

INTERNATIONAL DATELINE

An Awakening Giant: China and the New Civil Society

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through the looking glass of its long cultural history and development. As the Chinese calendar changes to reflect the attributes of the animals that control that year, we must also look with hope for the future realizing that there will be twists and turns in the road for this complex society.

Background

In 1950, one year after the founding of the People's Republic of China, the Chinese government passed the Provisional Procedures on the Registration of Social Organizations, the first law and regulation on the management of social organizations, and it remained effective for the next 40 years until the Provisional Regulations on the Registration and Management of Social Organizations was adopted in 1989.¹

It is certainly not right to say that there were no social organizations in pre-reform (1978) China. The meaning of social organizations, however, has seen great changes during that period. In the 1950s and 1960s, "social organizations" often referred to organizations such as "the All-China Women's Federation," "the Chinese Communist Youth League," "the China Writer's Association," "the Overseas Chinese Federation" etc. Those organizations still exist, but they are not in any real sense nongovernmental organizations (NGOs). The operation and administration of those organizations is more like that of governmental organs, and people working there usually enjoy the same benefits and privileges of governmental officials. They are also exempt from the registration and administration requirements that "true" nongovernmental organizations usually have to go through.

Since the adoption of economic reform and the "open-up policy," especially since the late 1980s, China has seen a plethora of various forms of NGOs. The Chinese government has come to realize that it cannot solve all the problems that a rapidly changing society is facing. The government is proposing a "small government, big society" policy and delegating more and more of its governmental functions to the private sectors, especially areas like environmental protection, poverty relief, and education. On the other hand, the



Charity

Preface

2003 is the year of the Ram in the Chinese calendar. Rams are described as talented, artistic, and usually successful. That may be an apt description of the emerging charitable sector in China. This article describes the current state of the law and our observations regarding its operation. However, as the Chinese calendar changes each year with different animals in control, we may see again the Monkey in 2004, a playful trickster compatible with the Dragon, whose life is political and filled with complexity.

For the past several years, we have seen the Ram in control in China moving toward democracy and a free market society. However, China remains a complex country in a struggle within itself to find its way in this new world. After a period of permitting its intellectuals the freedom to call for political reform and far-reaching revisions to China's constitution, the ruling Communist Party has again called a halt to such debate in party organizations, research institutes, and universities, even informing China's news media that there are additional subjects that can no longer be broached.

Although these are disturbing events and may cast a shadow on the reform movements, we must view China

¹It was later replaced by the new Regulations on the Registration and Management of Social Organizations in 1998.

government still maintains strong control over these organizations and places limitations on their activities. In sensitive areas like religion, human rights, and politics, the private sector's participation is still generally not allowed. This is also reflected in the legal framework of the regulation of NGOs in China.

Since 1989, a series of regulations aimed at granting NGOs legal status and standardizing the registration and administration process have been released. However, as we will see from the following discussion, many hurdles have to be overcome before an independent NGO can be registered. Such organizations have to operate under constant monitoring and guidance of corresponding governmental organs. With all this said, there is no denying that the NGOs are playing a more and more important role in Chinese society, and this phenomenon is changing the basic mechanisms on which the society is functioning. Legal, instead of political, control over NGOs is becoming the irreversible trend. The legal framework itself is constantly adjusting the social realities toward the direction of international standards.

Current Status of NGOs in China

Legally, there are two major types of NGOs in China: social organizations and private, nonenterprise units (PNU).² The first category includes charitable organizations, foundations, trade associations, chambers of commerce, etc. The latter is a very broad concept, covering nonprofit private hospitals, schools, research centers, even fitness centers, etc.

It is noteworthy that public hospitals, schools, and research facilities are considered public nonenterprise units (NEUs)³ in China. However, the registration and administration of those organizations are quite different from PNUs.⁴ Strictly speaking, NEUs are not NGOs because NEUs are funded, controlled, and operated by the state. Historically, NEUs were the only providers of the services that are now jointly offered by PNUs. Even now, NEUs are still the dominant force in most public-serving sectors. Therefore, it is appropriate to devote a sector of the laws to the regulation of NEUs.

According to the statistics released by the Ministry of Civil Affairs, by the end of 2002 there were 133,000 registered social organizations in China, a 3.1-percent increase over the last year.⁵ Of the social organizations, there were 1,712 national organizations and 15 foreign chambers of commerce.⁶ There were also 111,000 registered PNUs in China by the end of 2002, reflecting a hefty 35.4-percent increase over 2001.⁷

Because of the difficulty of registering in China, many NGOs are not registered. They operate like a normal corporation, partnership, or sole proprietorship, but in reality they operate spheres that are traditionally considered belonging to NGOs. Although it is impossible to give an accurate estimation of their number, Tsinghua University's NGO Research Center estimates that there are 1.4 million while NPO Network puts the number at 2 million.⁸ The consensus seems to be that there are far more unregistered NGOs than registered ones.

Quasi-Governmental Organizations, still quite common in China, are exempt from the registration requirement by law. The above-mentioned All-China Women's Federation is such an organization. In a recent effort to reduce the size of the government, a number of former ministries that regulated a particular industry were transformed into trade associations. For example, the Ministry of Textile Industry became the China National Textile Industry Council, a "not-for-profit" organization.⁹ In reality, the personnel are the same and even the organizational structure is the same as the former ministry. They are not NGOs in the traditional meaning of the term and are beyond the scope of this article because they operate and function more like a governmental organ than an NGO.

