Nonprofit Organizations in the People’s Republic of China

Thomas von Hippel / Knut B. Pißler

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* Shorter version of this paper is available in: Klaus J. Hopt/Thomas von Hippel, Comparative Corporate Governance of Non-Profit Organizations, Cambridge 2010, S. 428 – 477.

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Abstract

The steady growth in numbers of Nonprofit Organizations in the People’s Republic of China (NPOs) proves that this sector is becoming a more and more important part of China’s economic system. The Chinese legislators are aware of this fact and are actively trying to regulate all different aspects of NPOs. This paper aims to provide a comprehensive overview on the legal framework for NPOs in China.

First, the Chinese term for NPO is defined followed by an analysis of some empirical data about the development of NPOs in China. The second part of the paper then looks into the purpose, characteristics and the establishment of the existing legal forms for NPOs according to institutional law. The third part focuses on tax law relating to NPOs highlighting new developments regarding possible tax benefits for donors and the exemption from corporate income tax of NPOs according to two Notices issued by Ministry of Finance and the State Administration of Taxation in November 2009. The forth part deals with fiduciary obligations of the board members of NPO. The fifth part investigates the internal and external governance of NPOs and the enforcement of legal obligations through state supervision, third parties and the mechanisms of reporting, auditing and disclosure of information. In the sixth part questions regarding charitable solicitation are shortly explained. The following seventh part focuses on the questions, to what extent NPOs are allowed to conduct economic activities or to establish enterprises, and how creditors of NPO are protected. Before ending with some concluding remarks, some additional light is shed on reform proposals and standards of best practice for NPOs in China in the eighth part of this paper.

Keywords:
Nonprofit organizations, associations, civil society organisations, social organisations, civil non-business institutions, foundations, charitable trust, People’s Republic of China, donors, dual management system, taxation, governance, foreign nonprofit organizations, investment of assets
I. Introduction

In April 2000 the foreign community in Nanjing, the capital of Jiangsu-Province, sought to establish a nonprofit organization with the aim of financing schooling for children of poor families. The precipitating event for this private initiative was the robbery and killing of a German family in April 2000 by perpetrators who had never been the beneficiaries of childhood schooling. However, the Chinese authorities rejected the establishment of a foundation, allegedly on the grounds of an internal decision to temporarily halt the registration of further foundations. In discussions it became clear that the authorities had no interest in the establishment of a foundation which would institutionalise the memory of the crime. The “Pfrang Association” was, nevertheless, later established in cooperation with an already existing Chinese organisation.

ZHAI Meiqing earned her first million Yuan with furniture trading when she was only 23. “When I was in my 20s, I dreamed of having my own house, my own car and a happy life, which became my initial motivation for making money,” she said. “However, when I was in my 30’s, I found that I had become lost in the bountiful material world that I had earned for myself. Therefore, I began to have doubts and question myself: What is life for? What’s the purpose of making money?” Together with her husband she started in the 1990s to shift her career emphasis to charitable activities. However, her trip to the Civil Affairs Department of Guangdong Province in 1995 to indicate her intention to set up a private foundation was fruitless: The government department did not allow her to establish a foundation. It was only in early 2005 that ZHAI heard of newly promulgated regulations regarding foundations. After applying to the Ministry of Civil Affairs for the establishment of a foundation and making an initial endowment of RMB 50 million Yuan, her “Heung Kong Bright Future Foundation” was finally created in August 2005.

These two cases shed light on quite a new phenomenon in the People’s Republic of China (PR China): Private persons are feeling the need “to do something” in response to the problems which typically arise in a transformation economy like China or they wish to allow other people to benefit from their good fortune. This occurrence of philanthropy is nothing entirely new to China: Late imperial China possessed a well-developed philanthropic tradition that comprised a mixture of official, religious and private institutions embracing a range of causes from famine relief and care of the elderly and widows to the running of orphanages, hospitals and medical dispensaries as well as providing burial services for the poor and other forms of civic improvement. At that time merchants - condemned by Confucian morality as selfish and predatory beings - sought to convert part of their wealth into social status by dedicating it to charitable activities. But since the founding of the PR China, these activities have been marginalized and strictly controlled by the Chinese government, which has for some time been unwilling to tolerate (privately

