

HARD TO LEND A HELPING HAND: THE OBSTACLES IN REGISTRATION AND OPERATION OF INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS IN CHINA

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I. INTRODUCTION

In the afternoon of May 12, 2008, a 7.9-magnitude earthquake hit the Sichuan Province in China.¹ More than 87,000 people lost their lives or were missing.² Thousands of houses, schools, and hospitals collapsed.³ After this great tragedy, a significant number of international nongovernmental organizations (NGOs) reacted to provide disaster relief to the affected areas.⁴

China received about ¥76 billion (\$11.2 billion) in disaster relief funds from domestic and foreign donors.⁵ There have been waves of criticisms about the lack of transparency in the donation process and usage of donation funds.⁶ Some foreign donors were concerned about the accountability of international NGOs.⁷ Other donors chose not to

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1. *Sichuan Earthquake*, N.Y. TIMES, http://topics.nytimes.com/topics/news/science/topics/earthquakes/sichuan_province_china/index.html?scp=2&sq=sichuan%20earthquake&st=cse (last updated May 6, 2009).

2. *White Paper: China Gets 76 [Billion] Yuan in Donations for Sichuan Quake*, GOV.CN (May 11, 2009) [hereinafter *White Paper*], http://english.gov.cn/2009-05/11/content_1310517.htm.

3. *Sichuan Earthquake*, *supra* note 1.

4. See *White Paper*, *supra* note 2 (noting that donations came from domestic and foreign sources); Shawn Shieh, *The 2008 Sichuan Earthquake and China's NGOs*, NGOS IN CHINA (Feb. 25, 2010), <http://ngochina.blogspot.com/2010/02/2008-sichuan-earthquake-and-chinas-ngos.html> (discussing the unprecedented NGO response, volunteerism, and public donations).

5. *White Paper*, *supra* note 2.

6. See Rebecca Lee, *Modernizing Charity Law in China*, 18 PAC. RIM L. & POL'Y J. 347, 367 (2009); 760 Yi Dizhen Juankuan Quxiang Pilu, Wangmin Zhuiwen Juankuan Tizhi Quexian [Tracking the 76 Billion Earthquake Donations, Netizens Examine Shortcomings in the Donation System], JJ NEWS (Aug. 13, 2009), <http://jjnews.zjol.com.cn/News/2009/40169.shtml>.

7. E.g., Interview with S. Hensley, Compliance Manager, in Arlington, Va. (Sept. 9, 2011); Interview with Xiaoqin Fu, Research Associate, Children's National Medical Center, in Arlington, Va. (Sept. 9, 2011); see also Matthew Erie et al., *Setting Up International Nonprofit Organizations in China*, CHINA BUS. REV., <http://www.chinabusinessreview.com/public/0905/inpo.html> (last visited Oct. 25, 2011) (expressing concern about transparency).

donate through international NGOs either because they could not determine which organizations were reliable or because they had no way to know how those NGOs handled donation funds in China.⁸ Some donors chose to join relief groups for on-site visits because they felt the need to evaluate the effectiveness of the international NGOs through which they donated their money.⁹

The concerns about the handling of disaster relief funds expressed by donors following the Sichuan earthquake exemplify the problems existing in the operation of international NGOs in China.¹⁰ One of the major problems is that most international NGOs are unable to obtain the legal status necessary to register and operate in China within the current legal framework.¹¹

After the Sichuan earthquake, the presence of international NGOs in China has attracted global attention.¹² International NGOs have been actively involved in many aspects of Chinese society since the early 1990s.¹³ In addition to disaster relief, these organizations also play an important role in areas such as education and medical assistance to the underprivileged, environmental protection, and community development.¹⁴ International NGOs require formal legal recognition from the Chinese government, without which they cannot establish the organizational bank accounts needed to receive donations from places outside China.¹⁵ International NGOs inevitably encounter issues with transparency and accountability as a result of their attempts to work without this recognition and outside of the Chinese legal system.¹⁶ Therefore, it is necessary to identify an effective solution to address the registration and operation of international NGOs in China. Such a solution will not only benefit foreign donors and international NGOs, but also the Chinese people who are in need of social services.

8. *E.g.*, Interview with S. Hensley, *supra* note 7; Interview with Xiaoqin Fu, *supra* note 7.

9. Interview with Tai-li Kuan, President, Dynamic InfoSys, Inc., in Arlington, Va. (Sept. 9, 2011).

10. *See* Erie et al., *supra* note 7.

11. *See* Lee, *supra* note 6, at 348, 371; Emma Tzeng, *China's Long March Towards Civil Society: NGOs and the Charitable Sector*, CHINASOURCE (June 1, 2007), <http://www.chsource.org/site/en/politics/426-chinas-long-march-towards-civil-society-ngos-and-the-charitable-sector.html>.

12. *See* Erie et al., *supra* note 7.

13. Tzeng, *supra* note 11.

14. Deyong Yin, *China's Attitude Toward Foreign NGOs*, 8 WASH. U. GLOB. STUD. L. REV. 521, 522 (2009).

15. Jillian S. Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots" NGOs in China Today*, 26 B.U. INT'L L.J. 29, 69 (2008).

16. *See id.*

Legislators in China have been discussing and drafting a new charity law for many years.¹⁷ The new charity law is designed to provide a comprehensive legal framework for the entire nongovernmental sector.¹⁸ Unfortunately, the legislative process has been postponed several times since 2007.¹⁹ Such an overarching law will have a great effect on Chinese society, but there is no easy way to balance the competing domestic interests.²⁰ An interim measure is necessary to fill the gap in the current legal framework until the new charity law takes effect.

China should adopt an interim licensing system that would allow international NGOs to obtain legal status by applying for a license with the Ministry of Civil Affairs (MCA) or one of its regional offices. This interim measure will provide international NGOs with application procedures, rights and obligations under license agreements, and dispute resolution and termination procedures. This Note will address the advantages of this interim measure and why it is more desirable than the current workarounds that international NGOs use. This Note will also address potential challenges to this interim measure, and provide responses to these challenges.

Part II of this Note will provide an overview of international NGOs, their operation in China, and the current legal framework governing the nongovernmental sector. It will discuss the advantages and drawbacks of the methods that international NGOs currently use to operate around the legal framework in China. It will also discuss the need for, and recent developments of, the new charity law and the possible reasons for its slow development. Part III will propose an interim measure to facilitate a smooth transition to the new charity law.

II. DISCUSSION

A. *The Overview of International NGOs in China: History, Development, and Importance*

In the late 1970s, international NGOs started to enter China as the Chinese government implemented its “Reform and Opening-up” policy and adopted a more welcoming attitude toward international assistance

17. Erie et al., *supra* note 7.

18. See Karla W. Simon & Cadence Moore, *Regulating Charity in China: Recent Developments*, at 2, INT’L CTR. FOR CIVIL SOC’Y LAW (Jan. 2011), <http://www.iccsf.org/pubs/RegulatingCharityinChinaKWSfinal.pdf>.

19. *Id.* at 1–2.