Registration and Administration of NGOs in China

Introduction

The Constitution of the People's Republic of China grants its citizens the freedom of association.¹⁰ The pillars of NGO legislation that make the constitutional right a reality are the four regulations promulgated by the State Council:¹¹ the Regulations on the Registration and Management of Social Organizations (1998); the Interim Regulations on the Registration and Administration of Private Nonenterprise Units (1998); the Interim Regulations on the Management of Foreign Chambers of Commerce (1989); and the Regulations on the Management of Foundations (1988). The first two are the most general regulations on NGOs. The latter are more specific regulations concerning two kinds of social organizations: foreign chambers of commerce and foundations.

The key to understanding NGO regulation in China is that all NGOs must have two supervising governmental units: one is the "registration administration unit," usually the Ministry of Civil Affairs and its local branches on the provincial, municipal, and county levels. Another is the "professional administration unit," and it would be the Ministry of Agri-

²"Unit" (danwei) is a general concept of organizations in China.

³The official name does not contain "public" in it. The reason might be that for a long period the NEUs were the only public-serving organizations available. There was no need to distinguish between public and private — all are public.

⁴See *infra* section 3.5.

⁵See *Ministry of Civil Affairs of the People's Republic of China, Statistics on the 2002 Development of Civil Affairs Undertakings in China*, available at <http://www.mca.gov.cn/statistics/2002kbaio.html>.

⁶*Id.*

⁷*Id.*

⁸See The Embassy of the United States in Beijing, *Chinese NGO's — Carving a Niche within Constraints: a January 2003 Report from Embassy Beijing*, available at <http://www.usembassy-china.org.cn/sand/ptr/ngos-prt.htm> ("Embassy Report").

⁹"China National Textile Industry Council (CNTIC), is the national Federation of all textile-related industries, and is a nonprofit organization formed on volunteer basis." *The Brief of CNTIC*, at <http://www.cnfti.org.cn/exhjj.htm>.

¹⁰P.R.C. Const. art. 35.

¹¹The State Council is the highest administrative body of the People's Republic of China.

culture for an agricultural organization, or the Ministry of Science and Technology for a private nonprofit scientific research center depending on the nature and functions of the organizations. The structure and operation of an NGO must first be approved by the corresponding professional administration unit. In the case of foreign chambers of commerce, the procedure is a little different: A written application has to be submitted through the China Chamber of International Commerce to the Ministry of China Ministry of Foreign Trade & Economic Cooperation (now the Ministry of Commerce) for approval.¹² Then, the NGO needs to submit the application to the registration administration unit to register.

Registration and Administration of Social Organizations

The Regulations on the Registration and Management of Social Organizations define “social organizations” as not-for-profit organizations in the society that are “voluntarily formed by Chinese citizens, for realizing common wills of the members and operating according to its bylaws.”¹³ It seems that the definition of social organization does not distinguish between a mutual benefit and public benefit organization. At the same time, a social organization can have an NGO as its unit member.¹⁴ Social organizations must have 50 or more individual members or 30 or more unit members.¹⁵ If a social organization has a mixture of individual and unit members, the total number of members should be no less than 50.¹⁶ National social organizations must have at least 100,000 RMB *yuan*¹⁷ working capital, and regional organizations, 30,000 RMB *yuan*.¹⁸ Once the “professional administration unit” approves the organization that meets this high financial threshold and conditions, the rest of the registration process is fairly straightforward.

However, there are still noteworthy conditions. One is that the registration administration unit could determine that it is not *necessary* to form the organization because of the existence of similar organizations in the same administrative region.¹⁹ Another is that the registration unit has great discretion to refuse to register an organization for several reasons, including because it is against the national interests, the social public interests, or lawful rights and interests of other citizens and organizations.²⁰

Three types of social organizations are exempt from the registration requirements:²¹

- people’s organizations that participate in the Chinese People’s Political Consultative Congress (such as the All-China Women’s Federation);
- organizations that are certified by the Personnel Management Organ of the State Council and approved by the State Council to be exempt from the registration requirements (such as the China Writer’s Association); and
- organizations that are approved internally by a governmental unit, social organization, enterprise unit, or nonenterprise unit and operate within such a unit.

The last category of organization could provide a loophole for social organizations that are otherwise required to register to get around the requirement. For example, they can operate as an affiliate of a university.

Social organizations have an independent “legal person”²² status and can only have a single level branch (i.e., their branch cannot have other branches), and the branches can only be divided functionally, not geographically.²³

Registration and Administration of Foundations

Foundations are “private nonprofit organizations that manage the funds voluntarily donated by domestic and foreign social organizations and other organizations as well as individuals.”²⁴ Accordingly, foundations are “social organizations with legal person status.”²⁵ Therefore, foundations are within the scope of the Regulations on the Registration and Management of Social Organizations. Similar to other social organizations, foundations have a professional administration unit for financial monitoring and control — the People’s Bank of China²⁶ and its provincial level branches.²⁷ But because the new Regulations for Social Organizations were promulgated after the Regulations for Foundations, it is not clear that currently all the new regulations necessarily apply to foundations.

Under Chinese law, foundations are formed to “promote the development of scientific research, culture and education, social welfare and services in the public interests.”²⁸ The minimum funding requirement for creating a foundation is 100,000 RMB *yuan*.²⁹

¹²See The Provisional Regulations on the Registration and Administration of Foreign Chambers of Commerce, art. 7.

¹³Regulations on the Registration and Administration of Social Organizations, art. 2.

¹⁴*Id.*

¹⁵*Id.* art. 9.

¹⁶*Id.*

¹⁷The exchange ratio between the U.S. dollar and RMB *yuan* is about 1:8.3.

¹⁸Regulations on the Registration and Administration of Social Organizations, art. 9.

¹⁹*Id.* art. 13.

²⁰*Id.* arts. 12, 4.

²¹*Id.* art. 3.

²²*Id.* In Chinese law, an organization with legal person status means that the organization can independently assume civil responsibility.

²³*Id.* art. 19.

