
OPENING ONE EYE AND CLOSING THE OTHER: THE LEGAL AND REGULATORY ENVIRONMENT FOR “GRASSROOTS” NGOS IN CHINA TODAY

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I. INTRODUCTION

Dong Jian, a preeminent expert on eye care and the initiator of a recent National Eye Care Day in China, has a simple goal: to create a nonprofit, nongovernmental organization dedicated to the promotion of eye health. By advocating and promoting regular eye care in China, according to Dong, his organization will fill an important need. Eye care among Chinese people is woefully insufficient, resulting in annual medical expenses on eye diseases equal to the cost of building the Three Gorges Dam,¹ and the government cannot dedicate enough resources to the problem to address it fully. With this problem in mind, Dong joined together with several other eye care experts in early 2000 to file an application for sponsorship with the Ministry of Health for their proposed

¹ Zhou Lina, *Ai yan xie hui cheng li zao ju, gong min Dong Jian zhuang gao "xing zheng bu zuo wei"* [Eye Care Association Refused Establishment, Citizen Dong Jian Accuses "Administrative Malfeasance"], XIN HUA MEI RI DIAN XUN [XINHUA DAILY TELEGRAPH], Oct. 22, 2006, available at http://news3.xinhuanet.com/mrdx/2006-10/22/content_5234499.htm.

social organization, the Eye Care Association.² Under the Regulations on Registration and Management of Social Organizations, to achieve legal status for his association, Dong would have to obtain approval from both the Ministry of Health (MoH), as the government agency responsible for the association’s field, and the Ministry of Civil Affairs (MCA), the registrar for all nongovernmental organizations (NGOs) in China.³ Like many before him, however, Dong has found this requirement for double approval to be an insurmountable barrier: after over six years of repeated inquiries and fulfillment of requests for additional documentation, Dong has yet to receive a formal written decision from MoH regarding its sponsorship.⁴

What distinguishes Dong’s case from others is that he decided to take legal action. On February 3, 2005, Dong filed a personal lawsuit in the No. 1 Intermediate Court of Beijing against MoH for failing to answer his request for sponsorship. Unfortunately, although Dong’s inability to form his organization would seem to touch on the core constitutional right to freedom of association, China’s substantive laws offer little recourse if the appropriate supervising agency declines to back a given group. Dong turned to procedure for the legal basis of his claim: MoH should be held liable for its failure to act within the permissible timeframe under the Administrative Permit Law (AP Law).⁵ The AP Law came into effect on July 1, 2004, and had thus been on the books for only eight months when Dong filed his suit. This case was widely reported in various media outlets and the Internet in China, and despite its procedural framing, it was hailed as a landmark case to test the waters in the Court on the right to freedom of association long promised in the Chinese Constitution.⁶

Dong’s case did not succeed. Although Dong and the other cofounders insisted that they had sent their application materials and requested revisions nine times to various departments of the MoH between February

² Wang Heyan & Mao Zhipeng, “*Ai yan*” *zhi su* [An “Eye Care” Complaint], *CAI JING* [CAIJING MAGAZINE], Oct. 16, 2006, available at <http://www.caijing.com.cn/newcn/ruleoflaw/other/2006-10-16/12308.shtml>; see also *Yi xue zhuan jia cheng li ai yan xie hui wei huo pi zhuang gao wei sheng bu bu zuo wei* [Medical Expert Does Not Obtain Permission To Establish Eye Care Association, Accuses Ministry of Health of Malfeasance], *ZHONGGUO JING JI WANG* [CHINA ECONOMICS WEB], Oct. 10, 2006, http://finance.ce.cn/law/home/rdpl/200610/10/t20061010_8892865.shtml.

³ See *She hui tuan ti deng ji guan li tiao li* [Regulations on Registration and Management of Social Organizations] arts. 27-28 (promulgated by the St. Council, Oct. 25, 1998, effective Sept. 25, 1998) [hereinafter SO Regulation].

⁴ See sources cited *supra* note 2.

⁵ See sources cited *supra* note 2.

⁶ See *ZHONGGUO XIANFA* art. 35 (1982) (P.R.C.). A Chinese version of the Chinese Constitution is available at http://www.law-lib.com/law/law_view.asp?id=82529, and an English version is available at http://english.gov.cn/2005-08/05/content_20813.htm.

2000 and January 2004, the MoH denied administrative inaction. MoH claimed that it had actively dealt with the matter and communicated to the plaintiffs orally that their application materials were deficient. MoH also offered a substantive reason why it had not granted Dong's request (although from a legal perspective none was necessary on this procedural claim): as Dong had been told via telephone, it was not necessary to set up the proposed Eye Care Association because the MoH had already established the China Medical Association, within which there is a sub-association on eye care, and there is another eye-related association under MoH, the Association for Prevention of Blindness. On December 27, 2006, the court ruled in favor of the MoH.⁷ The legal basis for the court's ruling was not reported in the media, and the legal opinion of this case is not available to the authors. When interviewed, Dong replied firmly that he will appeal all the way up to the Supreme Court.⁸

Dong Jian's experience illustrates the difficulties faced by independent or so-called "grassroots NGOs" – a term used to distinguish citizen-led efforts from organizations that are nominally independent, but in fact are often established by and retain close ties to the state, known as "government-organized NGOs" or "GONGOs" – in China today. The Chinese government's position toward grassroots NGOs is seldom outright prohibition; the law provides a path to legal status, and a proposed organization merely needs to obtain the support of the relevant government agencies. But support is entirely at agencies' discretion and seldom granted in practice. Most independent NGOs thus operate outside the supervisory gazes of sponsoring agencies and the MCA in various quasi-legal states – a situation which the state is aware of and which it variously cracks down upon, tolerates, or even encourages by partnering with these organizations, when useful to state ends. This paper seeks to take a closer look at the regulatory environments of three types of grassroots NGOs in China today – domestic NGOs, foreign NGOs, and foundations – through a series of case studies. These case studies, it is hoped, will provide a rough picture of the barriers to full legal status under the MCA in practice, as well as the effects of lack of MCA registration on NGOs' operations. From there, we hope to draw some preliminary conclusions about whether, in fact, the registration issue matters beyond the level of mere principle, and if so, to provide some suggestions about how the problems seen might be remedied.

Part II provides the theoretical framework and historical background upon which our research builds. Part III presents an overview of the laws relevant to NGO registration and regulation as presented on the books in

⁷ Wang Yijun, "Ai yan xie hui" fa qi ren zhuang gao wei sheng bu xing zheng bu zuo wei bai su ["Eye Care Association" Founder Who Accused the Ministry of Health of Malfeasance Loses Suit], ZHONGGUO QING NIAN BAO [CHINA YOUTH DAILY], Jan. 1, 2007, available at http://news.xinhuanet.com/legal/2007-01/09/content_5582069.htm.

⁸ *Id.*

China today. Part IV then moves to the law as experienced in practice by grassroots NGOs, presenting the findings of a series of interviews conducted in Beijing and via telephone in Cambridge, Massachusetts in summer 2006 and winter 2007. Part V assesses the degree to which the registration issue affects NGOs’ work, concluding that it does appear to contribute to a “chilling effect” on NGO activities and creates an unhealthy environment for NGO growth. Part VI then examines how both NGOs and the government might build the trust necessary to remedy the flaws that force independent NGOs outside of the current regulatory framework. Part VII concludes.

II. BACKGROUND

A. *Defining Civil Society and Its Relationship to the State*

While it is not the focus of this paper to review and present various theories of civil society and the relationship between state and society, any analysis of state regulation of NGOs, generally considered the prototypical institutions of civil society, must begin from a normative stance on the value of these institutions. For that reason, we think it worthwhile at the outset to set forth a working definition of civil society that this paper will use, as well as our general position on the role of civil society so defined.

A broad definition of civil society could include all associational activity that falls between the realms of the family or kinship group, at the bottom, and the state, at the top. In the Chinese context, some scholars, especially in the early 1990s, viewed the market as part of civil society and thought that the very success of market reform in China signaled the triumph of civil society.⁹ This dichotomous view of state and civil society has a historical background. The state dominated society for decades before the reform and opening-up of 1978, and there was little room for and few voices heard from society as an independent entity. In light of this past, the very existence of a private economic sector outside of the state and its growing impact on the social fabric of Chinese society since the reform were historic developments then.

However, in recent years, an increasing number of scholars in China have accepted a tripartite view: state, market, and civil society.¹⁰ They

⁹ See Yu Jianxing, *She hui zhu yi shi min she hui de dang dai ke neng xing* [*The Contemporary Possibilities of a Socialist Civil Society*], WEN SHI ZHE (J. LITERATURE, HIST. & PHIL.), Issue 1, 2003, at 76; see also Li Yiyu, *Dang dai Zhongguo she hui yan jiu zong su—jian lun gong min she hui yan jiu jin lu* [Overview of Contemporary Research on Chinese Civil Society and Its Future Directions], <http://www.lw007.net/wx/054511491937704.htm> (last visited Jul. 5, 2008).

¹⁰ See Li, *supra* note 9. Li discusses several scholars who initiated the tripartite view. For instance, Tong Shijun pointed out the “third dimension” and the subtle relationships between civil society and the political and economic domains; Chen Yanqing analyzed the changing definition of civil society from one involving the

suggest disaggregating the economic sphere from civil society and think that civil society should be conceived to constitute primarily the social and cultural domains. These scholars are concerned that the ever-expanding economic sector and the ever-increasing commercialization resulting from economic expansion could damage the independence of civil society. The gradual shift in the definition of civil society, in part, reflects that Chinese society has become more plural, and in the process an embryonic civil society, outside of the economic domain, has been emerging.

For our present paper, we define civil society through the tripartite framework: all non-state, nonprofit entities organized above the level of the family or kinship group fall within the realm of civil society. In the Chinese context, the boundary between state and non-state entities can be hard to draw. Entities range in their distance from the state, from those that were initially established by and continue to receive guidance and funding from the government to those “bottom-up” organizations initiated by ordinary citizens and receiving no state assistance. Our definition is very inclusive, embracing GONGOs that continue to be closely led by the government, independent grassroots NGOs, and everything in between, because in our view all are contributing to the building of civil society in China today. However, because this field is large and based on the composition of our interviewees, as discussed further below, the focus of our discussion is on those grassroots NGOs on the most independent end of the spectrum.

But what is the proper role of this so-called “third sector”?¹¹ Civil society has many virtues. First, civil society may serve as a countervailing force against an oppressive government.¹² Even if the government is constituted such that different branches of government check and balance each other, civil society may serve as the ultimate check on the potential abuse of public power if these safeguards fail to work properly. Second, civil society can organize the public for democratic participation,¹³ and this participation in associations may inspire interest in public affairs. Civil society can provide a public sphere where people get together and engage in rational-critical debate about public issues.¹⁴ Third, participa-

economic domain and based on private exchanges toward one emphasizing the social and cultural realms; and Wang Xinsheng asserted that civil society represents the social space consisting of the public sphere, family, and other “needed systems.” See also Yu, *supra* note 9.

¹¹ For the following section, we borrow extensively from Robert C. Post & Nancy L. Rosenblum, *Introduction to CIVIL SOCIETY AND GOVERNMENT* 1 (Robert C. Post & Nancy L. Rosenblum eds., 2002), as the ideas therein are representative of a school of thought with which we agree.

¹² See *id.* at 17.

¹³ See *id.* at 18.

¹⁴ See generally JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (1989).

tion in civil society could inculcate civic values and socialize people to be responsible citizens.¹⁵ Civil society could serve as a training ground to build skills and confidence in self-government and the capacity to self-help. Fourth, civil society helps build social trust, create social networks, and increase social capital.¹⁶ On a personal level, civil society may provide a space beyond the family unit for human beings to fulfill their needs for self-expression and a sense of belonging and identity. Participation in various associations helps develop the personality and identity of an individual to its fullest potential. Civil society can be as plural as human imagination, and pluralism is the essential character of civil society, as Isaiah Berlin observes on the historicity of human nature: human identities cannot be other than local and particular, and this diversity is not transitory.¹⁷ Finally, various associations in civil society provide important public goods, especially when the government and market fail to function properly or adequately.¹⁸ In short, a vibrant civil society is indispensable for democracy and rule of law. The specter of totalitarianism and authoritarianism often originates from the weakening of civil society, where its members are atomized and under-organized.¹⁹

However, civil society is not without vices. First, within civil society, some groups and associations can wield tremendously disproportionate power and resources, potentially allowing them to capture and co-opt the state and leading to private engrossment of collective resources.²⁰ Second, civil society could become a source of private oppression, particularly when social norms sanction outright discrimination and hatred among social groups. Indeed, civil society, if ill-structured, can be so truncated, segmented, or balkanized into an aggregate of groups defined by ascriptive features, such as heredity, race, ethnicity, or caste, that individuals lose their freedom to voluntarily enter and exit these groups.²¹ Third, not all civil groups are civilizing: they can amplify self-interest, encourage arrant interest-group politics, exaggerate cultural egocentrism, and inculcate ethnic hatred.²² Finally, there may be dangers of an over-organized civil society in that politicized groups could be so many and societal interests so dispersed and divided that crises of ungovernability could result. Occasional compromise among various social and political

¹⁵ See *id.*

¹⁶ See generally ROBERT D. PUTNAM WITH ROBERT LEONARDI & RAFFAELLA Y. NANETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

¹⁷ See Post & Rosenblum, *supra* note 11, at 3.

¹⁸ See LEON E. IRISH ET AL., *GUIDELINES FOR LAWS AFFECTING CIVIC ORGANIZATIONS* 15-16 (2d ed. 2004).

¹⁹ See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951).

²⁰ See STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS* (1995).

²¹ See Post & Rosenblum, *supra* note 11, at 7.

²² See *id.* at 19.

groups and between civil society and a strong yet limited government, rather than constant stark confrontations, is a crucial norm for political interaction. In sum, in the absence of some common values of justice to hold society together and a functioning state capable of enforcing those common values, civil society could turn into an anarchic jungle. To avoid this scenario, the state must maintain sufficient independence to avoid excessive influence or control by particular interests in civil society—though in the real world, influence and control are a matter of degree. In this sense, a limited government is distinguished from a weak government.

Thus, the relationship between state and civil society should be balanced. State has the responsibility to provide public goods, including at a minimum civil peace, to a level of intervention and regulation that is varied from society to society. There is no uniform model or standard on what level of intervention and regulation can be tolerated, and different standards can be deeply rooted in different traditions and cultures. Again, it is a matter of degree and at some point the intervention and regulation would be deemed to cross the borderline. Nevertheless, we think that some forms of regulation and intervention are necessary for the healthy development of civil society. In this regard, Chinese society must develop its own equilibrium of state-society relations.

Chinese scholars of civil society have yet to embrace the so-called “western liberal” view that state regulation should be kept to a minimum and civil society has the capacity to organize and sustain itself from below.²³ Instead, their ideal model is a relationship of “positive interaction” (良性互动) between the state and civil society.²⁴ In recent years, some scholars have promoted a new concept of “socialist civil society”²⁵ to signify and expand essentially the same idea and try to distinguish it from the “western liberal” view.²⁶ In contrast, many in countries with

²³ See Yu Jianxing & Zhou Jun, *Zhongguo gong min she hui yan jiu de xin jin zhan* [The Latest Developments in the Study of Civil Society in China] (Apr. 10, 2007), <http://www.chinaelections.org/NewsInfo.asp?NewsID=106535>.

²⁴ See Deng Zhenglai & Jing Yuejin, *Jian gou Zhongguo de shi min she hui* [Constructing China's Civil Society], *ZHONGGUO SHEHUI KEXUE* [SOC. SCI. IN CHINA], 1st Issue, 1992.

²⁵ See Yu & Zhou, *supra* note 23. According to Yu and Zhou, “socialist civil society” was first coined by John Krane in *Public Life and Late Capitalism: Toward a Socialist Theory of Democracy* (1984).

²⁶ See *id.* See, e.g., Yu Keping, *She hui zhu yi shi min she hui: yi ge xin de yan jiu ke ti* [Socialist Civil Society: A New Research Project], in ZENG LIAN MIN ZHU YU SHAN ZHI [INCREMENTAL DEMOCRACY AND GOOD GOVERNANCE] 194-204 (2003); He Zengke, *Shi min she hui, she hui zhu yi yu she hui zhu yi shi min she hui—ba jiu shi nian dai yi lai guo wai shi min she hui yan jiu zong su* [Civil Society, Socialism, and Socialist Civil Society—An Overview of Research on Civil Society in Foreign Literature Since 1980s and 1990s], <http://www.cctb.net/zjxz/xscgk/200502240712.htm> (last visited Jul. 5, 2008); Wang Zhaoliang & Zhu Meifu, *Jian xi shi min she hui yu she hui zhu yi*

collapsed communist regimes have embraced the “social self-organization of society” as an ideal.²⁷ Apart from the usual suspicion that Chinese scholars may not be allowed to speak out as freely as they want, there appears to be genuine concern among scholars about the problems that arise in the aftermath of the collapse in many former communist regimes, and as a result, they are uncertain about the consequences of upholding a “western liberal” view of civil society.²⁸

In our view, “positive interaction” may capture a vision of the state-society relationship that, in the long term, would allow the two sides to move between checking one another’s dangerous tendencies on some occasions, and working in partnership on others. Admittedly, achievement of certain of the potential virtues of civil society – such as a check-and-balance function vis-à-vis the state – would require a degree of independence that may not be possible in current China, or even in China’s near future. However, given the country’s current political environment, encouragement of state-society partnership may hold great promise: at the outset, perhaps the state’s power to check civil society will be greater than civil society’s power to check the state, but trust built through partnership may lead to a more equal balance of power over time, such that both can (quite rightly) check each other in the long term.

The corporatist model, however, does not allow sufficient room for positive interaction to grow into a more robust system of a well-rounded society with checks and balances on all sides. Philippe Schmitter has defined corporatism as:

[A] system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.²⁹

As this article will discuss, this view of non-state actors’ societal roles essentially as exclusive conduits for certain interest groups’ views to the state, through a path defined by the state, pervades the regulatory framework for civil society in China today. But corporatism fails to adequately

shi min she hui—jian lun she hui zhu yi shi min she hui de te zheng [A Brief Analysis of the Relationship Between Civil Society and the Market Economy and also a Discussion on the Characteristics of Socialist Civil Society], ANHUI U. GAZ., Dec. 2000, at 59.

²⁷ See Vaclav Benda et al., *Parallel Polis, or an Independent Society in Central and Eastern Europe: An Inquiry*, 55 SOC. RES. 211, 245 (1988); see also Post & Rosenblum, *supra* note 11, at 24 n.20.

²⁸ See Yu & Zhou, *supra* note 23.

²⁹ Philippe Schmitter, *Still the Century of Corporatism?*, 36 REV. POL. 85, 93-94 (1974).

define civil society's role in the state-society relationship both from a normative and from an empirical perspective. From a normative perspective, corporatism is not appealing because it runs directly counter to pluralism as an essential character of civil society. From an empirical perspective, corporatism does not capture the complexities and fluidity of the relations between the state and the various associational forms in practice. As shown in our interviews³⁰ and as convincingly argued by many scholars,³¹ many NGOs have found creative ways to operate outside the corporatist hierarchical structure, thereby undermining the corporatist model by nonetheless introducing pluralism and even competition in a given field. For the purposes of this paper, then, our view of civil society acknowledges the possibilities in something less than the western liberal conception of full independence from the state, but stops short of accepting that civil society can exhibit the "virtues" described above within a corporatist structure.

B. *The Regulation and Growth of NGOs in China Since 1978*³²

The regulatory environment for independent NGOs in China can be characterized as a roller coaster, beginning at ground level of near zero tolerance in 1978 and generally trending upward in both level of permissibility and number and variety of organizations, punctuated by a few major plummets. Regulatory liberalization and growth have remained, however, a step or more behind reform and growth in the economic sector. This delay is natural, since from the state's perspective, liberalization in the realm of civil society has largely been a reactive measure in response to perceived need arising from change in the economic realm. It is said that by the 1980s the state realized it lacked the capacity to provide all necessary social services in the face of privatization and economic growth, and by the mid-1990s it had adopted the slogan "small govern-

³⁰ See *infra* Part IV.