20. *See id.* at 1–2.

and cooperation.²¹ In the 1990s, the Chinese government began promoting the notion of “small government, big society,” and began transitioning into a civil society.²² As a result, the number of international NGOs in China increased dramatically, especially after the Fourth World Conference on Women, which occurred in China in 1995.²³ No official statistics are available as to the exact number of international NGOs operating in China because there is no uniform registration process for NGOs and because many lack permanent offices or personnel in China.²⁴ While the statistics from various sources are inconsistent, it appears that as of 2005 there were between 3000 and 6000 international NGOs operating in China.²⁵ While most of these NGOs are not formally registered with the Chinese government, it is estimated that around 500 international NGOs have set up projects and opened offices in China,²⁶ and that around 140 have registered through various alternative approaches.²⁷

International NGOs in China are organized in a variety of forms,²⁸ including as associations, commerce groups, charity groups, research centers, or foundations.²⁹ They are actively involved in a wide range of social issues in China, including disaster relief, education, poverty, medical assistance, adoption, environmental protection, economic

21. See Deyong Yin, *supra* note 14, at 521; see also Renee Yuen-Jan Hsia & Lynn T. White III, *Working amid Corporatism and Confusion: Foreign NGOs in China*, 31 *NONPROFIT & VOLUNTARY SECTOR Q.* 329, 333 (2002) (noting that by the early 1980's, China was more welcoming to foreigners).

22. See Deyong Yin, *supra* note 14, at 521–22.

23. *Id.*; Qiusha Ma, *Impact of Globalization and International Non-governmental Organizations on the Development of Non-governmental Organizations in China*, CHINA-EUROPA-F., http://docs.china-europa-forum.net/doc_547.pdf (last visited Oct. 25, 2011) (translating excerpts of Ma Quisha, *Quanqiu Hua, Guoji Fei Zhengfu Zuzhi yu Zhongguo Minjian Zuzhi de Fazhan* [Globalization, International Nongovernmental Organizations and the Development of China's Nongovernmental Organizations], *KAIFANG SHIDAI* [OPEN TIMES], Mar. 10, 2006, at 119 (China)).

24. Deyong Yin, *supra* note 14, at 522.

25. Chen Jie, *The NGO Community in China: Expanding Linkages with Transnational Civil Society and Their Democratic Implications*, *CHINA PERSP.*, Nov.-Dec. 2006, at 29, 32, available at <http://chinaperspectives.revues.org/pdf/3083>. Among the 3000 to 6000 international nongovernmental organizations (NGOs), about 2000 are foundations, 1000 are implementing groups, 2500 are chambers of commerce, and 1000 are religious-based organizations according to Ming Wang, the Director of the NGO Research Center at Tsinghua University. *Id.*

26. See *id.*

27. See Qiusha Ma, *supra* note 23, at 7.

28. Liqing Zhao, *Ruhe Kandai zai Zhongguo de Waiguo Feizhengfu Zuzhi* [How to Assess the Foreign NGOs in China], *PEOPLE* (Aug. 31, 2006), <http://politics.people.com.cn/GB/30178/4764185.html>.

29. *Id.*

cooperation, legal reform, and community development.³⁰ They also operate in a variety of ways including providing funds, organizing conferences, conducting research programs, and setting up projects to work with local governmental agencies.³¹ It is estimated that international NGOs bring approximately \$1 billion in donations to China annually.³²

International NGOs play a significant role in Chinese society.³³ First, NGOs contribute considerable funds to the relatively underdeveloped spheres of Chinese society, such as environmental protection and the education of migrant children.³⁴ In promoting general social welfare, NGOs have reduced the financial burden on the Chinese government.³⁵ Second, international NGOs bring to China the experience, expertise, and working models that have been developed through practice in their respective fields.³⁶ For example, some NGOs have introduced microfinance programs into many Chinese villages as an innovative way to battle poverty.³⁷ Third, international NGOs have played a positive role in China's transition into a civil society.³⁸ They have been actively involved in dealing with the social problems stemming from the imbalance of economic development among different regions of China and with the increasing wealth gap between people of different economic status.³⁹ International NGOs help raise awareness in Chinese society for public services, volunteerism, and philanthropy, all of which are important elements of a civil society.⁴⁰ Through cooperation and support, international NGOs also assist with the development of China's domestic NGOs, especially with the development of China's grassroots NGOs.⁴¹ Fourth, international NGOs have been participating in almost every aspect of the "Reform and Opening-up" policy, including the reform of China's economic structure, legal system, and public policy.⁴²

30. Deyong Yin, *supra* note 14, at 522.

31. Liqing Zhao, *supra* note 28.

32. Qiussha Ma, *supra* note 23, at 3–4; Liqing Zhao, *supra* note 28.

33. Liqing Zhao, *supra* note 28.

34. *See id.*

35. Deyong Yin, *supra* note 14, at 531.

36. Liqing Zhao, *supra* note 28.

37. Qiussha Ma, *supra* note 23, at 7.

38. Deyong Yin, *supra* note 14, at 530–31; Qiussha Ma, *supra* note 23, at 9.

39. *See* Deyong Yin, *supra* note 14, at 531–32.

40. *Id.* at 532.

41. *See* Qiussha Ma, *supra* note 23, at 9.

42. *See* Deyong Yin, *supra* note 14, at 531; *see also* Qiussha Ma, *supra* note 23, at 4 (discussing the increasing influence of China's NGOs); Liqing Zhao, *supra* note 28 (discussing economic cooperation and legal construction).

They have facilitated research projects and human resources for the theoretical discussion and practical implementation of new policies by providing financial support, engaging scholars and experts, hosting conferences and training, and arranging exchange programs between domestic and foreign educational institutions.⁴³

B. *Current Laws and Regulations on the Registration and Operation of International NGOs*

Despite the substantial presence of international NGOs in China, there are no clear laws or regulations specifically addressing the registration and operation of these organizations in China.⁴⁴ Surprisingly, there is no overarching legislation regulating the entire nongovernmental sector in China.⁴⁵ Instead, the State Council of China (*Guowuyuan*) has promulgated a number of piecemeal regulations for each category of social organizations.⁴⁶ There are three officially recognized categories of social organizations: (1) social groups (*shehui tuanti*), (2) foundations (*jijinhui*), and (3) civil non-enterprise entities (*minban fei qiye danwei*).⁴⁷

The primary regulations governing these three types of social organizations are (1) Regulations Governing the Registration of Social Groups (*Shehui Tuanti Dengji Guanli Tiaoli*) (1998),⁴⁸ (2) Regulations

43. Deyong Yin, *supra* note 14, at 531–32; Liqing Zhao, *supra* note 28.

44. See *Frequently Asked Questions on Registering an International NGO in China*, CHINA DEV. BRIEF (Aug. 10, 2004) [hereinafter *Frequently Asked Questions*], <http://www.chinadevelopmentbrief.com/node/296>.

45. See Lee, *supra* note 6, at 347; Tzeng, *supra* note 11.

46. See Tzeng, *supra* note 11. In China, the legislation adopted the name of “social organization” instead of “nongovernmental organization”; however, both titles refer to the same kind of entities, which operate independently from the government.