²⁴The Regulations on the Management of Foundations, art. 2.

²⁵*Id.*

²⁶The People’s Bank of China is the central bank of China.

²⁷The Regulations on the Management of Foundations, art. 11.

²⁸*Id.* art. 2.

²⁹*Id.* art. 3.

Foundations may deposit funds in financial institutions and receive interest income.³⁰ Foundations also can purchase bonds and stocks and other securities with value, but foundations cannot purchase more than 20 percent of total stocks of a specific enterprise.³¹ Foundations are not allowed to operate and manage enterprises.³² Foundations can accept foreign donations and open foreign-currency deposit accounts.³³

Registration and Administration of PNUs

A PNU is established by an enterprise, institution, association, or other social group as well as individual citizens using nonstate assets and engaging in nonprofit social services.³⁴ PNUs are not allowed to conduct for-profit business activities.³⁵

There is no membership requirement for PNUs as there is for social organizations. Social organizations must be legal entities, but depending on its nature, a PNU could either be a legal entity, a partnership, or even a sole proprietorship.³⁶ There is no general minimum capital requirement for PNUs, but the regulations set a minimum for specific types of PNUs.³⁷ Unlike social organizations, PNUs are not allowed to have branches.³⁸

Based on the regulations, the Ministry of Civil Affairs released the Provisional Rules on the Registration of Private Nonenterprise Units in 1999. These rules divide PNUs into 10 categories for registration purposes:³⁹

1. Educational affairs: such as private kindergartens, schools, and colleges;
2. Health care affairs: such as private clinics, hospitals, and rehabilitation facilities;
3. Cultural affairs: such as private museums, galleries, and performance groups;
4. Scientific affairs: such as private scientific research centers, centers for scientific education, and technology appraisal centers;

5. Sports affairs: such as private sports clubs, stadiums, and schools;
6. Labor affairs: such as private vocational training schools and job referral centers;
7. Civil affairs: such as private retirement centers, orphanages, and community service centers;
8. Social intermediaries: such as private consulting centers, investigation centers, and labor markets;
9. Legal services: such as centers for legal aid; and
10. Others.

The rules also require that either the bylaws or partnership agreement of a PNU must state explicitly that neither the profits nor the property of these units can be distributed upon dissolution.⁴⁰ Accordingly, questions remain as to how to deal with the units' property upon dissolution when the units were formed by private individuals and enterprises and whether such property should be returned to the founder(s).

Interestingly, the rules state that the nonstate assets of the nonenterprise units should be no less than two-thirds of the total assets.⁴¹ Therefore, there seems to be some flexibility despite the regulations' definition of a PNU.

In conjunction with the correspondent professional administration governmental units, the Ministry of Civil Affairs has released detailed rules for the registration and administration of PNUs engaged in educational, cultural, sports, and labor affairs. These detailed rules further define the scope of activities that a PNU can engage in.

Registration and Administration of NEUs

The relationship between NEUs and PNUs is similar to that of state-owned enterprises and private enterprises. Before the adoption of the economic reform policy, the for-profit sectors were dominated by state-owned enterprises. Likewise, nonprofit social services were provided by nonenterprise units. As with the development of private enterprises, private nonenterprise units are also playing an increasingly important role. However, public units are still the prevailing force in both the for-profit and nonprofit sectors, and it will appear that this will remain the case for the near future.

NEUs are defined as "social services organizations that engage in educational, cultural, scientific, and public health activities and organized by the state, for the public benefit, through governmental organs or other organizations and using the assets of the state."⁴²

NEUs can have for-profit subsidiaries, but they have to be separately registered in the same way as other enterprises.⁴³

³⁰*Id.* art. 7.

³¹*Id.*

³²*Id.*

³³*Id.* art. 10.

³⁴The Provisional Regulations on the Registration and Administration of Private Nonenterprise Units, art. 2.

³⁵*See id.* art. 4.

³⁶*See id.* art. 12.

³⁷*See, e.g.,* The Provisional Rules on the Registration and Administration of Private Nonenterprise of Scientific Affairs, art. 4 (Sole proprietorship, minimum 10,000 RMB *yuan*; partnership, 30,000 RMB *yuan*; units with legal person status, 50,000 RMB *yuan*).

³⁸The Provisional Regulations on the Registration and Administration of Private Nonenterprise Units, art.13.

³⁹The Provisional Rules on the Registration of Private Nonenterprise Units, art 4.

⁴⁰*Id.* art 6.

⁴¹*Id.* art. 5.

⁴²The Provisional Regulations on the Registration and Administration of Nonenterprise Units, art. 2.

⁴³*Id.*

The NEUs' for-profit subsidiaries are presumably regulated the same way as other independent enterprises and taxed the same way.⁴⁴ An NEU has a legal person status.⁴⁵ The registration administration units here are not the Department of Civil Affairs, but the Organizational Planning Management Organ within each level of the government.⁴⁶ The Organizational Planning Management Organ is responsible for the planning and management of personnel distribution and organizational structure within the government.

Registration of Foreign Chambers of Commerce

By definition, social organizations have to be founded by Chinese citizens; therefore, a foreign chamber of commerce is not literally a "social organization." However, there are many similarities between regulations of domestic social organizations and foreign chambers of commerce. Foreign chambers of commerce have to be nonprofit and cannot conduct business activities.⁴⁷ Also, foreign chambers of commerce can also have individual and organizational (unit) members.⁴⁸ The China Ministry of Foreign Trade & Economic Cooperation (now the Ministry of Commerce) effectively acts as the "professional administration unit" for the chambers.⁴⁹ The Ministry of Civil Affairs also serves as the "registration administration unit."⁵⁰

Because of a chamber of commerce's unique nature, its regulation also has some unique aspects. First, a chamber's organizational members can only be foreign companies or the representative offices of foreign economic organizations.⁵¹ Only foreign employees of those organizations can become individual members.⁵² Second, foreign chambers of commerce have to be established according to their nationality. One country can only have one chamber of commerce in China and must include the name China in its title in addition to the name of the country.⁵³ Third, there is a rigorous application and reporting process required under the rules of the China Chamber of International Commerce.⁵⁴

Other Forms of International NGOs in China

A foreign chamber of commerce is the only type of foreign NGO that can register officially as an NGO to operate in China. Other NGOs have to seek other ways to establish a presence in China.