³¹ See, e.g., Jude Howell, *New Directions in Civil Society: Organizing Around Marginalized Interests*, in GOVERNANCE IN CHINA 143, 155-65 (Jude Howell ed., 2004); Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 CHINA Q. 124 (2000).

³² From the Communist takeover in 1949 until the late 1970s, China's civil society was almost totally suppressed. Almost all voluntary associations in rural China disappeared. Only a few political parties (accepting guidance from the Communist Party) and Party-led organizations were allowed to exist. In the early 1950s, there were only 44 national social organizations; in 1965, less than 100 national organizations, and just about 6,000 local social organizations existed. True change began only in late 1970s after the reform and opening-up, and our discussion begins from there. See generally Karla Simon, *Reform of China's Laws for NPOs – A Discussion of Issues Related to Shiye Danwei Reform*, 2005 ZEITSCHRIFT FÜR CHINESISCHES RECHT 71, 77-78; Yu Keping, *Zhongguo gong min she hui de xing qi ji xi dui zhi li de yi yi* [The Emergence of Chinese Civil Society and Its Significance for Governance] (Apr. 8, 2003), available at <http://www.tecn.cn/data/detail.php?id=10721>.

ment, big society” to promote the role of civil society in providing social services that had heretofore been considered the responsibility of the state.³³ In general, the state has consistently viewed the role of NGOs to be that of a gap-filler, stepping in where the government has stepped out and serving as a bridge between the state and the people,³⁴ and the state’s regulatory policies have reflected this view. It is in moments when civil society’s potential to act beyond this limited capacity—as a site for participation and debate, as a check on governmental action through reflective critique, or even as an incubator for opposition to the state – rears its head that the Chinese government has, at least temporarily, drawn in the reins.

The 1980s saw a dramatic burst of NGOs in China. In Shanghai, for example, the number of social organizations (SOs) grew from 628 in 1981 to 2,627 in 1984, a period of just three years.³⁵ The growth of student associations, especially, has been described as “unprecedented.”³⁶ The regulatory framework, however, was slow to catch up, likely reflecting a combination of the government’s general acceptance of these new groups as part of the overall reform process and the government’s lack of awareness of the groups’ potential political power.³⁷ Under law, all officially sanctioned SOs continued to be considered a part of the state,³⁸ but citizen-organized groups fell outside of that realm and were seemingly of little concern.

This all changed, of course, in the spring of 1989. Protests in Tiananmen Square clearly demonstrated the capacity of student, worker, and city resident associations to push for political reform, and it was in the midst of the democracy movement that the state began to rethink its policy (or lack thereof) on NGOs.³⁹ Later that year, the state promulgated the 1989 Regulations on Registration and Management of Social Organizations.⁴⁰ These regulations introduced the dual management system, requiring approval and oversight by both the MCA and a supervisory agency in the NGO’s line of work, that remains in effect today.⁴¹ Periodic re-registrations gave MCA an additional chance to trim down the amount of NGO activity; in a 1991-92 round of re-registration, only

³³ See Qiusha Ma, *The Governance of NGOs in China Since 1978: How Much Autonomy?*, 31 *NONPROFIT & VOLUNTARY SECTOR Q.* 305, 306 (2002).

³⁴ See *id.* at 310.

³⁵ *Id.* at 309.

³⁶ *Id.*

³⁷ See *id.*

³⁸ See Karla Simon, *China Update*, 3 *INT’L J. CIV. SOC. L.* 56, 60 (2005).

³⁹ See Ma, *supra* note 33, at 309.

⁴⁰ She hui tuan ti deng ji guan li tiao li [Regulations on Registration and Management of Social Organizations] (promulgated by the State Council, Oct. 25, 1989, effective Oct. 25, 1989) (P.R.C.), translated in China Development Brief, <http://www.chinadevelopmentbrief.com/node/298>.

⁴¹ See Ma, *supra* note 33, at 309.

89,969 of the 118,691 applicants were accepted, and in a 1998-2000 round, the total number of registered SOs dropped from around 200,000 to 136,841.⁴²

Despite these periodic drops in the number of registered SOs, the NGO sector in China – including both registered and unregistered organizations – continued to grow rapidly through the 1990s, and in 1996 Jiang Zemin convened a special meeting of the Politburo Standing Committee specifically to consider how to manage these NGOs.⁴³ These discussions led to the 1998 promulgation of two important pieces of legislation: a new set of Regulations on Registration and Management of Social Organizations, and the Provisional Regulations on Registration and Management of Private Non-Enterprise Units (both to be discussed further below). Although in some respects the new regulatory regime was stricter than the old, in that it vested significantly more power in the MCA and its Bureau of Management of NGOs, it also introduced the important new legal form of the private non-enterprise unit (PNEU).⁴⁴ These institutions were to be nonprofit social service organizations, but were not to be membership-based, as SOs must be. Typical PNEUs are private schools, hospitals, or museums.⁴⁵ In practice, the barriers to entry for independent NGOs wishing to register as PNEUs have tended to be lower.

The most recent rounds of tightening of government policy toward NGOs have occurred in reaction to the Falun Gong protest in 1999 and the Color Revolutions that took place in Central and Eastern Europe between 2003 and 2005. Following the Falun Gong crackdown, the MCA issued a new regulation explicitly making unregistered organizations illegal and prohibiting their existence.⁴⁶ Nerves then calmed somewhat, allowing for the 2004 issuance of the Regulations on Management of Foundations (Foundation Regulation),⁴⁷ which were largely welcomed by the NGO community for their specificity, their inclusion of a registration method for foreign foundations, and their lack of a corporatist non-competition provision, as discussed further below. The dual management requirement was retained, however. This was most likely due to

⁴² *Id.*

⁴³ *See id.*

⁴⁴ For discussion of the reforms of NGO regulations that occurred in 1998 (with respect to SOs and PNEUs) and 2004 (with respect to foundations), including discussion of the new PNEU form, see Simon, *supra* note 38, at 80-82.

⁴⁵ *See* Simon, *supra* note 38, at 64-68.

⁴⁶ QU DI FEI FA MIN JIAN ZU ZHI ZAN XING BAN FA [PROVISIONAL RULES BANNING ILLEGAL NGOS] (PROMULGATED BY THE MINISTRY OF CIVIL AFFAIRS, APR. 10, 2000, EFFECTIVE APR. 10, 2000) (P.R.C.).

⁴⁷ Ji jin hui guan li tiao li [Regulations on Management of Foundations] (promulgated by the State Council, Mar. 8, 2004, effective June 1, 2004), ST. COUNCIL GAZ., *translated in* China Development Brief, <http://www.chinadevelopmentbrief.com/node/301> [hereinafter Foundation Regulation].)

increased concern about foundations’ subversive potential after the first of the Color Revolutions, which occurred immediately before the Regulations’ issuance.⁴⁸ A very close-to-final draft did away with the requirement of a government supervising agency, but this requirement was re-introduced at the last minute and appeared in the promulgated Regulation, much to the disappointment of the NGO community.⁴⁹ Since the Foundation Regulation came out, the number of revolutions or attempted revolutions associated with the “Color Revolutions” model has increased, and many blame the current stall in the Regulation’s implementation on governmental fears stemming from these incidents. In addition, crackdowns on some prominent independent NGOs have been attributed to Color Revolution fears; for example, Unirule Institute of Economics and Shanghai Law and Economics Institute, two eminent independent think-tanks, were closed.

Nonetheless, one recent development may point to a thawing in governmental attitudes: the Bureau of NGO Management, currently a department of the Ministry of Civil Affairs, has been given a staff increase of thirty and the word “National” (国家) has been appended to the front of the bureau’s name, signaling a possible promotion to a vice-ministerial level and, more generally, increased attention and resources devoted to the issue of NGOs.⁵⁰

Despite the restrictive laws and regulations on the books and the volatile political environment, China’s NGO sector continues to grow. As of the end of 2006, there were 346,000 officially registered NGOs in China. Among them, 186,000 were SOs, 159,000 were PNEUs, and 1,138 were foundations.⁵¹ Estimates of the total number of NGOs in China vary greatly, ranging from two million to eight million. The wide difference in the estimates points precisely to the problem to be explored below: no one knows how many NGOs there are in China, because a majority of

⁴⁸ It is widely acknowledged that student-based NGOs, funded almost exclusively by foreign foundations such as George Soros’s Open Society Institute, played an instrumental role in the so-called Color Revolutions. For a discussion of the role of civil society in revolutions in the former Yugoslavia, Georgia, and the Ukraine, see *Reclaiming Democracy: Civil Society and Electoral Change in Central and Eastern Europe* (Joerg Forbrig & Pavol Demes eds., 2007). These events naturally raised concern within the Chinese government, both about the potentially subversive role of NGOs generally and, more specifically, about the possibility of foreign foundations funding NGOs likely to take stances politically adverse to the Party.

⁴⁹ Interview with Director of Organization A (Jan. 26, 2007) (on file with authors) [hereinafter Interview A].

⁵⁰ See Sun Weilin, Head of National Bureau of NGO Management, Zai quan guo min jian zu zhi guan li gong zuo shi pin hui shang de jiang hua [Speech at the National NGO Management Conference] (Jan. 31, 2007), <http://www.chinanpo.gov.cn/web/showBulletin.do?id=25790&dictionid=3500&catid=350012>.

⁵¹ *Id.*

them are unregistered or registered as commercial enterprises due to the great difficulty of registration.

III. SUMMARY AND ANALYSIS OF CURRENT NGO LAWS AND REGULATIONS

There are currently three major pieces of NGO legislation at the national level, all of which were promulgated by the State Council as agency regulations. These regulations classify NGOs into three main categories: social organizations (SOs), private non-enterprise units (PNEUs), and foundations. The 2004 Foundation Regulation is currently the only NGO legislation that allows a foreign citizen to act as the legal representative of an NGO⁵²; only Chinese citizens can incorporate, manage, and participate in SOs and PNEUs.

The MCA is the main government agency in charge of issuing implementing rules and interpreting NGO regulations. However, other government agencies also have significant power to set parameters on how to regulate NGOs. For instance, the State Administration of Taxation sets policies on the tax-deductibility of donations and any tax exemptions or benefits that an NGO may enjoy⁵³; the Ministry of Finance sets standards on fees that NGOs may charge for membership or other activities⁵⁴; and, depending on whether it is a civil or criminal matter, the Ministry of Public Security or the police will have the power to discipline NGOs for any irregularities.⁵⁵ Making the legal and regulatory landscape even more fragmented, local bureaus of the MCA and other relevant government agencies issue their own implementing rules that may differ significantly from locality to locality. Beijing is considered to be the most conservative in NGO registration and management due to its political sensitivity, while other provinces such as Yunnan and Guangdong take a relatively more liberal approach toward NGO management.⁵⁶

⁵² See Foundation Regulation, *supra* note 47, art. 24. Article 23 of the Foundation Regulation stipulates, however, that the legal representative of a public foundation or of a foundation whose original funds are of domestic origin must be a legal resident of mainland China.

⁵³ See Gong yi shi ye juan zeng fa [Public Benefit Donations Law] (promulgated by the Standing Comm.Nat'l People's Cong., June 28, 1999, effective Sept. 1, 1999), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. arts. 24-25 (P.R.C), translated in China Development Brief, <http://www.chinadevelopmentbrief.com/node/299>; see also INT'L CTR. FOR CIV. SOC'Y LAW, IMPORTANT DEVELOPMENTS IN CHINA'S LEGAL AND FISCAL FRAMEWORK FOR THE SUPPORT OF CIVIL SOCIETY 2-3 (2007), available at http://www.iccsl.org/pubs/China_Fiscal_Changes_March_07.pdf.

⁵⁴ See SO Regulation, *supra* note 3, art. 29.

⁵⁵ *Id.* art. 35

⁵⁶ See Interview A, *supra* note 49.

A. Key Provisions of the Regulation on Social Organizations

1. Dual Management System

The 1998 SO and PNEU Regulations and the 2004 Foundation Regulation all impose a dual management system. In order to incorporate an association under this system, a group must first seek a government sponsor, known as a professional supervising unit (业务主管单位) colloquially known as “mother-in-law”), and then register with the MCA or its local counterpart. The government sponsor has the duty to supervise and monitor the operations of the resulting SO, PNEU, or Foundation.⁵⁷

Any Party or government agency at the national, provincial, or city level can act as a supervising sponsor, and the government can also certify a GONGO to be the sponsor for other NGOs.⁵⁸ This structure would appear to give NGOs a large number of potential sponsors, but this choice is limited because the NGO’s proposed major activities must fall within the professional responsibilities of the would-be sponsor.⁵⁹ For instance, a health-related NGO must seek the sponsorship of the Ministry of Health or its local bureau. This requirement may be an issue for an NGO that wants to conduct activities in many different areas. The problem is particularly significant for foundations, which usually work in multiple sectors.

In practice, the dual management requirement has proved to be the most difficult hurdle for grassroots NGOs to surmount in gaining legal status. In order to secure the support of a government supervisory agency, the founders of an NGO must cultivate personal relationships with government officials to develop trust and connections. From a government agency’s perspective, acting as a sponsor to a grassroots NGO creates many new duties, responsibilities, and political risks,⁶⁰ but reaps few benefits. The extreme difficulty of finding a government sponsor is widely considered to be the major reason why over 90% of NGOs in China are either underground and unregistered or registered as commercial enterprises.

Nevertheless, a government agency will itself set up an SO, act as its sponsor, and then register with the MCA or its local bureau when it considers this in line with its interests. For instance, during government reshuffles (精简机构), a government agency might set up an SO in order to shed its redundant staff or to retire its senior officials into the SO,

⁵⁷ See *id.* arts. 6-9, 28; Min ban fei qi ye dan wei deng ji guan li zan xing tiao li [Provisional Regulations on Registration and Management of Private Non-Enterprise Units] (promulgated by the St. Council, Sept. 25, 1998, effective Sept. 25, 1998) St. COUNCIL GAZ. arts. 5-8 (P.R.C.), translated in China Development Brief, <http://www.chinadevelopmentbrief.com/node/300> [hereinafter PNEU Regulation]; Foundation Regulation, *supra* note 47, art. 7.

⁵⁸ See SO Regulation, *supra* note 3, art. 6.

⁵⁹ *Id.*

⁶⁰ See *id.* art. 28.

granting them honorary titles and positions in the new organization.⁶¹ Government agencies also often set up GONGOs to raise external sources of funding.⁶²

2. Non-Competition and No Branching Out

The non-competition, anti-branching, and anti-networking provisions in the SO Regulation represent the government's traditional view of the corporatist state-society relationship in China. First, the non-competition provision stipulates that only one SO operating in a particular field is allowed to exist in a given administrative region (city, provincial, or national).⁶³ For instance, if there is already a national AIDS NGO, a similar organization could register only at the provincial or city level. This limitation reflects the Party's corporatist view of the state-society relationship, considering SOs' purpose to be to serve as a bridge between the state and society by representing the interests of various constituent groups—for example, those with AIDS or, more traditionally, women or the disabled—at a given administrative level.⁶⁴

Second, the SO Regulation prohibits branching across administrative units.⁶⁵ The administrative level of the government sponsor dictates the regional limitation within which an NGO can conduct its proposed activities. For instance, a city-level SO can branch within the city, but cannot conduct activities outside of its registered city. If an SO wishes to conduct activities in multiple cities of the same province, it has to seek a provincial-level government sponsor and register at that level. And if an NGO wants to conduct activities in cities outside its home province, to apply the language of the regulation literally, the NGO would have to seek a ministerial-level sponsor and register a national NGO to legally carry out its mission. Even national NGOs cannot establish branches in different regions; rather, they are merely enabled to conduct pan-China activities. This provision potentially puts many grassroots NGOs in jeopardy because it is rather typical for NGOs registered locally to conduct their activities across China. Many of the grassroots NGOs that we interviewed have projects in different provinces.

Third, the legal representative of one SO cannot be the legal representative of another SO.⁶⁶ This provision is likely intended to prevent de facto branching, whereby sister organizations with separate legal identities in their respective administrative regions could in fact act as a single organization under a single leader. This provision may create hurdles for

⁶¹ See Interview A, *supra* note 49; Howell, *supra* note 31, at 158; Simon, *supra* note 38, at 74.

⁶² See Howell, *supra* note 31, at 158.

⁶³ See SO Regulation, *supra* note 3, art. 13, cl. 2.

⁶⁴ See Schmitter, *supra* note 29, at 93-94.

⁶⁵ See SO Regulation, *supra* note 3, art. 19.

⁶⁶ See *id.* art. 19.

NGOs trying to form closer networks or alliances and thus complicate the sharing of information and human resources.

SOs are membership-based organizations and may be more politically sensitive than other types of NGOs. The highly restrictive provisions against pluralism, branching, and networking are very likely due to government concerns over an SO becoming a rival power and thus threatening the political position of the Chinese Communist Party. Therefore, national-level NGOs are presumably the hardest NGOs to register and the most closely monitored and controlled by the government.

3. Potential for Abuse of Police Power

According to Article 4 of the 1998 SO Regulation, an SO must not endanger the integrity and safety of the state and the unity of all ethnicities, and must not violate the state interests, public interests, or public morals. The terms of this provision are very vague and broad, leaving the door open for abuse of the state's police power.

Another provision that raises particular concern for many grassroots NGOs is Article 35, which stipulates that an unregistered NGO operating in the name of an SO could be subject not only to civil, but also to criminal liability. According to Article 54 of the Law on Public Security Administrative Punishments, a person convicted under this provision could be subject to up to 15 days in prison and a fine of up to 1,000 RMB.⁶⁷ Given that many NGOs across China are not officially registered, this provision could be viewed as an axe always hanging over their heads.

4. Exempted Organizations

According to Article 3 of the 1998 SO Regulation, some organizations are exempted from the registration requirement. These organizations include those that participate in political consultative meetings, such as the Chinese Communist Party-sanctioned eight political parties and nine other associations including the All-China Federation of Industry and Commerce, the Communist Youth League, and the All-China Women's Federation. Other exempted organizations include fourteen well-known GONGOs, such as the China Writers' Association, the Song Qingling Foundation, and the Red Cross Society of China.⁶⁸ These GONGOs are usually considered to have government status and are often viewed as part of the government bureaucracy.

What is more interesting is the third clause of Article 3, which states that any organization that is set up by a government entity or an SO and

⁶⁷ Zhi an guan li chu fa fa [Law on Public Security Administrative Punishments] (promulgated by the Standing Comm.Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. art. 54 (P.R.C.).

⁶⁸ For a complete list of these exempted GONGOs see <http://mzj.sh.gov.cn/gb/shmzj/node8/node15/node55/node235/node283/userobject1ai8070.html>.

that conducts its activities within such entity is exempted from registration. In practice, many NGOs take advantage of this provision and find a way to gain semi-legal status by attaching themselves to a governmental or semi-governmental entity that holds more liberal attitudes toward NGOs. Universities are a common example of such liberal entities that shelter and sponsor grassroots NGOs.⁶⁹

Some GONGOs find it in their financial interest to offer shelter to grassroots NGOs in exchange for membership fees. The sheltered NGOs are thus exempted from registration. Sometimes, GONGOs may even formally sponsor NGOs for second-tier SO status by acting as their supervising unit and allowing them to register with the MCA or its local bureau. The legal status of a GONGO is a precious resource. A grassroots NGO can take advantage of the affiliation with such a GONGO and gain legitimacy and important government connections, though often at a high price. For instance, one such GONGO⁷⁰ under the MCA sponsors NGOs and charges them annual membership fees as high as RMB 200,000 (US\$ 25,900).⁷¹

B. *Key Provisions of the Private Non-Enterprise Unit Regulation*

The Private Non-Enterprise Unit (PNEU) form, first created by the 1998 Provisional Regulations on Registration and Management of Private Non-Enterprise Units (PNEU Regulation), is a special category of NGO in the Chinese context. By definition, a PNEU is a privately-run non-commercial unit (民办事业单位), and its main purpose is to provide social services,⁷² mainly in the fields of education, public health, technology, and sports. These facilities historically have been almost entirely state-run and state-owned, but with economic reforms starting in the late 1970s, private institutions have gradually proliferated. The 1998 PNEU Regulation formally recognized the legal status of these privately-run entities and granted them nonprofit status. However, in practice, a majority of the PNEUs are for-profit entities, such as private schools and hospitals. The PNEU sector has been growing very rapidly since the promulgation of the Regulation. As of December 31, 2006, a total of 159,000 PNEUs have been registered,⁷³ accounting for about 46% of all regis-

⁶⁹ See Howell, *supra* note 31.