47. Deyong Yin, *supra* note 14, at 523; *Ban Shi Zhi Nan [Instruction]*, ZHONGGUO SHE HUI ZU ZHI WANG [BUREAU OF SOC. ORGS.], <http://www.chinanpo.gov.cn/web/listTitle.do?dictionid=1302> (last visited Oct. 25, 2011). A social group is defined as a nonprofit group voluntarily organized by Chinese citizens for a legitimate shared purpose. *Shehui Tuanti Dengji Guanli Tiaoli* [Regulations Governing the Registration of Social Groups] (promulgated by the St. Council, Sept. 25, 1998, effective Oct. 25, 1998) ST. COUNCIL GAZ., Nov. 23, 1998, at 1028, 1028 (China). A foundation is defined as a nonprofit legal entity funded by donations from individuals, corporations, or other organizations, for the purpose of promoting social welfare. *Jijinhui Guanli Tiaoli* [Regulations on the Administration of Foundations] (promulgated by the St. Council, Feb. 11, 2004, effective June 1, 2004) ST. COUNCIL GAZ., May 20, 2004, at 18, 18 (China). A civil non-enterprise entity is defined as a nonprofit social organization set up by enterprises, institutional entities, social groups, or individuals for the purpose of social service. *Minban Fei Qiye Danwei Dengji Guanli Zanxing Tiaoli* [Interim Provisions on the Registration of Civil Non-enterprise Entities] (promulgated by the St. Council, Sept. 25, 1998, effective Oct. 25, 1998) ST. COUNCIL GAZ., Nov. 23, 1998, at 1036, 1036 (China).

48. The sources cited by this Note translate “*Shehui Tuanti Dengji Guanli Tiaoli*”

on the Administration of Foundations (*Jijinhui Guanli Tiaoli*) (2004), and (3) Interim Provisions on the Registration of Civil Non-enterprise Entities (*Minban Fei Qiye Danwei Dengji Guanli Zanxing Tiaoli*) (1998).⁴⁹ In addition, the Interim Measures on the Registration of Civil Non-enterprise Entities (*Minban Fei Qiye Danwei Dengji Zanxing Banfa*) (1999) and the Interim Measures on Banning Illegal Social Organizations (*Qudi Feifa Minjian Zuzhi Zanxing Banfa*) (2000) also provide important guidance.⁵⁰ These regulations govern the core issues relating to the registration and operation of social organizations, such as the appointment of directors, the management of funds, financial accountability, and the management of official seals.⁵¹ Various ministries, bureaus, and committees also issue a great number of administrative rules which regulate different aspects of a social organization's operations.⁵²

i. Difficulties of International NGOs under Current Regulations

Unfortunately, none of the current regulations expressly addresses the status of international NGOs.⁵³ Currently, the Regulations Governing the Registration of Social Groups and the Interim Provisions on the Registration of Civil Non-enterprise Entities do not apply to international NGOs.⁵⁴ Only Chinese nationals or entities may establish

differently. The most common translations are "Regulations Governing the Registration of Social Groups" and "Regulations on Registration and Administration of Social Groups." This Note uses "Regulations Governing the Registration of Social Groups" because it the translation given in the Gazette of the State Council of the People's Republic of China. *See Table of Contents*, 27 ST. COUNCIL GAZ. (1998).

49. Deyong Yin, *supra* note 14, at 523; Tzeng, *supra* note 11; *Zheng Ce Fa Gui* [Policies and Laws], ZHONGGUO SHE HUI ZU ZHI WANG [BUREAU OF SOC. ORGS.], <http://www.chinanpo.gov.cn/web/listTitle.do?dictionid=1201&subject=3> (last visited Oct. 25, 2011). *See generally* Regulations Governing the Registration of Social Groups; Regulations on the Administration of Foundations; Interim Provisions on the Registration of Civil Non-enterprise Entities.

50. *See* Tzeng, *supra* note 11. *See generally* *Minban Feiqiye Danwei Dengji Zanxing Banfa* [Interim Measures on the Registration of Civil Non-enterprise Entities] (promulgated by the Ministry of Civil Affairs, Dec. 28, 1999, effective Dec. 28, 1999) ST. COUNCIL GAZ., Mar. 20, 2000, at 39 (China); *Qudi Feifa Minjian Zuzhi Zanxing Banfa* [Interim Measures on Banning Illegal Social Organizations] (promulgated by the Ministry of Civil Affairs, Apr. 6, 2000, effective Apr. 10, 2000) ST. COUNCIL GAZ., Dec. 10, 2000, at 24 (China).

51. Tzeng, *supra* note 11.

52. *See also* ICNL: *NGO Law Monitor – China*, ICNL.ORG, <http://www.icnl.org/knowledge/ngolawmonitor/china.htm> (last updated Oct. 10, 2011) (discussing various legislative and regulatory initiatives governing NGOs).

53. Deyong Yin, *supra* note 14, at 523.

54. *See* Erie et al., *supra* note 7. *See generally* Regulations Governing the Registration of Social Groups; Interim Provisions on the Registration of Civil Non-enterprise Entities.

social groups or civil non-enterprise entities.⁵⁵ The Regulations on the Administration of Foundations is the only law that allows international foundations to gain legal status in China through the establishment of representative offices.⁵⁶

The current legal framework creates many obstacles for international NGOs seeking to gain access to China, not only because of the ambiguity of their legal status, but also because some features of the current social organization regulations impose extensive restrictions on their registration and operation.⁵⁷

The first barrier to an international NGO's operation in China is the so-called "dual-management system."⁵⁸ In order to register with the MCA, a social organization must first obtain sponsorship from a "business supervisory unit" (*yewu zhuguan bumen*).⁵⁹ Departments of the State Council, local governments, and organizations authorized by the State Council or local governments may serve as business supervisory units.⁶⁰ A business supervisory unit has extensive obligations under the regulations once it sponsors a social organization,⁶¹ even though it may not necessarily benefit from the relationship.⁶² There is a lack of incentives for government agencies to become a sponsor.⁶³ The sponsorship requirement usually creates a significant burden on an NGO wishing to register as a social organization in China, especially for those NGOs without strong economic or political ties to China.⁶⁴

A second barrier to an NGO's operation in China is the ambiguity in the language and the application of various social organization regulations.⁶⁵ For example, the MCA can deny a social group's registration application if "in the same administrative area there is

55. Erie et al., *supra* note 7.

56. *Id.*

57. *See id.*

58. ICNL: *NGO Law Monitor – China*, *supra* note 52.

59. Deyong Yin, *supra* note 14, at 523.

60. *See* Regulations on the Administration of Foundations, at 18; Regulations Governing the Registration of Social Groups, at 1029; Interim Provisions on the Registration of Civil Non-enterprise Entities, at 1036–37.

61. *See* Regulations on the Administration of Foundations, at 21; Regulations Governing the Registration of Social Groups, at 1033; Interim Provisions on the Registration of Civil Non-enterprise Entities, at 1040; *see also* Erie et al., *supra* note 7 (describing the sponsoring agency's duties).

62. Erie et al., *supra* note 7.

63. Lee, *supra* note 6, at 356; Erie et al., *supra* note 7.

64. *Cf.* Erie et al., *supra* note 7.