One way is to become an "international organization" in China. For example, United Nations agencies and affiliations are considered international organizations in China and presumably are not subject to the same regulations as other NGOs. The International Network for Bamboo and Rattan is alleged to be the only international NGO that successfully followed this route and became an international organization in China.⁵⁵ But this organization is based in Beijing and the current chairman of the Council, its highest governing body, is Mr. Zhou Shengxian, administrator of the State Forestry Administration of China (SFA).⁵⁶ This route may not be practical for most international NGOs without similar connections to the Chinese government.

A popular way to gain a presence in China without registration is to have a representative office in China, as many foreign multinationals and law firms have done. But to have a representative office, a foreign NGO still has to find a Chinese "sponsor" in the government like the "professional administration unit" for domestic social organizations.⁵⁷ Except for this requirement, the process for NGOs to have a representative office is quite similar to that of establishing an office for multinationals. They need to register with the State Administration of Industry and Commerce, the governmental organ that registers all for-profit enterprise in China.⁵⁸

The Department of Civil Affairs has long been responsible for the drafting of the regulations. The Registration and Management of Foreign Nonprofit Organizations in China is charged with drafting a law ensuring the cooperation and compliance regarding activity in China by NGOs from other countries. The department attempts to draft a law that will establish rules for operation in compliance with the law and enforce international cooperation among NGOs under uniform standards. The result of the legislation will give foreign NGOs other than foreign chambers of commerce legal status in China. However, the law has yet to be officially promulgated.

Generally, foreign NGOs will be divided, like domestic NGOs, into two categories: foreign social organizations and foreign private nonenterprise units. And foreign NGOs will be dually regulated by the registration administration unit (usually the Ministry of Civil Affairs) and the professional administration unit as well. The current requirement for going through the Ministry of Foreign Trade and Economic Cooperation for registering a representative office for NGOs will be abolished. The scope of activities that foreign NGOs can engage in will be greatly expanded, but foreign religious organizations will not be allowed to have a legal presence in China. There might also be some special limitations on the

⁴⁴But see *infra* section 4.6: special exemption for school-owned enterprises.

⁴⁵The Provisional Regulations on the Registration and Administration of Nonenterprise Units, art. 3.

⁴⁶*Id.* art. 5.

⁴⁷The Provisional Regulations on the Management of Foreign Chambers of Commerce, art. 2.

⁴⁸*Id.* art. 5.

⁴⁹*Id.* art. 7.

⁵⁰*Id.* art. 9.

⁵¹*Id.* art. 5.

⁵²*Id.*

⁵³*Id.* art. 6.

⁵⁴*Id.* art. 7.

⁵⁵See Embassy Report, *supra* note 10.

⁵⁶See http://www.inbar.int/about_inbar.htm.

⁵⁷See Embassy Report, *supra* note 10.

⁵⁸See Embassy Report, *supra* note 10.

repatriation of the income of those foreign NGOs when they dissolve.⁵⁹ Finding a governmental sponsor such as the professional administration unit is going to become a major challenge to foreign NGOs that are trying to register officially in China. If certain domestic organizations cannot find a governmental sponsor, they may have to give up their registration,⁶⁰ and consequently, it will be conceivably more difficult for foreign NGOs to gain the necessary governmental support.

Restrictions on the Governmental Units and the Possibility of Appeal for Nonregistration Decisions

All the regulations for registration and administration require that the registration unit respond within a certain time of receiving an application.⁶¹ However, there is no stipulation that the application will be deemed to be accepted if the time limit has passed.

The regulations usually contain clauses punishing government officials for illegal or delinquent activities such as receiving kickbacks, or for being negligent in conducting their official duties.⁶² This might prove to be a double-edged sword for NGOs. It will certainly curtail corruption involving government officials, but it also might provide a disincentive for the government officials to sponsor and register legitimate NGOs because of fear that they might be punished for the alleged wrongdoings of the NGOs.

The regulations do not provide for an official appeal process if either the professional administration unit or the registration administration unit decides not to approve the creation of the organization. Theoretically, the promoters of the organization could use the general administrative appeal process outlined in the Administrative Reconsideration Law of the People's Republic of China to have the decisions overruled by a higher governmental authority. They can also appeal to the administrative court in the judicial system under the Administrative Procedure Law of the People's Republic of China. Practically, because of the great discretion given to those governmental units⁶³ and the often political consideration behind the nonapproval decisions, it becomes very difficult to challenge the decisions. Moreover, if a governmental organ refuses to act as the professional administration unit from the start, there seems to be no way to force it to assume the sponsorship.

⁵⁹See, *i.e.*, Lehman, Lee, and Xu, Interview with Xing Jun, an Official from the Division of Administration of Foreign NGOs, Ministry of Civil Affairs of the People's Republic of China, May 29, 2001, available at http://www.chinaproject.net/texts/ngo_status.shtml.

⁶⁰See *infra* section 3.9.

⁶¹See, *i.e.*, the Regulations on the Registration and Management of Social Organizations, art. 12 (the registration administration unit has to approve the founding of the social organization within 60 days of receiving the application); art. 16 (issuing the certificate of registration within 30 days of receiving relevant documents).