⁷⁰ See Interview with President of Organization C (Jan. 30, 2007) (on file with authors) [hereinafter Interview C]. This GONGO, supposedly set up for a charitable purpose, in fact does only limited charity work, conducts many commercial activities, and engages in the real estate business.

⁷¹ *Id.*

⁷² See PNEU Regulation, *supra* note 57, arts. 1, 2.

⁷³ See Sun, *supra* note 50.

tered NGOs in China. Roughly one-half of these PNEUs are private schools.⁷⁴

Many key provisions of the PNEU Regulation are the same as those in the SO Regulation, such as the dual management system and non-competition within an administrative region.⁷⁵ The PNEU Regulation also includes the same broad and vague language subject to abuse by the state police power as in Articles 4 and 35 of the SO Regulation.⁷⁶ One provision of the PNEU Regulation is even more restrictive than its equivalent in the SO Regulation: a PNEU is not allowed to branch, even within its registered administrative region.⁷⁷ This provision is hard to rationalize, particularly in light of the fact that a majority of the registered PNEUs are private schools. Perhaps the government is concerned that the state-run noncommercial units (especially state-run schools and hospitals) are not ready to compete with PNEUs, and a restriction on the growth of PNEUs could give state units some breathing room, at least in the near term.

A PNEU, unlike an SO, cannot be a membership-based organization.⁷⁸ Its main purpose is to provide social services, and thus its work is usually seen as less politically sensitive. Current government policies actually favor further growth in the PNEU sector, as stated in a recent MCA work report.⁷⁹ Although the possibility of registering as an SO is still quite remote for grassroots NGOs, the threshold for registering as a PNEU seems to have been lessened in recent years. A few of the grassroots NGOs we interviewed have successfully established or are in the process of establishing PNEUs in regions outside Beijing, though the parent organizations still retain their commercial enterprise status in Beijing. The main benefit of being a PNEU is the nonprofit status and the legitimacy attached to it.

The PNEU Regulation may represent a first attempt by the government to create a tiered-management structure, to create and treat different types of NGOs somewhat differently. Though on paper the SO Regulation and the PNEU Regulation share many key provisions, in practice, the implementing policies and the government attitudes towards SOs and PNEUs seem to have diverged.

⁷⁴ See Zhao Yong, *Min ban fei qi ye dan wei you guan fa lu wen ti zhi si kao* [Thoughts on the Legal Issues of PNEUs], in *ZHONGGUO FEI YING LI ZU ZHI FA LU MO SHI LUN WEN JI* [COLLECTED ESSAYS ON THE LEGAL MODELS OF CHINESE NONPROFIT ORGANIZATIONS] 220 (2005).

⁷⁵ See PNEU Regulation, *supra* note 57, arts. 5,8, 13.

⁷⁶ See *id.* arts. 4, 27.

⁷⁷ See *id.* art. 13.

⁷⁸ See *id.* art. 2.

⁷⁹ See Sun, *supra* note 50.

C. Key Provisions of the Foundation Regulation

The Foundation Regulation was promulgated in March 2004. Two of its major characteristics are that for the first time, a foreign NGO, other than a chamber of commerce,⁸⁰ could legally establish its presence in China as a nonprofit entity,⁸¹ and that foreign citizens, although subject to a three-month residency requirement for some key management staff, are allowed to incorporate and participate in domestic private foundations.⁸²

Unlike the 1998 SO and PNEU Regulations, the Foundation Regulation includes elaborate requirements and standards for internal governance and financial management, an important feature for ensuring internal good governance for NGOs. However, as mentioned above, the Foundation Regulation was less innovative than hoped in that it retained the dual management requirement seen in the SO and PNEU Regulations.⁸³ The government sponsor must be an agency at least at the provincial level, which is more restrictive than the SO and PNEU Regulations.

1. Classification of Foundations

The Regulation has separate provisions for domestic foundations and for representative offices of foreign foundations.⁸⁴ A domestic foundation can be classified as a national foundation or a regional (provincial) foundation and can be further classified either as a private or public foundation, depending on whether the funds are publicly raised.⁸⁵ Foreign foundations are not allowed to raise funds inside China.⁸⁶ A national foundation, the representative office of a foreign foundation, or any foundation whose legal representative is not a mainland Chinese citizen has to register with the MCA and secure the backing of a ministerial-level government supervising agency or a sponsor recognized by the State Council.⁸⁷ As mentioned above, a foreign citizen may serve as a legal representative or Chairman of the Board for a domestic private foundation, though it is yet to be seen whether this will be allowed in practice. At a minimum, foreign citizens or citizens from Hong Kong, Macau, or

⁸⁰ See *Wai guo shang hui guan li zan xing gui ding* [Provisional Regulations on Management of Foreign Chambers of Commerce] (promulgated by the St. Council, June 14, 1989, effective July 1, 1989) (P.R.C.).

⁸¹ See Foundation Regulation, *supra* note 47, arts. 6, 13-14.

⁸² See *id.* art. 24.

⁸³ See *id.* art. 7.

⁸⁴ Article 13 of the Foundation Regulation specifies the registration requirements for representative offices of foreign foundations.

⁸⁵ See Foundation Regulation, *supra* note 47, art. 8.

⁸⁶ See *id.* art. 25.

⁸⁷ See *id.* art. 7.

Taiwan can assume important management positions of a foundation and thus potentially control its operations in significant ways.

2. Branching

Unlike SOs and PNEUs, a foundation is not forbidden from branching out. However, to set up branches, the foundation must apply to the MCA or its provincial counterpart for approval, and the civil affairs bureaus have the discretion to deny the application.⁸⁸

3. Capital Requirement

The capital requirement to set up a foundation is very high, a minimum amount of RMB 2 million (about \$260,000) for a private foundation.⁸⁹ The capital requirement for a national foundation is at least RMB 8 million (about \$1.04 million), while that for a regional foundation is RMB 4 million (about \$500,000).⁹⁰ These numbers represent minimums and localities may at their discretion require larger amounts. Moreover, while these funds may collect interest as an endowment, they must remain in the account at all times and thus cannot be used for programming activities.⁹¹

4. Standards for Internal Governance

The Foundation Regulation establishes very elaborate requirements for internal governance; the SO and PNEU Regulations, in contrast, have almost none. Key provisions include: 1) the board of directors must have between 5 and 25 members⁹²; 2) for private foundations established using the assets of a private individual, no more than a third of board members may be close relatives of that individual, and for other foundations, close relatives may not serve simultaneously as directors⁹³; 3) no more than a third of a foundation's board members may receive financial compensation from the foundation⁹⁴; 4) foundations should appoint a supervisory official (監事), who cannot be a member of the board, a close relative of a board member, or on the financial staff of the foundation⁹⁵; 5) persons currently employed by government agencies should not take the posts of chair or deputy chair of the board of directors, or secretary general⁹⁶; 6) the legal representative of the foundation may not concurrently represent

⁸⁸ See *id.* art. 12.

⁸⁹ *Id.* art. 8.

⁹⁰ *Id.*

⁹¹ See Interview with China Representative of Organization I (Mar. 2, 2007) (on file with authors) [hereinafter Interview I].

⁹² Foundation Regulation, *supra* note 47, art. 20.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* art. 22.

⁹⁶ *Id.* art. 23.

any other organization⁹⁷; and 7) a public or private foundation's legal representative should be a citizen of mainland China if the foundation's original funds are of domestic Chinese origin.⁹⁸

5. Financial Management Requirement

The Foundation Regulation also has very specific requirements for financial management. Key provisions include that: 1) the amount of money spent annually by public foundations on public benefit activities must not be less than 70% of the previous year's income, and private foundations' annual expenditure must not be less than 8% of the surplus from the previous year⁹⁹; and 2) a foundation may not allocate more than 10% of its total expenditure to cover staff wages and benefits and other overhead costs.¹⁰⁰

D. Tax Exemption and Deductibility

A key benefit to registering as an SO, a PNEU, or a foundation is that this status, combined with the nature of an NGO's activities, provides exemption from most significant taxes in China. China has no separate law specifically governing taxation of these organizational forms, but the SO, PNEU, and Foundation Regulations all stipulate that these organizations are "nonprofit" in nature¹⁰¹ and various provisions within the general tax laws make them virtually tax exempt.¹⁰² Preferential tax treatment may be possible for some organizations registered as commercial enterprises, but whereas registration with the MCA or its local branch in one of the three recognized NGO forms provides strong assurance of exemption, the local bureau of industry and commerce considers NGOs registered as commercial enterprises on a case-by-case basis.¹⁰³ As shall be seen below, in practice NGOs with commercial registration generally are taxed at normal business rates.

Registration as an SO, PNEU, or Foundation does not, however, ensure tax deductibility for the organization's donors. Tax deductibility is currently governed by the 1999 Public Benefit Donations Law.¹⁰⁴ The key provisions on what tax benefits donors can enjoy under the Public Benefit Donations Law can only be implemented by regulations to be

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* art. 29.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* art. 2; SO Regulation, *supra* note 3, art. 2; PNEU Regulation, *supra* note 57, art. 2.

¹⁰² See Xin Chunying & Zhang Ye, *China*, in PHILANTHROPY AND LAW IN ASIA 85, 101 (Thomas Silk ed., 1999); LEON E. IRISH, JIN DONGSHENG & KARLA W. SIMON, CHINA'S TAX RULES FOR NOT-FOR-PROFIT ORGANIZATIONS 12-16 (2004).

¹⁰³ See Xin & Zhang, *supra* note 102, at 101.

¹⁰⁴ Public Benefit Donations Law, *supra* note 53.

issued by the Ministry of Finance (MoF) and the State Administration of Taxation (SAT).¹⁰⁵ As of July 2006, the MoF and SAT had approved only sixty-two organizations whose donors could receive tax-deductions for their donations.¹⁰⁶ Donations to twenty-six organizations out of the sixty-two are fully deductible. For the other thirty-six organizations, individual donors can deduct up to 30% of taxable income, and corporate donors up to 3%.¹⁰⁷ The approved organizations are almost all GONGOs.

A number of reforms on the question of tax deductibility of donations are on the table, but not yet implemented, and are worth watching. First, it is reported that the number of organizations eligible to receive tax-deductible donations will continue to expand.¹⁰⁸ Indeed, in January 2007, the MoF and SAT issued a joint notice indicating that “all public benefit social organizations or foundations established upon approval of the civil affairs administrative department” would be eligible to receive tax-deductible donations, subject to a review conducted by MoF and SAT and designed to confirm the organization’s public benefit nature.¹⁰⁹ These reviews will undoubtedly take some time, however, and it is yet to be seen how stringent a barrier to tax deductibility MoF and SAT will continue to impose. Second, the recently revised Enterprise Income Tax Law, which took effect on January 1, 2008, increases the permissible charitable contribution deduction for corporate donors from the current 3%

¹⁰⁵ See *id.* arts. 24-25. Article 26 of the Foundation Regulation similarly refers to the relevant “laws and administrative regulations” for ultimate determination of tax benefits.

¹⁰⁶ See *Ci shan juan zeng you hui zheng ce* [*Preferential Policy for Charitable Donations*], ZHONGHUA CI SHAN DONG TAI [Latest Developments in Chinese Charities], Feb. 8, 2007, available at <http://www.juanzhu.gov.cn/article.asp?articleid=564>.

¹⁰⁷ *Id.* A deduction of up to 10% of corporate income is allowed for one organization, the China Social and Cultural Development Foundation. See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ Guan yu gong yi jiu ji xing juan zeng shui qian kou chu zheng ce ji xiang guan guan li wen ti de tong zhi [Notice Concerning Policy and Related Questions on the Pre-Tax Deduction of Public Benefit Relief Donations] (promulgated by the Ministry of Fin. and the Nat’l Tax Bureau, Jan. 8, 2007, effective Jan. 8, 2007), translated in Int’l Ctr for Law and Soc’y, *Notice of the Ministry of Finance and the State Administration of Taxation on the Policies and Relevant Management Issues concerning the Pre-tax Deduction of Public Welfare Relief Donations*, http://www.iccs1.org/pubs/China%20January_18_Notice%202_.pdf; see also INT’L CTR. FOR CIV. SOC’Y LAW, IMPORTANT DEVELOPMENTS IN CHINA’S LEGAL AND FISCAL FRAMEWORK FOR THE SUPPORT OF CIVIL SOCIETY 2-3 (2007), available at http://www.iccs1.org/pubs/China_Fiscal_Changes_March_07.pdf. The term “public benefit,” both here and in the Public Benefit Donations Law, is used to distinguish between SOs and foundations that aim to benefit the public at large from those whose goal is the mutual benefit of their own membership only (such as professional associations). See IRISH ET AL., *supra* note 18, at viii, 1.

to 12%, on par with that permitted for foreign companies.¹¹⁰ Third, the MCA has recently launched a Charitable Donations Information Center; organized as an NPO and intended to serve as a platform to encourage charitable giving in China and provide information regarding opportunities to give.¹¹¹ Finally, the MCA and MoF are currently working on a comprehensive Charity Law, which is intended to address multiple aspects of the regulation of charities in China, including tax deductibility of donations. The MCA and MoF have sought broad input on the law, a draft of which was circulated for comment in September 2006.¹¹²

None of these initiatives, however, will benefit NGOs that are unregistered or registered as commercial enterprises. The Public Benefit Donations Law stipulates that only legally registered SOs, PNEUs, and foundations, as well as government entities, are eligible to accept tax deductible donations.¹¹³ This exclusion once again highlights the importance of achieving registration with the MCA as a gateway to achieving other benefits.

IV. CASE STUDIES

With the above legal framework in mind, the following case studies seek to explore the experiences of a number of NGOs in China under the current regulatory regime as it operates in practice. The NGOs interviewed can be classified into three main categories: domestic NGOs, foreign NGOs operating in China, and foundations, which for our purposes of exploring the implementation of the new Foundation Regulation includes both domestic foundations and representative offices of international foundations. The NGOs operate in a variety of fields: environment, education, services for migrant workers, NGO sector capacity building, legal aid, and community action. All interviews were conducted in January and February 2007, with the exception of one that was conducted in the summer of 2006.

Of course, these NGOs cannot possibly represent all aspects of the NGO sector in China today. Several important caveats are in order. First, civil society organizations operating in China range in their degree of autonomy from the state. Some so-called GONGOs remain filled with

¹¹⁰ Qi ye suo de shui fa [Enterprise Income Tax Law] (promulgated by the National People's Congress, Mar. 16, 2007, effective date Jan. 1, 2008), art. 9, translated in KPMG HUAZHEN, PRC CORPORATE INCOME TAX LAW 5 (2008), http://www.kpmg.com.cn/en/virtual_library/Tax/PRCTaxLawBook.pdf; see also INT'L CTR. FOR CIV. SOC'Y LAW, *supra* note 109, at 2.

¹¹¹ See Zhongguo juan zhu wang [China Donations Web], <http://www.juanzhu.gov.cn> (last visited Jul. 5, 2008).

¹¹² See Int'l Ctr. for Civ. Soc'y Law, *Comments on the Draft Charity Law for the People's Republic of China*, 5 INT'L J. CIV. SOC'Y L. 12 (2007); Interview I, *supra* note 91.

¹¹³ See Public Benefit Donations Law, *supra* note 53, arts. 10-11.

retired officials and respond to state mandates above constituent concerns, while others are asserting increasing independence. At the same time, some citizen-led NGOs are seeking increasing ties to the state, while others maintain a greater distance.¹¹⁴ This study examines only one end of the spectrum—those organizations described as “grassroots NGOs,” organized by independent citizens and operating with no direction from the state (aside from regulatory requirements). This focus is not meant to imply that NGOs at other points on the continuum do not also have significant contributions to make to China’s budding civil society; rather, it reflects a desire to examine the questions presented from a narrower, but therefore more precise perspective in the limited space of this paper.

Second, almost all of the organizations we spoke with based their operations (or, if an international organization, based their China programs) in Beijing. Beijing, as the capital city, is the most politically sensitive space in which to work, and for this reason the regulatory hurdles these NGOs face are likely more stringent than those seen in other parts of the country. Indeed, deviations from official national policy are often permitted or even encouraged in outlying areas as a method of experimentation with new regulatory possibilities.¹¹⁵ Finally, among those domestic organizations that can be classified as “grassroots NGOs,” we leave out several important categories that should be further explored elsewhere. These include NGOs attached to existing social organizations as second- or third-tier entities but asserting significantly more independence than the parent,¹¹⁶ organizations under the relatively liberal umbrella of a university,¹¹⁷ voluntary associations in rural villages based on local tradition, family lineages, or folk religions, and unregistered organizations with no official existence.

The chart that follows briefly introduces the individuals interviewed and the organizations they represent. All interviewees were promised anonymity, so letters are used in place of actual organization names.

¹¹⁴ See Saich, *supra* note 31, at 141 (discussing the “shifting complexities” and “institutional fluidity, ambiguity and messiness” in state-society relations in China today); Kin-Man Chan, *Development of NGOs Under a Post-Totalitarian Regime: The Case of China*, in ORGANIZING BETWEEN FAMILY AND STATE: NON-GOVERNMENTAL ORGANIZATIONS, GLOBALIZATION AND POLITICAL CHANGE IN ASIA 20, 117, 133 (Robert Weller ed., 2005) (suggesting that some NGOs seek semi-official status, while semi-official organizations seek to become independent NGOs, largely in search of resources from either the state or foreign funders).

¹¹⁵ See Sun, *supra* note 50.

¹¹⁶ See Howell, *supra* note 31, at 149; Saich, *supra* note 31, at 135.

¹¹⁷ See Howell, *supra* note 31, at 149; Saich, *supra* note 31, at 134-35. The Women’s Legal Counseling Center, which is under the name of Beijing University Law School but in fact operates with great independence, is an example of this method. See Chan, *supra* note 114, at 127-28.

Organization	Category	Personnel Interviewed	Field	Number of FT Employees/PT/ Volunteers
A	Domestic NGO	Director	Rural Environmental Education	Information not available.
B	Domestic NGO	Director	Migrant Worker Education & Aid	12/0/~200
C	Domestic NGO	President	Community Organizing	6/4/~200
D	Domestic NGO	Director of Development	NGO Capacity Building	14/3/2
E	Domestic NGO/ Foreign NGO Spin-Off	Editor	Publishing	3/1/0
F	Domestic NGO	Director	Migrant Worker Aid	3/0/many
G	Foreign NGO	Vice President	Education	14/0/~4,500
H	Foreign NGO	China Legal Director, China Program Director	Law	5 foreign, several Chinese/several/several
I	Foreign NGO/ Foundation	China Representative	Charitable Aid	1 foreign, 2 Chinese/0/many
J	Foundation	Finance and Office Manager	Grant-making	2 foreign, 8 Chinese/0/occasional interns
K	Foundation	Assistant to the Representative	Grant-making	6 foreign, several local/0/0
L	Foreign NGO	Director	Environment	Information not available.

A. Domestic Non-Governmental Organizations

Of the six domestic NGOs operating in the Beijing area we spoke with, all were registered with the local bureau of industry and commerce as commercial enterprises. One NGO leader who has been working in the field for over ten years did not find this composition surprising; she estimated that 90% of grassroots NGOs in Beijing are registered as commercial enterprises, only about 5% as PNEU, and 1% as social organizations, with the remainder operating without registration of any kind.¹¹⁸ Due to the composition of our sample, the discussion that follows focuses on the situation of the large group of grassroots NGOs in Beijing that are currently registered as commercial enterprises. What factors have led them to register in this form? And what difficulties do they face due to it?

¹¹⁸ Interview A, *supra* note 49.