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2 See below at II E 4.
3 See www.womenofchina.cn/Profiles/Businesswomen/204813.jsp.
4 See below at II A 3 b.
initiated) “nonprofit organizations” (NPOs). During the “cultural revolution” in the years 1966 to 1976, all NPOs were eliminated. After the introduction of the policy of “reform and opening” NPOs were re-established. The growing number of private entrepreneurs and the formation of a middle-class in China made the re-emergence of “philanthropists” (善人) possible.

This gives rise to the question of what options Chinese as well as foreign philanthropists have in today’s China for channeling their charitable activities and which challenges and problems they face. This paper aims to examine the existing regulations regarding NPOs in China and the compliance of NPOs with these regulations by analyzing statutes and annual reports of some selected NPOs as well as statistical materials published by the Ministry of Civil Affairs in the years 2006 and 2007.

First, the Chinese term for NPO is defined followed by an analysis of some empirical data about the development of NPOs in China (I B). The second part of the paper then looks into the purpose, characteristics and the establishment of the existing legal forms for NPOs according to institutional law (II). Here, special attention is given to the question what practical possibilities are in place for activities of foreign NPOs. The third part focuses on tax law relating to NPOs highlighting new developments regarding possible tax benefits for donors and the exemption from corporate income tax of NPOs according to two Notices issued by Ministry of Finance and the State Administration of Taxation in November 2009 (III). The forth part deals with fiduciary obligations of the board members of NPO (IV). Besides the duty of loyalty and the duty of obedience, which commonly plays a special role in foundations, this part deal with the duties of board members regarding the investment of assets by not only analysing the corresponding legal regime but also aiming to understand its impact in the management practice of NPOs in China. The fifth part investigates the internal and external governance of NPOs and the enforcement of legal obligations through state supervision, third parties and the mechanisms of reporting, auditing and disclosure of information (V). In the sixth part questions regarding charitable solicitation are shortly explained (VI). The following seventh part focuses on the questions, to what extent NPOs are allowed to conduct economic activities or to establish enterprises, and how creditors of NPO are protected (VII). Before ending with some concluding remarks (IX), some additional light is shed on reform proposals and standards of best practice for NPOs in China in the eighth part of this paper (VIII).

A. The Term “Nonprofit Organizations”

In the People’s Republic of China (PR China), the term “nonprofit organization” (非营利组织, NPO) is seldom used by legal scholars.6

Since 2004 there has been a legal definition in the “Accounting System of Nonprofit Organizations” (NPO Accounting System) of the Ministry of Finance.7 The NPO Accounting system enumerates social organizations (社会团体, SO), civil

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6 A search through the database “China Academic Journals” (www.cnki.net) during the years 1999 to 2010 for articles with the term “nonprofit organizations” (非营利组织) in their title provides more than 200 hits, but reveals only two articles published in journals which have a focus on law. In none of the articles is a definition of the term given.

7 民间非营利组织会计制度 [Accounting System of Nonprofit Organizations], promulgate by the Ministry of Finance on August 18, 2004, effective since January 1, 2005.
non-business institutions (民办非企业单位, CNI), and foundations (基金会) as “nonprofit organizations.”

The regulations furthermore provide for three necessary characteristics of NPOs in the PR China:

- NPOs are not for profit purposes;
- “resource providers” making investments in NPOs are not allowed to receive an economic return;
- “resource providers” do not enjoy ownership of NPOs.

Therefore, the non-distribution constraint is one central element of the definition of NPO in the PR China. In fact, Chinese literature explains the essence of “nonprofit” to be the “nonprofit distribution” rather than prohibiting NPOs from “making money.”

There is no official classification of nonprofit organizations regarding public benefit and mutual benefit organizations, but foundations are under a legal obligation to pursue a public benefit purpose.