⁶²See *supra* notes 21, 22.

⁶³See *supra* notes 21, 22.

Unregistered NGOs

The often burdensome registration requirement, especially the difficulty of finding a "professional administration unit," causes the establishment of many de facto NGOs in China that lack a registered form. In fact, the unregistered NGOs may well outnumber registered ones. We are not referring to secret, underground organizations that operate illegally. Certainly those exist, but discussion of them is well beyond the scope of the article. Here, the term "unregistered NGOs" refers to those organizations that operate openly and legally, but not as registered NGOs.

As mentioned above, a social organization can operate as an internal organization of another enterprise and social organization without registration.⁶⁴ Often, those organizations reach beyond the scope of serving the affiliated enterprise or organization. For example, in many universities, the affiliated social organizations are also serving the society in general and the government will often just turn a blind eye to these types of activities.

Some de facto social organizations incorporate themselves and become corporations. In China, there are no officially defined nonprofit corporations. Therefore, theoretically if an NGO registers as a corporation, it will be treated the same way as a normal commercial enterprise. In reality, there is often room for flexibility. If the NGO can demonstrate its nonprofit nature to the local government and tax authorities, it is quite possible that some accommodations can be made.

Many NGOs simply do not exist as legal entities. They have their names, members, and activities, but they did not go through any registration process. However, they operate openly and are generally recognized in the community. In a country like China, where the culture traditionally favors informal ways of doing things and solving problems when the official process is burdensome and costly, this will likely continue to be an important form for many NGOs to function in.

Taxation of NGOs in China

Tax laws and tax authorities do not play an important role in regulating NGOs in China. The Regulations on Registration and Administration on NGOs do not cover tax treatment for NGOs; therefore, there is no automatic, general tax-exempt treatment for NGOs. Even if an organization officially registers as a social organization or PNU, that does not mean it can obtain any tax advantages, which may partly help explain the indifference that some de facto NGOs show toward registration. Preferential treatment for NGOs, however, does exist and is scattered in various tax laws and regulations.

Income Tax

From a tax policy point of view, registered social organizations and PNUs should not be subject to income tax because income tax laws apply only to individuals and commercial activities. However, the Provisional Regulations on Enter-

⁶⁴See *supra* note 23 and accompanying text.

prise Income Tax, the major income tax regulations for domestic enterprises, also cover “any other organizations deriving income from production and business.”⁶⁵ The Detailed Rules and Regulations enacted thereunder make it clear that “any other organizations” include nonenterprise units and social organizations.⁶⁶ Because the regulations for the registration and administration of social organizations and nonenterprise units specifically stipulate that social organizations and nonenterprise units are not allowed to have business operations, the article in the enterprise income tax regulations seems to create a tax law penalty for violations. Also, it may reach those for-profit enterprises in the guise of social organizations. Similarly, PNUs will be subject to income tax on the business-related income even though they will be exempt otherwise.

Tax Treatment of Charitable Donations

Individuals and corporations can deduct their charitable contributions within certain limits. For individuals, “personal contributions to educational and other undertakings for public welfare shall be deducted from the taxable income in accordance with the relevant regulations by the State Council.”⁶⁷ The regulations thereunder define donations as “donations by individual[s] of their income to educational and other undertakings of public welfare, and to areas suffering from serious natural disasters or poverty, through social organizations or government agencies in the People’s Republic of China.”⁶⁸ The regulations further limit the deduction to 30 percent of taxable income.⁶⁹

The Provisional Regulations on the Enterprise Income Tax permit the deduction for contributions to causes for “public benefits and social welfare” up to 3 percent of taxable income.⁷⁰ The Detailed Rules and Regulations thereunder define causes for public benefits and social welfare almost the same as the Regulations for the Implementation of the Individual Income Tax Law, and explicitly state that donations directly to the individual donees are not deductible.⁷¹ The regulations also give examples of social organizations eligible to receive deductible donations.⁷²

Strangely, there is no provision for the deduction of charitable contributions in the Income Tax Law of the People’s Republic of China for enterprises with foreign investment and foreign enterprises (those enterprises are not subject to the interim regulations on the Enterprise Income Tax). The

Detailed Rules and Regulations thereunder provide examples of items that should not be itemized as costs, expenses, or losses in the computation of taxable income.⁷³ One of the examples, “donations and contributions other than those used in China for public welfare or relief purposes,”⁷⁴ by negative implication means that foreign enterprises are allowed to deduct donations that are “used in China for public welfare or relief purposes.” Because the statute is silent on the issue, the deductions are presumably not limited to a certain percentage of taxable income.

The Chinese tax laws require that for charitable contributions to be tax-deductible, they must meet both a specific “cause” and organizational requirements: To be deductible, contributions have to be for certain causes as well as to (through) certain organizations. In practice, there is serious doubt about how important a role that tax benefit consideration plays in individuals’ or corporations’ donation process. For various reasons, personal charitable donations are not very common in China. First, it might be due to the general distrust toward social organizations and PNUs. Second, there is no estate tax in China, which eliminates an important motivation for making donations in many countries. The third reason may lie in the government’s strict control and limitation on religious activities over the past 50 years.

In 1999, the Standing Committee of the People’s Congress of China passed the People’s Republic of China Public Welfare Donation Law. The Law defines the following qualified public welfare undertakings to receive public welfare donations:⁷⁵

1. Activities carried out by social bodies and individuals to provide disaster relief, aid the poor, and give support and assistance to the physically disabled;
2. Educational, scientific, cultural, public health, and sports undertakings;
3. Construction of environmental protection facilities and public utilities in society; and
4. Other public and welfare undertakings in society that aim to promote social development and progress.

Also, the donations have to be made to lawfully established public welfare social organizations and public welfare private nonenterprise units.

