, there might be a temptation to terminate it and have all of its assets transferred to an MBO. That MBO might later be terminated (under the rule discussed in (b) below) with its assets going to members. This would obviously be an abusive transaction. One way to prevent such transactions would be to preclude transfers to NGOs of a type that are entitled to fewer benefits under the law than the type to which the terminating NGO belongs.

(b) An exception permitting distribution of assets to members upon termination after the payment of all liabilities of the NGO may be appropriate in the case of an MBO (see Section 1(b)) which never received significant contributions from the public (i.e., persons not affiliated with it as founders, donors, officers, directors, employees, or members) or significant grants or grants, contracts, or tax preferences from the government.

Discussion: Some MBOs never benefit from governmental or public support or subsidy, and when they terminate it should be permissible for the remaining assets to be distributed to the members. For example, if a sailing club is formed and sailboats are purchased for weekend races using member contributions, when the club is disbanded, it should be permissible for the boats and other assets of the club to be distributed to members in some equitable fashion.

This is an area in which it is possible to argue for many special rules and exceptions. Each of the possible exceptions has a rational basis, but the tradeoff for crafting highly particularized rules is that the law becomes very complicated. On the other hand, any simple rule involves inevitable unfairness.

Under the recommended general rule reversions would be prohibited from any terminating NGO that had had tax exempt status. It could be argued, however, that such a bar should not apply if the organization can demonstrate that it never received any advantage from its tax exempt status (e.g., never had any receipts that would have constituted taxable income if it had not been exempt.) Or, a reversion from a terminated NGO could be allowed if the tax authorities first collected all of the taxes that would have been paid if the entity had not been tax exempt. Tax recapture rules of this sort, however, are notoriously complicated and difficult to administer. Further, if an NGO separately accounted for all contributions from the public or the government, and could show that all such sums had been spent on appropriate programs, it can be argued that there should be no bar on reversions. This approach, however, would require special accounting over the life of the NGO. Because of the complexity involved in any of these special rules, the preferable course may be to simply prohibit reversions.

Chapter G. Activities and Operations of NGOs.

Section 19: Economic Activities. *An NGO should be permitted to engage in lawful economic, business, or commercial activities for the purpose of supporting its not-for-profit activities, provided that (i) no profits or earnings are distributed as such to founders, members, officers, directors, or employees, and (ii) the NGO is organized and operated principally for the purpose of conducting appropriate not-for-profit activities (e.g., culture, education, health, and so forth).*

Discussion. There are a number of technical problems that must be sorted out in dealing with the issue of economic activities of NGOs. These issues, and the closely related and even more technical issues involved in the question of whether and how to tax the profits from such activities, are dealt with in detail in Appendix I.

Here it is sufficient to note that it is a good practice to allow an NGO to engage in an active trade or business for the purpose of raising money to support its not-for-profit activities, so long as its *principal* purpose is not that trade or business activity but rather the carrying out of the not-for-profit purposes for which it was formed.⁹⁹ Of course, as discussed more fully in Section 15, it should not be permissible to distribute the profits. Allowing NGOs to engage in an active trade or business is especially desirable in many countries going through social and economic transition, for the profits from such activities may provide essential support for the development of a strong and responsive not-for-profit sector.

Section 20: Licenses and Permits. *Any NGO that engages in an activity (e.g., health care, education, banking) that is subject to licensing or regulation by a government agency should generally be subject to the same licensing and regulatory requirements and procedures that apply to similar activities of individuals, business organizations, or public agencies.*

Discussion: If an NGO wants to run a nursing home for old people, it should be held to the same standards requiring professional staffing, sanitary conditions, and so forth that apply to any other organization. The same should apply to any other activity for which the government has generally applicable rules and regulations, such as environmental protection rules. It should be noted, though, that some countries allow special and somewhat more lenient rules for certain kinds of NGO. For example, alternative schools might not have

⁹⁹ The Ugandan law on NGOs does not refer to the primarily nonprofit or noncommercial aspect of an NGO. In the Arab world, on the other hand, the NGO laws generally recognize that this is an important element of an NGO.

to meet the same strict curriculum requirements that apply to regular schools, as is the case in Hungary.

Section 21: Political Activities.

(a) In general, NGOs are not political parties and should not be allowed to engage in the kinds of activities normally the province of political parties, such as fundraising to support candidates for public office or registering candidates to qualify for public office.

Discussion: This guideline assumes that there is a separate law or laws governing political parties, political fundraising, elections, and political campaigning, and is intended to ensure the integrity of such law or laws.

(b) NGOs are often key participants in framing and debating issues of public policy, and they should have the right to engage freely in research, education, and advocacy on issues of public debate, even where the positions they take are not in accord with stated government policy.

Discussion: As background to the issues that arise under this heading, it is important to remember that under international law and the laws of virtually all countries, the right of freedom of speech is enjoyed by individuals not by legal persons.¹⁰⁰ In some countries legal persons are recognized as having free speech rights, either in their own right or by derivation from the individuals who belong to them, such as in the case of an MBO. Even when NGOs are accorded broad free speech rights, it may nonetheless be appropriate to impose reasonable restrictions with respect to time, manner, and place, so long as those restrictions are not more than those necessary to achieve or protect a demonstrable public interest. Any such restrictions, of course, should be no more onerous than similar restrictions imposed on other legal persons.

In many countries there are quite strict limitations on the extent to which NGOs are permitted to engage in public advocacy on issues or in criticism of the government and its policies.¹⁰¹ In other countries NGOs are robust participants

¹⁰⁰ As discussed above, there are some substantial arguments that NGOs must be recognized as having rights such as freedom of speech in order that the rights of individuals to freedom of association be adequately implemented. See Chapter A (d)(i).

¹⁰¹ "[W]hile stated policy is invariably supportive of NGOs, its implementation may not be; NGOs that get involved in issues on the political 'cutting edge,' particularly if they take on a strong advocacy role, can expect to be viewed as disruptive and threatening, with constraining or repressive action coming swiftly behind." ESCAP, Fiscal Incentives, p. 18 (1994).

In Malaysia the law has been changed to impose state control over NGOs engaged in political activities. NGOs are classified as "societies," which must be established with the Registrar of Societies. Amendments to the Societies Act in 1981 divided the country's NGOs into

in advocacy and criticism of the government. In many countries NGOs are allowed to support or oppose particular candidates for elective or appointive office.¹⁰² In others they are not. In some countries certain kinds of NGOs are forbidden from lobbying their government. Under other possible rules, no endowed foundation would be permitted to lobby the government, or could do so only if it disclosed how much funding it received from the government. Under the rules in force in some countries, NGOs may engage in advocacy on public issues but only if they speak out of their own expertise or knowledge and only if their advocacy is rational.

The question of political activities raises many sensitive issues. Views and practices differ widely. Some rules, such as several discussed above, involve considerable complexity and confer on government bureaucrats the discretion to determine when political activities of NGOs are permissible and when they are not. On the other hand, rules prohibiting any political activities by NGOs would dramatically lessen the extent and sophistication of public debate on important issues. In many societies NGOs provide the only voice for many poor, vulnerable, or minority groups. It is precisely these groups that are or may be most affected, positively or negatively, by development. Development that focuses on poverty alleviation and sustainability requires governments to adopt practices and policies that encourage accountability, transparency, and inclusive decision making, as well as integrity, for experience has shown that good governance is essential to sound development.

What this means at the very least is that independent NGOs that represent groups affected by development projects -- such as the poor, women, ethnic minorities, etc. -- should be allowed to participate fully in the processes by which development projects are selected, designed, and implemented. Otherwise there will not be the kind of participation that the Bank has learned from years of experience is necessary for successful development.¹⁰³ It is difficult to imagine that NGOs can participate in development as the independent voice of affected groups unless there are sound laws that permit them to be established easily and that protect their right to engage robustly in research, education, and advocacy, even when that means criticizing or opposing

"friendly" and "political" societies. The latter are required to obtain the Registrar's approval for foreign affiliation and fund raising. Certain categories of people are barred from holding office in those NGOs, and the Registrar's decision to register or de-register them has been held to be unchallengeable in court.

¹⁰² For example, in Malawi and Brazil NGOs may participate in the political process, including supporting candidates and lobbying the legislature. Nepal and Turkey forbid NGOs from participating in political activities. Similar rules apply to associations in Bulgaria and foundations in Lithuania.

¹⁰³ See Governance: The World Bank's Experience, p. 42 (The World Bank; 1994).

government policies or actions. It is also difficult to imagine a legal environment in which NGOs are allowed to participate fully in the selection, design, and implementation of development projects that did not also allow them wide freedom to criticize other policies and actions of the government.¹⁰⁴

One subsidiary rule deserves attention. There have been instances in which agencies of the government have used NGOs to lobby parliaments for issues of interest to those agencies. This sort of subterfuge is not desirable. On the other hand, an NGO should not be precluded from educational and advocacy activities aimed at its government simply because it receives a grant or contract from some agency of the government to carry out a particular government program. Accordingly, though governments should have their own internal rules restricting agencies from funding NGOs to lobby other arms of the same government, NGOs that have contracts with or grants from government should be allowed to conduct educational and advocacy programs aimed at that government so long as they separately account for the contract or grant money received from the government.

In any democracy the composition of each elective body is crucial to the determination of policy. In democracies, accordingly, an NGO should not be barred from endorsing or supporting candidates on grounds relevant to the purposes for which it was formed.¹⁰⁵ Any other rule would deprive voters in a democracy of access to essential information and research that will be relevant to voter choices. For example, in many democracies NGOs keep a "scorecard" on the policy positions taken and votes cast by candidates or prospective candidates for office. For example, an environmental organization might publish a chart showing the extent to which particular candidates for office supported or opposed policies deemed by it important to the protection of the environment. Although such information constitutes no more than the opinion of that environmental organization, to many of its members and to members of the larger public, such information might prove quite influential in helping voters to determine for whom to vote. If NGOs were not allowed to engage in such activities, individual voters would be deprived of important sources of research and information relevant to intelligent citizenship.¹⁰⁶

¹⁰⁴ It should also be borne in mind that, as key actors in civil society, NGOs have a central role to play in monitoring and criticizing individuals and organizations in the private sector as well as politicians and government agencies.

¹⁰⁵ In the United States, public charities qualified for federal income tax exemption under Section 501(c)(3) of the Internal Revenue Code – a large but limited set of US NGOs - is prohibited from participating or intervening in any political campaign on behalf of or in opposition to any candidate for public office.

¹⁰⁶ Understandably, in any given country it will be appropriate to place limits on the activities of NGOs in support of or in opposition to candidates for public office in order to preserve the integrity of the political party laws. In other words, NGOs should not become the functional

Chapter H. Fund Raising.

Discussion: After registration, fundraising is perhaps the most burning issue for NGOs throughout the world. Without a strong practice of charitable giving, NGOs in many countries live a precarious life. Some get contracts or grants from the state budget. (The GONGO problem is discussed in Section 37.) Others are supported by external donors, including bilateral and multilateral donors and private foundations.

A strong, independent, and vibrant civic sector will not emerge in the long run if NGOs continue to rely upon foreign funding or their own governments. One extremely important source of funding for NGOs in many countries is profits from economic activities. The issues relating to economic activities and their taxation are dealt with in Sections 19 and 32 and Appendix I. What is needed in addition, however, is grass-roots, community-based funding. Significant efforts are being made in countries around the world to develop this kind of financial support.¹⁰⁷ Leading foundations that support the development of civil society internationally, such as the Ford Foundation, the Charles Stewart Mott Foundation, and the Rockefeller Brothers Fund, have made sustainability one of their key issues. In short, it is clear that efforts need to be intensified to develop broad-based, citizen participation in funding of NGOs around the world.

Another source of funding that should be encouraged is that which can be provided by corporate foundations. So long as legal entities are permitted to establish NGOs, see Section 3(e), business entities that want to demonstrate their commitment to the communities in which they work can establish a corporate foundation to fund worthy causes. Even if all that is contributed by a company to its foundation is 2-3 percent of its net profits, that can be a substantial sum of money in the case of a large business enterprise. In more mature societies, corporate foundations have played an important role in providing funding to indigenous NGOs.

In fact, a strong partnership between business and civil society can be beneficial to both parties. NGOs can obtain money and in-kind assistance for

equivalent of political parties. Thus, an NGO might be foreclosed from raising funds for a candidate or assisting him or her to be listed on the ballot, but that does not mean that it should not be allowed to express its preferences for or against particular candidates.

¹⁰⁷ "Central fund-raising bodies, such as the Community Chests of Singapore and Hong Kong, which not only collect but also channel and monitor funds flows, can remove much of the burden of fund-raising from individual NGOs, introduce greater expertise into funds-collection and constituency-building schemes, ensure accountability, build donor confidence and encourage the capacity-building of NGOs and their staff." ESCAP, *Fiscal Incentives*, pp. 39-40 (1994). The Community Chests of Singapore and Hong Kong are affiliates of United Way International.

the good work that they do. Business enterprises can receive recognition for being "good citizens," not mere profit-making machines, an important consideration for any enterprise that intends to have a long and successful presence in a particular country.

Another way in which businesses and NGOs can cooperate is through "sponsorship." If a business is supporting an NGO (e.g., a soccer team) basically to obtain recognition in the community (e.g., "The Reebok Championship"), it is appropriate to categorize the activity as advertising rather than a contribution to charity. Within broad limits, most countries recognize advertising expenses as legitimate expenditure that can be deducted in calculating the income taxes of a business, so no new rule is required.

Section 22: Solicitation – Limitations, Standards, and Remedies.

(a) An NGO should be prohibited from engaging in any misrepresentation in connection with the solicitation of funds from others, each NGO should be required to divulge, in connection with its fundraising, the extent to which its funds are used to defray the direct and indirect costs of fundraising, and licensing is appropriate for public fundraising.

Discussion: It should be impermissible for an NGO to solicit funds using the name of another entity or to misrepresent the purposes for which the funds will be used. If a fee is paid to a fundraising organization, the amount of it should be disclosed. It is appropriate to require a license before there can be charitable solicitation in a public place.¹⁰⁸ Charity solicitors going door to door should be required to display their permit, and mail solicitations should be permissible only if a license is obtained. The point of all these requirements, of course, is to protect the public from fraud and misrepresentation.¹⁰⁹ The ways in which the public can be taken advantage by unscrupulous NGOs are myriad, so this is a very fruitful area for self-regulation, to protect the image and standing of NGOs as well as to protect the public. See Section 40.

¹⁰⁸ In Egypt an NGO cannot solicit contributions without a license, but the solicitation law has a "Catch 22" quality to it. An NGO can only receive two licenses per year, and each expires after three months. Accordingly, an NGO can only raise funds 6 months out of the year. In the Netherlands, fund raising is largely regulated by a private body called the Central Bureau of Fund Raising, which restricts fund raising activities of its members in a similar fashion. Since the organization grants a "seal of approval" to entities, as a practical matter organizations that are not members have very little ability to raise funds from the public. See Wino J. M. Van Veen, "Self-regulation of fundraising: The Dutch Example," unpublished paper on file with ICNL.

¹⁰⁹ There must be a balance, of course, between the need to protect the public and the creation of needless or expensive licensing or other bureaucratic burdens. For example, an NGO in South Africa must not only have a license to solicit contributions, it must also publish a plan of solicitation in a national newspaper, which is quite expensive.

In some countries there are strict statutory rules on the amount or percentage of funds an NGO may expend on administrative or overhead expenses or fundraising – e.g., 20%. Almost without exception, these rules are unsuccessful. In the first place, the legitimate overhead expenses of NGOs vary widely. An NGO engaged in running field projects for agriculture may have a very low costs of central administration and overhead, whereas an NGO formed primarily to engage in research and education may have very large central administration and overhead costs. Rigid, mechanical rules fail to respond to the great diversity among NGOs and drive many NGOs to adopt “creative” accounting measure to force their costs within the rule of the statute.

Here as elsewhere there is great advantage in requiring public disclosure and letting the public decide whether or not to support an NGO with high administrative or fundraising costs. Of course, it is essential first to have generally accepted standards for cost accounting, so that fair comparisons can be made between organizations. Many countries have not yet adopted accounting principles for NGOs, and doing so should be a priority. The next step is to require public disclosure of such key numbers as top salaries and the percentage of revenues spent on overhead and fundraising. A good practice is to require NGOs to make such information available to actual and prospective donors when soliciting donations from the public. This is, once again, an excellent area for self-regulation. See Section 40.

(b) Lotteries, charity balls, auctions, and other occasional activities conducted primarily to raise funds for an NGO are a form of fund raising and should not be regarded as economic or commercial activities. See Section 20.

Discussion: Activities of this sort are occasional and are presented and advertised as fund raising activities. For these reasons they should not be treated as economic activities.

Chapter I. Reporting.

Discussion: Under many existing NGO laws there is minimal reporting but one or more government agencies has considerable discretion to determine whether an NGO should be established or terminated. Some laws give government agencies wide discretion to determine what activities may be engaged in by an NGO, what funds it can seek or accept, and so on. In a modern society it is not feasible to receive the benefits of having an NGO sector, see Chapter A (2) above, and regulate NGOs in this fashion. If there were numerous NGOs, as there must be in order for a society to reap the rewards of having a vigorous and independent NGO sector, the bureaucratic task would be overwhelming.

Some countries exercise little or no supervision over NGOs once they are established. This is not a good practice. Fraud and abuse are possible in the NGO sector, as elsewhere, and vigilance is necessary if violations of the law are to be prevented or minimized. As the Chief Charity Commissioner of England and Wales has said: "We must be skeptical of the 'halo' argument. Not all charities are good. Charities are frequently inept, inefficient, unprofessional, and even corrupt."¹¹⁰ *The basic trade-off for relatively easy establishment of NGOs is accountability and transparency. In exchange for protection of the laws allowing easy establishment as a legal person, an established NGO should accept reporting requirements and enforcement mechanisms that are appropriate and proportional to the legitimate interests that the public may have in its operations and activities (see below).*

The basic tools for achieving accountability and transparency are a variety of reports. Some reports go only to the government and some are available to the public. It would be nice if there could be a single and simple form of reporting for all NGOs and for all of their activities. Unfortunately, the activities of NGOs are too numerous and diverse, and the legitimate interests of the government and the public are too diverse to make this possible. Still, to the maximum feasible extent, reports should be as simple to complete and as uniform among agencies as is possible. There should, of course, be penalties for failing to file reports, for failing to file them on time, or for filing false reports.¹¹¹ Finally, whatever reporting requirements are imposed on NGOs

¹¹⁰ Speech by Richard Fries at the South Asia Conference on Laws, Rules, and Regulations for the Voluntary Sector, March 6-10, 1996, a conference sponsored by ICNL, CIVICUS, and VANI, the Voluntary Action Network of India.

¹¹¹ Although the essence of accountability is to ensure that NGO funds have been used in accordance with applicable standards, accountability transcends financial integrity: "NGOs are also accountable to their immediate beneficiaries for the substantive services that they provide. More broadly, they are accountable to the ultimate beneficiaries, the public-at-large. . . . As a

should not be more onerous than comparable reporting requirements imposed on other entities, such as for-profit companies.

It is appropriate for the reporting requirements to be less onerous for MBOs than for PBOs, and small organizations should be given simplified reporting requirements or exempted altogether. More generally, the nature and extent of reporting requirements should be appropriate and proportional to the legitimate interests that the public may have in the operations and activities of the particular NGO.¹¹² For example, for an MBO with no activities affecting the public interest, it may be appropriate to require no more than an annual report indicating that the minimal activities required to maintain legal existence (e.g., annual meetings of its board of directors have occurred.) On the other hand, it may be appropriate to require extensive financial and operational reporting from a large PBO that receives significant tax preferences, government grants, or donations from the public.