B. Empirical Information

Official statistics on NPOs in China are available on the homepage of the NPO Affairs Bureau of the Ministry of Civil Affairs (MoCA). However, detailed statistical recording began only in 2002, and the categorization of different types of NPOs (SOs, CNIs, and foundations) in these statistics is not always entirely clear. This sometimes leads to contradicting statistical data, even on the website of the NPO Affairs Bureau of the MoCA.

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8 For a description of these organizational forms, see below at II.
9 Art. 2, para. 1, NPO Accounting System. Included are also temples, palaces, mosques, and churches without referring to the legal form of those objects.
10 Art. 2, para. 2, NPO Accounting System.
12 Art. 2, Foundation Regulations 2004 (see below at II, note 33).
14 In 2002 the corresponding statistics on the homepage of the NPO Affairs Bureau referred to foundations under the term “基金会社团” (“foundation social organization”), and as a subcategory of social organizations. Accordingly, a statistic of all three categories of NPO on the homepage of the NPO Affairs Bureau of the MoCA declares that “until 2002 foundations are included in [the statistical data of] SO.” In 2003 foundations were categorized separately as “基金会” (foundations), but were also included in the statistics on social organizations. Since 2004, statistics on foundations are no longer included with the statistics on social organizations, and are made available separately.
15 As of February 2010 there is no statistical information available for 2008. The statistical information for 2009 was published already in October 2009 implying that it actually does not contain the total number of NPO at the end of that year. Furthermore, there are discrepancies between statistical data provided for SOs in one table with statistical data for all NPOs 1988-2004 and other tables with statistical data provided only for SOs in the years 2002 and 2003. Inconsistencies between the data made available in this article, and the data provided by Kaur, The Third Sector: The Law in China and Non-Profit Organizations, in: INTERNATIONAL JOURNAL OF CIVIL SOCIETY LAW, Vol. 4 (2006), Issue 3, p. 47 et seq. (at 53) for the year 2005 is due to the fact that Kaur refers to figures provided by the MoCA for the first
Official statistical data on different organizational forms of NPOs in China

<table>
<thead>
<tr>
<th>Year</th>
<th>SO</th>
<th>CNI</th>
<th>Foundations</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>4,446</td>
<td>-</td>
<td>-</td>
<td>4,446</td>
</tr>
<tr>
<td>1989</td>
<td>4,544</td>
<td>-</td>
<td>-</td>
<td>4,544</td>
</tr>
<tr>
<td>1990</td>
<td>10,855</td>
<td>-</td>
<td>-</td>
<td>10,855</td>
</tr>
<tr>
<td>1991</td>
<td>82,814</td>
<td>-</td>
<td>-</td>
<td>82,814</td>
</tr>
<tr>
<td>1992</td>
<td>154,502</td>
<td>-</td>
<td>-</td>
<td>154,502</td>
</tr>
<tr>
<td>1993</td>
<td>167,506</td>
<td>-</td>
<td>-</td>
<td>167,506</td>
</tr>
<tr>
<td>1994</td>
<td>174,060</td>
<td>-</td>
<td>-</td>
<td>174,060</td>
</tr>
<tr>
<td>1995</td>
<td>180,583</td>
<td>-</td>
<td>-</td>
<td>180,583</td>
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<tr>
<td>1996</td>
<td>184,821</td>
<td>-</td>
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<td>184,821</td>
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<tr>
<td>1997</td>
<td>181,318</td>
<td>-</td>
<td>-</td>
<td>181,318</td>
</tr>
<tr>
<td>1998</td>
<td>165,600</td>
<td>-</td>
<td>-</td>
<td>165,600</td>
</tr>
<tr>
<td>1999</td>
<td>136,764</td>
<td>5,901</td>
<td>-</td>
<td>142,665</td>
</tr>
<tr>
<td>2000</td>
<td>130,668</td>
<td>22,654</td>
<td>-</td>
<td>153,322</td>
</tr>
<tr>
<td>2001</td>
<td>128,805</td>
<td>82,134</td>
<td>-</td>
<td>210,939</td>
</tr>
<tr>
<td>2002</td>
<td>133,297</td>
<td>111,212</td>
<td>1,268</td>
<td>244,509</td>
</tr>
<tr>
<td>2003</td>
<td>141,167</td>
<td>124,491</td>
<td>954</td>
<td>266,612</td>
</tr>
<tr>
<td>2004</td>
<td>153,359</td>
<td>135,181</td>
<td>892</td>
<td>289,432</td>
</tr>
<tr>
<td>2005</td>
<td>171,150</td>
<td>147,637</td>
<td>975</td>
<td>319,762</td>
</tr>
<tr>
<td>2006</td>
<td>191,946</td>
<td>161,303</td>
<td>1,144</td>
<td>354,393</td>
</tr>
<tr>
<td>2007</td>
<td>211,661</td>
<td>173,915</td>
<td>1,340</td>
<td>386,916</td>
</tr>
<tr>
<td>2008</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2009</td>
<td>229,681</td>
<td>182,382</td>
<td>1,597</td>
<td>413,660</td>
</tr>
</tbody>
</table>