65. Deyong Yin, *supra* note 14, at 526; *cf.* ICNL: *NGO Law Monitor – China*, *supra* note 52 (discussing organizational activities that the government may intervene in).

already a social group *active* in the *same* or *similar* area of work, and there is no need for a new social group to be established.”⁶⁶ Some official documents justify this provision by suggesting that the MCA has an interest in preventing social groups from developing without adequate planning or from competing maliciously.⁶⁷ Nonetheless, a phrase like “*active* in the *same* or *similar* area of work” is vague and hard to define. Such vague language gives the MCA wide discretion to deny registration and provides the opportunity for abusing its administrative power.⁶⁸

The third barrier existing to the operation of international NGOs in China is that, even after a social organization registers with the MCA, it is still subject to extensive operational restrictions.⁶⁹ The government may intervene in a variety of operational issues, such as in the appointment of directors or in financial accounting procedures.⁷⁰ Government agencies may investigate a social organization’s operational activities or terminate an organization under the asserted interest of enforcing constitutional or tax laws.⁷¹

C. Practical Approaches that International NGOs Adopt in Their Operation in China: Pros and Cons

Except for a few international foundations, many international NGOs operating in China are unable to register as international entities within the current regulatory framework.⁷² Although a small number of international NGOs have managed to register as domestic entities, many NGOs operate without formally registering with the MCA.⁷³ The typical approaches of NGOs for operating in China without formal registration include establishing partnerships with local governments,

66. Regulations Governing the Registration of Social Groups, at 1030 (emphasis added).

67. Karla W. Simon, *Regulation of Civil Society in China: Necessary Changes After the Olympic Games and the Sichuan Earthquake*, 32 *FORDHAM INT’L L.J.* 943, 962 (2009).

68. *See id.* at 962–63.

69. *See ICNL: NGO Law Monitor – China*, *supra* note 52.

70. *Id.*

71. *Id.* The Regulations Governing the Registration of Social Groups provides that “social groups must observe the Constitution, state laws, regulations, and state policy; must not oppose the basic principles of the Constitution, harm the unity, security or ethnic harmony of the state, or interests of the state and society, or the lawful interests of other organizations or citizens, or offend social morality.” Regulations Governing the Registration of Social Groups, at 1029. This very broad language gives the government wide discretion in the supervision and interference with the operations of the social organizations.

72. *See* Erie et al., *supra* note 7 (noting that “only a limited number of high-profile international foundations, such as the Bill & Melinda Gates Foundation, William J. Clinton Foundation, and World Wildlife Fund, have successfully done so to date”).

73. *See* Deyong Yin, *supra* note 14, at 529.

agencies, or social organizations; registering as domestic social groups; registering as for-profit enterprises; or registering as a representative office of foreign business enterprise.⁷⁴ Each of these approaches has proven successful to some extent as a method to work around the current legal regime, but each has its own shortcomings.⁷⁵

i. Partnership

The most common approach for international NGOs wishing to operate in China is to partner with local government agencies or institutions closely affiliated with the government.⁷⁶ These partnerships allow international NGOs to fund projects implemented by the Chinese partner, or to set up a project management office to engage in projects themselves.⁷⁷ The success of the latter option often depends on the good will of the Chinese partner in facilitating the opening of an office and in arranging visas and residency permits for foreign personnel.⁷⁸

In the partnership approach, international NGOs must collaborate closely and maintain good relationships with the local government and its agencies in order to carry out the NGOs' work in China.⁷⁹ Establishing a partnership relationship has several positive effects that have proved essential to the operation of international NGOs in China.⁸⁰ Local partners usually have first-hand knowledge about the practical situations in China with respect to particular projects.⁸¹ They also provide important social resources and networking in local areas for the successful operation of the NGOs' projects.⁸² Maintaining a partnership relationship can open up more opportunities for international NGOs to expand the reach of their projects.⁸³ Some international NGOs have reported that they were not obligated to pay taxes to the Chinese government because, under the partnership approach, the NGO does not register with the MCA and therefore, legally speaking, does not exist in China.⁸⁴

74. See generally Ashley & Pengyu He, *supra* note 15, at 67–74 (discussing four case studies involving “spin-off” and partnership strategies).

75. See generally *id.*

76. See *Frequently Asked Questions*, *supra* note 44; see also Ashley & Pengyu He, *supra* note 15, at 68 (three of the four NGOs interviewed used partnership agreements).

77. *Frequently Asked Questions*, *supra* note 44.

78. See *id.*

79. See Ashley & Pengyu He, *supra* note 15, at 71.

80. See *id.*

81. See *id.*

82. *Id.*

83. *Id.*

84. *Id.* at 69 (the Chinese government has been hesitant to charge NGOs taxes because it

Despite the positive effects of a partnership relationship, the lack of legal status creates many hurdles for international NGOs.⁸⁵ First, unregistered international NGOs are not allowed to raise funds in China.⁸⁶ They also face obstacles in obtaining funding from government agencies in their home countries or from inter-governmental organizations because these agencies and organizations often only provide funding to nonprofits that are registered in the country of operation.⁸⁷ Moreover, these international NGOs cannot open organizational bank accounts in their own name.⁸⁸ Some rely on the personal accounts of their local staff or the staff of their local partners to deposit funding from their foreign headquarters.⁸⁹ This practice has raised transparency and accountability concerns for donors, international NGO headquarters, and, most importantly, the governments of their home countries.⁹⁰ This practice became even more problematic after the People's Bank of China and the State Administration of Foreign Exchange set, in 2007, an annual limit of \$50,000 as the amount of foreign currency that an individual can exchange for Chinese currency.⁹¹ Further complicating the arrangement, international NGOs can neither legally employ personnel in China, nor enter into enforceable contracts under their own names.⁹²

Second, as international NGOs have no legal presence in China, they must rely on their Chinese partners to co-sponsor each and every project they undertake.⁹³ This gives local partners great leverage in negotiating partnership agreements.⁹⁴ It also places the additional burden on international NGOs of either trying to negotiate broad terms in their initial agreements, or to negotiate for specific terms each time they undertake a new project.⁹⁵ The partnership arrangement is even more complicated where the local partner of an international NGO is a social

does not want to generate anger in its international community relationships).

85. Erie et al., *supra* note 7.

86. Ashley & Pengyu He, *supra* note 15, at 69.

87. See Erie et al., *supra* note 7.

88. *Id.*

89. *Id.*; see also Ashley & Pengyu He, *supra* note 15, at 69 (discussing a specific instance where an NGO routed money through the personal bank account of a professor that the NGO partnered with).

90. Interview with Dawn Sikorski, Associate, Gammon & Grange, P.C., in McLean, Va. (Nov. 23, 2010).

91. Erie et al., *supra* note 7.

92. *Id.*

93. Ashley & Pengyu He, *supra* note 15, at 70.

94. *Id.* at 71.