Furthermore, it is not sufficient for the government to require the various reports, as suggested below. These Reports from an established NGO should receive adequate scrutiny. Important questions that are raised by them or by complaints from members of the public should trigger mail or telephone inquiries, or even on-site inspection and audit in appropriate cases. In short, in order to prevent misconduct and abuse, the NGO laws must be fairly and vigilantly enforced as well as being well conceived and drafted.

There is, of course, the ever-present danger of over-regulation by the government, or, indeed, the use of reporting and audit requirements to harass NGOs that are critical of the government or otherwise unpopular.¹¹³ There is no certain protection against governmental abuse, and it exists to some extent in every society. One of the most important reasons why every country should have

basic condition for ensuring accountability, all NGOs should be required to open their accounts to public scrutiny." ESCAP, Fiscal Incentives, p. 41 (1994).

¹¹² "To ensure that NGOs function effectively, it is necessary for governments to restrain themselves from the temptation of seeking to influence or otherwise involve themselves too closely in NGO affairs. . . . It is therefore in the interest of governments to encourage the activities of NGOs without restricting their independence of action." ESCAP, Fiscal Incentives p.4 (1994).

¹¹³ "Government-imposed NGO regulations and reporting requirements must strike a balance between nurturing NGO growth, and guarding against corruption, management ill-discipline and other malpractice. Restrictive laws and procedures designed for the political control of NGOs clearly hamper legitimate NGOs. . . . Where regulations and reporting are most lax, the door is open for unhealthy and even corrupt NGO activities which may taint the sector as a whole. Where the expansion of the sector has been most rapid (e.g., South Asia and certain African countries) there is considerable concern about the rapid ascension of "bogus" NGOs which serve their own interests rather than those of vulnerable groups." John Clark, "The State, Popular Participation, and the Voluntary Sector," 23 World Development 593, 598 (1995).

sound administrative laws that permit actions by organs of the government to be challenged in court, and independent judges to hear those appeals, is to provide a correction for governmental abuse and a deterrent to future abuses. See Section 2(b) above.

It is also important to emphasize that information about NGOs, and about the rules that apply to them, should be in the public domain and available to any person. Many governments want to have reports from NGOs, but are reluctant to make any of them public. Of course, it is essential to protect truly confidential or proprietary information from public disclosure, but the public is entitled to have basic information about NGOs. In this connection, it is far more important that information be available to the public about PBOs than it is about MBOs. The activities of PBOs – and the public interest activities of MBOs – affect the public interest, and the public is entitled to know about them. When significant tax preferences have been extended to PBOs, where they have received government grants or contracts, or where the PBO has been supported by public contributions, the public is entitled to a high level of accountability and transparency.

Moreover, it is in the interest of the government to insist on public disclosure of basic information about PBOs and the public interest activities of MBOs. When information is available to the public, interested citizens often scrutinize it carefully and frequently discern improper activities or operations that escape the attention of bureaucrats, who typically do not have adequate time and resources to exercise adequate oversight of NGOs. Making basic information public promotes self-regulation by the sector and enables each citizen to contribute to the monitoring and oversight necessary to bring to light misconduct or abuse. Making basic information public can also deepen public knowledge about the contribution of the NGO sector to civic life and national development.

Section 23: Internal Reporting and Supervision.

(a) The highest governing body of an NGO (the assembly of members or the board of directors) should be required to receive and approve reports on the finances and operations of an NGO.

(b) Some organ of the NGO (e.g., an audit committee of the board) should be required (and each member of a membership NGO should have the right) to inspect the books and records of the organization.

Discussion. In a number of civil law countries, it is mandatory that an NGO have an audit commission – an organ independent of the Board (though its members may be drawn from the Board) – which has the responsibility and

authority to conduct annual or special audits of the finances and operations of the NGO to assure compliance with legal and ethical standards and the policies adopted by the Board.

(c) An NGO with substantial activities or assets should be required to have its financial reports audited by an independent certified or chartered accountant.

Discussion. What constitutes a level of activities or assets sufficient to trigger a requirement for an independent accountant's audit may or may not be specified in the law. As a matter of good practice, members of the governing board should realize that most of them do not have the time or the competence to analyze the financial records of an NGO that has grown to any significant size. As soon as the organization can afford the services of an outside auditor to perform this task for the benefit of the board the better. Further, NGOs quickly find that responsible funders require independent financial audits of the books of an organization before they will make grants to it. Finally, when an NGO receives significant tax preferences or government contracts, it is typically required to have audited financial statements.

Section 24: Reporting to and Audit by Supervising Agency.

(a) Any established NGO that has activities that significantly affect the public interest should be required to file reasonably detailed reports annually on its finances and operations with the agency responsible for general supervision of NGOs. In certain specialized situations more frequent reporting may be appropriate.

Discussion. It is necessary that the laws or regulations applicable to NGOs state clearly what organizations must file reports. Below a certain level of activity, there is no real point in requiring reports. What the appropriate level of activity is before reports are required is a judgment to be made by the law writers in each country in light of local circumstances and traditions.¹¹⁴

(b) All reporting requirements should make appropriate provision to protect the legitimate privacy interests of donors and recipients of benefits as well as the protection of confidential information.

¹¹⁴ In Ethiopia onerous reporting requirements are imposed as a way of asserting government control over NGOs. Every established NGO must submit a detailed plan of operations describing what the NGO is going to do and how it is going to accomplish its objective two months before the end of every year. The reports are reviewed and approved or not by the Relief and Rehabilitation Commission. In addition, relief NGOs must give monthly inventory reports to local administrators. Other NGOs must file these reports quarterly.

Discussion. Countries vary considerably in the extent to which there are laws protecting the privacy of individuals. The reporting rules for NGOs in any country should obviously be conformed to the privacy laws, if any, in the country in question. In addition, it is appropriate for those establishing reporting requirements for NGOs to incorporate principles that protect individual privacy and any confidential or proprietary information from public disclosure.

As discussed above under Section 17, however, there are certain kinds of personal information that might be required to be disclosed in order to prevent abuse. For example, in order to let the NGO "market place" sort out whether particular organizations are paying unreasonably high salaries to key officers, it should be mandatory that the salaries of the most highly compensated individuals be disclosed. Again, in order to prevent conflicts of interest and self-dealing, and to let the market place of NGOs determine what activities are appropriate, it should be mandatory to disclose any sums paid or loaned to family members of directors or officers of an NGO.

(c) The supervising agency should have the right to examine the books, records, and activities of an NGO during ordinary business hours.

Discussion. There should be protections in place to prevent the supervising agency from using the pretext of an audit of an NGO to extract information about one or more individuals.¹¹⁵ Further, as soon as the investigators have reason to believe that criminal conduct may be involved, they should be required to notify those that are the target of the investigation that it has taken on criminal overtones, so that the target can take appropriate action to protect its interests.

(d) Small NGOs should be allowed to file simplified reports.

Discussion. What level of reporting is appropriate for NGOs of various sizes and types of activities is a complex issue that depends very heavily on the peculiar facts and circumstances in a given country. As an example of one approach, attached as Appendix III is a description of the reporting regime developed in England and Wales by the Charity Commission, which imposes different levels of reporting requirements on charities, depending on size.

(e) All reporting NGOs should be subject to random and selective audit by the supervising agency, and very large NGOs should be audited annually.

¹¹⁵ NGOs have reported that the Jordanian legislation permits the unlimited inspection of their books and records by the authorities. See Abdallah El Khatib, *Relations Between Government and Nongovernment Organizations* (1989).

Discussion. It is under this heading that the gravest shortcomings of government are evident. It is a relatively easy matter to pass laws. It is a very difficult and challenging one to administer and enforce them fairly and effectively. In most countries inadequate resources have been allocated to enforcing the legal requirements imposed on NGOs. Too often when problems arise – such as tax abuse by a civic organizations – the temptation is to change the law. For example, in Bulgaria and Ukraine when tax abuse was discovered in a number of civic organizations, the governments revoked tax exemptions for all NGOs. What is usually needed is not more laws or different ones but better enforcement of the laws already on the books.

(f) MBOs can generally be exempted from reporting requirement, or required to file simplified reports, except to the extent that they engage significantly in public interest activities.

Discussion. It is widely argued in civil law systems that there is no need for membership organizations (associations) to file reports because the affairs of the organization are adequately monitored by the members. It is certainly true that ultimate governing body in a membership organization is the assembly of all members, but to argue from that fact to the conclusion that no public accountability is necessary is no more persuasive than arguing that foundations do not need to file reports because the board of directors, the ultimate governing body of a foundation, has a duty to supervise the activities of the organizations.

Experience shows that members frequently do not do a very good job monitoring the affairs of a membership organization.¹¹⁶ This may be of no great consequence if the organization is not engaged in activities affecting the public, but that is the whole point of distinguishing, on the one hand, between membership and non-membership organizations, and, on the other hand, between MBOs and PBOs. See Sections 1(b) and 1(c) above. A membership organization can be either an MBO or a PBO, and a PBO can be formed as either a membership or a non-membership organization. Further, just as a PBO may also serve some membership interests, a membership organization may engage in significant public interest activities. Reporting requirements and enforcement should be most rigorous when the public interest is involved. Moreover, the public does have a legitimate interest in assuring that members of a membership MBO not be taken advantage of by its officers.

In light of these considerations, and in the interests of not imposing pointless or burdensome reporting requirements, it would be reasonable to have different reporting standards for each of three different groups: (i) small MBOs and PBOs (ii) large MBOs with no significant public interest activities, and (iii)

¹¹⁶ See note 63 above.

large PBOs and MBOs with significant public interest activities.¹¹⁷ Organizations in group (i) could be exempted from filing reports, those in group (ii) could be required to file and make public basic reports that would allow members of each MBO to monitor more adequately the way in which the organization is being run, and organizations in group (iii) would be required to file detailed reports.

Taking these suggestions in order, the purpose of exempting all small NGOs is to eliminate burdensome reporting requirements that might stifle new or small organizations. As long as the activities and assets of an organization are limited, its ability to have a negative or harmful impact on anyone is limited. What constitutes a level of activities and assets that is too small to require report filing can best be answered in the particular context of each country.

Even though an organization does not receive money directly or indirectly from the state or the public, it may engage in activities that affect the public interest. For example, a gardening club may decide that it wants to replant the flower beds in a public park. Although a state hard pressed for funds to maintain the public parks may gratefully accept this offer of assistance, the commissioner of parks and ultimately the public are entitled to know exactly what sort of replanting the gardening club has in mind. As another example, a professional association of doctors or nurses may decide that they want to provide free medical care to homeless people, but the state is entitled to put in place mechanisms and procedures to assure that the public interest is protected – that the care given to these homeless people is appropriate and that it is given by properly trained professionals under suitable conditions and with adequate facilities.

When an individual or a group wants to undertake an activity that affects the public, it is customary to require that an advance permit or license be obtained. If the organization wants to engage in a particular activity that affects the public on a continuous or permanent basis, it is customary for it to have to file annual reports and be subject to periodic inspections. For example, operating a shelter for abused or abandoned animals usually requires a license and is subject to annual reports and inspections. When a group decides not only that it is going to establish itself formally as an NGO but that it will principally or exclusively undertake activities that affect the public interest, it is then appropriate to require it to file annual reports, not just on selected activities, but on all of its activities. It may continue to be subject to the jurisdiction of a particular ministry of the state (e.g., the Ministry of Health for running a clinic for homeless people), but it will now come under the general reporting requirements and supervision of the organ of the state responsible for NGOs. Similarly, large

¹¹⁷ For a discussion of how to determine whether an organization is a PBO or an MBO, see Section 1(b) above.

MBOs that engage in significant activities affecting the public interest on a continuous or permanent basis should probably also come under the regular reporting requirements applicable to large PBOs.

Translating the above principles into clear and administrable reporting rules is not necessarily easy, but it is easier if the general framework is borne in mind. Finally, it bears repeating that the responsible organ should reserve most of its audit, investigation, and oversight resources for group (iii), the large PBOs and large MBOs with significant activities affecting the public interest.

Section 25: Reporting to and Audit by Tax Authorities.

(a) It is appropriate for separate reports to be filed with the taxing authority(ies), though efforts should be made to make these reports as consistent as possible with the financial reports filed with the general supervising agency.

Discussion. The reporting burdens imposed on NGOs should generally not be any more onerous than those imposed on business entities, and often they can be less onerous.¹¹⁸ The principle problem in most developing countries is not that tax reporting is too burdensome, but that the tax authorities do not adequately enforce the tax laws as they apply to NGOs, often for lack of adequate resources.¹¹⁹

(b) It is generally inappropriate for the taxing authority(ies) to examine any aspects of an NGO other than those directly related to taxation (including whether the requirements for exemption from taxation have been satisfied).

(c) Small NGOs should be exempted from filing tax reports, or allowed to file simplified ones.

¹¹⁸ South Africa provides a rare example of what would seem to be inadequate reporting. The only reporting requirement for NGOs is an annual tax report, which is not accessible to the public.

¹¹⁹ "In many developing . . . countries, however, large numbers of NGOs . . . may not register with the tax authority. Often the information flow between the NGO-registering and tax-collecting authorities is slow or incomplete, so that the latter may not know the names of registered NGOs or may not even learn of new registrations as they are issued. The fact that many NGOs combine charitable and other activities makes it particularly difficult for the fiscal authorities to trace the flow of funds. Furthermore, as the revenues of NGOs are usually quite small in comparison with those of business enterprises, they may not be regarded as meriting close attention, particularly when the determination of taxable income is left to the local assessor. It is therefore likely that many NGOs escape the tax net altogether, simply through their non-filing of tax returns." ESCAP, Fiscal Incentives p. 15 (1994).

Discussion. All but the smallest PBOs should be required to file tax reports, for these reports will be a basic tool by which the responsible organ can monitor tax preferences received by the organization. Such reports also allow a financially sophisticated agency to check what has been done with any moneys received directly from the state or the public.

There should not be a general exemption from tax reporting for MBOs that do not engage in significant activities affecting the public. Even if an MBO does not receive direct or indirect benefits from the state or the public, it may be engaging in economic activities on which taxes should be paid.

With respect to tax auditors going beyond the purposes of their audit, it is customary within any government for there to be information sharing agreements. For example, it would generally be improper for the tax authorities to share specific information about the taxes of an individual or a legal entity with other organs of the state. If in conducting a tax audit of an NGO, however, the tax auditor discovers information that indicates that there has been a violation of the employment laws, it should be appropriate for the tax authority to notify the ministry of labor of the possible violation. It should always be inappropriate, however, for the taxing authorities to take the excuse of a tax audit to conduct a general examination or appraisal of an NGO or its activities.

Section 26: Reporting to and Audit by Licensing Agencies.

(a) Any NGO engaged in an activity subject to the licensing or regulatory control of an agency of the state should be required to file the same reports with that agency as individuals or business entities are required to file.

(b) A licensing agency should have the right to audit and inspect the NGO for compliance with applicable licensing or regulatory requirements, but should not generally examine or supervise other aspects of the NGO.

Discussion. A licensing agency may get involved with an NGO in connection with a single activity (e.g., a permit to parade down a principal street) or in connection with a continuous or permanent activity (e.g., running a medical clinic for homeless people). The nature of the organization's relationship with the licensing agency, and hence the extent of reporting and disclosure, will vary with the duration of the activity as well as its importance.

Section 27: Reporting to Donors. *Substantial donors to an NGO should be entitled to contract for disclosure of information adequate for the donor to assess the suitability of the NGO for receipt of donations and the use(s) to which donations, or that particular donor's donations, are put.*

Discussion. This is a matter of good practice and not a guideline for a legal rule. Generally speaking, it should be up to each donor to require whatever information it needs from an NGO, including the right to conduct an audit.¹²⁰ If a substantial grant is made, the grant should specify the reports and accounts that must be filed. By imposing appropriate contractual conditions, each donor can adequately protect itself. Obviously, courts should enforce such contacts.

Section 28: Disclosure or Availability of Information to the Public. *Any NGO with activities that significantly affect the public interest should be required to publish or make available to the public a report of its general finances and operations; this report may be less detailed than the reports filed with the general supervisory agency, the taxing authority(ies), or any licensing or regulatory body and should permit anonymity for donors and recipients of benefits as well as protection of confidential information.*

Discussion. The public at large has a legitimate interest in the activities of PBOs and MBOs with significant public interest activities. Moreover, interested members of the public or the media are often more likely to detect and disclose impropriety than overworked government regulators.¹²¹ It should be emphasized that what is at stake is not simply the financial integrity of an organization. Adequate disclosure can also go far towards providing the public a base of knowledge against which it can determine whether and the extent to which an advocacy NGO really listens to and speaks for the group it purports to represent and benefit and whether it has a solid base in research and experience for the claims and statements that it makes. All of this requires that the public and the media have access to adequate and accurate information about NGOs. As leading regulator in Australia has said that, "The best regulation is ensured by open databases and a free press."¹²²

The specific rules adopted to implement this principle should not require large or needless expenditures by PBOs to disseminate their public reports. Some legal systems allow an annual publication in a newspaper or journal generally used for publishing legal notices. Under other systems a copy of the

¹²⁰ The Law of Georgia on Grants, however, codifies as law specific legal relationships between the donor and the entity receiving the grant.

¹²¹ In Kenya the public has complete access to NGO reports and files maintained by the Non-Governmental Organizations Coordinating Board and for a fee can make copies of them. In Malawi the Registrar keeps all NGO records. Although there is a fee for accessing them and for copying them, these records are available to the public.

¹²² Speech of David Pollard, Director of Information for the Australia Securities Commission at the South Asia Conference on Laws, Rules, and Regulations for the Voluntary Sector, March 8-10, a conference sponsored by ICNL, CIVICUS, and VANI, the Voluntary Action Network - India.

report is filed with the responsible organ, which places it in a public reading room, while the NGO is required to provide a copy to any member of the public who request it, charging no more than a reasonable photocopying charge.¹²³

Large MBOs with no significant public interest activities are of interest to those who are part of it. Accordingly, as discussed above under Section 30, it is appropriate for the responsible organ of the state to specify particular kinds of information that must be contained in reports prepared annually by such an MBO and to require that the reports be available. For example, the responsible organ might specify the accounting principles according to which the annual financial reports must be prepared, whether an independent audit is required, and might require that certain kinds of information must be disclosed, such as the salaries of the highest paid officers and employees, whether any family members received payments or loans, whether any sales transactions involving officers and directors had occurred, and so forth. By simply making available to those who are part of an MBO information that would allow them to take corrective action, the reporting requirements would serve their purpose.

Section 29: Special Sanctions: In addition to the general sanctions to which an NGO is subject equally with other legal persons (e.g., contract or tort law), it is appropriate to have special sanctions (e.g., fines or penalty taxes, involuntary termination) for violations peculiar to NGOs (e.g., self-dealing or improper solicitation).

Discussion: In any modern legal system, where the principal method of supervision of NGOs is performed by reports filed by NGOs and reviewed and checked by the government, many of the special sanctions for NGOs relate to these reports and the supervision resulting from them. For example, given that the board of directors is given primary responsibility for supervising the activities of an NGO, there should be sanctions to back it up. In Sections 12, 13, and 14 there is discussion of the duties directors and their liabilities for failing to act with loyalty or diligence, or acting out of a conflict of interest, and so forth. In addition to these sanctions, considerations should be given to adoption of a rule that would trigger termination of an NGO if its board of directors or assembly of members did not meet for several years or failed entirely to exercise any oversight over the organizations. Of course, any step as drastic as the proposed liquidation of an organization should not be allowed to occur without adequate notice and an opportunity to correct, and should not be final until appeal rights have been exhausted or the time to file an appeal has expired. See Section 9 above.