Source: Compiled by the authors

The most intriguing trend in this data is the decline in the number of foundations until 2004, which is contrasted by the almost steady growth in the number of social organizations and civil non-business institutions (There has been a decline in SOs between 1998-2001, which may be explained by the introduction of new regulations for SOs and CNIs in 1998 requiring a restructuring and reorganization of these NPO forms.). Only after the promulgation of new regulations on foundations in 2004 did the number of foundations increase again since 2005. Nevertheless, it is evident that foundations are playing a relatively minor role in China compared to the other forms of NPO (of which roughly 55% were SO and 45% CNI). It is notable to compare the number of NPOs in the chart above to the enormous number of public institutions (事业单位); in 2004 the latter – i.e., organizations owning public assets and providing administrative and operational functions in all public service fields, including education, research, health, social welfare, sports, arts, and culture – amounted to 1.3 million. Due to the fact that private sector individuals or companies cannot establish public institutions, this article will not deal with this form of NPO in China.

quarter of 2006 (until March 31) (see www.mca.gov.cn/news/content/recent/200642182431.html) that indicate a decline in the number of SOs (to 169,533) and CNIs (to 146,432).

16 See below note 28 and 29.

17 See also Kaur, (supra note 15) at 53.

18 Fan, 平稳有序推进中国事业单位改革 [Stable and Orderly Pushing Forward of the Reform of Public Institutions], 财经 (Caijing), April 29, 2004, p. 82.
According to statistics of the NPO Affairs Bureau of MoCA, in 2007 the NPO sector in China employed 4.6 million people (up 9.5% from 4.2 million people in 2006). Most of them were employed in SOs (2.9 million people in 2007, 2.7 million people in 2006). CNIs in 2007 had 1.7 million employees (1.5 million in 2006), while foundations employed only 18,269 people (compared to 3,802 people in 2006, the figure almost quadrupled).

Most NPOs are registered not with the MoCA on the national level of the Chinese government, but with the departments for civil affairs on the local level.\(^\text{19}\)

It should be noted that survey works of Chinese researchers reveal a large number of unregistered NPOs\(^\text{20}\) and NPOs registered as an enterprise with the State Administration for Industry and Commerce or the local Bureaus for Industry and Commerce; the explanation is that such organizations do not want to follow the registration process or are not able to find a sponsor required for conducting the registration process\(^\text{21}\). This paper will by large focus only on those NPOs registered with MoCA or the departments for civil affairs on the local level.

II. Institutional Law

Sources of Chinese law relating to NPOs include the General Principles of Civil Law (GPCL),\(^\text{22}\) promulgated in 1986, as well as a number of specialist laws and regulations largely developed over the past 20 years.

The terminology in the laws and regulations on NPOs is not cohesive. Some laws (like the NPO Accounting System mentioned above\(^\text{23}\)) distinguish three organizational types of NPO, namely SOs, foundations, and CNIs. Other regulations (particularly concerning taxation\(^\text{24}\)) use the term “SO” in a wider sense to include both “SOs” and foundations. The first differentiation is in line with the division between the “charitable trust” and the “charitable corporation,” while the latter use corresponds to the term “charity,” which includes both legal forms. The dissimilar usages of the term “SO” lead to some confusion.