The recent enactment of the first Trust Law of the People’s Republic of China in 2001 provides some legal foundation for a more promising future of charitable donations because it explicitly allows the establishment of a public (charitable) trust with certain limitations. The Trust Law defines the purpose of trusts for charity and public interests as including

⁶⁵The Provisional Regulations on Enterprise Income Tax, art. 2.

⁶⁶The Detailed Rules and Regulations for the Implementation of the Provisional Regulations on Enterprise Income Tax, art. 3.

⁶⁷The Personal Income Tax Law of the People’s Republic of China, art. 6.6.

⁶⁸The Regulations for the Implementation of the Individual Income Tax Law of the People’s Republic of China, art. 24.

⁶⁹*Id.*

⁷⁰The Provisional Regulations on the Enterprise Income Tax, art. 6.4.

⁷¹The Detailed Rules and Regulations for the Implementation of the Provisional Regulations on Enterprise Income Tax, art. 12.

⁷²*Id.*

⁷³The Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People’s Republic of China for Enterprises with Foreign Investment and Foreign Enterprises art. 19.

⁷⁴*Id.*

⁷⁵The People’s Republic of China Public Welfare Donation Law, art. 3.

poverty relief, emergency relief, assistance to the disabled, development of education, science and technology, culture and sports, development of medical and health welfare, and protection of the environment.⁷⁶

The establishment of a public trust and the appointment of the trustee for a public trust are all subject to the public welfare authorities' approval.⁷⁷ Also, the relevant public welfare authority is responsible for various aspects of oversight and regulation of public trusts. Public trusts shall establish a trust supervisor. The trust supervisor is prescribed by the trust documents or appointed by the public welfare authorities if there is no such prescription in the trust documents. The trust supervisor has the right to file an action or establish other legal activities in his own name for the benefit of the beneficiary.⁷⁸ The duties of the trustee of a public trust have been enhanced. The trustee must make a report about the disposition of the trust business and the status of the trust assets at least once a year.⁷⁹ If the public trust expires, the trustee must report the cause and date of the expiration to the public welfare authorities within 15 days of the occurrence of the event forming the reason for expiration of the trust.⁸⁰

Value Added Tax (VAT)

The VAT is by far the most important source of revenue in China. In 2002, domestic VAT constituted more than one-third of the total taxes collected by the national and local governments.⁸¹ According to the provisional regulations, all units and individuals engaged in the sales of goods, provision of processing, repairs and replacement services, and the importation of goods within the People's Republic of China are taxpayers of VAT.⁸² The Detailed Rules and Regulations enacted thereunder make it clear the units in the regulations include "state-owned enterprises, collectively owned enterprises, privately owned enterprises, joint-stock enterprises, other enterprises, administrative units, institutions, military units, social organizations, and other units."⁸³

Sales of goods include: "giving out self-produced, processed, or purchased goods to others as free gift."⁸⁴ Therefore, if manufacturers donate products that they made to the charitable organization, they still have to pay VAT, at least in theory.

Some articles are exempt from VAT. Exempt articles relevant to NGOs are: importation of instruments and equipment directly used in scientific research, experimentation, and education; importation of materials and equipment from foreign governments and international organizations as assistance free of charge; and articles imported directly by organizations for the handicapped for special use by the handicapped.⁸⁵

Business Tax

The Provisional Business Tax Regulations stipulate that: "All units and individuals engaged in the providing of services as prescribed in these regulations, the transfer of intangible assets, or the sale of immovable properties within the territory of the People's Republic of China shall be taxpayers of business tax."⁸⁶ However, there are some exemptions. The relevant parts are as follows:⁸⁷

- nursing services provided by nurseries, kindergartens, homes for the aged, welfare institutions for the handicapped, matchmaking, and funeral services;
- services provided on [an] individual basis by the disabled;
- medical services provided by hospitals, clinics, and other medical institutions;
- educational services provided by schools and other educational institutions, and services provided by students participating in work-study programs;
- certain agricultural services;
- admission fees for cultural activities conducted by [a] memorial hall, museum, cultural center, art gallery, exhibition hall, academy of painting and calligraphy, library, and cultural protective units; and
- admission fees for cultural and religious activities conducted at places of religious worship.

The Detailed Rules and Regulations enacted thereunder further clarify the concepts used in the provisional regulations:⁸⁸

(1) "Personal services provided on an individual basis by the disabled" as mentioned in paragraph 1, item 2, refers to services provided to the public by the disabled individual.

(2) "Medical services provided by hospitals, clinics, and other medical institutions" as mentioned in paragraph 1, item 3, refers to such services as diagnosis and treatment to patients, epidemic prevention, child delivery, and family planning, as well as the business

⁷⁶The Trust Law of the People's Republic of China, Chapter 5.

⁷⁷The Trust Law of the People's Republic of China, art. 62.

⁷⁸The Trust Law of the People's Republic of China, arts. 64, 65.

⁷⁹The Trust Law of the People's Republic of China, art. 67.

⁸⁰The Trust Law of the People's Republic of China, art. 70.

⁸¹Total taxes collected in 2002: 1700.358 billion RMB *yuan*, of which domestic VAT: 627.540 billion RMB *yuan*. See The National Tax Administration of China, *Categorized Table of 2002 Tax Income of Tax Administration Organs*, available at <http://www.chinatax.gov.cn/tjxx/tjxx.htm>.

⁸²The Provisional Regulations of the People's Republic of China on Value-Added Tax, art. 1.

⁸³The Detailed Rules and Regulations for the Implementation of the Provisional Regulations of the People's Republic of China on Value-Added Tax, art. 8.

⁸⁴*Id.* art. 4.

⁸⁵The Provisional Regulations of the People's Republic of China on Value-Added Tax, art. 16.