1. Barriers to Registration with Ministry of Civil Affairs

All organizations with whom we spoke had at least considered registering as an SO or a PNEU with the MCA or local civil affairs bureau.¹¹⁹ All, however, had encountered significant barriers to MCA registration that ultimately led them to turn to registration with local bureaus of industry and commerce. These barriers have made registration with the MCA a merely theoretical option for independent NGOs in Beijing; in reality, according to those we interviewed (among the most prominent of grassroots NGOs in Beijing), no grassroots NGO has succeeded in achieving registration with MCA in the capital city—such status is limited to GONGOs and similar organizations with continued close government ties.

A recent national survey of environmental NGOs confirms the difficulty of registering with MCA.¹²⁰ The study shows that as of the end of 2005, there were a total of 2,768 environmental NGOs in China, about half of which are GONGOs, 40% student groups, 7% independent grassroots NGOs, and less than 3% foreign NGOs. However, over three-quarters of the total are not registered with the MCA. Those registered with the MCA are almost entirely GONGOs.¹²¹

The dual management requirement, mandating that an NGO obtain the support of a supervising agency in its line of work prior to registering with the MCA, posed the most significant barrier to registration for the NGOs with whom we spoke. Few government agencies are willing to sponsor NGOs, as sponsorship entails extra responsibility for them—the supervising agency is ultimately responsible for sponsored organizations’ actions and must conduct yearly reviews of the organizations’ work—with no additional compensation or other benefit.¹²² In addition, sponsoring agencies usually charge fees to the NGOs whom they sponsor even though the law prohibits such charges.¹²³ One NGO noted that agencies are particularly unlikely to sponsor young organizations with no track

¹¹⁹ For simplicity, this discussion will use the term “MCA” to mean the civil affairs bureau at the appropriate level throughout.

¹²⁰ See Zhongguo huan bao min jian zu zhi xian zhuang diao cha bao gao [Report on a Survey of the Current Situation of Environmental NGOs in China] (Nov. 7, 2006), <http://www.ecoprov.com/ReadNews.asp?NewsID=24> [hereinafter Environmental NGO Report]. The survey was conducted in the latter half of 2005 by the China Environmental Protection Association, with the support of MCA and the Environmental Protection Agency. It is believed to be the most comprehensive survey ever conducted of environmental NGOs in China.

¹²¹ *Id.*

¹²² See, e.g., Interview with Director of Organization B (Jan. 28, 2007) (on file with authors) [hereinafter Interview B]; Interview with Director of Development of Organization D (Jan. 31, 2007) (on file with authors) [hereinafter Interview D].

¹²³ Interview D, *supra* note 122.

record,¹²⁴ but even the two most prominent organizations that we interviewed had not been able to register.¹²⁵

Another major barrier to NGO registration is the corporatist structure envisioned by both the SO and the PNEU Regulations. As discussed above, both regulations stipulate that only one organization may exist in a given field registered at a given administrative level, and a legal representative of one organization may not simultaneously serve as the legal representative of another organization at a different level or in a different geographical area. Moreover, SOs may form branches only with MCA permission, and PNEUs may not form branches. According to one interviewee, GONGOs usually take up the single slot allocated to an issue at each administrative level, leaving no room for grassroots NGOs to exist.¹²⁶ A few years ago, the number of GONGOs surged as the government sought to cut down on staff and offload excess employees and retired officials into these new organizations created for that purpose.¹²⁷ In some areas, these GONGOs have crowded out existing, registered grassroots NGOs. For example, after the 1998 central government overhaul of NGO regulation,¹²⁸ the local civil affairs bureau in one city declined to renew the registration of a local grassroots disabilities organization that had existed alongside a GONGO in the field for over ten years, forcing it instead to merge with the GONGO.¹²⁹ The problem of GONGO cooptation of NGO slots is especially prevalent at the national and provincial levels, leaving grassroots NGOs—if they are able to overcome the dual management barrier and register—with much smaller administrative regions, such as counties or city districts, in which they are permitted to operate.¹³⁰

Registration as a commercial enterprise, on the other hand, presents neither of these hurdles and is a relatively straightforward process. It provides the legal person identity necessary for doing everything from opening a bank account to hiring personnel with much less hassle. For this reason, Professor Wang Ming of the Tsinghua University NGO Research Center has estimated that 100,000 to 200,000 NGOs are regis-

¹²⁴ Interview B, *supra* note 122.

¹²⁵ Interview A, *supra* note 49; Interview D, *supra* note 122.

¹²⁶ Interview A, *supra* note 49.

¹²⁷ *Id.*

¹²⁸ See *supra* Part II.B.

¹²⁹ Yiyi Lu, *The Growth of Civil Society in China: Key Challenges for NGOs 3* (Chatham House Asia Programme Briefing Paper 05/01, Feb. 2005), available at http://www.chathamhouse.org.uk/files/3217_china.pdf. In another example brought up in our interviews, a local grassroots environmental group led by a farmer tried for a long time to register with MCA, but its application was turned down because the government found that there was already an environmental-related GONGO in the area. Interview A, *supra* note 49.

¹³⁰ Interview A, *supra* note 49.

tered with industry and commerce bureaus nationwide.¹³¹ All of the domestic NGOs we interviewed had taken this route.

The government is aware of this situation and has occasionally attempted to rectify it. In 2005, according to several NGOs we interviewed, the Beijing city government sought to carry out a "clean-up" of NGOs registered with the industry and commerce bureau. The original intention was that the Beijing City Social Sciences Union (itself a GONGO, registered as a social organization but very closely affiliated with the government) would identify NGOs registered as commercial enterprises, then approve and certify appropriate organizations for which it would become the supervising agency; the civil affairs bureau would then conduct its own registration process, moving these organizations from the industry and commerce system to the civil affairs system.¹³²

However, upon investigation, the Social Sciences Union was shocked by the number of NGOs registered as commercial enterprises in Beijing: 2,047, in its calculation.¹³³ The Union did not think itself capable of shouldering the responsibility of sponsoring all of these organizations. Publicly, the Social Sciences Union invited applications for sponsorship, but it is rumored that by then they had already determined internally, possibly with instruction from top levels of the Chinese Communist Party, not to approve any applications.¹³⁴ Indeed, they did not approve any new sponsorships as a result of this clean-up.

The clean-up's main outcome was not a shift in registrations from the industry and commerce bureau to the civil affairs bureau, but a regulation from the Beijing Bureau of Industry and Commerce on the names business were permitted to use.¹³⁵ Some NGOs, including one with whom we spoke, were forced to remove terms such as "development," "education," "research center," or "research institute" from their registered names in favor of terms such as "consulting center."¹³⁶ Indeed, of the six organizations interviewed, the official names of four organizations ended in "consulting center," and one other ended in "communication center." For organizations with additional offensive words in their titles, a common strategy has been to use homophones: The Chinese arm of the China

¹³¹ Tina Qian & Nick Young, *Rule on Names Starts to Close Door to NGO "Businesses,"* CHINA DEV. BRIEF, Apr. 15, 2005, <http://www.chinadevelopmentbrief.com/node/74>.

¹³² Interview C, *supra* note 70; Interview with Editor of Organization E (Feb. 1, 2007) (on file with authors) [hereinafter Interview E].

¹³³ Interview C, *supra* note 70.

¹³⁴ *Id.*

¹³⁵ Interview E, *supra* note 132; Qian & Young, *supra* note 131; see also Zhang Qiaoli, *Gong shang quan mian qing li "ming shi bu fu" NPO [Industry and Commerce Bureau Thoroughly Cleans Up NPOs with "Inconsistent Names"]*, GONG YI SHI BAO [CHINA PHILANTHROPY TIMES], May 18, 2005, available at <http://www.gongyishibao.com/shownews.asp?newsid=2214>.

¹³⁶ Interview E, *supra* note 132.

Development Brief, originally called “Beijing Civil Society Social Development Research Centre,” changed its name to Beijing Gong Min Hui (characters that sound like the word for “civil society,” but aren’t) Consulting Center.¹³⁷ Likewise, a group that calls itself “Community Participatory Action” chose the official name “Beijing Shining Stone (*can yu shi*, sounds like “participatory”) Information Consulting Center.”¹³⁸ Although their activities continued as usual, some NGOs are concerned that because their names have become more business-like, they will encounter more difficulties when applying for funding.¹³⁹

The experiences of the organizations we interviewed demonstrate the heightened hurdles to NGO registration in Beijing as compared to elsewhere in China. Organization B, working in the field of migrant worker services, was partnering with a local government outside Beijing to create a PNEU in that locale that would follow the organization’s model, not only to provide services to local migrant workers, but also to serve as an incubator for grassroots NGOs to be further replicated in other cities.¹⁴⁰ Organization C, working in the field of community action, was discussing with the city of Ningbo the possibility of establishing a PNEU there, and Nanjing and Qingdao have made similar offers for PNEU registration.¹⁴¹ Another well-known Beijing environmental NGO, Global Village, is registered as a commercial enterprise in Beijing but has set up a separate PNEU entity in Miyun County.¹⁴²

2. Problems Due to Lack of Registration as a Nonprofit

Registration of an NGO as a commercial enterprise avoids the barriers to registration as an SO or PNEU, but in doing so it creates other hurdles that affect the efficiency of operations for this young and vulnerable sector.

a. *Taxation*

A key difference in registration as a commercial enterprise and as an SO or PNEU is the organization’s tax status: SOs and PNEUs are tax-exempt, whereas organizations registered as commercial enterprises are generally expected to pay ordinary corporate taxes on income.¹⁴³ The extent to which the organizations we spoke with actually paid taxes, however, appeared to depend largely on the individual arrangements and understandings the organizations had developed with their local tax

¹³⁷ Qian & Young, *supra* note 131.

¹³⁸ *Id.*

¹³⁹ See Zhang, *supra* note 135.

¹⁴⁰ Interview B, *supra* note 122.

¹⁴¹ Interview C, *supra* note 70.

¹⁴² Interview A, *supra* note 49.

¹⁴³ See *supra* Part III.D.

bureaus, as well as on various accounting sleights of hand adopted to avoid payment.

For most organizations, the stated business tax rate was 5.5% of gross income.¹⁴⁴ Organization B, however, had successfully negotiated a full tax exemption from its local tax bureau.¹⁴⁵ The organization offered a creative legal argument: the State Administration of Taxation regulations stipulate that enterprise units organized for a nonprofit purpose shall be exempted from tax, and such units include “PNEUs and other enterprises”; the organization argued that it fell into the “other enterprises” category, despite its registration as a commercial enterprise, based on the nature of its actual activities.¹⁴⁶ This line of argument entails risks, as it draws into question the propriety of the organization’s registration as a commercial enterprise in the first place, and its success is highly dependent on the organization’s reputation and personal relationships with the local tax bureau. Moreover, Organization B must renegotiate with the tax bureau each year, and it acknowledged that many NGOs might think it not worth the hassle.¹⁴⁷ In any case, it seems clear that local tax bureaus will grant such tax exemption only on an ad hoc and case-specific basis.¹⁴⁸

There were numerous, often legally questionable, internal methods of avoiding taxes. Most prominently, NGOs we spoke with often kept two sets of accounting books, one to show the local tax bureau for determination of taxes owed and one to show donors.¹⁴⁹ Books kept for tax purposes have to follow standard corporate accounting practices, a method wholly inappropriate for ensuring accountability in a nonprofit organization.¹⁵⁰ Foundations, on the other hand, require detailed accounts of how their grants have been spent under a different methodology. The need for this dual system of accounting adds significant costs to grassroots NGOs with resources that are already very limited, as accountants and other personnel must be hired to keep track of both.¹⁵¹

In addition, some organizations avoided issuing official receipts (发票) to donors, because without a receipt the tax bureau had no way of identifying the donation and counting it as income.¹⁵² If such a method were

¹⁴⁴ See Interview A, *supra* note 49; Interview C, *supra* note 70; Interview D, *supra* note 122. The organizations were located in the Dongcheng and Haidian Districts of Beijing.

¹⁴⁵ Interview B, *supra* note 122. The organization was located in Beijing’s Dongcheng District.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*; Interview A, *supra* note 49.

¹⁴⁹ See Interview A, *supra* note 49; Interview B, *supra* note 122; Interview C, *supra* note 70.

¹⁵⁰ See Interview A, *supra* note 49; Interview B, *supra* note 122.

¹⁵¹ Interview A, *supra* note 49; Interview C, *supra* note 70.

¹⁵² Interview C, *supra* note 70; Interview D, *supra* note 122.

used, the organization generally would nonetheless issue receipts and pay taxes on a nominal amount of its donations to maintain good relations with the local tax bureau.¹⁵³ Major donors (generally international foundations) understand the taxation issue and are willing to forgo a receipt.¹⁵⁴ They also regularly gross up grant amounts to cover tax when tax payment cannot be avoided.¹⁵⁵ Some organizations enter donations as amounts payable in their accounting books so as to avoid counting those sums as income.¹⁵⁶

Under Chinese tax law, if a sum remains in a bank account for more than three months without movement—a common occurrence when an organization receives grant funding for a program with an implementation timeline of more than three months—it will be recognized as profit and taxed at a rate of 33%.¹⁵⁷ In response to this common problem, one organization explained that it often transfers funds between multiple accounts to avoid the tax.¹⁵⁸ A final tax avoidance method, used by Organization F, the organization with the most limited funding and human resources among those we interviewed, was simply to show consistent business losses, and thus no net income.¹⁵⁹ Organization F pled complete lack of knowledge of tax issues and simply allowed the local tax

¹⁵³ Interview D, *supra* note 122.

¹⁵⁴ *Id.*

¹⁵⁵ Interview C, *supra* note 70. Domestic corporate donors are also forced to gross up donations if they want a total of a certain amount to be received by an organization, and the gross-up can be significant when the grant is large enough to be recognized as net profit, triggering a 33% tax rate, under the income tax laws. A La Shan SEE Ecology Society, a famous environmental grassroots NGO and the first such organization set up by a group of prominent entrepreneurs, received about RMB 10 million in donations in its first year of operation, but a director said in an interview that the corporate donors actually contributed 3.3 million more than the donated amount to make up for required tax payments. See Li Meng, *Gong yi juan zeng shui shou zhi tong: Zhong Mei liang guo gong yi shi ye zhuang kuang bi jiao* [The Pain of Tax Collection on Charitable Donations: A Comparison of the Chinese and American Situations for Charity], REN MIN WANG [PEOPLE NET], Nov. 21, 2005, <http://finance.people.com.cn/GB/1037/3874730.html>.

¹⁵⁶ Interview D, *supra* note 122.

¹⁵⁷ Interview C, *supra* note 70. UNDER THE NEW ENTERPRISE INCOME TAX LAW, SEE SUPRA NOTE 110 AND ACCOMPANYING TEXT, Chinese domestic companies will pay the same 25% income tax as foreign-invested companies, rather than the 33% rate under the current law. See Press Release, Deloitte Touche Tohmatsu CPA Ltd., China's Unified Enterprise Income Tax Law Brings Greater Clarity, Transparency & Fairness to the Tax System (Mar. 16, 2007), http://www.deloitte.com/dtt/press_release/0,1014,cid%253D149787,00.html; see also *Full Text: Explanation on China's Draft Enterprise Income Tax Law*, PEOPLE'S DAILY ONLINE, Mar. 8, 2007, http://english.people.com.cn/200703/08/eng20070308_355504.html.

¹⁵⁸ Interview C, *supra* note 70.

¹⁵⁹ Interview with Director of Organization F (Jan. 31, 2007) (on file with authors) [hereinafter Interview F].

bureau to review their accounting records. The tax bureau expressed confusion at their consistent losses, but it seems the support of the local neighborhood committee has been key in giving the organization legitimacy and leading the tax bureau not to pursue the issue further.¹⁶⁰

b. *Domestic Donations*

NGOs registered as commercial enterprises are barred from public fundraising, including solicitation of donations through advertising, mail-in forms, or other methods.¹⁶¹ Further, donations to such organizations are not deductible by the donor under Chinese law. In fact, as discussed above, under China's current charities regulations donations to independent NGOs such as these would not be tax deductible even if they were registered with MCA, as the government allows deductibility only for a set group of 62 government-designated foundations as of July 2006 (some of these 62 foundations create funds for other organizations through which tax deductible donations may be made, but of course they charge a fee for such services).¹⁶² Moreover, it is often the promise of improved leverage in negotiations with the government that inspires China's corporate donors to give, and independent NGOs can offer no such leverage.¹⁶³ The resultant "government monopoly"¹⁶⁴ on charitable giving, according to the organizations we interviewed, has a large impact on their abilities to raise funds domestically.¹⁶⁵ Most estimated that 90% or more of their funding comes from international foundations.¹⁶⁶ The one exception, Organization A, estimated its international funding at 60-70%, but at the same time emphasized that the remaining 30-40% of funding from domestic donations (attracted by word-of-mouth through a network of friends and acquaintances, since public fundraising is illegal) came only through considerable effort.¹⁶⁷

Organization A has reasons beyond expanding its own budget for its efforts to attract more domestic funding. First, its leaders see constructive value in the act of giving, as it raises public awareness about charitable donations.¹⁶⁸ Second, they hope their organization can demonstrate

¹⁶⁰ *Id.*

¹⁶¹ Interview A, *supra* note 49.

¹⁶² See *supra* Part III.D; Interview A, *supra* note 49. In describing the operation of the Public Benefit Donations Law, Interviewee A called it a "complete sham" whose purpose is merely "to show the international community for public relations." *Id.*

¹⁶³ Interview E, *supra* note 132.

¹⁶⁴ Interview D, *supra* note 122; Interview E, *supra* note 132.

¹⁶⁵ Interview A, *supra* note 49; Interview B, *supra* note 122; Interview D, *supra* note 122; Interview E, *supra* note 132.

¹⁶⁶ Interview B, *supra* note 122; Interview C, *supra* note 70; Interview D, *supra* note 122; Interview E, *supra* note 132; Interview F, *supra* note 159.

¹⁶⁷ Interview A, *supra* note 49.

¹⁶⁸ *Id.*

to other NGOs that raising funds from the Chinese public is a viable option.¹⁶⁹ Organization B takes a similar attitude, viewing charitable giving as an important form of social participation.¹⁷⁰ Its director sees China's current wealth disparity as simultaneously creating both a huge potential market for the social services that NGOs can offer and a large donor base in the newly wealthy. It is only current policy restrictions that are blocking NGOs from tapping this potential. At the same time, the government, through its channeling of donations to government-controlled foundations, is failing to fully realize the potential because their methods are outdated and boring; grassroots NGO competition would bring an infusion of creativity.¹⁷¹

c. *International Funding*

With domestic fundraising effectively blocked as a viable option by government policy, grassroots NGOs in China must turn to international sources of funding to survive. But Chinese government policy also has an impact on grassroots NGOs' fundraising in the international arena: foreign foundations often require that the programs to which they distribute funds be recognized as nonprofit organizations under their home country's domestic laws. Grassroots NGOs registered as commercial enterprises in China often must do much explaining to convince foreign donors that the organization's activities are in fact not-for-profit, despite their commercial enterprise status and their for-profit-sounding names (also mandated by law, as discussed above).¹⁷² However, this is generally only a problem when applying for grants from foreign foundations that are new to China; foundations such as Ford that have been in China for a long period of time understand the situation and are even willing to gross-up grants to cover taxes necessitated by grantees' commercial status.¹⁷³

Another important implication of Chinese government policy toward grassroots NGOs is that it forces grassroots NGOs to become more reliant upon, and therefore compliant with the demands of, foreign parties. Registration laws and practices have denied these NGOs a place within the shelter of the MCA, where their activities could be monitored for compliance with China's nonprofit standards, so domestic compliance issues are limited to the tax concerns of the industry and commerce bureaus discussed above. Moreover, under current laws on charitable giving NGOs are not able to solicit funds domestically, much less offer their donees tax deductions, and are thus forced to look abroad for funding. In this scenario, requirements and restrictions imposed by foreign

¹⁶⁹ *Id.*

¹⁷⁰ Interview B, *supra* note 122.