¹²³ In Zambia an NGO is required to supply any individual with copies of its certificate of incorporation and articles of incorporation within seven days of receiving payment for making copies.

With respect to reports to be filed with the responsible organ, with any licensing agency, and with the tax authorities, there should be fines for failing to file a report, filing a report late, or filing a false report. If an NGO fails to file the basic annual report for an extended period of time (e.g., 2-3 years), the responsible organ should commence proceedings to terminate the organization, again with adequate provision for notice and administrative and judicial appeals.

As discussed under Section 12, third parties should be allowed to sue an NGO for harm done by it to them, and they should be allowed to sue officers and directors if by error or omission they caused or contributed to the harm. As discussed in Appendix I, if a the principal purpose test is adopted in a legal system with respect to economic activities, an NGO could lose its status as such if its principal activities over a period of years were primarily economic activities. It should, of course, be allowed to be re-formed as a business entity. Self dealing, private inurement, or improper solicitation of contributions are examples of special rules pertaining to NGOs that could appropriately be enforced by means of fines or penalty taxes.¹²⁴

¹²⁴ See Note 76. There should not, of course, be duplicative criminal sanctions, as has been proposed in Pakistan.

Chapter J. Taxation.

Discussion: The distinction drawn in Section 1(b) between mutual benefit organizations (MBOs) and public benefit organizations (PBOs) is of great importance in the area of taxation. By definition, a PBO benefits the public or some defined segment of it. Accordingly, PBOs are generally regarded as entitled to greater benefits from the state than are MBOs, which primarily serve the interests of their members. Tax preferences are one of the principal benefits extended to NGOs, and in most legal systems they are extended preferentially or even exclusively to PBOs.¹²⁵

Most legal systems do not use the terms MBO and PBO as such. These reflect an attempt to generalize and put on a sounder theoretical footing the actual, more fragmented practices that exist in various legal systems. Most tax laws focus on the functions or purposes of an organization in determining whether it is entitled to tax preferences. For example, the tax laws of a particular country might extend the privilege of receiving tax deductible contributions or property tax exemption only to organizations formed for the primary purpose of advancing education, health, science, culture, or the relief of poverty. Over the years other purposes may be added to the list, such as the protection of the interests of minority groups or the environment.

As a legal system matures it is often the case that the law writers realize that a common theme runs through the list of purposes or activities they have crafted over the years and that no mere listing can capture all of the possible kinds of organizations that deserve preference and support from the state. It is common, then, to find, tacked on to the end of such a list, a final, catch-all category such as "or any other organization formed primarily for the benefit of the public." In such a catch-all the unifying principle emerges and, in a sense, informs the entire list. It is education, health, and scientific organizations *that serve the public interest* that are entitled to a tax preference. The officials in charge of determining eligibility for tax preferences can now test each organization seeking a tax preference by the more expansive criterion of whether it is formed primarily to serve the public interest. In other words, is it a PBO? It should also be emphasized that the selection of the agency to make the determination of whether an NGO is a PBO or not is crucially important.

¹²⁵ In Cameroon, however, no NGOs receive any tax benefits. In both Japan and South Africa the types of organizations that may receive tax exemptions are very limited. For example, in South Africa tax exemptions are limited to institutions and funds that are ecclesiastical, charitable, or educational in nature, and of a public character. In Israel, on the other hand, all NGOs are exempt from corporate taxes.

In the actual state of development of the tax laws of any country, lists of purposes or activities rather than principles predominate. And the lists vary.¹²⁶ The kinds of organizations that qualify for a sales tax exemption may be different from the kinds of organizations that qualify for customs duty preferences. This is the natural result of the ad hoc way in which tax and other legal rules develop. It is useful, though, to look at the entire collection of tax rules affecting NGOs and determine whether a more consistent set of rules founded in principle could be carried consistently across the entire landscape of laws. The strong suggestion here is that the distinction between mutual benefit and public benefit organizations and activities has enormous analytic power and can be used to rationalize what otherwise might be a rather jumbled and inconsistent set of rules.

The focus of the sections that follow is on the special tax preferences that should or might be extended to NGOs, or at least to PBOs. Something that deserves special mention is that, virtually without exception, tax preferences are voluntary and are extended only to organizations that want and seek them. A special application must be filed in virtually every system in order to establish entitlement to one or more tax preferences. This means that any organization that prefers to operate without the higher level of oversight and scrutiny that accompanies tax preferences can choose not to subject itself to the process. Since tax laws, like other laws, can be used improperly to harass unpopular NGOs, this option to either seek or avoid tax preferences is of fundamental importance.

Another point also deserves special emphasis. Aside from the possible imposition of penalty taxes as a sanction for the kinds of special problems that occur in the civic sector, see Section 29, there should not be special taxes or tax rates imposed on NGOs. As the introductory material makes clear, most NGOs add something of benefit to society, and society benefits enormously from the existence of a strong, vibrant, and independent civic sector. The interests of society in having a strong civic sector would be undermined and frustrated by the imposition of special taxes or tax rates on NGOs. In fact, as societies mature they generally embrace indirect methods of macro-managing the institutions of society, and fiscal preferences have proven to be a powerful tool for encouraging the constructive development of the NGO sector while avoiding

¹²⁶ Although not desirable, there may be a list of purposes or activities. It is clearly not a good practice, however, to list by name or specific description the organizations that are entitled to receive tax benefits. Such lists nearly always derive from special or political preferences rather than from any consistent set of principles.

discrimination, excessive governmental bureaucracy, and market distortion that results from excessive direct intervention by the government.¹²⁷

Section 30: Income Taxation Exemption of NGOs. *Every NGO, whether organized for mutual benefit or for public benefit, and whether a membership or non-membership organization, should be exempt from income taxation on moneys or other items of value received from donors or governmental agencies (by grant or contract), membership dues, if any, and any interest, dividends, rents, royalties or capital gains earned on assets or the sale of assets.*

Discussion: Since NGOs as defined here preclude the possibility of personal benefit or the distribution of profits, there is a powerful argument that they are not proper objects of an income tax in any system.¹²⁸ Income taxes are imposed on the "profits" of legal entities because they are surrogates for the individuals who own them or who can receive a distribution of profits from them. In countries, such as New Zealand, which have fully integrated their corporate and individual income taxes, there is no need to impose separate income taxes on corporations. There is a single income tax and it is imposed on corporate profits once, at the shareholder level and at shareholder rates. Profits at the corporate level are subject to a tax, but all dividends are "franked" – that is, the shareholder receiving franked dividends is entitled to take a credit against his or her own taxes for the taxes paid at the corporate level.

NGOs, as defined here, stand on an entirely different footing. They are not "owned" by anyone and cannot distribute profits as such. Whatever profits they may earn from economic activities are reinvested or spent on appropriate nonprofit activities. They are not surrogates for the shareholders who own them, and thus it can be strongly argued that they should not be subject to income taxation at all. Unfortunately, most countries around the world assume that NGOs, like for-profit entities, are natural subjects of taxation, and that not applying tax to them is a matter of grace and exemption.¹²⁹

¹²⁷ See ESCAP, Fiscal Incentives, p. 19 (1994). In South Africa a special tax is imposed on donations to NGOs that do not meet a very narrow definition of public interest NGO.

¹²⁸ Sri Lanka illustrates that there can be positions in between treating NGOs as full taxpayers and exempting them. In that country income tax on charitable institutions is levied at a concessional rate of 10 percent on income in excess of Rs. 42,000 per annum, and this tax can be waived for charities providing institutional care. The theory behind this rule is that better accountability will be assured if sizable charities are required to file tax returns, even though the tax rate is quite low.

¹²⁹ A typical example of how difficult it is for NGOs to obtain tax exemption is provided by Thailand: In that country NGOs registered as foundations or associations may seek tax exemption if their purposes are charitable, which means that they are related to religion, education, health, or social welfare. No NGO can qualify for tax exemption until it has operated for three years, though this rule may be waived by Ministry of Finance. During the prior three

Typical sources of revenue for civic organizations are donations, membership dues, and interest and dividends on investments. There is general agreement that these items should not be taxed. There are, however, two different ways of arriving at this result. One approach assures that civic organizations are not taxable on these ordinary sources of revenue by defining those sources as not constituting "income" for tax purposes. The other approach recognizes these receipts as income but confers exempt status on civic organizations.

Generally accepted tax theory defines income as any receipt during a defined period of time that is either expended or that increases net worth.¹³⁰ Under this approach and in common understanding, it is clear that dividends and interest are generally considered income for tax purposes.¹³¹ Accordingly, the approach taken here is to recognize all receipts of a civic organization – donations, membership fees, interest, dividends, and capital gains – as income, but to advocate tax exempt status for all civic organizations for these items.¹³² This approach leaves several open questions – should those who make donations receive a tax preference? Should trade or business income of an NGO be exempt? And how should civic organizations be dealt with under other tax laws? These questions are dealt with in succeeding sections.¹³³

years, the NGO must have spent 60% of its income or 75% of its total expenditures on charitable purposes. The result of these rules is that only about 200 NGOs have tax exempt status in Thailand.

¹³⁰ See R.M. Haig, "The Concept of Income," The Federal Income Tax 1, 27 (1921); Simons, Personal Income Taxation 50 (1938).

¹³¹ In Romania, however, interest is deemed to be "without economic character" and therefore not subject to the profits tax. See Ministry of Finance Methodological Rules No. 5910 of 1991. Obviously, if interest income is not generally taxed, as in the case of Romania, NGOs should not be taxed on their interest income.

¹³² "It is particularly important that NGOs carrying out "watchdog" functions through policy research, lobbying and public awareness-raising be financially independent of both their own governments and foreign donors. To encourage such independence, dividend income on NGOs' financial endowments could be made tax-free. NGOs providing services to other NGOs (e.g., as "umbrella" organizations, as federations, as subcontractors) or those playing a catalyst role on behalf of the NGO community could also be given that concession on income from all funds held in trust." ESCAP, Fiscal Incentives, p. 48 (1994).

¹³³ There is no limit to the ingenious tax rules that can be devised, and often tax rules can be used to attempt to achieve very targeted goals. For example, in China enterprises in which disabled persons constitute a minimum of 10 percent of the work force receive a 50 percent tax concession, while those whose work force comprises 35 percent disabled employees receive complete exemption from income taxation.

One specialized issue deserves mention here. Should a donation received by one NGO but earmarked for another be treated as a donation to, and the revenue of, the first NGO? For the donor this can be an important question, for the item might be deductible if a donation to the first entity but not if it is given to the second. For example, a donation to a foreign organization might not be deductible, but a donation to a domestic organization, might be, even if it passes the donation along to the foreign organization. Some countries, such as the United States, have complex rules for distinguishing between contributions that have been permissibly earmarked and passed along from those that fail certain very technical tests.

On the side of the recipient NGO, there is a question of whether an earmarked or "pass through" donation should properly be reflected as its income, and whether it is improperly being used as a mere conduit, perhaps obscuring from regulators or the public the real purpose of the donation. Again, these issues become very technical very quickly, but it is important to note their existence and hence the need to take account of them in any fully developed set of laws.

Section 31: Income Tax Deductions or Credits for Donations. Within reasonably generous limits, individuals and business entities should be entitled to an income tax deduction or credit with respect to donations made to PBOs (but not MBOs). As a matter of tax policy, credits are preferable to deductions for individuals under a progressive income tax system, though deductions may attract more and larger gifts from wealthy donors.

Discussion: Under the rule recommended in the previous section, no NGO would be taxed on donations it receives. If, in addition, the giver is entitled to a tax credit or deduction against his or her personal or business income tax, the same donation receives a double tax preference, once to the giver and again to the recipient.¹³⁴ As a good practice, this generous tax treatment is deemed justified when the activities of the NGO in question are for the public benefit -- when, in other words, it is a PBO rather than an MBO.¹³⁵ If this distinction is

¹³⁴ In many developing countries policy makers generally resist the notion that tax preferences ought to be extended to NGOs, for they are not regarded as contributors to economic development. The structural adjustment policies being pursued by many countries often with strong support from the World Bank and the International Monetary Fund, emphasize deficit control and fiscal austerity. What has been suggested in this Handbook is that NGOs play a much more fundamental role in the development process than has often been recognized, and that the growth of a vigorous independent civil society may indeed be essential to long range economic development. See text above notes 41-43. Accordingly, it may be appropriate for policy makers to reconsider the importance of extending tax preferences to NGOs as part of an overall strategy promoting sound development.

¹³⁵ India provides an example of a relatively generous tax deduction scheme. In India, cash donations to charitable organizations are 50 percent tax deductible up to 10 percent of gross

drawn in the tax laws of a country – permitting a tax preference to those who make contributions – then there will be great pressure on the supervising authority (presumably the tax authority) to classify NGOs as PBOs. As discussed in Section 1(b), this distinction is often difficult to draw. In actual experience the tax authorities tend to proceed on a case-by-case basis.

A separate and different question is raised by whether a contributor to a PBO should get a tax credit or a tax deduction. The distinction is of great importance in a tax system with a progressive rate structure. A tax credit reduces the amount of tax owed, often unit-for-unit, whereas a deduction only reduces the amount of income that is subject to tax. Where rates are progressive, deductions favor higher income tax payers who are paying a higher rate of tax on income. Tax credits give each taxpayer the same tax preference for a contribution of the same amount, and hence represent greater equity as a matter of tax policy. Most countries with progressive rate structures, however, allow deductions rather than credits. This may be justified by data which show that lower income individuals tend to make charitable contributions without regard to their tax impact, and, indeed, other tax rules may preclude them from getting any tax preference at all from a charitable contribution.¹³⁶ On the other hand, there is substantial empirical data showing that high income taxpayers are

income. A recent study concluded that in India, "The scheme of deductions for charitable contributions increased the quantum of such contributions substantially. In the absence of incentive provisions, the contributions of companies would have been lower by about 64 percent of the actual contributions." ESCAP, *Fiscal Incentives*, pp. 23-24 (1994).

Through an inexplicable lapse, the Polish Parliament allowed individuals to take tax deductions during 1996 for contributions to other individuals. Thus, a brother might claim a tax deduction for a donation to his sister to enable her to have orthodontal work done, and she might get a similar deduction for giving him money to provide special education for his children. This law will be repealed for 1997 and subsequent years; deductions will be limited to donations to legally constituted charities, demonstrating again the great value of formal registration.

Under the Law of the Leningrad Region on Charities adopted on April 21, 1995, charitable activities may be conducted either with or without establishing a legal entity, but donors receive tax preferences (deductions of up to 3 percent of net profits) only if the state certifies that the activities are charitable. This requirement for certification saves the Leningrad Region law from the defect of the Polish law, which imposed no similar requirement.

¹³⁶ In the United States, for example, taxpayers must choose between claiming the "standard deduction" or itemizing all deductible expenses. For lower bracket taxpayers the standard deduction tends to be more valuable, but by choosing it a taxpayer is precluded from listing, and hence from deducting, actual gifts made to charity.

In other countries salaried individuals do not file tax returns because taxes are simply subtracted from their wages. In such situations it is difficult to claim a benefit if a charitable contribution is made.

quite sensitive to tax rates and that allowing deductions rather than credits tends to attract more and larger gifts from wealthy donors.¹³⁷

Another question that must be dealt with in any scheme of taxation are the limits, if any, put on the amount of tax preferences that can be achieved. For example, in Russia individuals can claim deductions only up to 3% of their income, and business entities are limited to 1%. In the United States, by contrast, individuals can claim deductions for up to 50% of their income, and in Australia there is no limit at all. Empirical studies show that few business entities contribute more than 1-2% of their income, so it is an essentially empty debate whether deduction limits should be higher than that.¹³⁸

The same is not true of individuals, however, and where there is no limit on allowable charitable deductions wealthy individuals can avoid paying any taxes by contributing to charity an amount equal to their taxable income each year. In a democracy it is appropriate that each citizen who is financially able to should bear a fair share of the costs of government, and it is therefore not a good practice to allow unlimited deductions. At the same time, if deductions are limited to contributions to PBO – i.e., organizations contributing to the public good and often relieving the burdens of government – generous deduction limits are appropriate. The laws of most countries need to be reconsidered in light of these considerations.

There has been considerable activity in some countries aimed at distinguishing between donations to NGOs and sponsorship of NGOs. For example, in Romania under provisions of Law No. 32 of 1994 "on Sponsorship"¹³⁹ Romanian or foreign natural or legal persons may deduct up to five percent of their taxable income for sponsorship contributions to NGOs. In addition, under the general provisions of the tax laws¹⁴⁰ an additional deduction of up to three percent of taxable income may be taken for general advertising, for a combined total of 8 percent.

¹³⁷ See, e.g., Charles Clotfelter, "Tax Incentives and Charitable Giving: Evidence from a Panel of Taxpayers", 30 *Journal of Public Economics*, 319 (1980); Richard Steinberg, "Taxes and Giving", 1 *Voluntas* 61 (1990); Kevin S. Barrett, Anya M. McGuirk and Richard Steinberg, *Further Evidence on the Dynamic Aspect of Taxes on Charitable Giving* (1996).

¹³⁸ An interesting alternative approach is exemplified by Indonesia, where the Ministry of Finance *requires* state owned enterprises to set aside 1-5 percent of net profits for social programs to assist small-scale industry and weaker social groups.

¹³⁹ Implementing regulations include Order No 994 of 1994 Minister of Finance "For Approval of the Regulations to Apply Law No. 32 of 1994" and Decision No. 19 of 1995 of the National Council of Audio-Visual "For Approval of the Compulsory Rules on Sponsorship in the Audio-Visual Field."

¹⁴⁰ See Article 39.1 of Law No. 22 of 1995 for Approval of the State Budget of 1995.

The apparent purpose of this Romanian provision is to give an added incentive to business organizations to sponsor NGOs, though exactly what constitutes "sponsorship" is not entirely clear. Thus, deductions for general advertising are permitted up to three percent of taxable income, but an additional five percent may be claimed for contributions that constitute "sponsorship" of an NGO. On the other hand, no deduction seems to be provided for a gratuitous contribution to a PBO. Although it makes sense to provide businesses with incentives to increase their advertising through the sponsorship of NGOs, it would seem more fundamental to provide for a basic tax deduction for individuals and business entities for gratuitous contributions to NGOs.¹⁴¹

Section 32: Taxation of Economic Activities. NGOs should be allowed to engage in economic activities so long as those activities do not constitute the principal purpose or activity of the organization. Any net profit earned by an NGO from the active conduct of a trade or business could be –

- (a) exempted from income taxation,*
- (b) subjected to income taxation,*
- (c) subjected to income taxation only if the trade or business is not related to and in furtherance of the not-for-profit purposes of the organization, or*
- (d) subjected to a mechanical test that allows a modest amount of profits from economic activities to escape taxation, but imposes tax on amounts in excess of the limit.*

Discussion. The considerations involved in selecting among these possible tax rules are complex and technical. They are discussed in detail in Appendix I. At this juncture it is sufficient to state that each of the above rules has been adopted and implemented in one or another country, and that the NGO sector has been able to flourish under any of the rules. The considerations in choosing among these rules often are determined by considerations unrelated to the NGO sector itself (e.g., a desire to avoid unfair competition with for-profit entities), issues of general tax policy, or considerations of practicability and administrability.

¹⁴¹ In contrast, the Lithuanian Law on Charity and Sponsorship recognizes that both forms of support for NGOs should be entitled to beneficial tax treatment.

Section 33: VAT and Customs Duties.

(a) PBOs should be given preferential treatment under a value added tax (VAT).