95. See *id.* at 70.

organization, instead of a government agency.⁹⁶ In Shanghai, a local organization had to report to and obtain approval from its business supervisory unit and the local bureau of civil affairs for each project it worked on with its international NGO partner, a Hong Kong-based charitable organization.⁹⁷

ii. Registration as a Domestic Social Group

Instead of operating “without presence,” some international NGOs seek to register as domestic social groups.⁹⁸ These international NGOs obtain legal status by registering in China through their local Chinese staff.⁹⁹ With this approach, an international NGO operating through its domestic subsidiary can open organizational bank accounts, employ local personnel, enter into contracts, enjoy tax-exempt status, develop domestic Chinese resources, and undertake projects with relatively fewer limitations.¹⁰⁰

Nonetheless, domestic social groups still face the hurdles under the “dual-management” system.¹⁰¹ Foreign headquarters may have concerns about losing control over the social group’s operation because a domestic social group is a separate and independent entity from the international NGO, and because foreign citizens may not assume management positions in a social group.¹⁰² In reality, few international NGOs are able to adopt this approach because they do not have a solid native Chinese leadership to carry out their mission.¹⁰³

iii. Registration as an Enterprise

Some international NGOs opt to register as “enterprises” with the Bureau of Industry and Commerce (*Gongshangju*).¹⁰⁴ An international

96. *See id.*

97. *Id.* at 68, 70.

98. *Id.* at 73.

99. *See id.*; Interview with a U.S. Based Nonprofit Organization Staff Member (because of the sensitivity of this Note’s topic, the staff member asked to remain anonymous) (Dec. 29, 2010) (discussing the organization’s successful registration as a social group in China).

100. *See Ashley & Pengyu He, supra* note 15, at 74; Interview with a U.S. Based Nonprofit Organization Staff Member, *supra* note 99.

101. *See Erie et al., supra* note 7.

102. *See Ashley & Pengyu He, supra* note 15, at 73–74 (arguing that even though the current law does not specifically prohibit it, it is likely that foreign citizens may not legally assume a management position in a social group, because, unlike the Regulations on the Administration of Foundations, the Regulations Governing the Registration of Social Groups does not mention the role of foreign citizens); *see also* Regulations on the Administration of Foundations; Regulations Governing the Registration of Social Groups, at 1028.

103. Ashley & Pengyu He, *supra* note 15, at 73.

104. Deyong Yin, *supra* note 14, at 539.

NGO can register as a foreign business enterprise¹⁰⁵ or a representative office of a foreign business enterprise.¹⁰⁶ Under this approach, international NGOs are able to obtain official status, open organizational bank accounts, and recruit Chinese nationals as staff.¹⁰⁷ This is not the optimal way for international NGOs to operate in China.¹⁰⁸ As business enterprises, NGOs have to pay taxes at the ordinary business rate, which can be a significant burden for not-for-profit organizations.¹⁰⁹ Moreover, NGOs who register as business enterprises may not raise donation funds or receive tax deductible contributions.¹¹⁰

D. *Compelling Need and the Recent Developments in the Chinese Charity Law Reform*

The need to reform the legal framework of China's charity sector has never been more urgent.¹¹¹ After the Sichuan earthquake, international NGOs and the general public both vigorously called for a more transparent and supportive system for the charity sector.¹¹² The Chinese government has also recognized the urgent need to reform the charity law.¹¹³

Under the current system, international NGOs are only able to work in very limited capacity, no matter which practical approach they take to operate in China.¹¹⁴ With the substantial presence and the increasing involvement of international NGOs in China's civil society, a legal regime that provides for clear status and specified mechanisms regarding registration and operation is necessary.¹¹⁵ Any reform to China's charity law must seek to reduce the burden on international NGOs by addressing the dual-management system which creates many administrative and political obstacles to an NGO's functioning.¹¹⁶

105. *Id.*

106. Ashley & Pengyu He, *supra* note 15, at 71.

107. *Frequently Asked Questions*, *supra* note 44.

108. *Id.*

109. See Ashley & Pengyu He, *supra* note 15, at 72; see also *The New Enterprise Income Tax Law of China*, HG.ORG (Nov. 3, 2009), <http://www.hg.org/article.asp?id=7497> (China's tax rates).

110. Ashley & Pengyu He, *supra* note 15, at 72; see Simon, *supra* note 67, at 969.

111. Tzeng, *supra* note 11.

112. See Simon, *supra* note 67, at 944 (Chinese citizens expressed concern); Erie et al., *supra* note 7 (entrepreneurs and international businesses called for reform).

113. Simon, *supra* note 67, at 944 n.3.

114. See Erie et al., *supra* note 7.

115. See *id.*

116. See Tzeng, *supra* note 11.

For business and individual donors, the most criticized shortcoming of the current system is the lack of credibility and accountability in NGOs' handling of donation and relief funds.¹¹⁷ The public is not well-informed and cannot effectively supervise the operation of NGOs because NGOs, except for foundations, are not required to publish any financial statements.¹¹⁸ For the large number of international NGOs operating without official status in China, use of personal accounts to transfer funds adds to suspicions surrounding the mishandling of donations.¹¹⁹ The corruption and embezzlement of donations in the current system inevitably shake the confidence of donors and ultimately harms China and its people.¹²⁰ Any reform of the charity law must address the urgent need to provide procedures enhancing transparency and accountability.¹²¹

After the earthquake, the Chinese government has recognized an increasing need to monitor the charity sector under an integrated legal system and to rebuild the public's trust in charitable organizations.¹²² It is also in the best interests of the Chinese government to support the work of NGOs in promoting social welfare.¹²³ In 2006, China endorsed President Hu Jintao's vision of building a "harmonious society," and declared a shift in focus from promoting economic growth to resolving social tensions.¹²⁴ By engaging the charity sector to fund and support social welfare programs, the Chinese government can be more effective

117. See Tzeng, *supra* note 11; Lee, *supra* note 6, at 366–67. According to a report conducted after the Sichuan earthquake by a research team from Tsinghua University, it is highly probable that approximately 80% of the ¥76 billion donated ended up in the Chinese government's financial account and became "extra tax revenue." Bao Limin, *Shui lai Zhizhang 760 Yi Dizhen Juankuan [Who Will Handle the 76 Billion Yuan Earthquake Relief Donation]*, CYOL.NET (Aug. 12, 2009), http://zqb.cyol.com/content/2009-08/12/content_2800866.htm.

118. See Lee, *supra* note 6, at 367–68 (only foundations are required to make a public annual report); see also Tzeng, *supra* note 11 (charitable organizations are not required to publish detailed financial statements).

119. See also Ashley & Pengyu He, *supra* note 15, at 69 (discussing problems an organization encountered when using a personal bank account); Interview with Dawn Sikorski, *supra* note 90.

120. Lee, *supra* note 6, at 367; Tzeng, *supra* note 11.

121. Lee, *supra* note 6, at 369; see Tzeng, *supra* note 11.

122. *Beijing Looks at Laws on Philanthropy*, CHINA DAILY (Nov. 03, 2010), http://www.chinadaily.com.cn/china/2010-11/03/content_11498980.htm; *New Charity Law to Bring Sector into Line in South China*, GLOBAL TIMES (Sept. 24, 2010), <http://china.globaltimes.cn/chinanews/2010-09/576642.html>.