¹⁷¹ *Id.*

¹⁷² Interview B, *supra* note 122; Interview E, *supra* note 132.

¹⁷³ Interview B, *supra* note 122; Interview C, *supra* note 70.

foundations become de facto law governing the actions of grassroots NGOs, because without foundation funding they could not continue to exist.

One example of this kind of de facto regulation by foundations can be observed with respect to administrative overhead. The Chinese government could, through a more rationalized system of NGO regulation, set limits on the percentage of donation income a nonprofit institution could spend on administration; indeed, it has done so in the recent Foundation Regulation.¹⁷⁴ In combination with government policies that encouraged, rather than inhibited, domestic donations to NGOs, so that NGO funding sources could diversify, the government’s limit would likely be the applicable one in an NGO’s budgeting process. As it stands, however, the applicable limit is the one set by foreign foundations (or, quite often, a single foundation) that are funding a given program. The standard range permitted by foundations for administrative costs in China is 8-15%;¹⁷⁵ many of the NGOs we interviewed complained, however, that this number varies greatly from one foundation to the next, with some having a reputation for being “very stingy”¹⁷⁶ and others being more understanding and considering long-term goals.¹⁷⁷ Several organizations associated these foundation-imposed ceilings on administrative overhead with problems of low pay for staff and, relatedly, staff quality and retention.¹⁷⁸ In a related but even more dramatic example of foundation-imposed “law” in the absence of Chinese government supervision, one foreign foundation explained that it requires its grantees to follow U.S. requirements for 501(c)(3) tax exempt status—essentially importing U.S. law to govern the operations of Chinese NGOs.¹⁷⁹

The large dependence on foreign funding by grassroots NGOs raises considerable concerns for the overall development of the NGO sector in China. As mentioned above, a vast majority of NGOs are grassroots and

¹⁷⁴ Article 29 of the Foundation Regulation stipulates that “a foundation may not allocate more than 10% of its total expenditure to cover staff wages and benefits and overheads.”

¹⁷⁵ Interview A, *supra* note 49.

¹⁷⁶ Interview D, *supra* note 122.

¹⁷⁷ Interview B, *supra* note 122; Interview D, *supra* note 122. The director of Organization A noted that the Chinese public, when they do donate, are actually more hesitant to allow their money to be used for staff salaries, administration, and program design and development, requesting instead that all money be used for programming. Interview A, *supra* note 49. This problem, however, is probably largely one of education, and if a comprehensive governmental monitoring system were in place to ensure the appropriate use of donations, the public’s trust in such institutions would likely increase, as would willingness to allow NGOs to use funds where most needed.

¹⁷⁸ Interview B, *supra* note 122; Interview D, *supra* note 122.

¹⁷⁹ Interview with Finance and Office Manager of Organization J (Jan. 29, 2007) (on file with authors) [hereinafter Interview J].

not registered with MCA. However, there is only so much money that foreign sources can commit to Chinese NGOs, and presumably a chunk of those resources will go to GONGOs. Thus, the gap between the supply and demand is potentially huge. The shortage of funds is very serious, as indicated in the environmental NGO survey: 43.9% of all full-time employees have no salary at all, and 56.3% of all environmental NGOs (including GONGOs) have no capability to provide any pension, health, or unemployment benefits.¹⁸⁰

3. The Continued Importance of Social Capital

The ability to navigate the above constraints successfully appears to continue to be tied to the social capital of an organization's leader. The term "grassroots NGO" is used broadly in China to encompass any citizen-driven organization, but seldom are these NGOs run by individuals drawn from the groups' ultimate constituencies, and that was the case among the several domestic NGOs we interviewed. The leaders of these "grassroots NGOs" are in fact well-educated and well-connected citizens acting on their concerns for less advantaged citizens. The leader of Organization A, for example, is a former university professor with rich experience in the NGO field and sufficient personal resources that she is able personally to contribute significant funding.¹⁸¹ The President of Organization C took time to work in a GONGO prior to starting her own NGO, with the specific aim of gaining invaluable government connections and legitimacy.¹⁸² The founder of Organization B had likewise previously worked in a GONGO and used to be a professional journalist.¹⁸³ The founders of the well-known NGOs Friends of Nature and Rural Women and the two founders of Organization D are all from intellectual elite families.¹⁸⁴ It would seem, at least anecdotally, that a combination of higher education and personal connections contributes to a citizen's ability both to avoid regulatory trouble and to attract the international funding necessary to conduct NGO activities. The reason seems clear enough: the barriers to success are high for anyone, but are even higher for those with fewer resources. While the regulatory regime is not solely responsible for this discrepancy, the opacity of the registration process in practice, the negotiation and convolution necessary to avoid hefty tax payments, the lack of ability to raise funds locally, and therefore the necessity of attracting foreign funding, certainly add to the barriers an ordinary citizen faces as compared to a member of the cultural elite.

Many of the organizations we interviewed expressed concern about this pattern of elite leadership among China's NGOs. The leader of Organi-

¹⁸⁰ See Environmental NGO Report, *supra* note 120.

¹⁸¹ Interview A, *supra* note 49.

¹⁸² Interview C, *supra* note 70.

¹⁸³ Interview B, *supra* note 122.

¹⁸⁴ Interview D, *supra* note 122.

zation A feared that their efforts would not have long-term effect if no "truly grassroots" NGOs rooted in the communities could carry on their work after their departure.¹⁸⁵ She expressed frustration that rural communities lacked independent organizations, forcing her organization instead to partner with local governments who, in her opinion, were simply happy to take their money. She attributed the lack of local social organizations in large part to the government's tight control over organization and success at "atomizing" (沙粒化) the local population.¹⁸⁶ Another organization noted that the grant-making process of international foundations has led to an over-concentration of resources in a handful of NGOs in urban areas, which will particularly limit the development of indigenous NGOs, much smaller in scale, formed by local constituent community members.¹⁸⁷

Two organizations, Organizations B and C, not only expressed concern at the lack of involvement of constituent communities in NGO work, but also are taking action to rectify it. Organization C's very mission is community participation, and to that end it provides training to local government officials and other community leaders encouraging participatory approaches. In addition, the organization is concerned about the development of "truly grassroots" NGOs, led by local constituents, and has taken one such organization, Organization F, under its wing.¹⁸⁸ Specifically, it has helped Organization F liaise with local government and secure grant funding.¹⁸⁹

Organization B has gone beyond this assistance approach, seeking both to transform its own organization into a body representative of its constituency and to serve as a model from which additional grassroots NGOs may be cloned. The organization, which provides educational and other support to migrant workers in the Beijing area, has from the start deliberately embraced migrant workers into its organization with the hope of not just including them, but also training them to be future leaders of similar organizations.¹⁹⁰ Of its 12 employees, 4 are migrant workers, and over half of its 200 volunteers are from the migrant worker community. The organization purposefully intermingles migrant workers, college students, and local youth volunteers at volunteer events in the hopes of fostering mutual understanding and learning.¹⁹¹ In addition, the organization describes as part of its mission the "incubation of local grassroots NGOs" and hopes to clone similar organizations in other cities; in fact, it is cur-

¹⁸⁵ Interview A, *supra* note 49.

¹⁸⁶ *Id.*

¹⁸⁷ Interview E, *supra* note 132.

¹⁸⁸ Interview C, *supra* note 70.

¹⁸⁹ *Id.*

¹⁹⁰ Interview B, *supra* note 122.

¹⁹¹ *Id.*

rently working with a local government to establish a PNEU on its model in that locale.¹⁹²

The one exception to the pattern of elite or semi-elite leadership among the NGOs we interviewed was Organization F, a three-person social services organization on the outskirts of Beijing with the goal of providing assistance and cultivating community and self-help among local migrant women. The organization was founded by a woman who counted herself among the first generation of “migrant worker sisters” (打工妹), having arrived in Beijing from her home province in 1982.¹⁹³ She has since settled down, marrying a Beijing native, and wanted to find a way to help those migrants newly arriving in Beijing today.¹⁹⁴ Hers was the most vibrant of the organizations we visited: during the course of the afternoon, children from the Children’s Activity Center swarmed around us, and we were able to observe the first meeting of a newly formed Mother’s Group, led by a volunteer retired elementary teacher and full of laughter as well as advice on how to raise children well.

But Organization F was also the most resource-constrained of the organizations we visited. Its grant funding was extremely limited and came from a single source (Oxfam Hong Kong), and its physical assets—nicked preschool-sized chairs and tables, hand-me-down children’s books, and an ancient computer occupying a single room—had been donated by schools in the city when no longer needed.¹⁹⁵ The founder complained of the organization’s limited capabilities and professed a need for more human resources help, especially in the area of finances.¹⁹⁶ Indeed, their approach to accounting and especially taxes was ad hoc in their own description.¹⁹⁷ The organization also faced challenges in dealing with the local government. Rather than handling communications themselves, they often relied on the leader of Organization C, who has government connections and fits more closely the mold of the well-educated and well-connected NGO leader, when negotiations and other discussions were necessary.¹⁹⁸ On the whole, however, the organization appeared to be quite resourceful at “doing good” within its niche—the difficulty is that the niche will necessarily remain small under current regulatory constraints.

¹⁹² *Id.*

¹⁹³ Interview F, *supra* note 159.

¹⁹⁴ Interview C, *supra* note 70; Interview F, *supra* note 159.

¹⁹⁵ The founder of Organization F prided herself in her ability to channel unused and untapped resources, not just physical but also human. She relied quite heavily on a team of retired elementary school teachers from Beijing. Interview F, *supra* note 159.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Interview C, *supra* note 70; Interview F, *supra* note 159.

Though the elite-led NGOs are important in inspiring and spearheading NGO development, "truly grassroots" or community-based NGOs like Organization F necessarily have to account for the bulk of the NGO sector going forward. These NGOs are the ones that emerge from within a community, allowing them to more intimately monitor the needs of the constituents they represent, and more flexibly adjust to local situations. They are typically social services-oriented and relatively non-political. Given that these NGOs may reach a large percentage of the population in their small localities, their potential to instill a spirit of self-government and participation through voluntary association is huge. More favorable regulation for these organizations is key to the overall growth of civil society in China, and is possible given China's current political environment.

B. *Foreign Non-Governmental Organizations*

For foreign NGOs (other than foreign foundations, to be addressed below) operating in China, the barrier to registration is clear: to date, China simply has not produced any law or regulation that stipulates how these groups should be treated. For years, rumors of a draft regulation on the registration and management of foreign NGOs have been circulating, but to date no regulation has been forthcoming.¹⁹⁹ The question, then, is not what are the barriers to registration with MCA, as it is for domestic NGOs, but rather in the complete absence of the possibility of registration with MCA, how do these organizations structure some operational form sufficient to conduct their activities? And what hurdles do these ad hoc arrangements create?

Among the four foreign NGOs interviewed, two methods of establishing operations in China were used: partnering with a local organization while not registering in any form, or registering as a representative office of a foreign commercial enterprise. Alongside these methods, an interesting phenomenon is taking place: foreign NGOs attempting, with varying degrees of success, to "spin off" their local operations to become independent, domestic NGOs registered either as commercial enterprises or, in areas outside Beijing, as PNEUs or SOs.²⁰⁰

¹⁹⁹ Most recently, it has been reported that a new version of the SO Regulation, a draft of which is already complete and has been sent to the State Council for consideration, will address foreign as well as domestic NGOs. See Guo Kun, *She wai min jian zu zhi ni he fa deng ji* [NGOs Involving Foreign Interests Plan to Register According to Law], JING HUA SHI BAO [BEIJING TIMES], Mar. 13, 2007, at A10, available at http://epaper.jinghua.cn/html/2007-03/13/node_11.htm.

²⁰⁰ This case study, due to the composition of the organizations interviewed, leaves aside one additional important method of operation worth mentioning, which is cooperation with the China Association for NGO Cooperation (CANGO) or a provincial nongovernmental organizations society (PINGOS). See Renee Yuen-Jan Hsia & Lynn T. White III, *Working Amid Corporatism and Confusion: Foreign NGOs*

1. Partnerships

Forming partnerships with local government agencies or other institutions closely affiliated with the government, such as educational institutions or GONGOs, is a common method for foreign NGOs to implement projects in China, and it is the method used by three of the organizations interviewed. All three organizations expressed relative satisfaction with their partnership arrangements. All, however, were in the process of seeking some form of more official status in China; one aggressively, two passively. When pressed, they admitted certain frustrations due to the limits imposed by a partnership arrangement, despite their overall satisfaction with what they had been able to achieve.

The founder of Organization H, a foreign NGO working in the legal field, arrived in China on the early side of recent rule-of-law efforts and established a Memorandum of Understanding with the Ministry of Justice (MoJ) in 2001. Since that time, the organization has partnered closely with a national-level bureau of the MoJ in its particular field, as well as with several universities and a provincial justice bureau. Its leaders have considered registration and have approached the national-level MoJ bureau, which would be the most sensible candidate to be Organization H's supervising agency, to inquire about the possibility. The bureau responded that it would appoint a staff member to "research" the registration process; that conversation occurred six months prior to our interview with Organization H representatives, and to their knowledge, no progress had been made. They have also considered registering at the provincial level, under a provincial justice bureau with which they have excellent relations, but if they did so their activities would be limited to that province in the same corporatist style as that for domestic NGOs noted above, and the organization is looking for a national platform.²⁰¹

Organization I has recently decided to take a rather novel approach. It is a Hong Kong-based charitable organization that has been active in China for over ten years. They have partnered with numerous organizations, ranging from the MCA on down to local private social services organizations. Although they have had many fruitful partnerships, they place a great emphasis on legality, and they are currently in the late stages of registering. Interestingly, because regulation procedures for foreign NGOs have yet to be stipulated in law, the organization is registering as a domestic foundation. Their experiences with registration are discussed in the Foundations section below.²⁰²

in China, 31 *NONPROFIT & VOLUNTARY SECTOR Q.* 329, 340-42 (2002); *Frequently Asked Questions on Registering an International NGO in China*, CHINA DEV. BRIEF, Aug. 10, 2004, <http://www.chinadevelopmentbrief.com/node/296>.

²⁰¹ Interview with China Legal Director and China Program Director of Organization H (Jan. 27, 2007) (on file with authors) [hereinafter Interview H].

²⁰² Interview I, *supra* note 91.

In certain respects, foreign NGOs operating through partnerships in China face fewer impediments than the domestic NGOs registered as commercial enterprises discussed above. Because they have no official legal presence in China, they are not obligated to pay taxes.²⁰³ Organization H representatives noted that the Chinese government would be hesitant to charge such organizations tax for fear of generating anger in the international community, although they also remarked that this reluctance seemed to be changing in Shanghai recently, where the government was more aggressively seeking to collect tax from foreign individuals and organizations.²⁰⁴ With respect to funding, although no foreign NGO is permitted to raise funds in China, this restriction has had little effect on either organization because they have a solid international funding base.²⁰⁵

But in other respects, these organizations faced hurdles equal to or greater than their domestic counterparts. First, there are the practical hurdles in day-to-day operations caused by lack of a legal status. Organizations with no legal status cannot open bank accounts, sign leases, or officially employ Chinese nationals in the organization's name. Technically, as Organization H described it, they are "not here."²⁰⁶ At Organization L, for several years of their operation, the funding from their U.S. headquarters went through the personal bank account of a professor in the university with which they partnered.²⁰⁷ Those who attempt to raise funds within China face additional hurdles due to the lack of official legal presence. For instance, in 2006, Organization L successfully raised a significant amount of funding from the Chinese subsidiaries of a few American corporations. Since Organization L cannot legally accept the donations within China, the money had to be routed to the headquarters of the American corporations and then to the American headquarters of Organization L.²⁰⁸ But this "not here" status is primarily a matter of semantics and logistics; it does not impede NGOs from freely interacting and implementing projects with high-level government departments and educational institutions. It merely requires adjusting processes, relying on partners to accomplish certain tasks that the organization cannot do in its own name, and carefully labeling events and office spaces so as to avoid implying a permanent presence in China.²⁰⁹

According to Organization H, these types of hurdles vary significantly depending upon where one is working. In Beijing, for example, if they

²⁰³ Interview H, *supra* note 201; Interview I, *supra* note 91.

²⁰⁴ Interview H, *supra* note 201.

²⁰⁵ *Id.*; Interview I, *supra* note 91.

²⁰⁶ Interview H, *supra* note 201.

²⁰⁷ Interview with Director of Organization L (Aug. 2006) (on file with authors) [hereinafter Interview L].

²⁰⁸ *Id.*

²⁰⁹ Interview H, *supra* note 201.

attempted to avoid the problem of lack of legal identity by simply renting office space under a staff member's name, the renting organization would insist upon seeing legal qualifications. Instead, a partner must sign the lease on the organization's behalf and allow them to use the space as part of their partnership agreement. In another province where Organization H does a significant amount of its work, however, the landlord's only concern was the organization's ability to pay rent; after putting down two years' rent up front, the program director was able to sign the lease in her own name.²¹⁰

Second, and somewhat more significantly, with no legal presence in the country every individual project the foreign NGO undertakes, no matter how small, must be co-sponsored by a Chinese partner.²¹¹ This adds bureaucratic hassles, particularly if the partner is not a government agency. When Organization I partners with a local social services organization that is registered as a PNEU in the Pudong District of Shanghai, for each project the partner organization must report its work with a foreign NGO to its supervising agency (in this case, the local governmental social work agency) and obtain its approval, then it must report to the civil affairs bureau with which it is registered to obtain its approval as well.²¹² Further, the requirement of co-sponsorship can become tricky when foundation grants stipulate certain conditions under which funding must be spent. These specifics must be included in the agreement with the Chinese partner, making negotiations on each point a necessity.²¹³

This problem can be mitigated somewhat by negotiating broader Memoranda of Understanding with partners and, more generally, establishing a relationship in which the Chinese partner is willing to give the foreign NGO certain leeway—but this approach requires mutual trust, which must be built over time. In Organization H's experience, both sides are initially careful to ensure that they have equal input into each project, but once trust is established, the Chinese partner's participation in a project may be a matter of appearances only.²¹⁴ For example, when a representative of Organization H conducts certain training sessions, a representative from the university that co-sponsors the project always accompanies him, but after several sessions the representative generally does not participate and works on something else, leaving Organization H to conduct its training solo. Similarly, Organization H often may ask a university partner to send the invitations for an event that Organization H has planned independently.²¹⁵

²¹⁰ *Id.*

²¹¹ *Id.*; Interview I, *supra* note 91.

²¹² Interview I, *supra* note 91.

²¹³ Interview H, *supra* note 201.

²¹⁴ *Id.*

²¹⁵ *Id.*

As can be seen in the above discussion, the ability of an unregistered foreign NGO to accomplish a given task, be it to secure office space or to implement a project, turns almost exclusively on its relationship with its Chinese partner(s). It could be said that the lack of a clear means of establishing a legal identity, and thus of undertaking activities independently, causes this heavy reliance on partners. But the regulatory structure is not the only factor that leads foreign NGOs to partner with local government-affiliated organizations; in many cases, the substantive goals of these organizations necessitate close collaboration with local entities that have intimate knowledge of Chinese conditions and a web of connections that will open additional doors. Organization H's partnership with MoJ, for instance, would be essential to their work whether or not it were legally necessary. Largely for this reason, and because they have been able to conduct most of their projects as desired through their partnerships, registration is not a top priority for Organization H at this time.²¹⁶

Nonetheless, the foreign NGO's lack of an independent legal identity certainly gives the Chinese partner greater leverage, and for this reason foreign NGOs should choose their partners wisely and negotiate clear and detailed terms of the working relationship.²¹⁷ Organization I acknowledged that there can be differences in culture between it and its Chinese partners. To minimize future disagreements, the organization performs thorough due diligence on any potential partners. First, they review the potential partner's goals, history, and strengths and shortcomings in their work with past partners, and they do not partner with organizations whose goals differ from their own. Second, they establish an agreement with the partner outlining the objectives of the project and the role of each partner within it, including a project plan, timeline, and budget. From there, Organization I diligently adheres to this framework and refers back to it if the partner is inclined to stray.²¹⁸ Although they acknowledge the continued importance of relationships and are willing to listen to their partners, they emphasize adhering to the letter of both the partnership agreement and the law as closely as possible.²¹⁹

2. Registration as a Representative Office of a Foreign Enterprise

A common method used by foreign NGOs to avoid the practical difficulties that arise from a lack of legal identity is to register as a representative office of a foreign business enterprise. Such prominent foreign

²¹⁶ *Id.*

²¹⁷ China Development Brief notes an incident in which, because terms were not negotiated clearly, a Chinese partner refused to permit a foreign NGO to see the results of the study the NGO had funded. See *Frequently Asked Questions on Registering an International NGO in China*, *supra* note 200.