Discussion. If an organization is excluded from a VAT system, it pays VAT on goods and services it buys from other, for the tax is built into the price it must pay (input VAT). However, since it is not in the system, it cannot apply for a refund of that tax. Although exclusion from the VAT system is not desirable from a tax point of view, small NGOs might rationally prefer it in order to be relieved of compliance burdens.

The best situation for an NGO is to be included in the VAT system but to be zero-rated. This means that, though the NGO pays VAT on the goods and services it buys, it does not have to pay output VAT, and it gets back as a rebate the input VAT paid plus the amount of any imputed VAT on goods and services it sells to others. This approach is not adopted in many countries.¹⁴² The more general approach is to give PBOs a favorable VAT rate, but not a zero rate. For example, if the general rate of VAT is 20%, the special rate for PBOs might be 6-10%.¹⁴³

(b) PBOs should be given preferential treatment under or exemption from customs duties on imported goods or services that are used to further their public benefit purposes.

Discussion. In practice, customs duties are among the most contentious and difficult of issues faced by NGOs. If the law of a particular country provides for exemption for NGOs, customs officials often disregard the law, and NGOs must spend a disproportionate amount of time getting more senior officers to actually get the benefit of the exemption.¹⁴⁴ At the same time, laws allowing customs exemptions for NGOs tempt charlatans and crooks into the NGO sector with the prime motive of establishing an NGO to get customs exemption.

If customs duties are imposed on legitimate NGOs, however, they can dramatically increase the costs of operations. This problem faces both foreign

¹⁴² In Bangladesh, Indonesia, The Philippines, and Thailand, NGOs receive no exemption from the VAT, but in some cases they benefit from lower rates levied on primary, unprocessed agricultural products. In Israel NGOs are exempted from VAT and thus suffer the burdens of not being able to obtain refunds of input VAT.

¹⁴³ For further analysis of VAT exemptions and reduced rating, see Ole Gejms-Onstad, "VAT," unpublished paper on file with ICNL.

¹⁴⁴ In Rwanda the only tax benefits for NGOs are exemption from customs duties and exemption for expatriate NGO employees from the entrance fee.

and domestic NGOs. The problem can be particularly severe for humanitarian relief organizations that typically must import all of their goods and services in order to meet emergency relief needs. It is a problem, though, for even the smallest NGO, which might want to import a fax machine or computer to make its work more productive.¹⁴⁵

The good practice in this area is to provide customs duty exemptions to PBOs, to have a fair but thorough process for assuring that only genuine PBOs qualify for the process, but then to have a certification, licensing, or similar process that ensure that a PBO's exemption from customs duties will be honored at the border. To protect against the improper use of the exemption, it is appropriate to provide that imports will be exempt only if they are going to be used by the NGO in its operations. Any item sold by an NGO (e.g., a truck or automobile) within a short period (e.g., 2-3 years) would be subject to customs duties at the time of sale.

Section 34: Other Taxes.

(a) Depending upon the extent to which a government wishes to encourage NGOs, exemption from or preferential treatment under other tax laws (e.g., taxes on real or personal property, sales taxes, estate or inheritance taxes) should be considered.

Discussion. Practices vary widely around the globe. As one example, Indonesia, Thailand, and The Philippines exempt religious organizations from land taxes, while Australia provides no income tax preferences for religious organizations.¹⁴⁶

(b) No NGO should be exempted or given preferential treatment under generally applicable employment or payroll taxes.

¹⁴⁵ Often the problem is not the absence of an exemption for NGOs, but the red tape involved in claiming it. In India NGOs wishing to obtain concession from duties imposed on equipment imports donated by foreigners have to apply for Central Government approval six months in advance, and strict rules and procedures are invoked. In Sri Lanka and The Philippines exemption from customs duties and the VAT on donations from foreign sources can be obtained only if the donations are consigned to the relevant government agency. These procedures generally involve numerous bureaucratic obstacles and conditions.

¹⁴⁶ "It may be useful to remove the distinction between NGOs that provide direct relief, social protection or opportunities for self-improvement and those that play representational, catalytic or advocacy roles. Rather, it may be advisable to introduce concessions on the basis of voluntarism, so that those NGOs which are run entirely by volunteers and which provide free services and labour would be entirely exempt from taxes on income from all sources as well as being permitted duty-free imports to build up their organizations. That could provide an especially significant boost to development-oriented community and grass-roots NGOs." ESCAP, Fiscal Incentives, p. 46 (1994).

Discussion. Despite the fact that NGO employees typically expect and receive a lower level of compensation than that which is paid for comparable work in the for-profit sector, there is no justification for exempting them from the usual social security and related employment taxes that are exacted from workers in the governmental or for-profit sector. Social security and similar taxes are exacted on the basis of actuarial estimates of what is required in order to meet the state's obligations to retired workers over the long term. Those who are employed in the not-for-profit sector should not be excluded from the benefits of state-provided benefits, nor should they be exempted from the benefits that are provided for those who participate in these state schemes.¹⁴⁷

In short, although it is a valuable tax preference to exempt NGOs for many forms of regular taxation, it would prefer such organizations over the long-term interests of their employees to exempt them from the employment taxes usually imposed on employers with respect to employees. Employees of NGOs should not suffer the double disability of working for a lower wage and being excluded from basic employee benefit programs imposed on other employees in that society.

¹⁴⁷ In Australia, however, NGOs involved in social welfare work pay reduced sales taxes and, if their payroll is over A\$10,000 a month, a reduced payroll tax as well, depending on which State they are in. Similar preferences are available in Brazil for a special group of social welfare NGOs.

Chapter K. Foreign NGOs and Foreign Funds.

Section 35: Establishment and Supervision of Foreign NGOs.

*(a) An NGO that is organized and operated under the laws of one country but which has, or intends to have, operations, programs, or assets, in another country should generally be allowed to operate as an NGO in that other country, or to create a subsidiary or affiliated organization under the laws of that other country, and such organization or its branch, subsidiary, or affiliate should enjoy all of the rights, powers, privileges and immunities of NGOs in that other country, and be subject to all of the requirements, responsibilities, duties, and sanctions applicable to NGOs in that other country as long as the activities of the foreign NGOs are consistent with the *ordre publique* of the host country.*

(b) Although the general restriction on political activities by NGOs, the general requirements of reporting and disclosure, and the right of the supervising agency to audit and inspect the books, records, and activities of an NGO should generally preclude (or punish) the misuse of the NGO laws of one country by entities from another, in certain rare and highly sensitive circumstances it may be appropriate to deny a foreign NGO the right to operate in another country or to impose special requirements or restrictions on it.

Discussion. The basic concept here is that there should be a level playing field for foreign and domestic organizations. It is appropriate to require a foreign organization to establish itself legally as a condition of operating in another country. It is also appropriate to require that organization to meet the same legal requirements – reports, taxes, etc. – that apply to domestic organizations. A foreign organization should be allowed to establish a branch of the parent organization through a process that is generally known as branch registration. Doing this means that all of the assets and income of the entire organization, including the parent, stand behind any contract or obligation the branch may have. It also means that the foreign organization must comply with all of the legal requirements in the country where it is established and, as to the activities and operations of its branch in the foreign country, all the applicable laws of that country as well. Alternatively, the foreign organization should be allowed to form an affiliate or subsidiary in the foreign country. In doing so it will establish a separate legal entity formed for the purposes of carrying on activities and operations in the foreign country.

Certain technical problems can arise if branch registration is allowed. A fundamental purpose of registration as a branch is to establish a public procedure that allows the organization to be sued in the country in which it is working, and otherwise to be held accountable in that country for its activities

there. For example, it would be required to designate a principal office where it could receive service of process and where it would maintain books and records for possible inspection regarding its activities in that country. A principal officer should be named. If the establishment criteria of the country of origin are significantly different from the establishment criteria of the country in which the branch wants to operate, the responsible organ may have to decide whether the differences are too great to allow the branch to be recognized as the equivalent of an association, foundation, or other appropriate entity in the country where the branch will be operating.

Two separate pressures coming from two separate directions come to bear on this principle of a level playing field. Very often foreign organizations want privileges not available to citizens. For example, they may want to be exempt from the tax or labor laws of the country in which they want to work, at least with respect to expatriate staff. Often privileges of this sort are provided to them by treaty or special bilateral agreement. These privileges are often extended in order to attract foreign organizations that want to bring substantial sums of money or other benefits to the country, for example, the Ford Foundation or USAID. Decisions to extend special privileges to foreign organizations are typically made on a case-by-case basis and in the discretion of the government.

The pressure from the other direction stems from the fear of subversion. Many countries, especially small or weak countries, fear that NGOs will be used to subvert the existing government or otherwise harm society.¹⁴⁸ This fear is generally not borne out in practice for several reasons. First, so long as the foreign organization performs only those activities for which it is formed and which constitute proper activities of an NGO in the country, no problems should arise. Second, if the foreign organization engages in illegal or subversive activities it should be subject to sanctions, up to and including termination, just as would a similarly subversive domestic organization; the rules should be the same. Third, NGOs are not particularly good vehicles for carrying out subversion. Generally speaking, business organizations are more easily formed in most countries, and can as easily be used to conceal improper activities from the watchful eye of the state. Fourth, banning foreign organizations will not

¹⁴⁸ For example, regulations in Kenya prohibit an NGO from becoming a branch of, or affiliated to, or connected with any organization or group of a political nature that is established outside Kenya without the prior written consent of the Non-governmental Organizations Coordinating Board. In Ethiopia foreign NGOs need permission from the Relief and Rehabilitation Council before they can generate their own income. In Madagascar the Home Ministry can refuse to allow foreign NGOs to operate in the country, and can cancel their permission at any time. In Bosnia and Herzegovina, proposed legislation on "Humanitarian Organizations" would require foreign NGOs to have permission from the Ministry of Foreign Affairs before they can begin work in Bosnia and Herzegovina.

prevent subversion. Real spies and subversives act clandestinely not by establishing legal NGOs. Anyone with a forged passport, a tourist visa, and a money belt can wreak enormous havoc on the stability and security of the state.¹⁴⁹

For all of the above reasons, forbidding foreign NGOs to establish a branch, affiliate, or subsidiary in the country will do little, or nothing, to cause or increase the threats to security or public safety. Nevertheless, the fear remains, and many countries will insist upon reserving the right to refuse to let foreign NGOs operate on their territory. In recognition of this political reality, Section 39(b) provides a small exception to the general rule. It should be underscored, however, that the exception is reserved for rare and highly sensitive circumstances.

Section 36: Foreign Funding.

(a) An NGO that is properly established or incorporated in one country should generally be allowed to solicit and receive cash or in kind donations or transfers from another country, a multilateral agency, or an institutional or individual donor in another country, so long as all generally applicable foreign exchange and customs laws are satisfied.

(b) Although the general restriction on political activities by NGOs, the requirement to report on the receipt and utilization of funds, and the right of the supervising agency to audit and inspect the books, records, and activities of an NGO should generally preclude (or punish) the improper use of foreign funds, in certain rare and highly sensitive circumstances it may be appropriate to require advance approval for the receipt of funds or property from abroad.

Discussion. The issues here are very similar to those discussed above. Generally speaking the rules should be the same for foreign and domestic funding.¹⁵⁰ If domestic funders must be disclosed in annual reports, the same rules should apply to foreign funders. If domestic funders are entitled to support any legal activity that is permissible for a domestic NGOs to engage in, foreign funders should be entitled to the same privileges.

¹⁴⁹ Sometimes there is also a fear of internal subversion. For example, in Uganda an NGO must give seven days advance notice to the local government and the District Administrator if the NGO wants to make any direct contact with people in any part of the rural areas of Uganda. Like individuals, NGOs should have general freedom of movement and the right to meet with others, subject only to limitations in times of true emergency.

¹⁵⁰ "[L]egitimate NGOs should be able to receive foreign funds and donated goods without onerous bureaucratic delays. There should be no arbitrariness, bias or 'rent-seeking' in the awarding of these privileges." John Clark, "The State, Popular Participation, and the Voluntary Sector," 23 World Development 593, 595 (1995).

Problems can arise, of course, because of banking or foreign exchange rules. In a country that does not have a fully convertible currency, which is true of many developing countries around the world, there is a tendency for the government to extract a significant share of the value of a foreign grant by requiring that it be exchanged for local currency at an unrealistic rate of exchange, or that a tax or fee be paid to a state bank for processing the transfer. Some foreign funders have responded by bringing in cash surreptitiously. Since this is illegal, it is clearly inappropriate. It is important, however, for countries throughout the world to recognize the importance of foreign funding to the growth and strength of civil society during the early stages of its development.¹⁵¹ Steps should be taken, consistent with overall financial and foreign exchange controls, to permit foreign funding to be processed at realistic rates of exchange and without exaction of a special tax or fee.¹⁵²

The fear that foreign funders are trying to subvert the security of the state is not well grounded, for all of the reasons discussed under the preceding section. So long as the laws requiring accountability and transparency from NGOs are applied firmly but fairly, the responsible organ will know whether any NGO, whether funded locally or from abroad, has used funds improperly. If it has, vigorous steps should be taken to correct the abuse and preclude its repetition. Requiring advance approval for every foreign grant, as is done in Egypt, India, and Bangladesh, however, is a wasteful, dilatory, and excessively bureaucratic approach.¹⁵³ Chile had similar legislation under General Pinochet,

¹⁵¹ Of course, foreign funding is not an unalloyed good: "The project approach to funding used by many foreign donors does not provide effective support to local NGOs in their effort to build financial and managerial self-sufficiency and to define their objectives and organizational strategies. It also reduces their flexibility in the use of funds, enslaving them to the programmes and project preferences and priorities of the donors." ESCAP, *Fiscal Incentives*, p. 40 (1994).

¹⁵² It should also be noted that problems often arise on the donor side. For example, tax preferences are denied to U.S. donors for donations to a foreign entity unless it has been determined to be an equivalent of a U.S. public charity or administratively burdensome "expenditure responsibility" rules are followed. These rules add significantly to the legal and administrative costs of making foreign grants.

¹⁵³ In Bangladesh the Foreign Donations (Voluntary Activities) Regulation Ordinance (1978) regulates the receipts and expenditures of foreign donations for NGO activities, and the Foreign Contributions (Regulation) Ordinance (1982) regulates receipts of foreign contributions in cash or in kind, including any tickets for travel abroad. Foreign or local NGOs that wish to obtain foreign funds or personnel have to submit to investigation by various government agencies, with the processing sometimes taking more than a year. In addition, NGOs have to submit an application to the government for prior approval for each project they wish to undertake. Applications have to be cleared by the NGO Bureau within the President's Secretariat, the relevant substantive ministry, the Special Branch of the Intelligence Bureau, and the Home Ministry. See: "Pursuit of Common Goods," W.B. Resident Mission, Dhaka, 1996.

but it was repealed when democracy was restored. Apartheid South Africa sought to enact such legislation, but it was defeated even before the recent change to majoritarian democracy.¹⁵⁴

Again, subversion using domestic funds is generally as likely as subversion with foreign funds, and the rules should be the same for each. Further, anyone intent upon bringing in foreign funds to threaten the security of the state or subvert the government can find dozens of clandestine albeit illegal ways to do so, and has no need to hide behind the appearance of a foreign grant to an NGO. Where security concerns exist, as they emphatically do in many countries, it may be appropriate to enact laws to deal directly with those problems without regard to whether they are financed from domestic or foreign sources. Again, though, in recognition of political realities the suggested rule would permit an exception in rare and highly sensitive circumstances.

Beyond the enormous burdens of bureaucratic red tape and delay, laws such as these invite both selective application and avoidance transactions. Under the Foreign Contributions Registration Act (FCRA) in India, Jack Prager, who was helping the poor and destitute in Calcutta, was denied clearance, while the Rajiv Gandhi Foundation received a waiver of the usual requirement of three years' existence before permission to receive foreign contributions can be sought. There are apparently many ways in which NGOs that are willing to can bring foreign money into the country notwithstanding the FCRA, starting with the fact there is no limit on private bank transfers into India. Laws that are easy to evade punish only the scrupulous and bring law generally into disrepute.

¹⁵⁴ The United Nations is working on a draft Convention that would protect the right to solicit, receive, and use voluntary foreign contributions for human rights purposes.

Chapter L. Other GO/NGO Relations.

Section 37: QUANGOS and GONGOS. Although there are many appropriate roles for quasi-nongovernmental organizations or government organized or controlled NGOs (e.g., museums, research institutes, special lending or credit programs), great care must be taken to prevent the use of such entities to benefit government officials, directly or indirectly, either politically or monetarily. Special care must also be taken to avoid inappropriate discrimination against independent NGOs.

Discussion: Among NGOs there is much hostility to GONGOs and QUANGOs. Stories abound about how they have been used to evade some legal requirement or to enrich some member of the government. There is no consensus on what constitutes a GONGO or a QUANGO. Some feel that any organization formed by the government falls into this category, others that any organization funded by the government does, while others place the emphasis on whether or not there is government control. Some feel that abuses are so pervasive that GONGOs and QUANGOs should not be permitted to exist.

The experiences in mature democracies suggests that these fears are exaggerated, that there is no need to ban GONGOs and QUANGOs, and that in fact they are often very good and useful entities. For example, the state may find that the public (through contributions) is more than willing to bear part of the cost of operating a state supported culture center if it is transferred to an NGO where it has a governance structure separate from that of the government. It may be that the state continues to provide substantial funds or even controls the board. Distinguished members of the public may also be chosen for the board, and, especially if tax deductions are available, those citizens who particularly support the work and activities of the culture center may be willing to make substantial contributions to it.

As another example, it may be easier to operate a government funded research institute staffed largely by researchers who come from various universities or from abroad for periods ranging from a few months to a few years if it is outside the regular civil service rules. Or, since the general government operates on an annual budget, it may be useful in establishing, say, a microenterprise fund to support small businesses, to set up a separate structure outside the government and transfer to it an endowment to be used as a revolving fund to make microenterprise loans over a long or indefinite period of years. Of course, if entities such as these are established as NGOs, they should meet all of the requirements applicable to NGOs. They may also have to meet additional requirements imposed by the State by law, regulation, or contract.

In all these situations there is the danger of conflicts of interest, self-dealing, or improper personal enrichment. For example, a minister of finance might appoint his son to run a microenterprise fund endowed by his ministry. Or, a minister of culture might arrange to receive two salaries, one from the ministry and the other as chairman of a GONGO funded by that ministry to operate a museum. In order to prevent and punish such improprieties, it is important to have clear rules about these matters and to enforce them vigilantly. Human nature being what it is, it is not possible to eliminate these problems in any society. They are really just part of the larger problem of getting rid of corruption in government and imposing ethical standards of accountability and transparency in both developed and developing countries. There is no need to ban GONGOs and QUANGOs.

Section 38: Government Grants and Contracts. There should be an open, fair, and nondiscriminatory bidding, tender, or procurement process for all substantial grants or purchases by or contracts from a governmental body or agency for goods, services, or assets.

Discussion: Procurement is not a problem peculiar to NGOs. Good procurement laws are fundamental to the fair, effective, and non-corrupt operation of government. Generally speaking, NGOs should be eligible to bid on government contracts on an equal footing with for-profit entities or GONGOs.¹⁵⁵ Under most modern procurement laws, public tender is not required on certain small purchases, and sole source contracts or grants can be given to qualified organizations that design and propose acceptable projects.¹⁵⁶

Section 39: Transfer of Assets and Services Out of the Public Sector. Consideration should be given to using NGOs to transfer various governmental assets or programs (e.g., educational, medical, research, or cultural) out of the governmental sector and into the NGO sector if they could be run more efficiently

¹⁵⁵ There is no limit to the kind of contractual relationships that an NGO can have with a governmental ministry or agency. Although grants and contracts predominate, there can also be joint ventures and other kinds of partnership arrangements.