123. See Tzeng, *supra* note 11.

124. Maureen Fan, *China's Party Leadership Declares New Priority: "Harmonious Society,"* WASH. POST (Oct. 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610.html>.

in bridging wealth gap and balancing social inequality.¹²⁵

In 2004, the National People's Congress (*Quanguo Renmin Daibiao Dahui*) directed the MCA to draft a new charity law to provide an overarching legal framework for the charity sector,¹²⁶ and to include a provision for international NGOs to register and obtain official status in China.¹²⁷ The National People's Congress initially scheduled the new charity law to be submitted to the Legislative Affairs Office of the State Council (*Guowuyuan Fazhi Bangongshi*) in 2007 and to be announced in 2008.¹²⁸

Unfortunately, the legislative process has been postponed several times.¹²⁹ Different governmental departments have disagreed about the level of autonomy to be granted to NGOs.¹³⁰ The National People's Congress has since postponed review of the proposed charity law until 2011, due to its lack of practical experience in charity work and the difficulties in balancing the conflicting interests of different groups.¹³¹

E. *Possible Reasons for the Slow Development of the Legal Framework for International NGOs in China*

In addition to the cited reasons for the delay in passing the new charity law, the Chinese government's mixed feelings toward international NGOs strongly affect the establishment of an overarching legal system.¹³² On one hand, the government generally welcomes international NGOs that work in fields with minimal political sensitivity, such as disaster and poverty relief, environmental protection, healthcare, and education.¹³³ On the other hand, the government adopts very stringent restrictions on international NGOs with politically sensitive agendas, such as human rights or religious groups.¹³⁴ These varying attitudes toward international NGOs complicate attempts to establish a consistent and universally-applicable legal standard for

125. See Deyong Yin, *supra* note 14, at 530–32; Tzeng, *supra* note 11.

126. Tzeng, *supra* note 11.

127. Erie et al., *supra* note 7.

128. Tzeng, *supra* note 11.

129. *Frequently Asked Questions*, *supra* note 44.

130. Erie et al., *supra* note 7.

131. Bao Daozu, *Charity Law Faces Delay*, CHINA DAILY (Nov. 3, 2010), http://www.chinadaily.com.cn/china/2010-11/03/content_11493259.htm.

132. See Deyong Yin, *supra* note 14, at 534–39 (discussing China's concern over the growing presence of foreign NGOs); see also Liqing Zhao, *supra* note 28 (noting that Chinese society holds diametrically opposed views towards NGOs).

133. Deyong Yin, *supra* note 14, at 536; Lee, *supra* note 6, at 355.

134. Deyong Yin, *supra* note 14, at 537; Lee, *supra* note 6, at 355.

registration and operation.¹³⁵

Moreover, the Chinese government is wary of any foreign influence that an international NGO might bring.¹³⁶ First, national security is a major concern.¹³⁷ While there have been few reports on any such incidents, the Chinese government is concerned that undercover spies might enter China through international NGOs and threaten China's national security.¹³⁸ Second, the Chinese government is very sensitive about the possibility of western countries' using the work of international NGOs to subvert the sovereignty of the Communist Party through "peaceful transformation."¹³⁹ Third, the threat to party-state stability is another major concern.¹⁴⁰ International NGOs bring western views on liberty and democracy with them.¹⁴¹ Increased exposure to these views might exacerbate the societal tension that already exists in China.¹⁴² In recent years, the Chinese government has become increasingly attentive to the activities of international NGOs.¹⁴³

These concerns hinder the progress of making a comprehensive law governing international NGOs.¹⁴⁴ Establishing a well-tailored legal framework to address the aforementioned needs and the concerns is challenging.¹⁴⁵ Before an agreement can be reached in promulgating such a law, China should adopt an interim measure to address the urgent need to provide for the registration and operation of international NGOs.

III. ANALYSIS

A. *Proposal for an Interim Measure for International NGOs: A Licensing System*

China should implement an interim licensing system for the

135. See Deyong Yin, *supra* note 14, at 538–39.

136. *Id.* at 534.

137. Liqing Zhao, *supra* note 28.

138. *Id.*

139. Deyong Yin, *supra* note 14, at 535.

140. Liqing Zhao, *supra* note 28.

141. See Deyong Yin, *supra* note 14, at 534.

142. *Id.*

143. See *id.* at 534–35.

144. See Lee, *supra* note 6, at 356–57; *cf.* Erie et al., *supra* note 7 (China has been working on its social organizations laws since 2004).

145. See Erie et al., *supra* note 7 (“[The new law] was postponed because of disagreement among different government departments on the degree to which charitable organizations will be autonomous.”).

registration and operation of international NGOs until a comprehensive legal regime for the charity sector is established. This interim licensing system should serve three primary purposes. First, it should provide official status and legal guidance for NGOs in order to allow them to operate effectively in China.¹⁴⁶ It should also remove certain legal and administrative hurdles in the current system to reduce the burdens on international NGOs.¹⁴⁷ Second, this interim system should respond to the public's demands for transparency and accountability.¹⁴⁸ Particularly, it should restore the public's confidence in the trustworthiness of international NGOs' financial and project management.¹⁴⁹ Third, the interim system should attempt to balance China's interests in adopting a liberal attitude toward international NGOs, with its concern about certain organization's political views.¹⁵⁰ The proposed interim licensing system should provide (1) standards and procedures for license application, (2) rights and obligations under the license, and (3) dispute resolution and termination procedures.

i. Standards and Procedures for License Application

This interim measure should eliminate the dual-management requirement from the licensing application procedures. Unlike current regulations for social organizations,¹⁵¹ this licensing system should not require an international NGO to obtain sponsorship from a business supervisory unit before it applies to establish a legal presence in China. Under this system, an international NGO will apply directly to the MCA or one of its regional offices for a license to operate in China.

This change will substantially mitigate the hardship on international NGOs seeking to enter China, especially for those organizations without strong economic or political ties.¹⁵² Under this interim system, without mandatory sponsorship by a business supervisory unit, NGOs will be able to save time and resources upfront and devote them to the actual

146. *See id.*

147. *See id.*; *see also* Tzeng, *supra* note 11 (existing policies lag behind actual practices). For example, the dual-management system has been a major obstacle to international NGOs. *See* discussion *supra* Part II.B.i, II.C.ii. In addition, extensive documentation requirements and the government's wide discretion to intervene in an NGO's operation also stand in the way of an efficient registration process and effective operation of NGOs. *ICNL: NGO Law Monitor – China, supra* note 52.

148. *See* discussion *supra* Part II.D.

149. *See* Lee, *supra* note 6, at 369; Tzeng, *supra* note 11.

150. *See* discussion *supra* Part II.E.

151. *See* discussion *supra* Part II.B.

152. *See also* Erie et al., *supra* note 7.

setup of new offices and projects.¹⁵³ The interim system will also relieve the pressure on governmental agencies that are reluctant to serve as business supervisory units.¹⁵⁴ Without a mandatory sponsorship requirement, an international NGO could still voluntarily enter a mutually agreeable relationship with a government agency. Such a relationship will be more desirable and rewarding to both parties because it is not driven by regulatory mandate, but by the parties' common interests.