The first regulations on foundations appeared in 1988.\(^\text{25}\) The law of SOs, originally dating back to the early days of the PR China,\(^\text{26}\) was reformed in 1989.\(^\text{27}\)

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\(^\text{19}\) See below at II A 3 c (foundation), II B 3 (SO), and II C 3 (CNI).


\(^\text{22}\) Art. 50, para. 2, 中华人民共和国民法通则, Chinese-English in: CCH Asia Pacific (Hrsg.): CCH CHINA LAWS FOR FOREIGN BUSINESS – BUSINESS REGULATION, Volume 1-6, Hong Kong 1985 et seq. (cited as CCH Business Regulation) ¶19-150.

\(^\text{23}\) See supra at I A.

\(^\text{24}\) See below at III E 4. In addition, the first regulations on foundations of 1988 (below note 25) deal with foundations as one form of SO, and Art. 10 of the Donation Law of 1999 (below note 30) defines public benefit SOs as legally established foundations, charitable organizations, and other SOs that are aimed at developing public benefit undertakings.


\(^\text{26}\) “Temporary Measures for the Registration of Social Organizations” [社会团体登记暂行办法], promulgated on October 19, 1950.

\(^\text{27}\) “Regulations on the Registration and Administration of Social Organizations” [社会团体登记管理条例], promulgated on October 25, 1989.

and then revised in 1998. Membership-based SOs are comparable to associations in civil law countries, as they are voluntary groups formed by citizens to realize a shared objective and develop nonprofit-making activities. 1998 also saw the introduction of the legal form of CNIs. CNIs are “social enterprises” that offer nonprofit charitable services, e.g., hospitals, schools, and museums. All these regulations on NPOs were issued by the State Council, i.e., the Chinese government. In 1999 the Public Welfare Donation Law (the Donation Law) was promulgated. The Trust Law followed in 2001, recognizing charitable trusts for the first time in the PR China. However, charitable trusts have so far not been significantly used in practice. On March 8, 2004, the law on foundations was reformed under the Regulations of the Administration of Foundations (the Foundation Regulations 2004). These regulations define a foundation as a nonprofit legal entity that employs assets donated by natural persons, legal entities, or other organizations for the purpose of engaging in some public benefit enterprise. Consultations are currently being conducted on further reforms to NPO and charity law.

28 Regulations on the Registration and Administration of Social Organizations” [社会团体登记管理条例] (the SO Regulations), reprinted in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 146 et seq.
29 “Temporary Regulations on Registration and Administration of Civil Non-business Institutions” [民办非企业单位登记管理暂行条例] (the CNI Regulations), reprinted in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 159 et seq.
30 中华人民共和国公益事业捐赠法, reprinted in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 264 et seq.
32 One reason for this is that the Trust Law 2001 subjects charitable trusts to stricter establishment requirements and a more complex governance structure than general (private) trusts, which are also regulated by this law (see von Hippel/Pißler, China, in: Richter/Wachter (eds.), HANDBUCH DES INTERNATIONALEN STIFTUNGSRECHTS (2007), p. 699 et seq. (at 739). In addition, the charitable trust has the practical disadvantage that, until now, no administrative regulations existed for registration and approval procedures.
33 基金会管理条例, reprinted in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 20 et seq.
34 For foundations and representative offices of foreign foundations established before the enactment of the Foundation Regulations 2004, a deadline of November 31, 2004, was set for the application of a new registration certificate (see Art. 48, Foundation Regulations 2004). Shortly before the Foundation Regulations 2004 went into force, the Ministry for Civil Affairs (the MoCA) published a document containing detailed transitional regulations (see “Plan for the Issuance of New Registration Certificates of Foundations” [基金会焕等级证书方案] dated May 28, 2004, reprinted in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 241 et seq.). For example, it was required that the name of the foundation be adapted to the “Provisions on the Administration of the Name of Foundations” [基金会名称管理规定] issued by the MoCA on June 21, 2004 (reprinted in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 183 et seq.). In addition, in view of the increased minimum endowment capital requirements for foundations (see below at II A 3 d), the Ministry allowed an interim deadline of the 2006 annual inspection, i.e., March 31, 2006 (see Art. 2, para. 7, “Plan for the Issuance of New Registration Certificates of Foundations”).
Besides this legislation originating from the Chinese legislators and government, there are a number of model statutes issued by MoCA concerning foundations, SOs, and CNIs. These model statutes specify the more general requirements of the respective regulations of the State Council, especially regarding the internal organizational structure of NPOs in China. Although these model statutes are not automatically binding, they are important in practice because it is supposed that the approval for the establishment of the respective NPO will not be granted if the requirements of the model statutes have not been fulfilled.