Preferences may sometimes be appropriate. In Indonesia concern over maldistributing of income prompted the Finance Ministry to require state-owned enterprises to set aside 1-5 percent of net profits for social programs to assist small-scale industry and weaker social groups.

¹⁵⁶ The complexity of governmental bidding processes, however, is often a bar to small NGOs. "The capability of [small, grass-roots NGOs] to implement projects is sometimes interfered with by government procedures regarding competitive bidding in the procurement and purchase of goods and services, proof of experience, official registration, and financial guarantees. The complexity of such procedures may not only block small NGOs from access to grants and subsidies and encourage fiscal avoidance but can also exclude them from participation in government-led projects." ESCAP, Fiscal Incentives, p. 29 (1994).

by an NGO or if they might be supported in whole or in part through private donations.

Discussion: Throughout the world there is a strong tendency to downsize the state. To a large part this is an effort to privatize the economy and place the means of production in private hands. There is also a movement to transfer social services and facilities out of the government sector. These services and facilities are not profit-making enterprises and thus they cannot be "privatized" in the ordinary sense of that word. With many government revenues declining, however, there is a need to reduce state budget expenditures and, where possible, generate fees or contributions to support these services and facilities. It should be recognized that the traditional ways in which NGOs work with governments – by contract and grant – are in fact ways of "privatizing" government services. Rather than having a governmental bureaucracy provide all of the goods and services funded by the government, it may ask NGOs to act as the supplier of the goods or the deliverer of the services, for reasons stated in Chapter A. There is a new development taking root in many countries, however, under which major assets of the state are transferred to NGOs with the expectation that they will carry on the programs formerly conducted by the state.

It is important, in this context, to avoid the situation in which governments use such "privatization" moves to shirk important social responsibilities. There are obvious basic human needs that can be met only by government intervention in many cases. Beyond these, it is important to remember that this Handbook stresses government-NGO partnerships for meeting social and economic development needs and alleviating poverty. It does not advocate a situation in which NGOs should be forced to shoulder too much of the burden of dealing with social problems.

If a health, research, or educational facility is transferred to an NGO, it may be possible to raise substantial support for it through contributions from citizens. Even if the facility continues to receive some support from the state budget, placing it in an NGO creates the possibility of significant public support. Such an NGO may remain partly or wholly controlled by the government. This raises the problems discussed under Section 37.

Some countries – e.g., Russia, Hungary, and the Czech Republic – have felt that it is necessary to create new types of legal entities to which to transfer services and facilities previously provided by or owned by the state. The reasons for this are unclear. One apparent reason is the belief that a foundation is an inappropriate legal vehicle for owning and operating a facility, such as a library or a museum. The belief is that a foundation should have an endowment and only make grants. Of course, many foundations are grant-making organizations. It is also true, however, that many foundations in Western

Europe and the United States are “operating” foundations rather than “grant making” foundations. They own and operate museums, libraries, and other cultural facilities. The foundation form has proven itself to be a perfectly suitable legal vehicle for operating foundations in the West, so it is not clear why lawmakers in these countries have felt it necessary to create new legal entities, which necessarily causes confusion.

Chapter M. Self-Regulation.

Discussion: It is fundamental, of course, that an NGO must obey all applicable laws, including general civil and criminal laws, not simply special provisions enacted for NGOs. See Section 2. It is frequently argued that self-regulation should be encouraged in order to discourage the state from engaging in over-regulation. Without doubt, self-regulation should be encouraged, but both logic and experience suggest that it cannot realistically be expected to substitute for basic laws. First, self-regulation is voluntary, and NGOs interested in skirting basic standards will choose not to participate. As discussed below, powerful incentives can be created to encourage NGOs to participate in self-regulatory schemes, but there also needs to be clear and comprehensive laws, binding on all NGOs, establishing minimum standards of conduct. See Sections 10-18. By contrast, the nature and extent of reporting required by an NGO should be appropriate and proportional to the extent to which its activities and operations affect the public interest. See Chapter I.

Secondly, self-regulation is most prevalent and successful in countries where the legal system for NGOs is most highly developed. By contrast, meaningful self-regulation is essentially unknown in countries with rudimentary NGO laws. What this suggests is that both the laws governing NGOs and the sector's own awareness of the need for even higher standards, march hand in hand. As the NGO sector matures, NGO laws become more complex, because experience reveals the natural complexity of the subject, and because it is necessary to prohibit specific devices or tactics that less scrupulous NGOs invent to avoid the intended purposes of more general laws. On the good side of the ledger, responsible NGOs become increasingly aware that the success of their sector depends to a large extent on whether the public regards it as efficient, effective, and ethical. Further, self-regulatory codes are often developed to enable groups of NGOs working in a specific sector (e.g., health, disaster relief, development) to deal with the particular needs and challenges of that sector.

With respect to compliance with general laws, an issue that frequently comes up relates to employment laws. On the one hand, NGOs frequently seek, and sometimes obtain, exemption from employment laws applicable to government or private sector employers. On the other hand, there is a tendency for some NGOs to regard their employees as one of the key interest groups for whose benefit they exist.

Although there may in any society be sound reasons for having special employment rules for NGOs, there is not in principle any reason that an NGO should not be a good employer, in terms of compensation, benefits, and conditions of employment, and should not be held to all of the general labor laws

applicable in that society. On the other hand, it should be clear that the purpose for which an NGO exists is to benefit, not the staff, but the groups or purposes for which it is established.

Section 40: Self-regulation. *Self-regulation is essential to the existence of a well-ordered NGO sector.*

(a) Individual NGOs should be permitted and encouraged to adopt explicit standards for regulating their own activities.

Discussion: "Self-regulation" is an ambiguous term. Although it most clearly and literally refers to the efforts of an NGO to regulate itself, it is in fact used most often to refer to efforts of groups of NGOs to set and enforce standards for all members in the group. Both kinds of self-regulation are valuable and should be encouraged.

Each NGO should be permitted and encouraged to adopt a code of conduct or ethics. Although a code of conduct needs to be tailored to the peculiar circumstances of each NGO, it is common for such codes to cover matters such as conflicts of interest, travel expense policies, standards for selection of board members, prohibitions on private inurement or self-dealing, and so forth. For example, a code of ethics might state that no officer or director can participate in the discussion or decision of a matter directly affecting that individual (e.g., re-election to the board, remuneration, approval of a transaction involving that individual, etc.). A code of conduct might require each officer or director to disclose each institutional affiliation he or she has that might possibly involve a conflict of interest (e.g., sitting on the board of another NGO with overlapping goals and missions.) It might preclude any officer or director from receiving any compensation from the organization, other than the reimbursement of reasonable expenses, without disclosure to and approval by the Board (e.g., for legal or accounting services rendered to the NGO.) A code might require employees, officers, and directors to refuse all significant gifts connected with their position, or to turn significant gifts over to the organization. It might require that employees, officers, and directors use the least expensive reasonable form of transportation and stay only in moderately priced hotels

Exactly what specific issues are dealt with in a code of conduct must be determined by each individual NGO in light of its particular facts and circumstances. Such a code, however, can have great value in assuring that all individuals involved with the NGO are sensitive to potential improprieties and abuses. Discussing, drafting, and adopting such a code will bring home vividly to the organization exactly what its values are. New officers and directors should obviously be given copies of the code when they join. Many organizations require annual certifications by employees and board members

(e.g., that they have reviewed the conflict of interest provisions and are in compliance). Finally, the adoption and internal enforcement of a clear, strong code of conduct is a powerful statement to donors, beneficiaries, and other interested parties that the NGO has high standards and takes meaningful steps to enforce them. Replicated by numerous NGOs in any society, the process of adopting and enforcing codes of conduct can measurably raise the actual and perceived status and integrity of the sector.

(b) Groups of NGOs should be permitted and encouraged to set higher standards of conduct and performance through self-regulation.

Discussion: For example, organizations operating in a particular field (e.g., economic development or disaster relief) might form an umbrella group (an association of organizations) that democratically adopts special standards (e.g., for governance, disclosure, fundraising, etc.) and requires member organizations to certify that they adhere to those standards.¹⁵⁷ The umbrella group could be given power by its members to audit members or investigate complaints to assure adherence to the standards, and to expel members that fail to correct non-complying operations.¹⁵⁸ By publicizing its membership (and its expulsions) as well as its standards, the umbrella organization could give added confidence to the public about the integrity and operations of member organizations. Membership in such an organization, or lack of it, might become an important criterion in selecting an organization to receive a contract or grant.¹⁵⁹ A report setting for the recommendations of Central European NGO leaders and experts on self-regulation is set out in Appendix II.

¹⁵⁷ "Umbrella organizations or apex bodies of NGOs could also be provided with grants to help cover the cost of the services provided to their members, such as representation, data banks and information services, resource-cum-training centers, technology research and development services, etc. Increases in the capacity of such NGOs would make them more attractive and would lead to an increase in their membership. When their coverage of the NGO sector becomes substantial, mechanisms for self-regulation of the sector could be developed, such as setting standards for service provision, costing of facilities and staff, development of a code of conduct and monitoring of member performance." ESCAP, *Fiscal Incentives*, P. 50 (1994).

¹⁵⁸ "NGOs naturally oppose government oversight and monitoring. To reduce governments' perceptions of the need for such control, the NGOs could reach their own consensus on an NGO code of conduct and self-regulatory mechanism. They could collectively improve their accountability by setting in place mechanisms to evaluate their own programmes and operating procedures. To activate such collective self-accountability, apex organizations to fulfill those functions and provide a forum for the NGOs themselves would be necessary." ESCAP, *Fiscal Incentives*, p. 42 (1994).

¹⁵⁹ A very interesting example of "compulsory self-regulation" is presented by Kenya. Under the NGO Act of 1990 an NGO Council was created consisting of the first 100 NGOs to register under the law. This Council was given the task of developing codes of conduct to regulate the activities of NGOs in various fields (e.g., health, education, etc.). The Council reports to the Non-governmental Organizations Coordination Board, which must approve the codes of conduct.

(c) It is appropriate to encourage the establishment of "watchdog" organizations to monitor and evaluate organizations in the NGO sector.

Discussion: In some countries special NGOs have been formed or funded to monitor all NGOs in the sector, or in parts of the sector. These programs are not voluntary, in the manner that membership in an umbrella organization is voluntary. Rather, these organizations are self-appointed "watchdogs" that apply criteria and values they have developed themselves to other NGOs, who may have little or no say in the development of these criteria. The evaluations prepared by these watchdog organizations are no better than the standards they adopt and the methods they use for evaluation. Nonetheless, they have had a substantial impact in creating public awareness of the importance of standards for NGOs, publicizing the fact that certain NGOs live up to those standards and others do not, and in increasing NGO sensitivities to the question of standards. Although not voluntary in the usual sense, these watchdog organizations provide yet another example of the sector seeking to regulate itself, rather than being regulated by the state. The standards and ratings of the National Charities Information Bureau, a US "watchdog" NGO, are set forth in Appendix IV.

(d) In certain circumstances where it is appropriate to make membership in an organization mandatory, it may be appropriate for the legislature to delegate to that organization the authority to license, regulate, supervise, and sanction members .

Discussion: In some legal systems all members of a particular profession (e.g., lawyers) are required to belong to a particular professional society. That society is given the power to set and grade examinations to determine whether an individual is qualified to be admitted to practice in that jurisdiction. The society may also be given authority to discipline or expel members for breach of the rules or standards applicable to that profession, and to publish general guidance. Organizations such as these are obviously exceptions to the general rule that membership in an organization should be voluntary. See Section 3(h) and footnote 4.

APPENDIX I: ECONOMIC ACTIVITIES AND TAXATION

In considering the interrelated questions of economic activities and taxation, it is important at the outset to be clear about what sorts of activities are in question. Any NGO might have a bank account on which it earns interest, and many NGOs have endowments that are invested in stocks, bonds, and other investments, on which they may earn dividends, interest, rents, royalties, other types of income, or capital gains. These types of investments are generally recognized to be "passive" activities and are generally permitted for all NGOs, and this Handbook endorses that approach

There are other kinds of activities that are engaged in on an irregular or occasional basis by NGOs, such as raffles or charity auctions. Such activities do not constitute trade or business activities that are regularly carried on, but are principally a form of fund-raising. They should be subject to any appropriate rules discussed in Chapter H above, but should not generally be treated as economic activities.

Trade or business activities constitute the sale of goods or services, such as when a society for the blind sells white canes or an environmental NGO earns money by doing environmental impact studies for clients in the private sector. It is not always easy to determine, however, whether the provision of goods or services for remuneration constitutes engaging in an active trade or business or is simply the way in which the NGO carries out its nonprofit work. Thus, increasingly NGOs funded by government agencies or multilateral agencies operate under a form of contract that calls upon them to furnish goods or services to third parties. The NGO providing these services (e.g., family planning, education, or water resources instruction), however, typically regards them as part of its core purposes and not as a trade or business activity undertaken to support its nonprofit goals. A contract to provide water resource instruction to private industry may not be so easy to categorize.

Similarly, even when an NGO is selling goods to the public, it may not regard the activity as a trade or business activity. For example, when Goodwill sells used clothing to the public, it may be doing so principally as a way in which to provide employment and job skill training to handicapped individuals, and it may not regard the activity as an active trade or business activity. Perhaps the most useful test in any given situation is twofold: (i) if the NGO is being paid by a third party to provide goods or services to a needy group (e.g., orphans, abused women, the poor), the activity can be presumed not to constitute an active trade or business activity, but (ii) if the principal purpose of the activity is to generate income for the NGO rather than to carry out one or more of the nonprofit purposes of the NGO, then it can be presumed to be an active trade or

business activity. Under these tests, a development NGO that charges users for access to a document center or collects a fee for editing and publishing the proceeds of a development seminar would generally not be engaged in an active trade or business activity.

To further complicate the picture, certain activities are often singled out and not treated as a trade or business activity at all. For example, a museum that charges an entrance fee, a private college that imposes a tuition charge, or a charitable hospital that charges fees to patients. Fees of this sort are so traditional and well established that their appropriateness is not challenged. It may also be that they are not thought of as *separate* trades or businesses because the fee is so integral to the principal activity of the organization – e.g., art, education, or health care. Under some legal systems the fact that revenue sources of continuous activities such as these are not treated as economic activities is made clear in the law, often the tax law. In other systems the issue is felt to be so clear that there is no written rule about it at all, simply a long standing and unquestioned practice.

To add one more distinction to the discussion, it should generally be irrelevant whether the economic activity in question is conducted directly by the NGO itself or indirectly, e.g., by a wholly-owned subsidiary. In either case there are two different and distinct issues – should the activity be permitted and should it be taxed. In England a charity may engage in a trade or business but only indirectly, through a subsidiary. In Poland a foundation may engage in a trade or business directly. In both countries no tax is paid on net profits that are used for the charitable purposes of the organization.¹⁶⁰ In France, by contrast, a foundation may not engage directly or indirectly in a trade or business activity, so the tax issue never arises.¹⁶¹

In light of the above distinctions, it should be clear that what we are discussing are active trade or business activities of NGOs that are carried out on a regular or permanent basis, either directly or indirectly through a subsidiary, and that do not constitute certain historically favored activities that produce income but which are integral to the principal purpose of the NGO, such as college or museum fees. The questions with respect to these activities are whether NGOs should be allowed to engage in them and whether the net income from them should be taxed.

¹⁶⁰ In England and Wales there must be an explicit covenant that the net profits will be transferred to the charity to be used for charitable purposes in order to avoid taxation.

¹⁶¹ In the Philippines, since all income of an NGO arising out of a trade or business activity is subject to income tax, and all dividends and interest as well, many NGOs have set up separate companies for their business ventures. ESCAP, *Fiscal Incentives*, p. 23 (1994).

The guideline set out in Section 19 states that an NGO should be permitted to engage in lawful economic, business, or commercial activities provided (i) no profits or earnings are distributed as such to founders, members, officers, directors or employees, and (ii) the NGO is organized and operated principally for the purpose of conducting appropriate not-for-profit activities (e.g., culture, education, health, etc.) The test set out in the guideline is known as the "principal purpose" test. It looks to whether the principal activities and expenditures of the organization are for non-commercial purposes. Under it, an NGO that persistently spent more than half of its efforts and money in an active trade or business activity would be subject to termination as an NGO. It might, of course, be allowed to reestablish itself as a for-profit business entity.

The principal alternative test is the "destination of income" test. Under this test, so long as all of the profits earned from the active conduct of a trade or business are committed for and actually used to carry out the principal purposes for which the NGO was formed, the organization would be regarded as an NGO, and would be entitled to any advantages that go with that status, such as tax exempt status.¹⁶² Thus, an organization that spent 99% of its time and assets making profits from a purely commercial activity, such as manufacturing noodles, would be treated as a tax exempt NGO if each year it gave all of its profits to charitable causes.¹⁶³

Although these issues are complex and difficult, on balance the better practice is to permit NGOs to engage in an active trade or business, but to require that its principal purpose not be that trade or business but rather the carrying out of the purposes for which it was formed as an NGO. There are two principal reasons that support this conclusion. First, it is desirable in many emerging economies to allow NGOs to engage in an active trade or business to support their NGO activities, but it is not necessary to adopt the destination of income test to achieve this end. Although the destination of income test is adopted in many countries, it can cause the public to conclude that many NGOs are just commercial enterprises set up as tax dodges. This image, once created by a handful of NGOs, affects the entire sector and gives it a bad reputation. On the other hand, forbidding all commercial activity, as is done in some countries, deprives NGOs of a source of income that is sorely needed where there is no tradition of charitable giving or no private wealth to support NGO activities.

¹⁶² For example, there are no restrictions on the economic activities of NGOs in Malawi, and no income tax is imposed on income so long as it is devoted to the noncommercial purposes of the NGO.

¹⁶³ If the active trade or business is carried out indirectly, through a subsidiary, the legal system might regard the subsidiary as a for-profit business entity, but simply exempt it from income taxation. The result is the same: the activity is permitted and the profits are not taxed.

Second, once it is decided to rule out the extreme positions – no economic activities, on the one hand, or permitting economic activities to be the principal activity of the organization, on the other – the issue becomes purely a tax issue. With respect to tax, practices vary. Some countries tax all profits from economic activities, some tax none, some tax only those that are “unrelated” to the principal purposes of the organization, and others use a mechanical rule to allow some but not all income from business activities escape taxation. Other approaches are also possible. In other words, once the extreme positions are removed, the issue becomes a tax issue on which practices vary considerably.

Pursuing further the question of taxation, the choice of tax rules will depend largely upon the extent to which a particular government wishes to encourage NGOs, and the extent to which it is concerned that exempting the trade or business activity of an NGO puts for-profit entities engaged in a similar trade or business at an economic disadvantage. If a country chooses the destination of income test rather than the principal purpose test, it will exempt all profits earned by an NGO engaged in an active trade or business. A variety of approaches have been taken. For example, Poland exempts all income from active trade or business activities, but only if that income is devoted to the civic purposes for which the organization has been formed.¹⁶⁴ Bulgaria, by contrast, taxes all net income from economic activities, regardless of its use.¹⁶⁵

In a country with a developing market economy, it may be appropriate to strike the balance in favor of tax exemption, for these are also countries where the civic sector is also just beginning to flourish. NGOs in such societies are often desperate for money simply to survive, and the profits from economic activities may make the difference between continued existence and termination. In such societies it is also possible to argue that there is such a need to develop economic activities independent of the state that all entities, whether NGOs or business entities, ought to be encouraged to engage in them.