⁸⁶The Provisional Regulations of the People's Republic of China on Business Tax, art. 1.

⁸⁷*Id.* art. 6.

⁸⁸The Detailed Rules and Regulations for the Implementation of the Provisional Rule of the People's Republic of China on Business Tax, art. 26.

of providing medicine, medical apparatus, hospital lodging, and meals in relation to these services.

(3) "Schools and other educational institutions" as mentioned in paragraph 1, item 4, refers to ordinary schools and schools of various kinds approved to be established by the people's governments above the prefecture and city levels or departments for educational administration under governments of the same level and where the academic qualifications of their students are recognized by the state.

(4) Activities related to agricultural services.

(5) "Cultural activities conducted by memorial hall, museum, cultural center, art gallery, exhibition hall, academy of painting and calligraphy, library and cultural protective units" as mentioned in paragraph 1, item 6, refers to cultural activities that fall within the taxable scope of taxable items under culture and sports activities conducted by those units in their own locations. The admission fees refer to the box office receipts on the sales at the first entrance.

"Admission fees for cultural and religious activities conducted at places of religious worship" refers to cultural and religious activities held by temples, Taoist temples, mosques, and churches.

Consumption Tax

The provisional regulations on the consumption tax require "all units and individuals engaged in the production, sub-contracting for processing, or the importation of consumer goods prescribed by these regulations within the territory of the People's Republic of China are taxpayers for purposes of the Consumption Tax."⁸⁹

It also states that "taxable consumer goods produced by the taxpayer shall be subject to tax upon sales. For self-produced taxable consumer goods for the taxpayer's own use in the continuous production of taxable consumer goods, no tax shall be assessed; tax shall be assessed when the goods are transferred for other use."⁹⁰ The Detailed Rules and Regulations enacted thereunder define "other use" as the use of taxable consumer goods by taxpayers for the production of nontaxable consumer goods; for construction in process, administrative departments and nonproduction institutions and provision of services; and taxable consumer goods used as donations, sponsor, fund-raising, advertising, samples, staff welfare, awards, etc.⁹¹ Therefore, donations to charitable organizations should fall into the category of other use, and thus not be taxable.

⁸⁹The Provisional Regulations of the People's Republic of China on Consumption Tax, art. 1.

⁹⁰*Id.* art. 4.

⁹¹The Detailed Rules and Regulations for the Implementation of the Provisional Regulations of the People's Republic of China on Consumption Tax, art. 6.

Only limited kinds of goods are subject to consumption tax, and most of them, such as alcoholic beverages and cigarettes, are not relevant to NGOs. Cars are probably the only goods that might concern NGOs. If a company makes a donation of cars to charitable organizations, theoretically it has to pay consumption tax.

Special Exemption on Circulation Taxes⁹² for Social Welfare Enterprises and School-Owned Enterprises

On June 4, 1994, the National Administration of Taxation of China issued two circulars granting special exemption status for social welfare enterprises and school-owned enterprises.⁹³ The circulars gave the qualified enterprises exemptions on circulation taxes. Originally, the circulars were scheduled to expire after two years,⁹⁴ but they have been renewed several times and remain effective today.

The major qualifying factor for being a social welfare enterprise is to have at least 35 percent of the entity's employees to be considered handicapped.⁹⁵ It has to be certified by both the Department of Civil Affairs and the Department of Industrial and Commercial Regulations of appropriate level.⁹⁶ Foreign enterprises, including joint ventures, cannot be social welfare enterprises.⁹⁷

Social welfare enterprises are exempt from business tax when their business is the kind of service that is subject to business tax, but advertising services are not exempt. When 50 percent or more of a social welfare enterprise's employees are handicapped, the enterprise can enjoy a full refund of the VAT it paid.⁹⁸ When the percentage is 35 percent or more but less than 50 percent, the refund of VAT is limited to loss the enterprise suffered, if any, during the same tax year.⁹⁹

Social welfare enterprises are not exempt from consumption tax when it is applicable.¹⁰⁰ Also, when consumption tax is applicable to its products, a social welfare enterprise will lose the benefit of VAT refunding.¹⁰¹ Social welfare enterprises also cannot have the VAT refunded if the goods are not produced by them or are sold for export purposes.¹⁰²

To be a school-owned enterprise, an enterprise has to meet three conditions: It has to be founded by the school using its

⁹²Circulation taxes include VAT, consumption tax, and business tax.

⁹³One is the Circular on the Collection of Circulation Taxes on Social Welfare Enterprises, and the other is the Circular on the Collection of Circulation Taxes on School-Owned Enterprises.

⁹⁴Circular on the Collection of Circulation Taxes on Social Welfare Enterprises, art. 7; Circular on the Collection of Circulation Taxes on School-Owned Enterprises, art. 8.

⁹⁵Circular on the Collection of Circulation Taxes on Social Welfare Enterprises, art. 1.2.

⁹⁶*Id.* art. 1.4.

⁹⁷*Id.* art. 1.1.

⁹⁸*Id.* art. 2.1.

⁹⁹*Id.* art. 2.2.

¹⁰⁰*Id.* art. 3.1.

¹⁰¹*Id.* art. 3.2.

¹⁰²*Id.* arts. 3.3, 3.4.

own capital; it has to be managed by the school; and the profit from the business has to be distributed to the school.¹⁰³

If the taxable goods produced by the school-owned enterprise are used for the school's teaching and scientific research, no VAT needs to be paid.¹⁰⁴ The refund of VAT for goods sold outside of the school is limited to the loss of the tax year.¹⁰⁵ Taxable services are exempt from business tax if the services are for the teaching and scientific research of the school, but hotels, restaurants, and entertainment services are not exempt.¹⁰⁶ Otherwise, the enterprise has to pay business tax.