²¹⁸ Interview I, *supra* note 91.

²¹⁹ *Id.*

NGOs as Save the Children (UK) are registered in this manner.²²⁰ Organization G, an affiliate of a U.S.-based NGO in the education field that has spread its model worldwide, has taken this route. It is registered with the State Administration of Industry and Commerce (SAIC) as a representative office of its parent, an entity established in the United States as a 501(c)(3) solely for this purpose and actually called “[Organization G] China.” The organization successfully registered in 1995, and in its over ten years in China, its experience has been “so far, so good” under the representative office registration form.²²¹

The organization’s vice president noted that certain potential hurdles under the form, such as the inability to raise funds inside China, were irrelevant to their organization because they have a large and steady funding base made up almost entirely of multinational corporations who do business in China. The organization does face some hurdles based on its registration form, however. First, like domestic NGOs registered with industry and commerce bureaus, it is required to pay taxes at ordinary business rates. Second, it occasionally faces problems with funders who question their registration as a representative office of a foreign business enterprise. In the organization’s assessment, however, this problem is fairly easily remedied through explanation, and they have a core group of repeat funders who are aware of conditions in China. Ultimately, because of the tax and funding issues, the organization would like to register as a local NGO. But because the feasibility of obtaining such registration is currently far from clear and the issues that would lead them to switch registration are fairly minor, they have not yet taken any action to pursue this option.²²²

Despite its registered status, partnering with government agencies remains crucial to Organization G’s work. The substance of the group’s work requires that they partner with local and provincial education departments in any case, but the vice president also attributed the organization’s generally smooth experience in China to their good relations with these government departments. As seen with domestic NGOs, whether official government partners are required for a given operational method or not, good government relations remain key to the successful operation of NGOs in China today.

Interestingly, in both this case and in the pure partnering scenario, and for reasons similar to those seen with domestic NGOs above, China in effect has ceded regulatory ground to foreign authorities. If China had a clear registration and management scheme for foreign NGOs under the MCA, the activities of foreign NGOs in China would be governed by Chinese law. Instead, those NGOs that implement projects through part-

²²⁰ Interview E, *supra* note 132.

²²¹ Interview with Vice President of Organization G (Feb. 13, 2007) (on file with authors) [hereinafter Interview G].

²²² *Id.*

nerships are technically "not here" and are thus naturally governed by the law of their home country. Those NGOs that are registered as representative offices of foreign business enterprises are held to account to Chinese authorities only in regard to taxation. In their governance and operations, NGOs such as Organization G follow not Chinese law, but the provisions of Section 501(c)(3) of the U.S. tax code.²²³

3. Domestic Spin-Offs

Another approach to obtaining local legal status that foreign NGOs are increasingly attempting is the establishment of a domestic NGO. This approach confronts all of the hurdles to domestic NGO registration seen above, and additionally the SO and PNEU Regulations, which suggest that no foreign citizens could assume management positions in any Chinese NGO entities. The SO Regulation clearly stipulates that only Chinese citizens can incorporate an SO,²²⁴ while the PNEU Regulation is not clear in this regard.²²⁵ Unlike the Foundation Regulation, which specifically allows a foreign citizen to be the legal representative even in a domestic foundation, not a single provision in the SO or PNEU Regulations has any mention of foreign citizens' role. It is likely that the foreign staff of an NGO may not legally assume any management positions in a domestic registered entity. Thus, the option of domestic registration is generally not available until a foreign NGO has been on the ground in China long enough to establish solid native Chinese leadership. Save the Children UK is currently attempting this route, hoping to register an entity to be known as Save the Children China, but it has not succeeded as of yet.²²⁶ In several cases, the local staff have formed their own NGO upon the completion of foreign NGOs' projects, thus continuing their work.²²⁷

For some foreign NGOs, the incorporation of a Chinese entity by the local staff causes concern in their headquarters. Under the current laws, if a foreign NGO spins off a Chinese entity, the local entity is legally separate and independent from the parent organization, except for any

²²³ *Id.*

²²⁴ See SO Regulation, *supra* note 3, art. 2.

²²⁵ The PNEU Regulation, Article 2 reads: "The private non-enterprise units referred to here are the non-governmental organizations established by enterprises, public service units, social organizations and other non-governmental forces and individual citizens with non-state assets to engage in non-profit service activities." PNEU Regulation, *supra* note 57, art. 2.

²²⁶ See BCG Greater China, Pro Bono Project, <http://www.bcg.com.cn/chapters/work/probono.html> (last visited Jul. 5, 2008).

²²⁷ Interview E, *supra* note 132. Examples of local staff registering NGOs and continuing the service mission of the foreign NGO after project completion include the Xin Xin Aid project in Shaanxi Province and a cooperative poverty alleviation project between the Chinese and Dutch governments in Huoshan, Anhui Province. *Id.*

contractual arrangements, and the parent organization may fear losing control of its Chinese operations. Organization L's headquarters raised such a concern when they were contemplating the options for spin-off and registration as a local Chinese entity.²²⁸

Organization E is an actual example of such a spin-off organization, although due to its location in Beijing it has managed only to register as a commercial enterprise. Working in the field of publishing, the parent foreign NGO originally published only an English-language newsletter; in 2001, it began a Chinese-language division, and in 2003, the staff of the Chinese-language division registered a commercial enterprise as a legal platform for their work.²²⁹ The two organizations continued to work side-by-side as of the date of our interview.²³⁰ An editor of Organization E highlighted several benefits of this kind of localization of foreign NGOs: As a local entity, they have more room to operate and more legitimacy. They can freely hire Chinese staff and train and promote local talent. Moreover, this type of localization is a good method for foreign NGOs to develop and cultivate domestic Chinese resources for public interest activities.²³¹ He sees the growth of such spin-off organizations as a positive externality of foreign NGOs', and particularly operational NGOs', presence in China.

C. Foundations

The regulation and management of foundations is currently in flux: the new Foundation Regulation was promulgated in 2004, but many aspects of the law have yet to be implemented. In this arena, the government's ambivalence toward civil society is amplified. On one hand, China sees the funding that these organizations put toward social services as a great boon. On the other hand, the government fears the political agendas that may come with that funding. When the Foundation Regulation was issued, it was expected to be but one piece of legislation in an overall plan to rationalize regulation of the NGO sector. But on its heels came the Color Revolutions, for which civil society organizations funded by international foundations were largely perceived to be responsible, and a new wave of apprehension swept through China's agencies and bureaus.²³²

²²⁸ Interview L, *supra* note 207.

²²⁹ Interview E, *supra* note 132. The foreign NGO is not registered in any way in China. It at one time was registered as a corporation in Hong Kong, but that registration has since been cancelled. *Id.*

²³⁰ The parent foreign NGO's China operations and its English-language publication have since been shut down, and now only the Chinese-language publication continues.

²³¹ Interview E, *supra* note 132. As an entity registered as a commercial enterprise, however, Organization E is not permitted to solicit donations from the public.

²³² See *supra* Part II.B.

Since that time, the long-anticipated Regulations on the Registration and Management of Foreign NGOs have yet to appear, and the MCA not only has not issued implementing regulations for the Foundation Regulation, but they also seem to be stalling on review of applications for foreign foundation registration.²³³

Prior to the issuance of the Foundation Regulation, options for international foundations were the same as those for other types of foreign NGOs discussed above, and they faced similar problems. Organizations J and K, both large, international grant-making foundations with operations in China, are currently registered as representative offices of commercial enterprises under the State Administration for Industry and Commerce (SAIC).²³⁴ Organization K was allowed to enter China in the late 1980s with the high-level support of certain members of the Politburo Standing Committee and the sponsorship of the Chinese Academy of Social Sciences (CASS). The organization was also able to secure tax exemption through special arrangement with the Tax Bureau mainly due to its high-level government connections.²³⁵ Organization K is thus a somewhat special case due to its early arrival and valuable connections, and its prestige and track record mean that it is able to carry out its activities quite smoothly. This special status could not come without a price. To the present day, Organization K has to employ some Chinese staff assigned by the government, presumably to monitor its internal operations, and as part of the agreement, Organization K cannot publicly criticize or denounce the Chinese government.

Organization J is perhaps a more typical case. It arrived in China in 1999. After securing registration with SAIC, the organization applied for and received an expenditure tax exemption²³⁶ from the Tax Bureau based on its status as a "non-enterprise" (*fei qiye*) unit similar to a trade association. The process for this form of tax exemption is opaque, and organizations generally have to wait one to two years after registration for an uncertain result. Perhaps the organization's largest complaint with the current arrangement—and one that remains unresolved under the new Foundation Regulation—is that it would prefer its China Program to have an independent legal identity, since it is in fact funded by a consortium of foundations, and the international foundation for whom Organization J is in name a representative office merely happens to be the administrator. Such registration is not possible without a corresponding overseas legal entity for which the China Program could be a representa-

²³³ This state of affairs was discussed in Interviews E, G, J, K, and I.

²³⁴ Interview J, *supra* note 179; Interview with Assistant to the Representative of Organization K (Feb. 1, 2007) (on file with authors) [hereinafter Interview K].

²³⁵ Interview K, *supra* note 234.

²³⁶ The Finance Manager with whom we spoke indicated that income taxes were irrelevant for their organization, since as a grant-making institution they had no income in China, only expenditures. Interview J, *supra* note 179.

tive office. Organization J nonetheless uses the name of the China Program, rather than the name of the administering foundation, in all but legal contexts.²³⁷

Although Organization K has faced no significant regulatory impediments in recent years, it nonetheless wishes to transfer its registration from SAIC to MCA under the new Foundation Regulation, in large part to serve as a model for others. CASS, the organization's current sponsor, is willing to serve as Organization K's supervising agency under the Foundation Regulation and has been quite cooperative in attempting to move the process forward. CASS has issued and submitted an invitation letter confirming its sponsorship, and Organization K and CASS have communicated with the MCA Social Organizations Office about the matter. To date, however, they have not submitted a formal application, because MCA has been unable to provide guidance as to what a formal application would entail. MCA has requested various materials from Organization K several times, and Organization K has complied, but recently the process seems to be at a standstill.²³⁸

Organization J would also like to transfer its registration from SAIC to MCA. Its reasons are more practical: it seeks greater legitimacy and, in particular, a more straightforward path to tax exemption. Under the Foundation Regulation, a registered foundation simply presents a certificate of nonprofit status from its home country, and MCA will automatically recognize its representative office in China as nonprofit and tax exempt. The problems Organization J has encountered also differ from those seen by Organization K. The Foundation Regulation requires that representative offices of foreign foundations obtain the support of a supervising agency, and Organization J has not yet been able to do so. In addition to the usual problem of agency reluctance, Organization J is challenged by the fact that its work spans multiple sectors, so that no one government agency stands out as the perfect match. For a foreign foundation, the sponsor must be at the ministry level, further narrowing options. Moreover, if Organization J were to obtain a sponsor that was knowledgeable in only one area of its work, it is unclear how the sponsor would conduct the annual review, which is apparently meant to be substantive. MCA, for its part, does not seem to have the political power to encourage sponsorship by other agencies or to provide more guidance on how the process should work.

Despite the efforts of Organizations J and K and several others, no organization we spoke with was aware of an international foundation that

²³⁷ *Id.* Another option might have been for Organization J to take the path of Organization G described above: Register the China Program as a 501(c)(3) or similar legal entity in the United States, primarily as a formality, then register a representative office for the China Program in China. See Interview G, *supra* note 221.

²³⁸ Interview K, *supra* note 234.

had successfully registered with MCA as of the date of our interviews—although it is difficult to say for sure, since MCA is extremely opaque with regard to both pending applications and completed registrations.²³⁹ More than two years after passage, the Foundation Regulation’s provisions on representative offices for foreign foundations remained unimplemented. Further, the Finance Manager of Organization J expressed skepticism as to whether MCA would move forward with registrations in the near future. In his view, silence and inaction give MCA and other relevant state bodies time to research how to guard against events like the Color Revolutions in their implementation of the Foundation Regulation. He suspected that all actors involved are reluctant to take the lead on a highly political issue and will not act until some guidance is provided from the very top, possibly at the upcoming National Congress of the Chinese Communist Party.²⁴⁰ As of the date of this article, it appears little progress has been made. The authors of this article are aware of only three international foundations that have successfully registered, all three of which are extremely high profile and influential: World Economic Forum, the Gates Foundation, and the Clinton Foundation.²⁴¹

Implementation of the Foundation Regulation’s provisions for registration of domestic private foundations, however, has proceeded more smoothly, likely because there is less fear of foreign influence in this arena. In a recent government report, the MCA and some local provincial bureaus have encouraged the growth of domestic private foundations.²⁴² For instance, in 2006, MCA approved seven private foundations at the national level with a total of RMB 310 million in registered capital, and Guangxi province approved five private foundations.²⁴³

In a move similar to those foreign NGOs that have “spun off” local entities staffed by Chinese personnel—but with the promise of stronger continued ties—some international organizations have looked to register a domestic private foundation as an alternative.²⁴⁴ One foreign NGO discussed above, Organization I, has taken this route after observing, first, the dearth of clear-cut guidance on how to register as a foreign NGO and,

²³⁹ Interview J, *supra* note 179.

²⁴⁰ *Id.*

²⁴¹ See Nick Young, *Full Steam Ahead for “Charity” Even as Breaks Are Applied to NGOs*, CHINA DEV. BRIEF, Oct. 20, 2007, <http://www.chinadevelopmentbrief.com/node/1222>.

²⁴² See Sun, *supra* note 50.

²⁴³ *Id.*

²⁴⁴ An example of an organization that has succeeded in registering as a domestic private foundation is the Bright China Foundation. Bright China Holding Ltd. (BCHL), a commercial enterprise, first established the Bright China Foundation in Los Angeles, CA in 2003, prior to the promulgation of the Foundation Regulation. Then, in 2005, BCHL succeeded in registering a domestic “sister” foundation in Beijing under the same name. See Bright China Foundation, <http://www.bcf.org.cn/english/index-en.asp> (last visited Mar. 30, 2008).

second, the difficulty others were having in registering as a representative office of a foreign foundation. This registration status will give Organization I the ability to implement its projects independently and exercise more control. But most important to the leaders of Organization I, registration will put them on more straightforward legal ground. The civil affairs bureau in Shanghai, where the domestic foundation will be registered, informed Organization I that all was in order as of late 2006, and their registration awaits only collection of the necessary RMB 2 million registered capital.²⁴⁵

Despite the greater clarity of the Foundation Regulation as compared to previous legislation in the field, significant hurdles to registration parallel to those in the regulations on SOs and PNEUs remain. Most prominently, as discussed above and as has proved problematic for Organization J, the dual registration requirement continues to leave foundations scrambling for agency backing. But as mentioned above, experimentation has begun in some local areas to lessen the burden of dual registration. The city of Shanghai, where Organization I is registering, has established a supervising agency specifically for foundations; in other words, the agency's area of expertise for which it will sponsor foundations is not health, or social work, or environmental policy, but specifically the work of foundations, so that any foundation could fall under its arm. Organization I chose Shanghai as its site of registration for this reason, and it has obtained the support of the foundations supervising agency.²⁴⁶

Another impediment, and indeed the impediment that to date has prevented the completion of Organization I's registration, is the registered capital requirement of at least RMB 2 million for private foundations.²⁴⁷ The threshold is even higher in Beijing, where the number is reportedly RMB 8 million.²⁴⁸ According to the understanding of Organization I's China Representative, the capital requirement is intended to ensure a pool of money from which claims could be drawn should the organization's activities turn out to be illegitimate. Organization I's leaders did not initially understand that the required sum could not be spent on programming, but rather had to remain in the account at all times (although it may collect interest as an endowment). The initial RMB 2 million that the organization had collected was earmarked for various projects, and as

²⁴⁵ Interview I, *supra* note 91.

²⁴⁶ *Id.*

²⁴⁷ See Foundation Regulation, *supra* note 47, art. 8. The registered capital requirement for public foundations is even higher at RMB 4 million for local public foundations and RMB 8 million for national public foundations. See *id.* In practice, all public foundations—the only foundations that can solicit funds from the general public in China—are and in the short term likely will remain GONGOs. See Interview I, *supra* note 91.

²⁴⁸ Interview I, *supra* note 91.

a result could not be used to meet the capital requirement as they had intended. They are now in the process of raising an additional RMB 2 million.²⁴⁹

Finally, an impediment that other international organizations may face, but Organization I did not, is the need for strong domestic Chinese relationships to make this method succeed. First, the legal representative of the domestic foundation must be a Chinese resident to be eligible for registration at the provincial level.²⁵⁰ Otherwise, the registration process has to proceed at the national level, entailing registering with the MCA and finding a ministerial-level government sponsor, which is rather unlikely at the moment.²⁵¹ Second, the leaders of Organization I have high-level connections with the MCA that likely contributed to their success. The organization attributes their assets on both these fronts—a trustworthy domestic team of supporters who can serve in the new foundation and helpful government connections—to their long-term investments of time and in relationships in mainland China. A newly arrived organization would be hard pressed to emulate this model.

Once Organization I is registered, several hurdles will still lie before it. First, the organization is concerned about whether it will be able to adhere to the 10% cap on administrative overhead imposed by the Foundation Regulation.²⁵² Especially now, when the organization is in its startup stage and doing due diligence to investigate the feasibility of various projects, the 10% ceiling seems very low. Second, as a private foundation, the organization will be able to accept donations from individuals and corporations, but it will not be permitted to solicit funds from the general public. Third, as discussed above, the Foundation Regulation provides that “[f]oundations, their donors and beneficiaries enjoy tax benefits as stipulated by law and administrative regulations,” but does not specify what those benefits are.²⁵³ The organization will likely enjoy tax exemption through the current complex web of general tax provisions. The prospect of tax deductibility of donations is farther off. The China Representative of Organization I expresses hope in recent efforts of the Tax Bureau to explore how to give tax deductibility certifications, including trips abroad to study other systems.²⁵⁴ But despite MoF’s and SAT’s January Notice that all public benefit SOs and foundations are potentially eligible to accept tax deductible donations,²⁵⁵ private foundations (as

²⁴⁹ *Id.*

²⁵⁰ Technically, the legal representative of a private foundation is required to be a resident of China only if the origin of the foundation’s funds is domestic. *See* Foundation Regulation, *supra* note 47, art. 23.

²⁵¹ *See* Foundation Regulation, *supra* note 47, art. 6.

²⁵² *See id.* art 29.

²⁵³ *Id.* art. 26.

²⁵⁴ Interview I, *supra* note 91.

²⁵⁵ *See supra* Part III.0.

opposed to local or national public foundations) will likely be the last to receive such certification, if at all.

V. A CHILLING EFFECT?

The difficulty—or, in the case of foreign NGOs, impossibility—of “by the books” registration for independent NGOs by no means indicates that the Chinese government, or specifically MCA, is unaware of or disapproves of these groups’ work. In fact, the government is keenly aware that it will need the assistance of such organizations to provide adequate social services for its population as the government withdraws from direct provision of these services.²⁵⁶ Government agencies themselves often partner with these NGOs on various projects.²⁵⁷ At the same time, the ambiguous legal status and resultant irregularities stemming from these organizations’ ad hoc arrangements serves as an effective governmental tool to keep organizations in check in certain respects—namely, it keeps them in fear of the government’s selective enforcement of registration, accounting, and other requirements that they are forced to bend. Domestic NGOs are at risk when registered as commercial enterprises not only due to the mischaracterization that their registration entails, but also because of the double bookkeeping and various tax-evasive techniques they employ to survive. Unregistered foreign NGOs have no legal standing in the country and often push the limits of legality in everyday tasks such as taking out leases and hiring Chinese nationals, while those registered with SAIC face tax and mischaracterization issues similar to those of domestic NGOs. Knowledge of their own vulnerability in these areas in turn makes NGOs hesitant to wade into questionable political waters.²⁵⁸ Ambiguity creates a chilling effect—a cheap and powerful regulatory tool.