The licensing system should adopt a guideline to provide presumptive approval to licensing applications for international NGOs which work in fields with minimal political sensitivity. Fields of minimal political sensitivity might include disaster and poverty relief, environmental protection, health services, education, or other fields that the Chinese government selects.¹⁵⁵ The guideline for presumptive approval serves to provide international applicants reasonable expectations on the outcome of their applications. Currently, applicants cannot predict the outcome of their license applications based on past practice or experience because there has not been any generally applicable legal guidance on the registration of international NGOs.¹⁵⁶ The guideline will allow the Chinese government to make policy determinations upfront about the level of restriction it wants to impose on international NGOs' access to certain areas of Chinese society. It will also help to achieve a uniform practice across China in issuance of licenses in those presumptive fields.

The interim system should also require international NGOs which operate in fields other than those given presumptive approval to petition the main office of the MCA for special permission before they submit a license application. This will give the MCA direct control over the approval of licenses in fields with higher levels of political sensitivity.¹⁵⁷ Centralizing the approval authority in the main office of the MCA will promote uniformity at the national level.

This petition requirement might be subject to criticism for its inconsistent treatment of international NGOs depending on the issues they work on and for the additional burden it places on some organizations. The benefits of this requirement outweigh these criticisms. First, this interim measure addresses the reality that China

153. *See id.*

154. *See discussion supra* Part II.B.i.

155. *See discussion supra* Part II.E.

156. *See discussion supra* Part II.B.

157. *See discussion supra* Part II.C.

has varied attitudes toward international NGOs with different types of missions.¹⁵⁸ The inability to reach an agreement on a uniform standard for every NGO's access to China has been a major obstacle in the legislative process of the new charity law.¹⁵⁹ The goal of this interim measure is to reconcile these disagreements and provide a workable standard. Including this petition requirement allows the Chinese government to apply a higher level of scrutiny to certain organizations while still providing access for a large number of NGOs.

Second, this petition requirement manages the comfort level of the Chinese government and the effect of eliminating the dual-management system. In the current system, a business supervisory unit acts as a gatekeeper for the registration process.¹⁶⁰ Without an initial screening process, the Chinese government's tolerance of steps further relaxing its tight control over international NGOs may wane. This petition requirement will provide the necessary assurance to the Chinese government that it will be able to adequately oversee the licensing process under the interim measure.

Third, this petition requirement will ultimately benefit international NGOs. Under the interim measure, NGOs working in politically sensitive areas will petition for special permission early in the licensing process. An international NGO subject to this requirement will know the likelihood of its success before it expends time and resources in researching and preparing a license application. Once an NGO passes this initial heightened scrutiny phase, the organization will have the same status as other international NGOs in applying for a license and in its operation. A high threshold at the start will be more desirable to international NGOs than heavy governmental monitoring in their later operations.

Under this interim measure, international NGOs should refer to the Regulations Governing the Registration of Social Groups and the Interim Provisions on the Registration of Civil Non-enterprise Entities for the documentation and other requirements to prepare for their license applications.¹⁶¹ The interim measure should restrict the MCA's

158. See discussion *supra* Part II.E.

159. See discussion *supra* Part II.E.

160. See, e.g., Regulations Governing the Registration of Social Groups, at 1029; see also discussion *supra* Part II.B.

161. Articles 11 and 15 of the Regulations Governing the Registration of Social Groups are almost identical to articles 9 and 10 of the Interim Provisions on the Registration and Administration of Social Groups, with minor variations. See Regulations Governing the Registration of Social Groups, at 1030–31; Interim Provisions on the Registration of Civil Non-enterprise Entities, at 1037–38.

discretion in denying applications. Specifically, the MCA should only deny an international NGO's license application if the application is insufficient, in violation of China's public policy and existing laws, or if there is fraud or misconduct in application process. If an NGO's application is denied for insufficiency, the MCA should permit the NGO to amend its application. The MCA should issue its decision within sixty days from the date it receives a license application. If the MCA denies an application, it should provide a written explanation of its decision in the notice of denial and provide a mechanism for appeal. The sixty day turnaround time and the written explanation requirement mirror the existing provisions in the regulations for social groups and civil non-enterprise entities.¹⁶²

Two major deficiencies in the current regulations are the ambiguity of standards for denying a license, and the government's wide discretion in the decision-making process.¹⁶³ By limiting the grounds for denial and allowing appeals and amendments to applications, the interim measure will curtail the MCA's discretion in decision-making to a reasonable level. A mandated turnaround time for MCA to issue decisions will provide international NGOs with a reasonable expectation about the estimated length of the application process.

ii. Rights and Obligations Under the License

An international NGO should be recognized as a "licensed international NGO," once its application is approved by the MCA. A licensed international NGO should have the same status as a registered social group and should receive all rights and benefits under the applicable laws. Specifically, a licensed international NGO should be eligible to open a corporate account under its own name and to recruit staff in China. It should also be eligible to raise funds publicly and to receive tax benefits.¹⁶⁴

Under this interim licensing system, an international NGO wishing to establish offices in China will be able to obtain official status from the

162. See Regulations Governing the Registration of Social Groups, at 1030; Interim Provisions on the Registration of Civil Non-enterprise Entities, at 1038.

163. See discussion *supra* Part II.B.i.

164. Promulgating uniform rules about public fundraising and nonprofit tax is one of the major goals of the current charity law reform. See Simon, *supra* note 67, at 966, 971–72 (describing the proposed charity law governing taxes, charity donations, and fundraising); *Beijing Looks at Laws on Philanthropy*, *supra* note 122 (noting that reform efforts would provide a "more regular environment for charities"); see also discussion *supra* Part II.D. Before the new rules come into effect, a licensed international NGO will still be subject to the limitations of current regulations on tax and fundraising.

MCA. The NGO will no longer have to work around the Chinese legal system. While the international NGO's operation will be limited by the scope of its license, a licensing system is more desirable than any of the approaches that international NGOs currently use to operate in China. Unlike the partnership approach, under the interim measure a licensed international NGO does not have to affiliate with any government agency or local social group.¹⁶⁵ It can avoid the disadvantages inherent in seeking a partnership relationship,¹⁶⁶ and operate independently in its daily business. For example, a licensed international NGO could enter contracts, recruit staff, and set up projects in its own capacity under the interim measure. Most importantly, a licensed international NGO could maintain an organizational bank account, which will substantially mitigate the risks involved in the transaction of funds and enhance the organization's accountability. As a result, the licensing system will reduce the public's suspicion regarding mishandled donations and restore confidence in international NGOs.

Moreover, a licensed international NGO can avoid the practical limitations imposed on registered domestic social groups.¹⁶⁷ Under the interim licensing system, there is no dual-management requirement and therefore NGOs will not be subject to the dual supervision of both the MCA and a business supervisory unit.¹⁶⁸ In comparison to a social group, a licensed international NGO under the interim measure will have substantial freedom in carrying out its daily operations and in conducting projects.¹⁶⁹ Furthermore, a licensee status is more desirable than an enterprise status because an international NGO will be able to raise donation funds and receive tax benefits.¹⁷⁰

An international NGO's operations should not exceed the purpose or scope of the license. The NGO should be required to file an annual report with the MCA by the end of each fiscal year. The annual report should include a list of all financial transactions exceeding ¥10,000. It should also include a list of every program and project that the licensed NGO has engaged in during the past fiscal year. An international NGO should also publish a copy of its annual report on the Internet and in print, with a notarization certifying its accuracy and completeness.