A. Foundations

1. Purpose

Pursuant to Art. 1 of the Foundation Regulations 2004, the aim of the regulations is “to protect the legitimate rights and interests of foundations, donors and beneficiaries and to encourage the participation of social forces in public benefit activities.” The Official Commentary on Foundations especially mentions wealthy private persons as potential founders. Thus one purpose of foundations in China is to make it possible for private persons to devote assets to the promotion of public benefit purposes.

a) Specific Permission to Raise Funds Publicly?

From a continental point of view, it is remarkable that the law expressly permits foundations to publicly raise funds, but only under certain conditions. The Foundation Regulations 2004 have introduced two types of foundation: foundations which are not permitted to publicly raise funds (endowment foundations) and, alternatively, foundations which may raise funds publicly (fundraising-oriented foundations).

According to the traditional continental European understanding, foundations do not undertake fundraising but rather limit themselves to the administration of their

36 “Model Statutes for Foundations” [基金会章程示范文本], reprinted in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 171 et seq.
37 See below at II B 4 (note 143).
38 See below at II C 3 (note 180).
39 See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 54. The fact that foreign nationals may establish foundations in the People’s Republic derives also from Art. 2, Foundation Regulations 2004, according to which foundations may be established by any natural or legal person. The OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 49, also emphasizes that the Foundation Regulations 2004 do not distinguish in this regard between domestic and foreign founders.
40 This function is well known in all countries and is accordingly entirely conventional. However, this function is not unquestioned under Chinese law, as in the traditional planned economy there are no private resources and no need to pursue public purposes through private resources; see OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 47.
41 This was permitted expressly under Art. 4, Foundation Measures 1988 (Footnote 25).
43 For details, see below at II A 3 d. For the English terms, see OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 53.
assets in order to generate revenue.\textsuperscript{44} As a result, it is normally not the foundations which raise funds but rather other organizational forms, in particular the association (or – in the Chinese context – the SO).

Under Chinese law, by contrast, only foundations are expressly permitted to raise funds publicly. Thus, one function of the foundation seems to be to have specific permission to raise funds from the public. However, it is still not clear from the law and also apparently not settled in practice, whether and under what circumstances other NPOs are entitled to raise funds.\textsuperscript{45}

b) Foundations as an Instrument of Privatization?

Examination of the Official Commentary on the Foundation Regulations 2004 reveals indications that the foundation could have a further function, that is, as a vehicle for directing state assets toward public benefit purposes.

In response to the question of who could serve as a potential donor, the Official Commentary includes the following remark:

It is necessary to make clear that the development of the charitable sector is an important duty of the Chinese government. The government principally fulfils this duty by way of public administration and public service provision. This, however, in no way precludes the government from establishing foundations. While in other countries the share of foundations established by the government is relatively low, the foundations established by the Chinese government and its organs acting as founders carry significant weight.\textsuperscript{46}

This trend is supported by Chinese authors who take the view that the transfer of state assets to a foundation has advantages over a “privatization” in that the assets continue to be devoted to a public benefit purpose and thereby serve the general public good.\textsuperscript{47}

2. Characteristics

The Chinese Foundation Regulations define foundations as “nonprofit legal persons, which […] utilize assets donated by natural or legal persons or other organizations to pursue a public benefit purpose.”\textsuperscript{48} Although the wording does not expressly say that a foundation has no membership, this may be inferred from the fact that the Foundation Regulations 2004 make no provision for membership meetings. This lack of membership distinguishes the foundation from the SO,\textsuperscript{49} which is comparable to associations in other civil law jurisdictions.