The question of unfair competition can become a serious issue, but typically only in a matured economy where the scale and number of economic

¹⁶⁴ Although the substance of the rule is the same for both associations and foundations in Poland, associations get the benefit of the rule only if they engage in economic activities through a wholly owned subsidiary, whereas foundations are exempt on activities that they carry on directly.

In India an NGO registered as a society or trust must show that 75 percent of its income in the year of receipt was applied for the objects for which the organization was formed during the previous 3-4 years in order to obtain registration under the Income Tax Act (1961) as a charitable institution and obtain income tax exemption.

¹⁶⁵ In India 25 percent of the income of a charitable organization need not be spent on its charitable activities; it can be held on deposit with scheduled banks or invested in public sector companies. Investment in private companies, however, is forbidden.

activities by NGOs begins to pose a threat to private enterprise. Obviously, if a large and well-heeled NGO can engage in a particular activity (e.g. book publishing) without paying taxes, it has an economic advantage over its for-profit competitors. When this point is reached in the development of an economy, the one possible response is to tax such profits, at least if they are unrelated to the purposes of the organization.¹⁶⁶

There are strong arguments, however, that militate against imposing taxation on the active trade or business income of an NGO merely because failing to do so would give it an advantage that for-profit organizations do not have. Although exemption from income tax gives a clear advantage to NGOs, for-profit entities have capital advantages not open to NGOs that may more than offset the income tax advantage. Thus, an NGO cannot raise capital for expansion or modernization of its facilities by going to the capital markets. For-profit organizations can and do raise billions of dollars for improvements and working capital from the private and public debt and equity markets by issuing shares, bonds, and debentures. NGOs are foreclosed from these markets, and even typically find it extremely difficult to negotiate a bank loan. In short, the "level playing field" argument frequently cited by for-profit organizations may not be all that it seems. NGOs operate their trades and businesses at a material disadvantage compared to for-profit organizations, and exemption from income tax may in fact best be seen as a "rough justice" way of giving NGOs a "level playing" field which, on the capital side, is tilted heavily in favor of the for-profit entities.

If a country makes a decision to tax the trade or business income of an NGO, it may nonetheless exempt such income if it is derived from "related" activities. This approach makes a great deal of theoretical sense. Often the most effective way in which an NGO can achieve its purpose is to pursue it through economic means. For example, the most effective way in which to disseminate information about a particular kind of art or culture that an NGO wants to promote may be to publish and sell a high-quality magazine devoted to that topic. If the primary purpose of the organization is to promote the particular kind of art or culture, it is not primarily seeking to make a profit, and no profits are distributed, then publication of the magazine is simply the method that has been chosen to pursue the civic purpose. Publishing a magazine is a means for achieving the end of promotion of art or culture. Exempting income from such related activities makes good theoretical sense.

¹⁶⁶ In Singapore profits from a trade or business are exempt only if they arise out of activities carried out in conformity with the primary purpose of the NGO or if the activities are carried out by the NGO's beneficiaries. ESCAP, *Fiscal Incentives*, p. 22 (1994).

Unfortunately, it is extremely difficult to distinguish "related" economic activities from "unrelated" activities, and hence this rule is very difficult to administer. For example, if a museum sets up a shop on its premises to sell copies of the outstanding works in its collection, or perhaps books that picture them or postcards that replicate them, this can easily be argued to be "related" to the museum's activities. What, though, if the museum opens a chain of retail stores which generally sell books related to art and culture, most of which have no connection with its collection? Is it engaging in an "unrelated" activity, or has it simply broadened its purposes and chosen to pursue the broader purpose using economic means? The fact that a distinction between related and unrelated economic activities is very difficult to apply is demonstrated by the fact that very little revenue is raised by a tax that is imposed only on "unrelated" activities.¹⁶⁷

If the principal purpose test and the rule exempting related income are both adopted, it is then necessary to determine how economic activities undertaken in furtherance of the purposes of an NGO -- "related" economic activities as that term is being used here -- are to be counted in determining whether the principal purpose of an organization is to engage in economic activities or to pursue civic ends. To the extent that economic activities (e.g., publication of a magazine or of books) is simply a chosen means by which most effectively to pursue a given end (e.g., promotion of a particular art or culture), there is a strong argument that they should not be counted as economic activities which would disqualify the entity for status as an NGO if they constituted the principal activity of the organization. One must be careful here, however, for if "related" economic activities constituted, say, 99 per cent of the activities of an NGO, one would in effect have come back to the "destination of income" test, under which economic activities can constitute the entire active work of an NGO so long as all profits go to a civic purpose. Crafting administrable rules that adequately response to these considerations is not easy.

A mechanical test for determining the difference between economic activities that are taxed and those that are not -- or between economic activities that are permitted and those that are not -- is a far simpler way to go. For example, in Hungary a foundation is exempt on the net profits from economic activities to the extent of the greater of 10 million forint or 10% of total revenue. This works fine as a tax rule, for the only consequence of exceeding the minimum in any year is that taxes must be paid. Another type of mechanical test

¹⁶⁷ Although US NGOs generate over US\$1 trillion in revenue each year, fewer than five per cent report unrelated business income, and in 1994 the amount of tax paid on this income was a relatively insignificant US\$373.4 million. "Tax Exempt", U.S. News and World Report, pp.36-37, October 2, 1995.

is illustrated by South Africa, where 75 percent of net income on economic activities must generally be spent on charitable activities by the end of the year following the year of receipt in order for all of the income to escape income taxation.¹⁶⁸ A rule such as this inevitably creates administrative burdens, for income from economic activities must be segregated from other income and "stacked" as to year of receipt. Presumably, "older" income is deemed spent before "newer" income.

The principal purpose test discussed above essentially proposes a mechanical approach for determining eligibility for classification as an NGO. Thus, if more than 50 percent of the revenues or expenditures of an NGO are attributable to economic activities for a significant period of time (e.g., 3 years), the organization is reclassified as a business entity. So long as "related" economic activities are not disregarded, this mechanical test will generally be adequate to permit significant economic activities, while not risking the reputation of the sector, as does the destination of income test.

¹⁶⁸ From 1991 through 1995 Poland had a rule taxing all income, including grants and donations, unless it was expended on charitable activities by the end of the year following the year of receipt. This rule was repealed, in part because it precluded any possibility of building up an endowment.

REGULATING**CIVIL****SOCIETY**

WORKING GROUP ON SELF-REGULATION

Group leaders: Katarina Kosatlova, Valentin Mitev

Rapporteurs: Ersey Katalyn, Hegyesi Gabor

Experts: Lindsay Driscoll, Leon Irish, Judy Nelson, Kenneth Phillips, Cyril Ritchie

Issues presented for discussion:

1. Governance
2. Organizational integrity
3. Management practices and human resources
4. Finances
5. Communications to the public
6. Fundraising
7. Program
8. What is the role of umbrella organizations: can they provide enforcement mechanisms?

Proposed Standards for Not-for-Profit Organizations in East-Central Europe

The following proposed Standards were adopted (unanimously) by (a majority of) the participants in the conference on Regulating Civil Society sponsored by the Soros Foundation, the Charles Stewart Mott Foundation, and the International Center for Not-for-Profit Law and held in Sinaia, Romania, on May 12-15, 1994.

The conference was attended by more than 100 representatives of not-for-profit organizations and government officials from the following countries: Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Slovakia, and Slovenia. The conference was also attended by a number of international participants in not-for-profit organizations and not-for-profit law from France,

Germany, The Netherlands, Switzerland, the United Kingdom, and the United States.

In order to strengthen the not-for-profit sector in East-Central Europe, increase public trust for the sector, and improve the sector's effectiveness and integrity, the participants in the conference recommend the following Standards for adoption by not-for-profit organizations throughout East-Central Europe. Conference participants also recommend that umbrella organizations in East-Central Europe adopt the provisions relating to them and promote and enforce the Standards with respect to their member organizations.

STANDARDS I

I. Programs

A. The organization should adopt and regularly review a clear written statement of its mission, goals, and objectives.

B. The organization should adopt and regularly review a clear written statement of the group or groups it intends to benefit and how it intends to do so.

C. The organization should adopt a clear written statement committing it to the highest possible standards of quality and effectiveness, and it should commit to conducting regular and meaningful evaluations of its programs and projects.

D. The organization should adopt and implement projects that are designed to carry out its programs.

E. The organization should adopt long and short term programs that are coordinated, wherever appropriate, with the activities and programs of other not-for-profit organizations, including those abroad.

F. The organization should bear in mind in the conduct of its programs and activities that how it is perceived by others will have an impact on the public attitude towards the sector and the level of public trust.

1. The Standards are intended to apply to associations as well as foundations or other not-for-profit organizations. It is understood that in an association the assembly of members is the supreme authority, and that an association may or not also have a board of directors. When an association has a board of directors, basic policies of the kind set forth in the Standards may appropriately be decided by the general assembly of members or the board of directors, depending on the particular statute and bylaws of the organization. Throughout, when the Standards refer to the "Board", that reference should be understood to refer in the case of an association to either the general assembly of members or the board of directors, as appropriate.

II. Governance

A. The organization should have a multiperson governing Board that determines the organization's mission and goals and revise them periodically.

B. The organization should also have a managing board that executes and carries out the programs and projects of the institution.

C. The Board should adopt a clearly written statement of the responsibilities of the Board members and the chief executive officer, including a prohibition of conflicts of interest and rules on the process of decision-making and delegation of authority.

D. The Board should have access to and use all necessary information that will enable it to carry out its responsibilities.

E. The Board should be responsible for adopting a strategic plan and providing the means for its implementation and evaluation.

F. The Board should carefully select and fully support the chief executive officer and review his or her performance periodically.

G. The Board should ensure that adequate training is provided, both for its own members and the staff and volunteers of the organization.

H. The organization's statutes or bylaws should provide a transparent process for the election and replacement of officers and members of the Board.

I. The Board should provide effective leadership to ensure the survival and growth of the organization, including support for fundraising, effective fiscal management, and enhancing public image of the organization.

J. The Board should adopt clear, written rules providing for potential conflicts over leadership and for efficient and productive meetings.

K. The Board should consider encouraging the fullest level of participation of its members through delegation of responsibilities to working committees (e.g., fundraising, finance, recruitment of new members or volunteers, program development, communications).

L. The Board should actively and carefully exercise its responsibility for selecting and orienting new Board members, with particular attention to reflecting the organization's constituencies and avoiding overt discrimination.

III. Organizational integrity

A. The organization should comply with all applicable laws and regulations.

B. The organization should establish a clear written policy prohibiting conflicts of interest of members of the Board, officers, employees, consultants, and volunteers. Among the relationships that should be considered in articulating this policy are the following:

1. Whether members of the Board should receive compensation for services provided to or for the organization.

2. Whether members of the Board should receive reimbursement for reasonable expenses incurred in connection with attendance at meetings of the Board, meetings of Board committees, or services rendered to or on behalf of the organization.

3. Whether members of the Board, officers, employees, consultants, or employees should compete with the organization for contracts, funding, or other benefits or advantages on behalf of themselves or another organization.

4. Whether members of the Board, officers, employees, consultants, or volunteers should do or say anything that is contrary to the interests of the organization, other than as required by law or in order to protect himself or herself from loss, damage, or liability.

C. The organization should operate at all levels with the highest level of transparency consistent with fulfilling its essential mission and goals.

D. Except where doing so is (i) illegal, (ii) contrary to an international treaty or convention that has been ratified by the relevant government, or (iii) inappropriate in light of the mission and

goals of the organization, the organization should adopt an anti-discrimination policy requiring that:

1. no person shall be denied the benefits of the organization, and
2. no person may be excluded from participation in the organization, and
3. no person may be otherwise subject to discrimination by the organization,

on the basis of race, color, national or ethnic origin, age, religious or political belief or affiliation, handicap, or sex.

E. The organization should pursue and maintain policies and practices that enhance the independence of the organization.

F. The organization should seek to recruit a Board that is composed of competent and trustworthy individuals that represent the organization's constituencies.

G. The organization should recognize its responsibility for raising the awareness of governments and the business sector of the importance and the role of the not-for-profit sector in civil society, and develop understanding, trust, and cooperation among governments, the business sector, and the not-for-profit sector.

H. The organization should seek to prevent abuses in the not-for-profit sector.

IV. Management practices and human resources

A. In order promote and effectuate sound management policies, once the mission and goals have been set by the Board, the chief executive officer should choose the measures most effective for attaining those goals and fulfilling that mission.

B. Periodically the organization should assess the results of its activity by established measurements and compare them with set standards.

C. Following assessment of effectiveness and results, and taking into account the present social, technological, economical, and political factors, the organization should either continue its activity or, if needed, make corrections to its objectives or activities.

D. The organization should have clear, well defined written policies and procedures relating to employees and volunteers.

1. The policy of the organization for staff and volunteer motivation should take into consideration, on the one hand, those factors allowing satisfactory working conditions (clearly defined organizational structure, physical conditions, compensation and benefits, considerate supervision, personal relationships, etc.) as well motivating factors (training opportunities, self-

development, providing internal and external recognition of achievements, etc.)

E. The organization should endeavor to obtain and provide whenever possible adequate training for the Board, the staff, and volunteers.

G. The organization should endeavor to recruit and retain staff that combines professional competence with commitment to serve.

H. The organization should seek to achieve effectiveness of the leadership through a democratic decision making process, oriented towards the motivation and commitment of the staff and volunteers.

V. Finances

A. Because not-for-profit organizations hold funds given by donors for the benefit of others, they should conduct all financial activities in an open, honest, and accurate manner and in accordance with the highest possible standards, respecting any donor request for privacy.

B. Organizations should purchase goods and services at the lowest reasonable prices and make its programs and services as inexpensive and efficient as possible.

1. For example, by maximizing the use of volunteers, labor costs are minimized and support for the program is increased as volunteers become advocates for the organization.

C. Because resource are usually limited, the organization should manage its property and funds carefully and creatively.

1. Although management expenses should be kept to a reasonable minimum, the organization should retain well qualified financial professionals as employees, consultants, or volunteers.

D. The organization should maintain detailed and accurate books and records of its finances and should provide regular, accurate, and appropriately detailed reports to the government, the public, and its donors.

1. Such reports must meet the requirements of government regulations and such other standards as are appropriate for the particular organization.

2. In order to increase the credibility of the organization with its founders, the organization should provide them with timely, accurate, and detailed information, as required.

3. Organizations should take care not to expend resources unnecessarily for redundant or inessential retention, preparation, or provision of financial data.

VI. Communications

A. The organization should communicate honestly and accurately, both externally and

internally, about its mission, goals, objectives, and programs.

1. *Reasons:* The reasons for communicating include, advocacy of the values and goals of the organization, information for internal and external constituencies, creation of favorable attitudes towards the organization and its goals and purposes.

2. *External communications:* Depending upon the nature of the organization, communications should be directed locally, nationally, regionally, and/or internationally, and should be directed to governments, the business community, other not-for-profit organizations, and/or the general public.

3. *Internal communications:* Communications should be directed to all of the organization's constituencies and stockholders, including the Board, staff, consultants, volunteers donors, and beneficiaries of the organization.

4. *Tools:* Person-to-person communication, telephone, personal letters, mass or direct mail, facsimiles, electronic media, organizational promotional materials etc.

VII. Fund raising

A. The organization should have a written fund raising policy intended to assure its institutional advancement and financial sustainability.

B. The organization should have an annual plan of action for raising funds that includes a solicitation process, identification of possible sources of income, a diversity of fund raising methods, a master list of donors and prospective donors (ongoing, cumulative, and confidential) and a plan for training of board, staff, and volunteers in fund raising.

C. The organization should communicate with donors and prospective donors in a manner and by methods that are fair, truthful, and do not involve undue pressure or misrepresentation.

ROLE OF UMBRELLA ORGANIZATIONS

Umbrella organizations are not-for-profit membership organization that represent groups of operating not-for-profit organizations grouped

according to subject matter, geography, sector, issues (e.g., fund-raising), etc.

1. Umbrella organizations should advocate the values, goals, and interests of their members, and represent them in appropriate governmental, public, and other forums.

2. Umbrella organizations should promote cooperation and networking among their members and other not-for-profit organizations and seek to eliminate duplication of efforts, programs, and activities.

3. Umbrella organizations should provide services, including information (e.g., libraries, newsletters, databases, etc.), training, consultation, professional and technical advice, group discounts, etc.

4. Umbrella organizations should promote and enforce the above Standards with respect to their member organizations. In enforcing these Standards, each such organization should consider using some or all of the following methods:

a. Insist upon compliance with the Standards as a condition for membership in the umbrella organization.

b. Require each member organization to provide a certification that it has adopted and adheres to the Standards.

c. Require each member organization periodically to supply to the umbrella organizations the written statements and reports that demonstrate its compliance with the Standards.

d. Regularly conduct inquiries to assure that member organizations adhere to the Standards.

e. Investigate all significant complaints that a member organization is not in compliance with the Standards.

f. Provide an organization that is not in compliance with an opportunity to get into compliance and to correct any harm, damage, or loss caused by its noncompliance.

g. Expel any organization that does not, within a reasonable time, bring itself into compliance with the Standards and make reasonable correction of any damage, harm, or loss caused by its noncompliance.

h. Regularly publish and make available a list of member organizations and publicize the



The Charity Commissioners are appointed under the Charities Act 1993 principally to further the work of charities by giving advice and information and checking abuses.

In particular the Commissioners:

- maintain a public register of charities;
- investigate misconduct and the abuse of charitable assets, and take or recommend remedial action;
- give advice to charity trustees to make the administration of their charity more effective; and
- make Schemes and Orders to modernise the purposes and administrative machinery of charities and to give trustees additional powers.

The Commissioners may charge fees for their services, but only in accordance with regulations made by the Home Secretary and approved by Parliament.

At present, regulations allow the Commissioners to charge for providing copies of documents which they keep for public inspection, and for printed extracts from the register of charities. No charges are made for other services.

However, it is possible that further regulations will be made introducing charges for a number of the Commissioners' other services.

Further information can be obtained from the Commissioners' offices at:

St Alban's House 57-60 Haymarket London SW1Y 4QX	2nd Floor 20 Kings Parade Queens Dock Liverpool L3 4DG	Woodfield House Tongler Taunton Somerset TA1 4DL
0171 210 4477	0151 703 1500	01823 345000

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Charity Accounts

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Introduction

1. This leaflet outlines the new accounting framework for charities. The framework is effective from 1 March 1996 and covers:-

- the maintenance of accounting records;
- the preparation of charity accounts and annual reports;
- the audit or independent examination of accounts;
- the submission of accounts and annual reports and returns to the Charity Commission; and
- the availability of accounts to the public.

2. The new legal requirements are contained in Part VI of the Charities Act 1993 (as amended), and Regulations, made under Part VI. The Regulations cover the form and content of accounts, annual reports, auditor's report and duties and independent examiner's report. In addition a revised Statement of Recommended Practice (SORP), Accounting by Charities has been issued.

3. The Act and the Regulations set out the minimum legal requirements for charities in England and Wales. The Charity SORP recommends best practice for all charities in the United Kingdom and the Republic of Ireland. We expect all charities in England and Wales to follow the Charity SORP or to provide a clear explanation of the reasons for any departure from it.

4. General directions for the conduct of independent examinations and guidance on the selection of independent examiners will be published by the Commissioners before 1 March 1996. Regulations prescribing the form of the annual return to be sent by larger registered charities to us, and the information to be contained in the return, will also be made before that date.

5. Charities have long had an obligation to keep accounting records and to prepare accounts but there is now a detailed statutory framework for this and for the preparation of annual reports. It is designed to meet the need for public accountability for the large resources held by charities without adding unnecessarily to the burden on trustees. That is why the requirements imposed on large charities are more rigorous than those for small charities.