There are similar restrictions on the exemption status of school-owned enterprises such as the social welfare enterprises. Also, there are some unique rules. First, any school-owned enterprises that are transformed from a nonexempt enterprise are not eligible for the tax benefits.¹⁰⁷ Second, any forms of joint ventures that a school has with another unit cannot enjoy the tax benefits.¹⁰⁸

Stamp Tax

The Provisional Regulations on Stamp Tax state that "all units and individuals who execute or receive documents in the categories specified in these regulations within the People's Republic of China shall be taxpayers subject to stamp tax."¹⁰⁹ The taxable documents are:¹¹⁰

1. contracts or documents in the nature of a contract with regard to: purchases and sales, the undertaking of processing, contracting for construction projects, property leasing, commodity transport, warehousing loans, property insurance, technology contracts;
2. documents transferring property rights;
3. business account books;
4. certificates evidencing right or licenses; and
5. other documents that the Ministry of Finance determines to be taxable.

Documents that are executed when property is donated to the government, social welfare units, or schools are exempt from stamp tax.¹¹¹

Exemption for Foreign Donations

Foreign donations, for the most part, are exempt from custom duties and to a limited extent VAT, but interestingly,

different treatments do exist according to the identity of the donors. Also, some exemptions were written in more authoritative law and regulations, others in less authoritative rules.

Gratuitous donations from foreign governments and international organizations are generally exempt from custom duties¹¹² and import VAT.¹¹³ All foreign donations to registered foundations are exempt from custom duties.¹¹⁴ Donations from foreign natural persons, legal persons, and other organizations (other than governments and international organizations) to charitable organizations and the State Council, and the provincial governments for poverty relief and charitable causes are also exempt from custom duties and import VAT.¹¹⁵

To the best knowledge of the authors, China has not entered into a bilateral treaty on international grant-making or covered the subject in an income tax treaty with any country.

Miscellaneous Provisions

There is no general property tax in China because the state owns most of the land.¹¹⁶ But there are taxes on the use of land and ownership of buildings. The exemptions from these taxes are identical. The self-use land of the state-sponsored social organizations, NEUs, religious temples, parks, and historical sites are exempt from both taxes.¹¹⁷

The state-sponsored social organizations and public and private schools are exempt from the vehicle and boat plate use tax.¹¹⁸

Conclusion

China's laws on the regulation of NGOs are good indications and reflections of the current status of the transitional society as a whole. The new phenomenon and old concepts coexist and are struggling to reconcile with each other. Many regulations are still borrowing the old concepts to define and regulate an actually new occurrence — the creation and growth of NGOs. As a result, confusion is unavoidable. Still, the old way of thinking can be seen embodied in the idea of putting all the NGOs under dual control of the governmental organs because the government traditionally used to control everything. The delay in the promulgation of the regulations on foreign NGOs shows the momentum of resistance — should the government really allow foreign organizations to

¹⁰³Circular on the Collection of Circulation Taxes on School-Owned Enterprises, art. 2.

¹⁰⁴*Id.* art. 3.1.

¹⁰⁵*Id.* art. 3.2.

¹⁰⁶*Id.* art. 3.3.

¹⁰⁷*Id.* art. 4.1.

¹⁰⁸*Id.* arts. 4.2, 4.3, 4.4, 4.5.

¹⁰⁹The Provisional Regulations of the People's Republic of China on Stamp Tax, art. 1.

¹¹⁰*Id.* art. 2.

¹¹¹*Id.* art. 4.

¹¹²The Customs Law of the People's Republic of China, art. 56.

¹¹³*See supra* note 88 and accompanying text.

¹¹⁴The Regulations on the Management of Foundations, art. 10.

¹¹⁵*See* The Provisional Rules on the Exemption of Import Taxes for Foreign Donations for Poverty Relief and Charitable Causes.

¹¹⁶Essentially, there are two forms of land ownership: collective ownership by the members of the farmer's association in the rural areas, mostly farmland; all other land is owned by the state.

¹¹⁷*See* the Provisional Regulations on the Land Use Tax in the City and Township of the People's Republic of China, art. 6; the Provisional Regulations on the Building Ownership of People's Republic of China, art. 5.

¹¹⁸The Provisional Regulations on the Vehicle and Boat Plate Use Tax, art. 6.3.

carry out undertakings that were traditionally reserved to a quasi-governmental organ? The introduction of those organizations can help to relieve the burdens of the government. The traditional wisdom has it that many things being done in practice are better left unregistered, which explains the pervasive existence of foreign and domestic NGOs.

However, the momentum for the development of NGOs, or to put it more fundamentally, the development of a civil society, cannot be stopped. The Chinese government understands that openness will bring change but does not openly admit it. The promulgation of the four major registrations was a good faith effort by the government to embrace the unavoidable. The quick replacement of 1989 social organization regulations was an impressive step for a government that has been devoting its efforts to economic development consistently. The government also knew that the current framework can be only temporary. This is readily seen from the consistent use of the term “provisional” in the regulations,

but it can also be inferred from the fact that they are “regulations” enacted by the State Counsel, not “laws” promulgated by the People’s Congress.

As a result, tax agencies and tax laws are destined not to play a significant role in the regulation of NGOs for the near future. Even the most enthusiastic promoter of NGO tax law reform in China will not feel comfortable adding the tax administration agency to the list of governmental organs that have decisional power over the operation of NGOs.

Moreover, in a country where even many for-profit enterprises and wealthy individuals do not take tax seriously, it is argued that any dramatic overhaul in the tax system favoring NGOs may only create more loopholes than the society could afford. The more realistic advice is to aggregate the current tax benefits for NGOs and make them coherent, not only with each other, but also with registration and administration regulations on NGOs.