The NGO representatives interviewed varied in the degree to which they would agree with the above depiction. Two of the domestic NGOs, Organizations A and D, are quite frustrated with the impossibility of

²⁵⁶ See, e.g., Chan, *supra* note 114, at 119-21; Lu, *supra* note 129, at 2; Ma, *supra* note 33, at 306.

²⁵⁷ Most of the organizations we spoke with, including Organizations A, C, D, G, H, I, J, K, and L, engaged in extensive projects with government agencies, usually at the local but sometimes at the national level.

²⁵⁸ See Interview A, *supra* note 49. Indeed, the government does appear to use technicalities stemming from lack of MCA registration as an excuse to crack down on groups whose political message it views as problematic. Very seldom has the state cracked down on unregistered environmental groups, since such groups’ messages are generally in line with the state policy of environmental protection. At the same time, the government has, for example, shut down an unregistered NGO, Corruption Monitor, in Henan Province ostensibly for its failure to register with MCA at the national level to conduct its pan-China anti-corruption activities. See Chan, *supra* note 114, at 129.

registration with MCA, to the point that they have banded together with six other prominent and well-established grassroots NGOs in the Beijing area to submit a bill to the NPC calling for the improvement of the legal environment for NGOs.²⁵⁹ Of the eight organizations joining in this effort, all have over ten years of history, and all but one have only been able to register as commercial enterprises; the one exception is a second-tier entity under a GONGO.²⁶⁰ As the Director of Development of Organization D explains it, the time has come for grassroots NGOs to ascend to the stage (登堂入室); he jokingly commented that under the current regime, the grassroots NGO's position is “even lower than that of a mistress” (不如二奶)—used by the government when useful, but denied the respect of formal recognition.²⁶¹ The Director of Organization A views the current legal ambiguities as a purposeful attempt on the part of the government to keep grassroots NGOs unregistered, so that the government can exercise arbitrary control and allow NGOs to operate only in areas that they prescribe. The government in this way is using law not as a means of regularizing human conduct, but as a tool for governmental control. Independent NGOs thus “always have an axe hanging over their heads” and lack a sense of security.²⁶²

But others placed regulatory issues low on their list of concerns.²⁶³ The President of Organization C described how she had been offered, but ultimately turned down the chance to register as a social organization under MCA. Registering with MCA proved impossible when Organization C was first getting off the ground, but after it had gained a reputation for the quality of its work, she got to know the head of the Beijing Civil Affairs Bureau (BCAB). As a result, the Social Organizations Management Division agreed to accept her application to register as a social organization in November 2006. BCAB recommended CASS as a potential supervising agency, but she would have to make those connections and arrangements herself. In addition, BCAB imposed a harsh condition: Organization C would have to cease accepting foreign funding. Ultimately, the Director decided that the organization could retain more independence under its current commercial enterprise registration, and since most people in the field already knew the organization and its oper-

²⁵⁹ Interview A, *supra* note 49; Interview D, *supra* note 122.

²⁶⁰ Interview A, *supra* note 49. The eight organizations are: Green Earth Volunteers, Beijing Huiling, Hui Tian Yu, Maple Women's Psychological Counseling Center, Friends of Nature, China NPO Network, Cultural Development Center for Rural Women, Stars and Rain, and Beijing Brooks Education Center.

²⁶¹ Interview D, *supra* note 122.

²⁶² Interview A, *supra* note 49.

²⁶³ The Director of Organization C, for instance, professed upon our explanation of our research topic: “Regulatory environment, eh? To be honest, I don't give the subject much thought!” Interview C, *supra* note 70.

ations were fairly smooth, she stuck with the status quo.²⁶⁴ Organization C is not alone in viewing registration and other regulatory matters as not a top concern: Organizations B, F, and J joined Organization C in listing capacity building, personnel, and funding among their top challenges, over and above regulatory hurdles.²⁶⁵

Foreign NGOs interviewed seemed to view the risks posed by their legally ambiguous status as fairly minimal. Organization H suggested that foreign NGOs had less to fear from the current ambiguities than their domestic counterparts, not because their status was clearer, but because China cares greatly about its international reputation.²⁶⁶ Unlike Russia, China is highly unlikely to suddenly crack down and force all unregistered foreign NGOs out of the country.²⁶⁷ Nonetheless, some viewed improvement of the NGO regulatory environment as an important issue, calling for the rationalization of the overall structure for NGO regulation.²⁶⁸ Most seemed satisfied with their ability to conduct their activities in China, and even when a “chilling effect” on activities was admitted, the explanation offered was quite different from that of Organizations A and D above: ambiguity may prove to be effective governance, but it is not intentional, claimed the Finance Manager of Organization J. The ambiguity results from confusion between departments, the difficulty of answering recent challenges (such as the Color Revolutions), and a lack of willingness among officials to take a position.²⁶⁹

But do dismissals of the chilling effect by organizations like C and H mean that there is none or that it is insignificant? Not necessarily. In fact, many elements of the rhetoric of some interviewed organizations, as well as recent research on Chinese NGOs’ self-described goals, suggest that some aspect of the Chinese environment—be it the regulatory regime or another factor—has caused even grassroots NGOs in China to

²⁶⁴ *Id.*

²⁶⁵ Interview B, *supra* note 122; Interview C, *supra* note 70; Interview F, *supra* note 159; Interview J, *supra* note 179.

²⁶⁶ On the other hand, the government’s suspicion of hidden political agendas is likely greater for foreign organizations than for domestic ones. See Interview K, *supra* note 234.

²⁶⁷ Interview H, *supra* note 201. Whereas China’s reaction to the Color Revolutions to date can be characterized primarily as stalling, Russia’s was to enact harsh new regulations forcing unregistered foreign NGOs out of the country, raising barriers to registration, and requiring close monitoring of the finances of both domestic and foreign NGOs. See generally Yevgeny Volk, *Russia’s NGO Law: An Attack on Freedom and Civil Society* (May 24, 2006), <http://www.heritage.org/Research/RussiaandEurasia/wm1090.cfm>.

²⁶⁸ Interview G, *supra* note 221; Interview I, *supra* note 91; Interview J, *supra* note 179; Interview K, *supra* note 234.

²⁶⁹ Interview J, *supra* note 179.

embrace a service-based role and eschew advocacy.²⁷⁰ It is only practical that NGOs working in China should frame their goals in terms of forming a "harmonious society" and serving as "middle organizations" bridging the gap between the government and citizens.²⁷¹ But the danger is that at some point, through repetition, these notions of civil society's role may be internalized. One defines one's goals within the limits of what seems possible. Indeed, one study argues that it is acts of self-censorship that have allowed China's grassroots NGOs to avoid interference from the state, and thus labeled China's a "self-censored civil society."²⁷² This is not to denigrate the work of these organizations—their accomplishments are numerous and impressive—but merely to note that legal ambiguity combined with China's political climate seems to have shaped the overall agenda of China's grassroots NGOs to favor politically safe fields and politically prudent approaches.²⁷³

Whether this regulatory "chilling effect" is a purposeful ploy for governmental control, an inadvertent side effect of governmental confusion, or (most likely) some combination of the two,²⁷⁴ and whether individual NGOs think it important or not, it has implications for the healthy growth of the NGO sector in China. NGOs in China appear to have subverted the original corporatist intent of the SO and PNEU Regulations by registering as commercial enterprises or simply not registering, but they

²⁷⁰ See CHINA DEV. BRIEF, NGO ADVOCACY IN CHINA (2006), available at <http://www.chinadevelopmentbrief.com/node/749> (click on "Download Special Report"). The study finds that few Chinese NGOs spontaneously mention "advocacy" as an important methodology, and even among those that do, they emphasize moral renewal over political change as their end goal. The NGOs interviewed in the study generally professed a strong desire to work with the government.

²⁷¹ See, e.g., Interview G, *supra* note 221.

²⁷² Jiang Ru, *Environmental NGOs in China: The Interplay of State Controls, Agency Interests and NGO Strategies* 11 (Aug. 2004) (unpublished Ph.D. dissertation, Stanford University) (on file with authors).

²⁷³ An example of prudence among the interviewees might be seen in Organization H. Its leaders work in a politically sensitive area, legal reform, and yet their approach is cautious. They emphasize not international legal norms, but China's own laws, and insist that the problem is not content, but local-level implementation. They work closely with their governmental partners and are always willing to frame issues in the least sensitive terminology possible. See Interview H, *supra* note 201. It is difficult to say whether they would frame issues differently if they had independent legal status and were implementing projects on their own (they certainly would say they would not); there may be good reasons other than uncertain legal status to articulate their positions as they do. But it seems clear that, with their current uncertain status, a more aggressive articulation would result in a swift end to their China operations.

²⁷⁴ Cf. Hsia & White, *supra* note 200, at 347 (describing the difficulties faced by foreign NGOs in China as a "combination of corporatism and confusion" wherein the Chinese government's corporatist views of civil society combine with its "lack of a clear policy for foreign social groups").

remain within the corporatist conception in the service-oriented roles they seek to fill. What long-term implications will this channeling of NGO energies toward social services have for China's ability to develop a pluralist civil society that displays the virtues discussed in Part II above,²⁷⁵ including the ability to act as a check on government excesses? In addition, this "chilling effect" method of regulatory control places independent NGOs beyond MCA's field of vision, leaving them not just to self-censor but also to self-govern at a stage of development when supervision may be crucial to healthy growth. One prominent NGO leader observed that because of the ambiguity of NGOs' legal status, combined with the lack of regulation and supervision from the government, the public, or NGOs themselves, more corruption and scandals involving NGOs are likely to crop up in the near future.²⁷⁶

In sum, a regulatory regime that attempts to regulate by "opening one eye and closing the other," blocking most independent NGOs from formal registration but nonetheless tolerating or even encouraging their activities when useful, creates a chilling environment wherein both the scale and range of NGO activities will necessarily be limited. Such an environment does not offer the NGO sector room for healthy growth. This environment not only hinders achievement of the virtues of civil society from an NGO perspective, but also limits the extent to which these organizations will be capable of filling the role for them envisioned by the state, namely, stepping in to meet social welfare needs as the state steps out. Lacking the assurance and the logistical benefits offered by formal recognition, and the supervision that accompanies it, NGOs will be hard-pressed both to develop and expand their capacity to meet China's growing social needs and to keep themselves disciplined and accountable while doing so. But trust will likely have to be built on both sides before the government will be willing to bring independent NGOs into the fold of fully legalized organizations.

VI. TRUST AND TRUSTWORTHINESS: THE CHICKEN OR THE EGG?

Both public trust and the trust of the government are key to independent NGOs' growth and development in China today. The former is essential because charitable giving by the public could diversify NGOs' funding sources, making them less beholden to foreign foundations, more responsive to the interests of the Chinese populace, and generally more independent. The latter is important because only with increased trust will the government begin to regularize its supervision of NGOs, replacing the looming axe with clear-cut rules. But both are lacking in China today. Time and again, the NGOs we interviewed lamented the lack of

²⁷⁵ See *supra* Part II.A.

²⁷⁶ Interview A, *supra* note 49.

public trust in their work.²⁷⁷ Supporting this perception, one recent informal study found that while Beijing's elites are aware of the work of independent NGOs, the most trusted routes for donations remain work units, schools, and neighborhood committees.²⁷⁸ The perception of everyday "people on the street" was more negative: they suspected NGOs' financing and viewed them as lacking in public accountability, and therefore expressed an unwillingness to give.²⁷⁹ On the government side, meanwhile, fear of NGOs' potential for incubating political dissent ebbs and flows in response to current events.²⁸⁰ With respect to events such as the Color Revolutions, independent NGOs' heavy reliance on international funding foments governmental fears. Additionally, the government generally considers China's NGOs to lack the capacity and organization necessary to achieve their objectives.²⁸¹

Several organizations we interviewed emphasized the need for greater communication and building of mutual trust between the government and civil society as a prerequisite to an improved regulatory environment.²⁸² The Vice President of Organization G was particularly optimistic in this regard, insisting that the main problem was that MCA and other governmental stakeholders simply did not know what was happening on the ground in the NGO sector; with increased communication with these government "customers" of NGOs and cooperation to improve NGO regulation, the situation would improve.²⁸³ Not all organizations were as confident that mere communication would solve the problem, of course, but even those that were more critical of government policy emphasized

²⁷⁷ Interview A, *supra* note 49; Interview B, *supra* note 122; Interview D, *supra* note 122.

²⁷⁸ See U.S. Embassy Beijing, *Chinese NGOs—Carving a Niche Within Constraints* (Jan. 2003), <http://www.usembassy-china.org.cn/sandt/ptr/ngos-prt.htm>.

²⁷⁹ *Id.*

²⁸⁰ See *supra* Part II.B.

²⁸¹ See, e.g., Guanyao Chen, *China's Nongovernmental Organizations: Status, Government Policies, and Prospects for Further Development*, 3 INT'L J. NOT-FOR-PROFIT L. (2001), available at http://www.icnl.org/knowledge/ijnl/vol3iss3/art_2.htm. Chen describes his view of the situation: NGOs are not yet ready to operate independently. Because the structures of some NGOs do not accord with the requirements of a market economy, they have a tendency to rely overly much on the government and are too administrative structurally. Congenitally defective, they cannot achieve their objectives. Concurrent with this problem, internal controls within China's NGOs are imperfect as they lack a complete set of democratic management mechanisms, thereby greatly weakening their effectiveness. *Id.*

²⁸² Interview G, *supra* note 221; Interview I, *supra* note 91. A recent comprehensive study of NGOs' self-described goals and objectives generally found a great willingness to communicate and cooperate with the government. See CHINA DEV. BRIEF, *supra* note 270.

²⁸³ Interview G, *supra* note 221.

the need for NGOs' own self-improvement to make their organizations more transparent and accountable.²⁸⁴

But efforts on the NGO side to build trust are unlikely to succeed in the absence of governmental improvement of the regulatory environment. At the same time that the government's approach to regulation creates a "chilling effect" on independent NGOs' politically sensitive activities, it also creates a supervision gap that could lead to messy accounting and internal governance, further undermining both governmental and public trust in these organizations that are vital to the provision of social services as China's economic development continues. The inability to register properly with MCA leaves independent NGOs unsupervised in everything from the nonprofit nature of their activities to their internal governance structure—with the only potential gap-fillers coming in the form of restrictions imposed by international foundations or even foreign governments, the parties whose intentions the Chinese government most fears.²⁸⁵ The legally questionable moves that NGOs must resort to in order to accomplish everyday tasks - due to their lack of proper registration - further undermines public and governmental trust. As public trust diminishes, so too does public willingness to give (which is further undermined by lack of incentives such as tax deductibility from the government). In response, NGO reliance on international funding increases, and governmental trust diminishes.

If an environment that will foster NGO development, but also address governmental fears and allow for the gradual building of trust over time, is to be created, it will require action on two fronts. First, the government must work to remove those elements of current policy that actively discourage NGO trustworthiness. Namely, it must find a way to bring independent NGOs into the system of governmental supervision under MCA that will allow for their guided and accountable growth. This approach will allow the government, over time, to observe the quality of work that civil society is capable of producing and increase its trust in the third sector as a vital part of society. At the same time, NGOs must continue to build their own trustworthiness from within. This is an endeavor not just for each individual NGO, but also for the NGO sector as a whole. If the NGO sector can devise a mechanism to improve overall governance and even to crack down on bad actors within its midst, governmental and public trust in the sector's work will naturally improve.

²⁸⁴ Interview A, *supra* note 49; Interview D, *supra* note 122.

²⁸⁵ See *supra* Part IV.A.2.c.

A. *Building a Framework for Trust: Regulatory Problems and Possibilities*

As many of the interviewed NGOs²⁸⁶ and several scholars in the field²⁸⁷ have noted, the creation of an ideal enabling environment for growth of the NGO sector in China would entail a rationalization of the current legislation, bringing SOs, PNEUs, and foundations under a single piece of legislation that, among other things, would eliminate the dual management requirement, allow competition and branching, and provide detailed guidance on the financing and internal governance of NGOs. But a single piece of framework legislation, to be implemented consistently throughout the country, is not only politically unlikely in the near future, but also premature from a practical perspective. Due to the dearth of trust in NGOs discussed above, if the government were to enact framework legislation today, it would likely retain the current problematic restrictions. Moreover, the MCA and its local bureaus at their current staffing and budget levels do not have the capacity to register and monitor the large influx of new applicants likely to occur if, for example, the dual management requirement were abruptly dropped. Instead, experimentation with more liberal policies, moving toward a system in which independent NGOs are both granted legal status and brought under MCA supervision, should continue and expand. These experiments would allow government agencies to develop their internal practices, build government trust in independent NGOs as their familiarity increases, and create for those NGOs an environment more conducive to trustworthy behavior.

Chinese officials have already begun such experimentation. Although the laws on the books are still very restrictive, government policies on NGO registration and activities both at the central government level and in various localities have been increasingly open. In particular, in recent years, the government has begun to give certain types of NGOs more favorable treatment than the law requires. These NGOs include those that are smaller in scale, such as community-based NGOs in city and rural villages; trade and commerce associations; and charitable organizations that deliver various social services to socially disadvantaged groups.²⁸⁸ Policies that encourage or even promote these fairly politically safe

²⁸⁶ See, e.g., Interview D, *supra* note 122; Interview K, *supra* note 234.

²⁸⁷ See, e.g., Wang Ming, *Guan yu gai ge wo guo min jian zu zhi shuang chong guan li ti zhi de jian yi* [Suggestions for Reforming China's Dual Management System for NGOs], ZHONGGUO WANG [CHINA WEB], Mar. 14, 2007, http://www.china.com.cn/2007lianghui/2007-03/14/content_7960561.htm.

²⁸⁸ See Sun, *supra* note 50; see also Ma, *supra* note 33, at 311-16 (discussing governmental encouragement of private trade associations); *id.* at 322 (discussing how the government has allowed the expansion of private social assistance organizations); Simon, *supra* note 38, at 71-72 (discussing local experiments with lower barriers to registration for farmers' cooperatives and trade associations).

NGOs vary considerably from locality to locality. Some innovative policies seen at the local level may be ripe for the next step of experimentation at the national level. A few key possibilities follow:

1. Three-Tiered Management System

One of our key policy suggestions for the immediate future is to create a tiered management system. For instance, a three-tiered management system could be instituted. First, for NGOs that involve few people and that operate in fields that are considered “safe,” the system would simply require that they file registration documents (备案) at their local civil affairs bureau, and no approval would be needed. These NGOs should include most community-based NGOs, now active in cities and rural villages. Local governments in Guizhou and Anhui Province and some districts of Shanghai and Shenzhen have already started this experimentation, and many smaller localities have done the same.²⁸⁹ But since there is no formal law recognizing the practice, it is still considered a legal grey area. It is time to take the next step and revise the law affecting these small-scale NGOs to require only record-filing for registration. Second, for social service NGOs of certain types, such as poverty alleviation, education, children, AIDS, or women, a tiered management system could eliminate the dual management requirement but retain the MCA approval process. Third, the system could retain dual management for NGOs that are considered politically sensitive, such as those engaging in political activism and religious activities—given the current political climate, the Chinese Communist Party will likely insist on continued dual management in these areas for quite some time.

Wang Ming, a noted NGO scholar, has suggested a similar three-tiered management framework for NGO registration that would do away with dual management and create three tiers, namely, record-filing for small-scale NGOs, registration for larger-scale NGOs, and a public-interest legal person certification process for the most influential charitable NGOs, allowing them not only legal status but also tax exemption and deductibility benefits.²⁹⁰ It is a sound idea on its own and we support its spirit. We hope our proposed framework might serve as a step that can be immediately implemented and that the Chinese Communist Party and the state might be willing to undertake at a moment when concern about the political dangers of NGOs continues to run deep, and complete elimination of dual management is thus unlikely.