It may therefore be said that the concept of the Chinese foundation broadly corresponds to that of the foundation commonly found in the civil law jurisdictions: Chinese foundation law also contains the three elements of the foundation concept of civil law jurisdictions (purpose, endowment, a distinct organization\textsuperscript{50}) and its own


\textsuperscript{45} See below at II B 2.

\textsuperscript{46} OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 49.


\textsuperscript{48} Art. 2, Foundation Regulations 2004.

\textsuperscript{49} OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 52.

\textsuperscript{50} See Rawert (supra note 44), p. 109 et seq.
legal status. As in many European countries\textsuperscript{51} (but not, e.g., Germany\textsuperscript{52}), a Chinese foundation may only pursue public benefit purposes (公益事业).

In contrast to the previous legal position,\textsuperscript{53} the new Foundation Regulations 2004 intentionally no longer define which purposes are to be seen as to the public benefit, so as not to pre-empt any future extension of the concept.\textsuperscript{54} According to the Official Commentary on Foundations,\textsuperscript{55} reference may be made to the designated public benefit purposes (公益事业) in the Donation Law of 1999,\textsuperscript{56} that is:

\begin{itemize}
  \item disaster relief, poverty alleviation, assistance to the handicapped, and other activities for SOs and individuals in straitened circumstances;
  \item education, scientific, cultural, public health, and sport undertakings;
  \item environmental protection and construction of public facilities; and
  \item other public welfare undertakings promoting social development and progress.
\end{itemize}

The Trust Law also contains a list of “public interest purposes” (公共利益目的) for charitable trusts which largely corresponds to the designation for public benefit purposes in the Donation Law.\textsuperscript{57}

The Official Commentary on Foundations makes it clear that the dissemination of religion and political participation are not public benefit purposes.\textsuperscript{58} The concept of public benefit is also defined negatively as not for the purposes of an individual private person.\textsuperscript{59} Accordingly, non-charitable foundations such as family foundations are impermissible.

3. Establishment

a) No Right to Establishment

In China neither the Constitution nor other law provides for a positive right to establish a foundation. Instead, the authorities can withhold approval even when all legal requirements for establishment have been fulfilled.\textsuperscript{60}

\textsuperscript{51} Hopt/Walz/von Hippel/Then (eds.), THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH (2006), p. 73.

\textsuperscript{52} German foundation law recognizes the so-called “gemeinwohlkonforme Allzweckstiftung”; see Seifart/von Campenhausen/Hof, HANDBUCH DES STIFTUNGSRECHTS, 2nd. edition (1999), § 4 note 36.

\textsuperscript{53} See Art. 2, para. 2, Foundation Measures 1988 (supra note 25), which designates academic research, culture and education, social welfare, and other public benefit purposes.

\textsuperscript{54} OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 51.

\textsuperscript{55} OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 51, 74 et. seq.

\textsuperscript{56} See Art. 3, Donation Law 1999.

\textsuperscript{57} Art. 60, Trust Law; see below at II D 2.

\textsuperscript{58} It is interesting to note that the OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 89, mentions this as an illustration in connection with the establishment of representative offices of foreign foundations.

\textsuperscript{59} OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 51.