6. A brief explanation of some of the terms used may be helpful.

The Annual Report will be a concise but comprehensive review of the activities of the charity. The Regulations set out the basic requirements with more detailed guidance in the Charity SORP. Registered charities within the £10,000 threshold will only need to complete a simplified version.

Aim

Meaning of words used in this leaflet and expressions

Who do the new provisions apply to?

The Annual Return will contain factual information on the charity to enable us to keep the Register up to date. It will also help us to monitor larger charities.

Independent examination is a less onerous form of scrutiny than an audit. Examiners report whether specific matters which are identified in the Regulations have come to their attention. The Regulations set out the requirements for an examiner's report and we will also be issuing guidance to trustees on the selection of examiners and directions for examiners on carrying out an examination.

7. Most charities are affected but in different ways. The following are some of the main variations but there are others. If you are unsure where your charity fits in please call the helpline given at the end of this leaflet.

8. Charitable Companies must prepare accounts under the Companies Acts and must file accounts and reports with Companies House. The audit/compilation report requirements for charitable companies are generally the same as for other companies except that the compiler report threshold is £90,000 gross income (instead of turnover) and the audit threshold is £250,000 gross income (instead of £350,000 turnover). Charitable companies are also subject to charity law and, if registered, must file an annual report and their own full statutory accounts with us if their income or expenditure is over £10,000 or if asked to do so. The requirements for that annual report are those in the Charities Act. The revised Charity SORP applies to companies as well as unincorporated charities.

What is required?

9. Exempt charities will generally have to keep proper accounting records and prepare statements of account as before. They must now provide copies to members of the public on request, but need not submit them to us.

10. Excepted Charities. Some charities (many religious institutions for example) are excepted from registration by Order or Regulation. They may register if they choose, in which case they are treated as any other registered charity. If they do not they must still produce annual accounts in the same way as a registered charity but do not have to submit them to us.

11. A number of charities are obliged by their governing document to have their accounts audited. Unless amended, such provisions will continue to apply even if the regulations require only independent examination.

12. The general accounting framework for charities is based on gross income and/or total expenditure thresholds. All are required to maintain accounting records (which must be retained for at least six years), prepare accounts and to make the accounts available to the public on request.

13. The other requirements vary according to the size of the charity. Please note, however, that if a charity crosses the threshold described at paragraph 18 below, it must have its accounts audited for at least 3 years.

14. Income not over £1,000. Without permanent endowment and the use or occupation of land such charities are not required to register. If they choose to do so they fall within the next band but otherwise have only the basic obligations mentioned at paragraph 12 above.

15. Neither income nor expenditure over £10,000.

- Accounts must be prepared, but may be on the receipts and payments basis.
- A simple annual report must be prepared.
- A simple annual return must be sent to us.
- There is no requirement to have the accounts independently examined or audited but we have the power to require an audit in exceptional circumstances and ask for the submission of the report and accounts.

16. Income not over £100,000 (but over the previous threshold).

- Accounts must be prepared, but may be on the receipts and payments basis.
- Accounts must be subject to outside scrutiny but trustees may choose independent examination rather than audit.
- An annual report must be prepared.
- Accounts, report and annual return must be sent to us within 10 months.

17. Neither income nor expenditure over £250,000 (but income over the previous threshold).

- Accounts must be prepared on the accrual basis.
- Accounts must be subject to outside scrutiny but trustees may choose independent examination rather than audit.

- An annual report must be prepared.
- Accounts, report and annual return must be sent to us within 10 months.

18. Income or Expenditure over £250,000 in the current year or either of the two previous years.

- Accounts must be prepared on the accruals basis.
- Accounts must be audited by an auditor who is qualified to audit the accounts of companies.
- An annual report must be prepared.
- Accounts, report and annual return must be sent to us within 10 months.

Further Publications

Available now

Statement of Recommended Practice: Accounting by Charities (published by the Commission). Copies are available from our London office. Every charity is entitled to one free copy but otherwise it costs £5.00 (including postage).

We have also prepared two free guides to the Charity SORP for charities with an income of no more than £100,000.

- **Accounting for the Smaller Charity.** This is for those preparing accounts on the receipts and payments basis.
- **Accruals Accounting for the Smaller Charity.**

Charity Accounts and Reports (produced by the Home Office). This includes a copy of the Regulations, relevant extracts from the legislation and a commentary. Copies are available from HMSO (telephone: 0171 873 9090, fax 0171 873 8200).

Available in January

We will be issuing the following to help charities meet the new requirements. Every registered and many exempt charities will be sent the appropriate leaflet in January. All will be available from us on request.

1. Leaflet CC52 directed at charities with income or expenditure not over £10,000.
2. Leaflet CC53 containing specific advice for charities in each of the other income/expenditure bands.
3. A standard accounts form (ACC-1371). This will be included in leaflets 1 and 2 above and be available separately.
4. A guide for Independent Examiners.

Helpline

If you need any further advice on the new requirements you should contact our Accounts helpline on 0151 703 1570

We aim to make our publications as useful and easy to read as possible. If you have any suggestions about how this leaflet may be improved, please write to the Publications Unit at our Trunion Office.

Distribution of work for each office
based on charity's area of benefit/operation

London Office	Taunton Office	Liverpool Office
National and Overseas charities based in all the Boroughs in the Greater London area.	National and Overseas charities based in: Bedfordshire Kent Buckinghamshire Surrey East Sussex West Sussex Hertfordshire	National and Overseas charities based in: Cambridgeshire Suffolk Essex Norfolk Northamptonshire
Local charities in: Bedfordshire Buckinghamshire Cambridgeshire East Sussex Essex Greater London Hertfordshire Kent Norfolk Northamptonshire Suffolk Surrey West Sussex	Local, National and Overseas charities based in: Avon Hereford & Worcester Berkshire Isle of Wight Cornwall Mid Glamorgan Devon Oxfordshire Dorset Somerset Dyfed South Glamorgan Gloucestershire West Glamorgan Gwent Wiltshire Hampshire	Local, National and Overseas charities based in: Cheshire Merseyside Cleveland North Yorkshire Chwyd Northumberland Cumbria Nottinghamshire Derbyshire Powys Durham Shropshire Gtr Manchester South Yorkshire Gwynedd Staffordshire Humberside Tyne & Wear Lancashire Warwickshire Leicestershire West Midlands Lincolnshire West Yorkshire

Responsibility for deciding which organisations seeking registration as National or Overseas charities is determined by the address of the charity's head office/registered office of the charity.	All charities administered by the National Team Service are dealt with by the NHS Charities Review Section in the Liverpool office.
All Welsh general charities — operating throughout Wales but not elsewhere — are dealt with in the Liverpool office.	All charities in connection with the Armed Forces are dealt with by the Service Charities Section within Charities Division in the Taunton office.

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Summary of NCIB Evaluations as of February 27, 1996

The National Charities Information Bureau is a nonprofit organization with an independent, volunteer board of directors.

General Policy: The National Charities Information Bureau's point of view is that of prospective givers; it believes that they are entitled to reasonable assurance of public service by organizations to which they make their contributions.

NCIB evaluates national charities according to its nine basic Standards (listed on page 7) and informs contributors through its reports about individual agencies. The evaluations on the following five pages may change at any time. Omission from these listings has no negative significance. NCIB does not advise whether to give to any particular charity. Contributors are encouraged to familiarize themselves with NCIB Standards and then decide for themselves the importance of an organization's compliance with or variation from those Standards. The information and analysis contained herein is furnished to assist contributors in making informed decisions and is not intended to endorse or disparage the organization.

NCIB focuses its reporting on organizations which have stimulated broad contributor interest. In preparing its reports, NCIB cooperates with organizations to

encourage them to meet NCIB Standards. NCIB does not generally undertake to report about religious, fraternal or political organizations and single or local institutions (such as colleges, hospitals, museums, libraries, etc.). NCIB reports on the social welfare and human service activities of some of these organizations and institutions which solicit contributions nationally from the general public. NCIB does not accept donations from the groups that it evaluates.

National Service Centers: Many organizations have a number of affiliates. NCIB's report covers the national and its affiliates as a single organization where (1) the affiliates raise funds in the name of the national, or (2) national program services and fund-raising activities are substantially financed by support from affiliates, or (3) the national has the capacity to generally control its affiliates.

A number of organizations with affiliates do not substantially display any of the three characteristics noted above. The national headquarters function as NATIONAL SERVICE CENTERS, supplying affiliates with various services — standard-setting, leadership training, research, consultation, program development, liaison with other organizations. In such cases, the national and its affiliates are not viewed by NCIB as a single entity. Contributors interested in specific affiliates should request information directly from them.

TABLE 1 - MEET ALL STANDARDS

The following organizations meet NCIB's nine Standards.

An "NSC" code indicates that NCIB's evaluation is of the NATIONAL SERVICE CENTER ONLY, and does not include chapters or affiliates.

* An asterisk indicates that a new evaluation has recently been completed.

- | | |
|---|--|
| <ul style="list-style-type: none"> ■ Access to Voluntary and Safe Contraception International (formerly Association for Voluntary Surgical Contraception) ■ Action on Smoking and Health ■ Advocates for Youth (formerly Center for Population Options) ■ Africa Fund (American Committee on Africa) ■ African Wildlife Foundation ■ Africare * ■ AFS Intercultural Programs ■ ALM International (American Leprosy Missions) ■ ALS Association - Woodland Hills, CA (NSC) ■ ALSAC-St. Jude Children's Research Hospital * ■ Alzheimer's Disease and Related Disorders Association ■ America the Beautiful Fund ■ American Cancer Society ■ American Civil Liberties Union/ACLU Foundation ■ American Diabetes Association ■ American Farmland Trust ■ American Forests (American Forestry Association) ■ American Foundation for AIDS Research ■ American Foundation for the Blind ■ American Heart Association ■ American Humane Association ■ American Indian Graduate Center ■ American Kidney Fund ■ American Liver Foundation ■ American Lung Association (Christmas Seals) - New York, NY (NSC) ■ American Near East Refugee Aid * ■ American Printing House for the Blind ■ American Red Cross ■ American Refugee Committee ■ American Rivers * ■ American Social Health Association * ■ American Symphony Orchestra League ■ AmeriCares Foundation ■ Amnesty International U.S.A. ■ Animal Protection Institute of America * ■ Animal Welfare Institute ■ The Arc (formerly Assn. for Retarded Citizens of the U.S.) ■ Arthritis Foundation | <ul style="list-style-type: none"> ■ Camp Fire Boys and Girls - Kansas City, MO (NSC) ■ Cancer Care Inc. ■ Cancer Research Foundation of America ■ Cancer Research Fund of the Damon Runyon-Walker Winchell Foundation ■ Cancer Research Institute ■ CARE ■ Catalyst for Women ■ Catholic Relief Services - United States Catholic Conference ■ Center for Community Change * ■ Center for Marine Conservation ■ Child Find of America ■ Child Welfare League of America ■ Childreach (PLAN International USA) ■ Children Incorporated * ■ Children International (Holy Land Christian Mission) ■ Children's Defense Fund ■ Christian Children's Fund ■ Citizens' Scholarship Foundation of America - St. Peter, MN (NSC) ■ Compassion International ■ Consortium for Graduate Study in Management ■ Council on Economic Priorities ■ Council on Foreign Relations ■ Covenant House ■ Crohn's & Colitis Foundation of America (formerly Natl. Assn. for Ileitis and Colitis) ■ Cystic Fibrosis Foundation |
| <ul style="list-style-type: none"> ■ Big Brothers/Big Sisters of America - Philadelphia, PA (NSC) ■ Boy Scouts of America - Irving, TX (NSC) ■ Boys and Girls Clubs of America - Atlanta, GA (NSC) ■ Business Council for the U.N. * | <ul style="list-style-type: none"> ■ Deafness Research Foundation ■ Direct Relief International ■ Disabled American Veterans |
| | <ul style="list-style-type: none"> ■ Epilepsy Foundation of America ■ Ethics Resource Center |
| | <ul style="list-style-type: none"> ■ FAIR (Federation for American Immigration Reform) ■ Fight for Sight (Prevent Blindness America) ■ Food for the Hungry ■ Foundation Fighting Blindness (formerly RP Foundation) ■ Freedom from Hunger ■ Friends of Animals ■ Fund for Animals ■ Fund for an Open Society ■ Fund for Peace * ■ Futures for Children |
| | <ul style="list-style-type: none"> ■ Gifts In Kind America ■ Girl Scouts of the U.S.A. - New York, NY (NSC) ■ Girls Incorporated (formerly Girls Club of America) - New York, NY (NSC) |

MEET ALL STANDARDS

- Goodwill Industries International - Bethesda, MD (NSC) *
- Guide Dog Foundation for the Blind
- Heifer Project International
- Helen Keller International
- Holy Land Christian Mission (Children International)
- Hugh O'Brian Youth Foundation
- Hunger Project
- Immigration and Refugee Services of America (formerly American Council for Nationalities Service)
- Institute for Humane Studies
- Institute of International Education
- INTERACTION: American Council for Voluntary International Action
- Inter-Aid, Inc. (International Christian Aid)
- International Executive Service Corps
- International Eye Foundation
- International Institute of Rural Reconstruction
- International Rescue Committee *
- Junior Achievement - Colorado Springs, CO (NSC)
- Juvenile Diabetes Foundation International
- Laubach Literacy International
- League of Women Voters Education Fund
- Leonard Wood Memorial (American Leprosy Foundation)
- Leukemia Society of America
- Linus Pauling Institute of Science and Medicine
- Literacy Volunteers of America - Syracuse, NY (NSC)
- Lupus Foundation of America
- Make-A-Wish Foundation of America - Phoenix, AZ (NSC)
- March of Dimes Birth Defects Foundation
- Medic Alert Foundation - United States
- Medical Education for South African Blacks
- Mexican-American Legal Defense and Educational Fund
- Muscular Dystrophy Association
- NAACP Legal Defense and Educational Fund
- National 4-H Council
- National Action Council for Minorities in Engineering
- National Alliance of Business
- National Association for Visually Handicapped
- National Audubon Society
- National Braille Association
- National Center for Learning Disabilities
- National Center for Missing and Exploited Children
- National Coalition for the Homeless
- National Committee to Prevent Child Abuse - Chicago, IL (NSC)
- National Conference of Christians and Jews
- National Council for Adoption
- National Council on the Aging
- National Council on Alcoholism and Drug Dependence - New York, NY (NSC)
- National Council on Economic Education (formerly Joint Council on Economic Education)
- National Crime Prevention Council
- National Down Syndrome Society
- National Easter Seal Society *
- National Executive Service Corps
- National FFA Foundation, Inc.
- National Hemophilia Foundation *
- National Hispanic Scholarship Fund
- National Hospice Organization
- National Jewish Center for Immunology and Respiratory Medicine
- National Kidney Foundation
- National Medical Fellowships
- National Mental Health Association - Alexandria, VA (NSC)
- National Multiple Sclerosis Society
- National Neurofibromatosis Foundation
- National Osteoporosis Foundation
- National Parks and Conservation Association
- National Psoriasis Foundation
- National Recreation and Park Association
- National Urban Fellows
- National Urban League - New York, NY (NSC)
- Native American Rights Fund
- Natural Resources Defense Council *
- Nature Conservancy
- Near East Foundation
- Oral Health America (formerly American Fund for Dental Health)
- Our Little Brothers and Sisters
- Overseas Development Council
- Oxfam America
- Parkinson's Disease Foundation
- Partners of the Americas
- Pathfinder International
- Pearl S. Buck Foundation
- PLAN International USA (Childreach)
- Planned Parenthood Federation of America
- Population Action International (formerly Population Crisis Committee)
- Population Institute
- Population Reference Bureau
- Prevent Blindness America (National Society to Prevent Blindness)
- Project Concern International *
- Project Hope
- Puerto Rican Legal Defense and Education Fund
- Rails-to-Trails Conservancy
- Rainforest Action Network
- Recording for the Blind and Dyslexic
- Resources for the Future
- St. Jude Children's Research Hospital (ALSAC-St. Jude) *
- Second Harvest
- SIDS Alliance
- Sierra Club
- Sierra Club Foundation
- Sierra Club Legal Defense Fund
- Starlight Foundation International
- Starr Commonwealth Schools
- Sunshine Foundation *
- Technoserve *
- Trust for Public Land
- Union of Concerned Scientists
- Unitarian Universalist Service Committee
- United Negro College Fund
- United Way of America - Alexandria, VA (NSC)
- USO (United Service Organizations)
- U.S. Committee for Refugees (Immigration and Refugee Services of America)
- U.S. Olympic Committee
- VITA (Volunteers in Technical Assistance)
- Wilderness Society
- Wildlife Preservation Trust International
- World Concern
- World Education
- World Emergency Relief
- World Learning Inc. (formerly Experiment in International Living)
- World Neighbors
- World Resources Institute
- World Vision
- World Wildlife Fund, Inc.
- YMCA of the United States - Chicago, IL (NSC)
- YWCA of the U.S.A., National Board - New York, NY (NSC)
- Youth for Understanding
- Zero Population Growth

TABLE 2 - DO NOT MEET ALL STANDARDS

The following list includes organizations evaluated by NCIB which do not meet one or more NCIB Standards and organizations which have not provided information to NCIB despite repeated requests. An asterisk (*) indicates that a new evaluation has recently been completed.

■ = Meets the Standard X = Does not meet this Standard

? = Question(s) is raised about the Standard(s) cited by number. Questions about these agencies make it impossible to state that they meet NCIB Standards. However, these questions are not so substantial as to lead to the conclusion that they do not meet NCIB Standards.

nc = No conclusion - information required by the Standard(s) cited has either not been clearly presented or has not been provided.

NCIB requests for information unanswered - information requested for a regular evaluation has not been provided despite repeated requests. An organization's willingness to supply information voluntarily demonstrates its belief in the importance of public accountability.

Preliminary report available - As a service to contributors, NCIB may prepare reports on organizations that are in an early stage of development, and for which it is premature to conduct a regular evaluation.