2. Non-Corporatist System at City Level

Similar in spirit to our suggestion on the three-tiered management system, we also suggest experimenting with a non-corporatist system in local

²⁸⁹ See Sun, *supra* note 50.

²⁹⁰ See Wang, *supra* note 287.

areas such as at the city level in “safe” fields, such as social services NGOs and trade associations. The national-level law, as it currently stands, stipulates that there shall be only one NGO allowed in a given area of activity.²⁹¹ Counter to this, Guangdong Province has passed the first provincial legislation on trade associations that not only does away with the dual management system, but also abandons the non-competition requirement.²⁹² It was hailed as an historic experiment.²⁹³ Allowing multiple NGOs makes a lot of sense, particularly for NGOs active in the field of social services. Given the alarming inequality and the inadequacy of public goods provision in rural and urban areas all over China, need in areas such as poverty alleviation and education is immense. As discussed above, these social services NGOs would still need government approval for registration, but a number of them working in similar areas should be allowed. In the same light, it makes little sense that PNEUs registered as schools and hospitals are not allowed to branch within a city under the current PNEU Regulation.²⁹⁴

3. Foundation-Specific Supervising Unit

In the area of foundations, the creation of a designated government entity known as the “foundations supervisory unit” to serve as the supervising agency for all foundations should be further encouraged. As seen in Organization I’s experience, Shanghai is already experimenting with this method. Similarly, in 2006, Jiangsu and Guangdong abandoned the dual management system for foundation registration: civil affairs bureaus will act as both the supervising agency and the registrar.²⁹⁵ This would be a good way to minimize the difficulty of finding a supervising agency, while at the same time ensuring continued close monitoring by the government. This move will bring foundations into some kind of monitoring system rather than forcing them underground where they will not be monitored at all. Also, this arrangement makes sense given that foundations’ work is often multi-sector, and in such situations no government

²⁹¹ See SO Regulation, *supra* note 3, art. 13; PNEU Regulation, *supra* note 57, art. 11.

²⁹² See Guangdong Sheng hang ye xie hui tiao li [Guangdong Province Industry Association Regulations] (promulgated by the Guangdong Provincial People’s Cong., Dec. 2, 2005, effective Mar. 1, 2006).

²⁹³ See Fang Xiangwen, Guangdong NGO Management Bureau Director, Zai quan guo min jian zu zhi guan li gong zuo shi pin hui yi shang de fa yan [Speech at the National NGO Management Conference], <http://www.chinanpo.gov.cn/web/showBulletin.do?id=25789&dictionid=3500&catid=350012> (Jan. 31, 2007); see also Guangzhou di qu jiu dian xie hui [Guangzhou Hotels Ass’n], Hang ye xie hui guan li mo shi jiang jin xing zhong da gai ge [Industry Association Management Model Will Undergo Large-Scale Reform] (Sept. 19, 2006), <http://www.gzha.com/newinfo.asp?id=136>.

²⁹⁴ See PNEU Regulation, *supra* note 57, art. 13.

²⁹⁵ See Sun, *supra* note 50.

agency would be an appropriate sponsor unless an agency is designated to supervise foundations.

In addition, the government should continue efforts to implement the Foundation Regulation, especially with respect to foreign foundations. Although governmental fears in the wake of the Color Revolutions are somewhat understandable, stalling on implementation does not halt the activities of foreign foundations but merely leaves them outside of the MCA's supervisory purview. To date, MCA has not yet issued the implementation rules for the Foundation Regulation, though it is reported that the rules have already been drafted by the MCA and sent to the State Council for approval.²⁹⁶

4. Non-Governmental Organization Regulatory Commission

Professor Wang Ming has put forth the innovative idea of establish an NGO Regulatory Commission (民监会) as a ministerial-level government agency directly under the State Council.²⁹⁷ Though an NGO Regulatory Commission is not likely to be set up soon, the vision and the rationale behind it hold great importance for China. The current regulatory framework is very fragmented, with the MCA and almost all government agencies having a share in the regulation of NGOs, given the dual management system in place. However, in reality, most government agencies decline to take on the responsibility of supervising and monitoring grassroots NGOs, thus a majority of them go unregistered and underground. MCA, as the only government body in charge of registration, cannot possibly oversee the whole NGO sector, given its limited resources and relatively lower political status in the government hierarchy. The establishment of a higher-level government body with sufficient manpower both to supervise the NGO sector and to start to recognize and grant underground NGOs legal status seems to be an inevitable choice going forward. This approach would resemble that of England and Wales, where the government has appointed a Charity Commission to serve as the official registrar of charities and to "regulate so as to promote compliance with charity law and to equip charities . . . to maximise their potential and enhance their accountability to donors and those who benefit from charities."²⁹⁸

B. *Building Trustworthiness from Within: The Potential of Self-Governance*

As the government continues to experiment with regulatory structures, NGOs must take action to improve mutual trust and understanding

²⁹⁶ See *id.*

²⁹⁷ See Wang, *supra* note 287.

²⁹⁸ Charity Comm'n of Eng. & Wales, The Charity Commission and Regulation, <http://www.charity-commission.gov.uk/spr/regstance.asp> (last visited Jul. 5, 2008).

between themselves and the government. Part of this trust building may come through increased communication, and in this regard independent NGOs should continue to partner with government agencies on specific projects and invite government participants to conferences and other events.²⁹⁹ But part, too, must come from the grassroots NGO community’s conscious efforts to prove its trustworthiness by demonstrating transparency, accountability, and effectiveness in the fields in which they work.³⁰⁰ Finding a means to ensure accountability across the NGO sector will prove difficult in a regulatory environment that discourages horizontal ties and, at the same time, provides no supervision for most independent NGOs, but it will also likely be essential to winning the government’s confidence to institute regulatory reforms.

The NGOs we interviewed seemed very conscious of internal governance and accountability issues, but responded to these concerns in a variety of ways. Passionate, dynamic leaders who kept a strict eye on all goings on and would allow no departure from the organization’s goals—which were often tied closely to their personal ideals, led certain NGOs.³⁰¹ Others consciously infused their organizations’ decision-making processes with democratic norms.³⁰² Most organizations interviewed charged a Board of Directors with overseeing their operations, but the degree of independence and power of the Board seemed to differ greatly.³⁰³ Some organizations condemned all for-profit activity conducted by an NGO as potentially confusing and diminishing public and governmental trust at a time when trust is already low;³⁰⁴ others openly engaged in for-profit activity to fund their nonprofit enterprises.³⁰⁵

²⁹⁹ See Interview G, *supra* note 221.

³⁰⁰ See Zhao Liqing, *The Nature of Partnerships with NPOs that Contribute to the Balanced and Sustainable Social, Economic and Environmental Development in Mainland, China 5-6* (Oct. 2003), available at <http://www.etc.be/ftp/public/CPI/Essay%20by%20Professor%20Zhao.pdf>.

³⁰¹ The leaders of Organizations A and C gave us this impression.

³⁰² See Interview B, *supra* note 122.

³⁰³ For example, Organization B retained 7 out of 8 seats on its Board for individuals outside the organization. Fiscal resources of potential Board members were specifically not a criteria for selection, and each Board member had veto power over key decisions. Barriers to constituents’ (in this case, migrant workers’) participation were thus low, and their power through the veto was quite high. See *id.* Organization C’s Board, in contrast, had a different kind of power: one Director committed to donations of RMB 10,000 a month and in turn was able to control the agenda of the organization in certain areas. See Interview C, *supra* note 70.

³⁰⁴ Interview A, *supra* note 49.

³⁰⁵ Interview C, *supra* note 70 (charging for consulting and training sessions when specifically invited by the target), Interview F, *supra* note 159 (operating a volunteer-run supermarket to fund its activities). Most governmental regulatory regimes allow nonprofit organizations to engage in certain for-profit activities, based on various tests examining the organization’s purposes. IRISH ET AL., *supra* note 102, at 56-58.

Actions taken to ensure transparency and accountability varied widely, from hiring outside auditors and publishing all financials online³⁰⁶ to simply saying the organization was happy to show its books to anyone who wished to see.³⁰⁷ In general, the fewer resources an organization possessed, the fewer transparency and accountability measures it took.

These individual attempts at self-imposed good practices are sincere and, in some cases, internally effective. But proving trustworthiness to the public and the government, weeding out corrupt actors that give the sector a bad name, and actually improving practices across the sector will likely require more than just individual efforts. Two recent efforts to examine and implement best practices across the sector hold great promise for achieving these goals.

First, several major professional firms and corporations operating in China have taken action to enable Chinese NGOs to build their capacity and spread best practices. The firms -McKinsey & Company, Deloitte Touche Tohmatsu, Ogilvy & Mather, Novartis, Jun He Law Offices, and Motorola—have joined together with the China Youth Development Foundation and the China Foundation for Poverty Alleviation, two prominent GONGOs, to form a “venture philanthropy foundation,” Non-Profit Partners (NPP).³⁰⁸ Unlike other foundations, NPP will provide its grantees not just with money, but also with pro bono professional support in the fields of management, finance, accounting, law, and marketing, as well as multi-year financial support specifically designated for capacity building activities.³⁰⁹ Through this model, NPP hopes to see its 20 to 25 grantees become “standard-bearers” for the NGO sector in China.³¹⁰ This approach to improved accountability and effectiveness of NGOs is particularly notable in that it brings together the state, civil society, and corporate sectors in a mode meant to strengthen trust on all sides.

Second, China NPO Network (CNPON), a Beijing-based NGO, is currently developing a set of “honesty and self-discipline” (*cheng xin zi li*) standards and a corresponding certification process for China’s NGOs. CNPON has been working to build the capacity of NGOs in China through trainings, conferences, and information sharing since its formation in 1998, and in 2001 the Center proposed “Nine Rules for NPO Self-

The keystone to an organization’s nonprofit nature is not that it refrains from all for-profit activity, but that no profits are distributed to Board members, employees, or other interested parties. *See id.* at 48.

³⁰⁶ Interview A, *supra* note 49; Interview B, *supra* note 122; Interview D, *supra* note 122.

³⁰⁷ Interview F, *supra* note 159.

³⁰⁸ McKinsey & Co., *Innovating Corporate Giving in China* (Oct. 30, 2006), <http://www.mckinsey.com/locations/greaterchina/ourwork/latestnews/corpgiving.aspx>.

³⁰⁹ *See id.*

³¹⁰ *Id.*

Discipline.³¹¹ In 2003, it circulated the “Accountability Standards for Nonprofit Organizations,” which built upon the principles established in the Rules and expanded them to provide more specific guidance. The Standards cover topics including the nonprofit nature of the organization’s motives, general ethics, internal governance, financial management, and transparency.³¹² CNPON is now partnering with the China Youth Development Foundation and McKinsey & Company to develop its certification methodology³¹³ - like the NPP above, bringing the three sectors together to build mutual trust even in the process of establishing methods to increase NGO trustworthiness. The certification process is to be fully voluntary: organizations will request evaluation from CNPON of their own accord, CNPON will conduct an evaluation, and if the organization passes, it will be authorized to advertise its certification as a mark of quality.³¹⁴ China NPO Network has developed a comprehensive set of evaluation criteria. At this preliminary stage, it has published these criteria as a “self-audit tool” and encouraged NGOs to conduct self-audits and provide feedback on how the system might be improved.³¹⁵ CNPON has also begun conducting evaluations based on these criteria on a trial basis.³¹⁶ To date, however, the development of the certification system has proved far more challenging than the development of the standards: China’s NGOs are diverse in their size, resources, structure, and missions, and an evaluation system cannot be one-size-fits-all without discriminating against the smallest and most vulnerable organizations.³¹⁷

Despite the impediments, experience in the region would suggest that CNPON is on track to be a very useful mechanism for improving NGO accountability and raising government trust in independent NGOs. In several countries, NGOs have initiated self-regulation with voluntary codes of ethics, similar to the Standards of CNPON absent a certification

³¹¹ See NPO XIN XI ZI XUN ZHONG XIN [CHINA NPO NETWORK], FEI YING LI ZU ZHI GONG XIN LI BIAO ZHUN GUO JI GAI LAN [INTERNATIONAL REVIEW OF ACCOUNTABILITY STANDARDS FOR NONPROFIT ORGANIZATIONS] 63 (2004); see also Mark Sidel, *Trends in Nonprofit Self-Regulation in the Asia Pacific Region* (Asia Pacific Philanthropy Consortium Paper 2003) (English translation of the Rules).

³¹² See CHINA NPO NETWORK, *supra* note 311, at 63-64.

³¹³ Interview D, *supra* note 122.

³¹⁴ *Id.*

³¹⁵ See China NPO Network, *Zhongguo NPO zu zhi zi wo ping gu gong ju jie shao* [Introduction to the China NPO Self-Audit Tool], NPO ZONG HENG [NPO LENGTH & BREADTH], Issue 4, 2006, at 19.

³¹⁶ *Id.* at 23-24. Organization B, for example, has undergone a CNPON evaluation. See Interview B, *supra* note 122.

³¹⁷ See Interview D, *supra* note 122; Interview E, *supra* note 132. To combat this problem, some NGO certification programs in other countries have developed distinct evaluation criteria for NGOs of various sizes. See, e.g., Pakistan Ctr. for Philanthropy, NPO Certification Model, available at <http://www.pcp.org.pk/pdf/Certification%20Model.doc> (last visited Jul. 5, 2008).

mechanism.³¹⁸ True adherence to voluntary codes, however, is difficult to measure, and many have proved unsustainable after initial enthusiasm subsides.³¹⁹ While certification schemes remain relatively young and it is therefore difficult to determine their staying power, their actual effect on NGO practices appears much greater.³²⁰

Moreover, in at least two cases, NGO-initiated, self-regulatory certification processes have not only successfully calmed governmental suspicions of NGO irregularity, but also led to innovative government-NGO partnerships in which the state has delegated tax exemption and deductibility determinations to third sector parties. The first instance of such a delegation began with a threat from a “revenue-hungry” Philippine government to withdraw all tax benefits from nonprofit organizations, spurred by the perceived impossibility of distinguishing legitimate organizations from tax shelters and otherwise supervising NGOs’ activities in the face of their burgeoning numbers.³²¹ When the NGO community protested, the Department of Finance challenged them to design a mechanism to sort the worthy from the mediocre or even fraudulent, and the result was the Philippine Council for NGO Certification (PCNC). The program, begun in 1998, evaluates organizations based on criteria in six categories—Vision, Mission, and Goals; Governance; Administration; Program Operations; Financial Management; and Networking—and views its mission as overall improvement of accountability in the NGO sector, but its determinations, through agreement with the Department of Finance, also determine tax status.³²² As of February 2007, the organization had evaluated 941 organizations and certified 748, and it is still going strong after over eight years.³²³

Pakistan, meanwhile, has followed in the Philippines’ footsteps: after intense governmental suspicion and periodic repression of the NGO sector based on the sector’s heavy international funding during the mid- to late-1990s,³²⁴ in 2003 the Pakistan Centre for Philanthropy (PCP) established a certification system to enhance NGO accountability, and shortly

³¹⁸ Countries in addition to China in the Asia-Pacific region where self-regulatory codes of ethics have been introduced include Australia, Bangladesh, Cambodia, India, Indonesia, Pakistan, and the Philippines. See Sidel, *supra* note 311, at 35-36.

³¹⁹ See *id.* at 6, 8, 12.

³²⁰ Countries in the region where some form of certification scheme is underway include Australia, India, Pakistan, and the Philippines. See *id.* at 35-36; Pakistan Ctr. for Philanthropy, Certification, <http://www.pcp.org.pk/certification.html> (last visited Jul. 5, 2008).

³²¹ Caroline Hartnell, *The Philippines: Self-Regulation on Trial* (Jan. 1, 2004), <http://www.icnl.org/knowledge/news/2004/01-09.htm>; *Accountability in Practice: Philippines Council for NGO Certification* (Mar. 21, 2007), <http://www.oneworldtrust.org/?display=accnewsmar07>.

³²² See Hartnell, *supra* note 321.

³²³ See *Accountability in Practice*, *supra* note 321.

³²⁴ See Sidel, *supra* note 311, at 21.

thereafter the government recognized PCP certification as a basis for tax exempt status.³²⁵ Although the PCP process is closely modeled on that of the PCNC, it differs in two important respects that might make it more palatable for a regime more wary of NGOs' potential power. First, the PCP certification process has not become the exclusive path to tax exempt status in Pakistan; nonprofit organizations still may apply directly to the Central Board of Revenue for exemption, and government retains the right to delegate certification power to third party organizations in addition to PCP.³²⁶ Second, although the evaluation process is conducted entirely by PCP, ultimate decision-making authority rests in the Certification Panel, an independent body composed of representatives from civil society, the corporate sector, and the government.³²⁷

Of course, it is likely premature in China to expect that the government would consider a delegation of power such as that seen in the Philippines or Pakistan. China's civil society remains weak, and the government's ambivalence runs deep.³²⁸ But CNPON's close collaboration with China Youth Development Foundation, as well as more generally its regular communication with the MCA,³²⁹ make it more likely that these parties will have confidence in the certification process that CNPON establishes. From there, the government's confidence in the NGO sector will grow as more NGOs are certified, and the government may look to CNPON's standards and processes as it considers how to improve governmental supervision of the sector.

VII. CONCLUSION

If China's nearly three decades of reform can be called an "economic revolution," the next stage of reform holding great promise is a quiet "social revolution" coming from an emerging and ever-growing civil society. Quite apparently, the Chinese Communist Party and the government bureaucracy are not ready for the upcoming sea change. Their attitude toward independent NGOs remains one of deep ambivalence, alternating between fear that these groups will be a source of social instability and political opposition, and acknowledgement that without these NGOs' help the state will be unable to meet growing social need—a situation that will itself foment instability and political unrest. The current

³²⁵ See Ahsan Rana, *NPO Self-Regulation: The Pakistan Model*, ALLIANCE, Mar. 2004, at 28; Muhammad Ahsan Rana, *Setting Standards in the Nonprofit Sector: The Certification Experience in Pakistan*, 2 INT'L J. CIV. SOC. L. 83, 83-84 (2004).

³²⁶ See Rana, *NPO Self-Regulation*, *supra* note 325, at 28.

³²⁷ See Rana, *Setting Standards*, *supra* note 325, at 84.

³²⁸ Cf. IJCSL Staff, *Introduction to Special Section on NGO Certification*, 2 INT'L J. CIV. SOC. L. 74, 74 (2004) (noting that the PCNC model requires "a strong tradition of an independent civil society" supported by the state's political culture and "a very strong existing society").

³²⁹ Interview D, *supra* note 122.

legal and regulatory environment for grassroots NGOs is a clear reflection of this ambivalence.

Though keeping grassroots NGOs in a state of legal ambiguity may serve as a powerful regulatory tool in the immediate term, the long-term costs to the government and to China's further development and reform are potentially dire. The number of independent NGOs operating outside the regulatory framework will doubtless continue to grow, as it has over the past three decades. The question is whether these groups will grow in ways that enhance their capacity to contribute to China's most pressing problems. Healthy growth requires formal recognition and its concomitant removal of logistical barriers, as well as government supervision to ensure accountability. Such conditions do not exist under the current regime.

As long as government ambivalence remains, however, major reform is unlikely, and changing the government's outlook will require actions on two fronts. First, the state must continue to experiment with gradual reform, focused on lowering the barriers to entry into the formal legal framework for grassroots NGOs. These experiments will provide the benefiting NGOs with conditions conducive to healthy growth and allow the government to grow familiar with and gain trust in their work. Second, the NGO sector must continue to build its trustworthiness from within, demonstrating to the public and to the government that it is accountable and not to be feared.

This process will take time. In the immediate term, the dual management and non-competition provisions that threw a roadblock before Dong Jian's attempt to establish an Eye Care Association will likely remain. But if China is to have a "social revolution" as successful and stable as its economic one, the state must find ways to tap the virtues of civil society, which include both assistance to and checks upon the state, while controlling its vices. To build a relationship of "positive interaction" in which this is possible, both the state and civil society will need to face one another with two eyes wide open.