165. See discussion *supra* Part II.C.i.

166. See discussion *supra* Part II.C.i.

167. See discussion *supra* Part II.B.i.

168. See discussion *supra* Part II.B.i.

169. See discussion *supra* Part II.C.ii.

170. See discussion *supra* Part II.C.iii. For details about China's developing public fundraising regulations and tax laws, see generally *Simon, supra* note 67, 966–72.

In response to the public's criticisms after the Sichuan earthquake,¹⁷¹ the interim licensing system should emphasize the requirement for filing and publication of detailed annual reports. In listing this requirement in detail, the interim measure will inform the public of an international NGO's obligations. As a result of this proposal, the public will have better access to an international NGO's financial and project status. The interim measure will enhance the transparency and accountability of international NGOs. It will contribute significantly to restoring the public's confidence in the charity sector and will serve as a stepping stone for the successful implementation of the future charity law.

iii. Dispute Resolution and Termination Procedures

The interim licensing system should include dispute resolution and termination procedures. Specifically, the MCA should issue a warning letter to an international NGO if it reasonably believes that the organization is failing to comply with its license or Chinese laws and regulations. The MCA should reserve the right to inspect the organization's bank account and operation site and should notify the organization of such right in the warning letter. The MCA should be able to impose a civil fine for noncompliance.

As part of the implementation of this licensing system, the MCA should create a Committee of Compliance. An organization should have a right to challenge a warning letter or an order of civil fine before the MCA's Committee of Compliance. The organization should have a right to appeal the Committee's decision to a People's Court (*Renmin Fayuan*) sitting in the organization's principal place of business. Unless the organization successfully challenges the warning letter or the imposition of a civil fine, it should respond and comply with the MCA's request within sixty days. The MCA should have the right to revoke the organization's license if it fails to comply within the deadline.

These dispute resolution and termination procedures are indispensable to the interim licensing system. The number of international NGOs in China will likely increase significantly after implementation of the interim licensing system and the liberal approach to granting licenses as proposed in this Note. It is therefore necessary to provide the Chinese government with flexible mechanisms to exercise supervisory power over international NGOs. Even though the Chinese government should not use its revocation power too frequently, the interim measure should still provide a revocation option to assure the Chinese government of its ultimate control over international NGOs.

171. See discussion *supra* Part II.D.

This option will effectively relieve the Chinese government's concerns about the negative consequences that might result from the substantial presence of international NGOs in China.¹⁷²

On the other hand, these procedures assure international NGOs that the Chinese government must follow clear and public provisions when it exercises its supervisory power. These procedures will prevent the government from abusing its authority to intrude on the normal operations of international NGOs.¹⁷³ The procedures provide international NGOs a right to appeal an administrative decision of the MCA Committee of Compliance to the judicial branch. The right to a second review by an independent court will protect an international NGO against what may be an arbitrary and unjust decision by the Chinese government.

B. Challenges to the Proposed Licensing System and Responses

One possible challenge to this proposal might be that this interim licensing system is not comprehensive and therefore may not be workable in practice as it fails to address every concern that might arise. However, this interim measure does not intend to make a new law. Its purpose is to fill the gap between the current and developing regulations,¹⁷⁴ and to provide international NGOs an efficient mechanism to officially register and operate in China. It provides a parallel system to the current regulations for social groups, civil non-enterprise entities, and foundations.¹⁷⁵ The interim measure only needs to fill the void currently existing for the operation of international NGOs without repeating the every provision of the current laws. For example, the interim measure refers international NGOs to the documentation requirements in the existing regulations for social groups and civil non-enterprise entities for their license applications.¹⁷⁶

The interim licensing measure departs significantly from the current regulations in some important aspects. Namely, it eliminates the dual-management system, adopts a differentiated procedure for application, includes a publication requirement for annual reports, and provides detailed termination procedures. These provisions are specially tailored to address the needs of international NGOs, the demands of the public, and the concerns of the Chinese government. The interim measure lays

172. See discussion *supra* Part II.E.

173. See discussion *supra* Part II.B.i.

174. Deyong Yin, *supra* note 14, at 523–24.

175. See discussion *supra* Part II.B.

176. See discussion *supra* note 161.

out these provisions in detail so that the Chinese government and international NGOs will have sufficient guidance to carry out the licensing system.

A second challenge to the interim system might be that this system is conservative in nature. It still limits access of international NGOs, and noticeably confines their operation. These criticisms are legitimate because the interim measure does purposefully limit the capacity of international NGOs to enter and operate in China. Nonetheless, the following reasons justify this system. First, the mission of this licensing system is to serve as an interim step before the Chinese government enacts the new charity law. Comprehensive reform of the legal framework for charity sector will have a great effect on the entire Chinese society. As such, it takes time and resources to balance conflicting interests and to reconcile different opinions.¹⁷⁷ An interim measure, by its nature, should avoid such controversies. Instead, it should only be a moderate step to ensure a smooth transition. Second, this interim licensing system strikes an effective compromise between the urgent need of international NGOs for official status and China's concerns about sovereign security. The licensing system substantially lowers the bar for international NGOs to obtain legal status by removing the dual-management requirement. Under this system, international NGOs will have substantial freedom in their operations while still being constrained by the license's scope and purpose. The petition requirement and the termination procedures also serve as safety valves to keep the Chinese government comfortable.

IV. CONCLUSION

After the Sichuan earthquake, the urgent need to establish an integrated system for the charity sector in China became evident. International donors are calling for a more transparent and accountable practice of NGOs in China. NGOs, especially international NGOs, are eager to obtain officially recognized status and to receive clear legal guidance in their registration and operation. The Chinese government is under pressure to restore the public's confidence in the charity sector, and to monitor the large number of unregistered international NGOs.

The emergence of a new charity law with a comprehensive legal framework is inevitable. There is no easy solution to the debates and

177. Cf. Erie et al., *supra* note 7 (describing discussions among stakeholders and solicitation of opinions by the Ministry of Civil Affairs); *Frequently Asked Questions*, *supra* note 44 (“[T]he government regards as delicate and contentious any topic which raises associational issues and/or foreign engagement with China.”).

disagreements about the level of autonomy to be granted to international NGOs and the conflicting interests of different governmental departments. The Chinese government's concerns related to international NGOs are a significant burden to any new charity law. In the absence of sufficient experience in monitoring independently operating NGOs, it is hard for the Chinese government to let go of its tight control all at once for the new charity law.

Therefore, taking an interim step to set up a transitory licensing system is beneficial to both the Chinese government and international NGOs. Upon receiving a license from the MCA, international NGOs will be able to operate independently with a legally recognized identity. The Chinese government will be relieved from the pressure and criticisms resulting from the lack of systematic and transparent practices of international NGOs. At the same time, a licensing system will provide mechanisms for the Chinese government to retain a level of control over international NGOs. The government will be able to closely monitor the operation of international NGOs to ensure they do not impose any risks on Communist sovereignty. Furthermore, this interim licensing system provides opportunities for the Chinese government to gain important experience in establishing the new legal framework for charity law.