Organizations	NCIB STANDARDS										Comments
	Basic Documents		Purposes	Programs	Information	Financial Support	Use of Funds	Annual Reporting	Accountability	Budget	
	1	2									
A Better Chance											NCIB requests for information unanswered
Accion International	X	■	■	■	■	■	■	■	■	■	Does not meet Standard 1g
Accuracy in Media	X	■	■	■	■	nc	X	X	X	X	Does not meet Standards 1cgh, 7, 8ac, 9. No conclusion for 6ab
American Enterprise Institute											NCIB requests for information unanswered
American Friends Service Committee *	■	■	■	■	■	■	X	■	■	■	Does not meet Standard 7a
American Heart Disease Prevention Foundation											NCIB requests for information unanswered
American Indian College Fund											Preliminary report available
American Indian Heritage Foundation											NCIB requests for information unanswered
American Indian Relief Council *	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
American Institute for Cancer Research	X	■	■	■	■	X	■	■	■	■	Does not meet Standards 1af, 6ab
AMVETS National Service Foundation											NCIB requests for information unanswered
Arrow *	■	■	■	■	■	■	X	■	■	■	Does not meet Standard 7b
Asia Foundation	X	■	■	■	■	■	■	■	■	■	Does not meet Standard 1f
Asia Society	X	■	■	■	■	■	■	■	■	■	Does not meet Standard 1e
Asian Relief											NCIB requests for information unanswered
Association on American Indian Affairs	■	■	■	■	■	■	X	■	■	■	Does not meet Standard 7
Blinded Veterans Association	■	■	■	?	■	X	X	■	■	■	Does not meet Standards 6ab, 7a, Question on 4
Bosnia Children's Fund											NCIB requests for information unanswered
Boys Town (Father Flanagan's Boys' Home)	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
Butterfield Youth Services	X	■	■	■	■	■	■	■	■	■	Does not meet Standard 1g
Cal Farley's Boys Ranch	■	■	■	■	■	X	■	■	■	■	Does not meet Standard 8c
Cancer Center for Detection and Prevention											See Pacific West Cancer Fund
Cancer Federation	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
Cancer Fund of America	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
Cedars Home for Children Foundation	X	■	■	X	■	X	X	■	■	■	Does not meet Standards 1cgh, 4, 6c, 7c, Question on 1i, 6b, 7a
Center for Science in the Public Interest	■	■	■	■	■	X	■	■	■	■	Does not meet Standard 8b
Chemotherapy Foundation	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
Childhelp USA											NCIB requests for information unanswered
Children's Aid International											NCIB requests for information unanswered
Children's Survival Fund											NCIB requests for information unanswered
Children's Wish Foundation International											NCIB requests for information unanswered
Choice in Dying (formerly Concern for Dying and Society for the Right to Die)	■	■	■	■	■	X	■	■	■	■	Does not meet Standard 8b
Christian Appalachian Project	■	■	■	■	■	X	■	■	■	■	Does not meet Standards 6ab
Christian Blind Mission International	X	■	■	■	■	nc	X	■	■	■	Does not meet Standards 1cgh, 7, No conclusion for 6ab
Christian Record Services	■	■	■	■	■	X	■	■	■	■	Does not meet Standard 6d
Christian Relief Services											NCIB requests for information unanswered
Citizens for a Drug Free America											NCIB requests for information unanswered
Committee for Economic Development											NCIB requests for information unanswered
Concern Worldwide (U.S.), Inc. *											Preliminary report available
Concerns of Police Survivors	X	■	■	■	X	nc	■	■	■	■	Does not meet Standards 1h, 5a, No conclusion for 6ab
Congress of Racial Equality (CORE)											NCIB requests for information unanswered
Conservation International Foundation	X	■	■	■	■	■	■	■	■	■	Does not meet Standard 1g
Council for Aid to Education											NCIB requests for information unanswered
Council for Basic Education	X	■	■	■	■	■	X	■	■	■	Does not meet Standards 1h, 7
Cousteau Society *	X	■	■	■	■	■	■	■	■	■	Does not meet Standards 1h
David Livingstone Missionary Foundation											NCIB requests for information unanswered
Diabetes Trust Fund	■	■	■	?	■	X	■	■	■	■	Does not meet Standards 6abc, Question on 4
Don Stewart Association (Feed My People)											NCIB requests for information unanswered

0 = MEETS THIS NCIB STANDARD

1 = DOES NOT MEET THIS NCIB STANDARD

Organizations	NCIB STANDARDS										Comments
	1	2	3	4	5	6	7	8	9	10	
Earth Island Institute											NCIB requests for information unanswered
Eisenhower Exchange Fellowships	X										Does not meet Standards 1e, 8c
Environmental Action Foundation *	X										Does not meet Standards 1g, 7ac
Ethics and Public Policy Center	X										Does not meet Standards 1cch, 7c
Father Flanagan's Boys' Home (Boys Town)											See Boys Town
Feed the Children											See Larry Jones Evangelistic Association
Feed My People											See Don Stewart Association
Foreign Policy Association											Does not meet Standard 6d
Friends of the Earth											Does not meet Standard 6d
Heart Support of America											NCIB requests for information unanswered
Help Hospitalized Veterans *	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
Heritage Foundation	X										Does not meet Standards 1ch, 9
Hope School											NCIB requests for information unanswered
Humane Society of the United States											NCIB requests for information unanswered
Inform											Does not meet Standard 6d
International Cancer Alliance	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
International Center	X										Does not meet Standards 1cch, 6a, No conclusion for 1i, Question on 6b
International Children's Fund											NCIB requests for information unanswered
International Fund for Animal Welfare											NCIB requests for information unanswered
Interracial Council for Business Opportunity	X										Does not meet Standards 1g, 8c
Just Say No International											NCIB requests for information unanswered
Larry Jones Evangelistic Association (Feed the Children)											NCIB requests for information unanswered
Little Sioux (St. Francis Indian Mission)											NCIB requests for information unanswered
Local Initiatives Support Corporation	X										Does not meet Standard 1f
MAP International *											Does not meet Standard 6d
Martin Luther King, Jr. Center for Nonviolent Social Change											NCIB requests for information unanswered
Mays Mission for the Handicapped											Does not meet Standards 6ab
Morality in Media	X										Does not meet Standards 1eg, 7, 9
Mothers Against Drunk Driving											Does not meet Standards 6ab, 7, No conclusion for 8
Multiple Sclerosis Association of America											NCIB requests for information unanswered
National Anti-Vivisection Society											NCIB requests for information unanswered
National Awareness Foundation											NCIB requests for information unanswered
National Cancer Center (formerly National Cancer Cytology Center)	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
National Cancer Coalition											NCIB requests for information unanswered
National Cancer Research Center											See Walker Cancer Research Institute
National Caregiving Foundation											NCIB requests for information unanswered
National Children's Cancer Society	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
National Committee for Citizens in Education											Does not meet Standard 6d
National Committee for Responsive Philanthropy											NCIB requests for information unanswered
National Council on Crime and Delinquency	X										Does not meet Standard 1e
National Council of Negro Women	X										Does not meet Standards 1gh, 9, No conclusion for 1d, Question on 8d
National Emergency Medicine Association	X										Does not meet Standards 1g, 4, 6ab, 7c, 8a, 9, No conclusion for 1i
National Foundation for Cancer Research	X										Does not meet Standards 1i, 6ab
National Heart Court											See National Emergency Medicine Association
National Humane Education Society	X										Does not meet Standards 1eg, 6ab
National Law Enforcement Officers Memorial Fund											NCIB requests for information unanswered
National League of Families of American Prisoners and Missing in Southeast Asia											Question on 6d
National Merit Scholarship Corporation											NCIB requests for information unanswered
National Right to Work Legal Defense Foundation											NCIB requests for information unanswered
National Trust for Historic Preservation in the U.S											Does not meet Standard 6b
Native American Heritage Association											NCIB requests for information unanswered
North Shore Animal League											Does not meet Standard 6b

Organizations	NCIB STANDARDS										Comments
	1	2	3	4	5	6	7	8	9	10	
Omaha Home for Boys	X						X	X		X	Does not meet Standards 1cdhj, 6bc, 7ac, 9, Question on 1i
Pacific West Cancer Fund (Cancer Center for Detection and Prevention)	X						X	X		X	Does not meet Standards 1acdfh, 6ab, 6a, Question on 6d
Pan American Development Foundation	X										Does not meet Standard 1a
Paralyzed Veterans of America	X						X				Does not meet Standards 1cghi, 6ab
Pediatric AIDS Foundation	X										Does not meet Standard 1g
People for the American Way/People for the American Way Action Fund							X	X			Does not meet Standard 6a, Question on 6b
People for the Ethical Treatment of Animals	X										Does not meet Standard 1b
People-to-People International							X	X			Does not meet Standards 7c, 8a
Project Cure	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
Public Citizen											NCIB requests for information unanswered
Rosebud Educational Society (Little Sioux)											NCIB requests for information unanswered
St. Joseph's Indian School	X						X				Does not meet Standards 1a, 6ab
St. Labre Indian School Educational Assn.											NCIB requests for information unanswered
Salesian Missions											NCIB requests for information unanswered
Salvation Army											NCIB requests for information unanswered
Save-the-Redwoods League							X	X		X	Does not meet Standards 6c, 7a, 9
Shriners' Hospitals for Crippled Children											NCIB requests for information unanswered
SOS Children's Villages, USA											NCIB requests for information unanswered
Southern Christian Leadership Conference											NCIB requests for information unanswered
Southern Christian Leadership Foundation											NCIB requests for information unanswered
Southern Poverty Law Center	X						X	X			Does not meet Standards 1g, 6abc
Southwest Indian Foundation	X						X	X			Does not meet Standards 1ach, 6ab
Toys for Tots Fdn. (Marine Toys for Tots Fdn.)											NCIB requests for information unanswered
UN Association of the U.S.A.							X				Does not meet Standard 6d
United Cancer Research Society	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
United Children's Fund (Washington, D.C.)											NCIB requests for information unanswered
U.S. Committee for UNICEF							X				Does not meet Standard 6d
Veterans of Foreign Wars of the United States											NCIB requests for information unanswered
Veterans of the Vietnam War, Inc.											NCIB requests for information unanswered
Vietnam Veterans Memorial Fund											NCIB requests for information unanswered
Walker Cancer Research Institute (National Cancer Research Center)	REPORT BASED ON PUBLIC INFORMATION AVAILABLE										NCIB requests for information unanswered
World Mercy Fund											NCIB requests for information unanswered
World Rehabilitation Fund											NCIB requests for information unanswered
World Relief Corporation of National Association of Evangelicals	X										Does not meet Standard 1a

TABLE 3 - REPORTS ON UPDATE

<p>Reports on the following organizations are on update. An "NSC" code indicates that NCIB's evaluation is of the NATIONAL SERVICE CENTER ONLY, and does not include chapters or affiliates.</p> <p>Alzheimer's Disease Research Program (American Health Assistance Foundation) AMC Cancer Research Center American Action Fund for Blind Children & Adults (American Brotherhood for the Blind) American Health Assistance Foundation American Parkinson Disease Association City of Hope</p>	<p>Defenders of Wildlife Ducks Unlimited Environmental Defense Fund Families International (formerly Family Service America) Greenpeace Fund (formerly Greenpeace USA) Guiding Eyes for the Blind Habitat for Humanity International HALT (Help Abolish Legal Tyranny) Huntington's Disease Society of America Izaak Walton League of America Myasthenia Gravis Foundation of America NAACP Special Contribution Fund National Federation of the Blind</p>	<p>National Glaucoma Research Program (American Health Assistance Foundation) National Heart Foundation (American Health Assistance Foundation) National Wildlife Federation NOW Legal Defense and Education Fund Pacific Legal Foundation Reading Is Fundamental Red Cloud Indian School Save the Children Federation Special Olympics International United Cerebral Palsy Associations - Washington, D.C. (NSC) Volunteers of America</p>
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APPENDIX IV
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The National Charities Information Bureau was founded in 1918 by a group of national leaders who were concerned that Americans were giving millions of dollars to charitable organizations, particularly war relief organizations, that they knew little or nothing about.

NCIB's mission is to promote informed giving. NCIB believes that donors are entitled to accurate information about the charitable organizations that seek their support. NCIB also believes that well-informed givers will ask questions and make judgments that will lead to an improved level of performance by charitable organizations.

To help givers, NCIB has been evaluating national charitable organizations against its Standards for 78 years. Its present Standards are the result of a study in the late 1980's by a distinguished national panel, in an exercise that spanned two years and took hundreds of comments into account.

NCIB believes the spirit of these Standards to be universally useful for all charities. However, for organizations less than three years old or with annual budgets of less than \$100,000, greater flexibility in applying some of the Standards may be appropriate.

NCIB STANDARDS IN PHILANTHROPY

Governance, Policy and Program Fundamentals

1. **Board Governance:** The board is responsible for policy setting, fiscal guidance, and ongoing governance, and should regularly review the organization's policies, programs and operations. The board should have

- a. an independent, volunteer membership;
- b. a minimum of 5 voting members;
- c. an individual attendance policy;
- d. specific terms of office for its officers and members;
- e. in-person, face-to-face meetings, at least twice a year, evenly spaced, with a majority of voting members in attendance at each meeting;
- f. no fees to members for board service, but payments may be made for costs incurred as a result of board participation;
- g. no more than one paid staff person member, usually the chief staff officer, who shall not chair the board or serve as treasurer;
- h. policy guidelines to avoid material conflicts of interest involving board or staff;
- i. no material conflicts of interest involving board or staff;
- j. a policy promoting pluralism and diversity within the organization's board, staff, and constituencies.

2. **Purpose:** The organization's purpose, approved by the board, should be formally and specifically stated.

3. **Programs:** The organization's activities should be consistent with its statement of purpose.

4. **Information:** Promotion, fund raising, and public information should describe accurately the organization's identity, purpose, programs, and financial needs.

5. **Financial Support and Related Activities:** The board is accountable for all authorized activities generating financial support on the organization's behalf:

- a. fund-raising practices should encourage voluntary giving and should not apply unwarranted pressure;
- b. descriptive and financial information for all substantial income and for all revenue-generating activities conducted by the organization should be disclosed on request;
- c. basic descriptive and financial information for income derived from authorized commercial activities, involving the organization's name, which are conducted by for-profit organizations, should be available. All public promotion of such commercial activity should either include this information or indicate that it is available from the organization.

6. **Use of Funds:** The organization's use of funds should reflect consideration of current and future needs and resources in planning for program continuity. The organization should:

- a. spend at least 60% of annual expenses for program activities;
- b. insure that fund-raising expenses, in relation to fund-raising results, are reasonable over time;
- c. have net assets available for the following fiscal year not usually more than twice the current year's expenses or the next year's budget, whichever is higher;
- d. not have a persistent and/or increasing deficit in the unrestricted fund balance.

Reporting and Fiscal Fundamentals

7. **Annual Reporting:** An annual report should be available on request, and should include

- a. an explicit narrative description of the organization's major activities, presented in the same major categories and covering the same fiscal period as the audited financial statements;
- b. a list of board members;
- c. audited financial statements or, at a minimum, a comprehensive financial summary that 1) identifies all revenues in significant categories, 2) reports expenses in the same program, management/general, and fund-raising categories as in the audited financial statements, and 3) reports all ending balances. (When the annual report does not include the full audited financial statements, it should indicate that they are available on request.)

8. **Accountability:** An organization should supply on request complete financial statements which

- a. are prepared in conformity with generally accepted accounting principles (GAAP), accompanied by a report of an independent certified public accountant, and reviewed by the board; and
- b. fully disclose economic resources and obligations, including transactions with related parties and affiliated organizations, significant events affecting finances, and significant categories of income and expense; and should also supply
- c. a statement of functional allocation of expenses, in addition to such statements required by generally accepted accounting principles to be included among the financial statements;
- d. combined financial statements for a national organization operating with affiliates prepared in the foregoing manner.

9. **Budget:** The organization should prepare a detailed annual budget consistent with the major classifications in the audited financial statements, and approved by the board.

NCIB's **WISE GIVING GUIDE** is published quarterly to aid givers so that they may make better informed decisions. Single copies are available free on request. NCIB individual supporters who contribute \$35 or more (NCIB Members) and corporations or foundations contributing \$200 or more are assured four issues of the *Wise Giving Guide*.

REPORTS - Detailed evaluative reports are available on most of the organizations listed in this *Guide*. Each NCIB report includes:

- * a description of program activities
- * name of the board chair and the paid staff head
- * an analysis of the organization's financial statements
- * information on its tax deductibility status, salary ranges and current budget
- * NCIB conclusion.

NCIB supporters of \$35 or more become NCIB Members entitled to four issues of the *Wise Giving Guide* and up to three detailed reports on currently evaluated charities by mail (not fax) free of charge. Sustaining

Members (\$50 or more) also receive special updates and information throughout the year. Non-members may request one NCIB report free of charge.

Additional reports are available at \$3.50 each; please include payment with your request. Report(s) will be mailed out within 10 business days of receipt of your request.

Requests can be made by calling 1-212-926-6300 during regular east coast business hours, or by writing to NCIB at 19 Union Square West, New York, NY 10003.

QUICK REFERENCE REPORTS AVAILABLE

NCIB full reports on individual charities are available immediately by fax 24 hours every day for \$5.95, inclusive of all costs, charged to your Visa or Mastercard. Call toll-free 1-800-FAX-3333 with the 4-digit code (from the *Quick Reference* guide in the centerfold of this issue) of each charity in which you're interested.

A CRISIS OF DEFINITION: An Alphabet-Soup of Acronyms

*Before I built a wall
I'd ask to know
What I was walling in
Or walling out ...*

— ROBERT FROST

AGNs	Advocacy Groups and Networks	(for example, Clark, 1991)
BINGOs	Big International NGOs	(for example, Charlton & May, 1995)
BONGOs	Business-organized NGOs	(for example, Constantino-David, 1992)
CBMS	Community Based Management System	(for example, Hussain, 1992)
CBOs	Community Based Organization	(for example, Fowler, 1996)
DONGOs	Donor Organized NGOs	(for example, Gordenker and Weiss, 1996)
ENGOs	Environmental NGOs	(for example, Najam, 1995)
GDOs	Grassroots Development Organizations	(for example, Clark, 1991)
GONGOs	Government Organized NGOs	(for example, Gordenker and Weiss, 1996)
GRINGOs	Government-run/initiated NGOs	(for example, Constantino-David, 1992)
GROs	Grassroots Organizations	(for example, Padron, 1987)
GRSOs	Grassroots Support Organizations	(for example, Fisher, 1993)
GSCOs	Global Social Change Organizations	(for example, Gordenker and Weiss, 1996)
GSOs	Grassroots Support Organizations	(for example, Reilly, 1992)
IAs	Interest Associations	(for example, Esman & Uphoff, 1984)
IDCIs	International Development Cooperation Institutions	(for example, Padron, 1987)
INGOs	International NGOs	(for example, Najam, 1993)
IOs	Intermediate Organizations	(for example, Ware, 1989)
IPOs	International Peoples Organizations	(for example, Galzung, 1986)
LDAs	Local Development Associations	(for example, Esman & Uphoff, 1984)
LINGOs	Little NGOs	(for example, Fisher, 1993)
LOs	Local Organizations	(for example, Esman & Uphoff, 1984)
MOs	Membership Organizations	(for example, Reilly, 1992)
MSOs	Membership Support Organizations	(for example, Carroll, 1992)
NGDOs	Nongovernmental Development Organizations	(for example, Padron, 1987)
NGIs	Nongovernmental Interests	(for example, Najam, 1993)
NGOs	Nongovernmental Organizations	(for example, Edwards and Hulme, 1996)
NNGOs	Northern NGOs	(for example, Fowler, 1996)
NPOs	Nonprofit organizations	(for example, James, 1987)
OEPs	Popular Economic Organizations	(for example, Fisher, 1993)
PDAs	Popular Development Agencies	(for example, Clark, 1991)
POs	Peoples Organizations	(for example, Korten, 1990)
PSCs	Public Service Contractors	(for example, Korten, 1990)
PSNPOs	Paid Staff Nonprofit Organizations	(for example, Smith, 1995)
PVDOs	Private Voluntary Development Organizations	(for example, Karim, 1996)
PVOs	Private Voluntary Organizations	(for example, Gorman, 1984)
QUANGOs	Quasi-NGOs	(for example, Kramer, 1981)
RWAs	Relief and Welfare Agencies	(for example, Clark, 1991)
SHOs	Self-help Organizations	(for example, Uvin, 1996)
SHPOs	Self-help Support Organizations	(for example, Uvin, 1996)
SNGOs	Southern NGOs	(for example, Fowler, 1996)
TIOs	Technical Innovation Organizations	(for example, Clark, 1991)
TNGOs	Transnational NGOs	(for example, Zadek and Garward, 1996)
VDAs	Village Development Associations	(for example, Fisher, 1993)
VIIs	Village Institutions	(for example, Shah and Shah, 1996)
VNPOs	Volunteer Nonprofit Organizations	(for example, Smith, 1995)
VOs	Voluntary Organizations	(for example, Brown and Korten, 1989)

Source: ADIL NAJAM, 1996. "Understanding the Third Sector: Revisiting the Prince, the Merchant and the Citizen." *Nonprofit Management and Leadership*, 7(2).

Appendix VI: CONTRIBUTORS

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