\textsuperscript{60} Of course, this is not a specific problem of Chinese foundation law, but rather a fundamental question of Chinese administration law and its subjective rights on individuals. See Heuser, EINFÜHRUNG IN DIE CHINESISCHE RECHTSKULTUR, 2nd edition (2002), p. 296 et seq., who investigates this question using examples and concludes that a system of subjective rights is gradually being built up in China. Chinese administrative law has made progress in this direction by promulgating the “People’s Republic of China Licensing Law” on August 27, 2003 (Chinese-English in: CCH Business Regulation [supra note 22] ¶19-555). In Art. 38, para. 1, this law lays down that “the administrative authorities shall issue an approval decision in writing for administrative licensing applications which satisfy statutory requirements and standards in accordance with laws.” Scholarly comment on this regulation in the literature shows that the
b) Dual Management System

Furthermore, Chinese law provides for a “dual management system,” whereby a so-called “sponsor organization” is involved alongside the government body in charge of registration. This system is a uniquely Chinese feature of state NPO supervision, which also applies independent of legal form to both SOs and CNIs. The Official Commentary on Foundations describes this system as a fundamental feature of the supervision of NPOs in China.61

In the approval procedure, the dual management system is manifest in that prior to the filing of the actual establishment application with the competent registration and administrative authority,62 the initial consent of a sponsor organization for the establishment of the foundation must be gained.63

Gaining this consent of a sponsor organization is the key difficulty in the registration procedure of Chinese foundations.64 In the Official Commentary on Foundations, the problem is frankly discussed that privately initiated foundations are unable to find a sponsor organization.65 This difficulty is due to the fact that foundations in China up until now were mostly set up by government bodies or with state support, and accordingly in a sense acquired a sponsor organization from inception. On the other hand, with privately initiated foundations, no effective procedure for finding a sponsor organization has yet been established. The Official Commentary on Foundations additionally points out that potential sponsor organizations may be reluctant to take on the role of sponsor organization because the Chinese government is endeavoring to make the administrative apparatus leaner and more efficient.66 However, since the promulgation of the new Foundation Regulations 2004, MoCA itself has acted as sponsor in a number of cases.67 Some of

Chinese legislators intended hereby not to introduce a binding decision on administrative approval. Instead, they intended to establish binding rules for the routine case, but to allow variations for atypical cases where there are particular grounds for departing from the norm. See, e.g., WANG Yongqing, COMMENTARY ON THE PEOPLE’S REPUBLIC OF CHINA LICENSING LAW [中华人民共和国行政许可法释义], Beijing 2003, p. 127; LI Fei, EXPLANATIONS TO THE PEOPLE’S REPUBLIC OF CHINA LICENSING LAW [中华人民共和国行政许可法释解], Beijing 2003, p. 142; XU Anbiao, COMMENTARY TO AND GUIDE TO THE APPLICATION OF THE “PEOPLE’S REPUBLIC OF CHINA LICENSING LAW” [《中华人民共和国行政许可法》释义及使用指南], Beijing 2003, p. 189. See further on this question regarding (for-profit) investment projects of foreigners in China Wolff, MERGERS & ACQUISITIONS IN CHINA: LAW AND PRACTICE, Hong Kong 2007, p. 6 (“Until today, it is unclear if Chinese authorities are obliged to approve, verify and register investment projects where the formal requirements are met and if any right to verification, approval or registration can in fact be enforced through court proceedings.”).

61 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 69.

62 The MoCA or corresponding departments of civil affairs in the provinces, autonomous regions, and municipalities directly under the central government act as registration and administrative authorities; see Art. 6, and Art. 34, Foundation Regulations 2004.

63 Art. 9, No. 5, Foundation Regulations 2004.


65 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 71.


67 MoCA is sponsor of the following foundations: China Social Welfare Education Foundation (中国社会福利教育基金会, 0037, founded in 2005), the China Aging Development Foundation (中国老龄事业发展基金会, 0051, founded in 1986 - according to general information on the webpages of MoCA the foundation was registered with MoCA in 2003), the China Yongjun Youzhu Foudation (中国拥军优属基金会, 0096, date of founding unknown), the Heung Kong Bright Future Foundation (香江社会救助基金

these foundations are clearly privately initiated like the Heung Kong Bright Future Foundation (initiated by ZHAI Meiqing, chairwomen of the Xiang Jiang Group)\(^68\), the WANG Zhentao Charitable Foundation (initiated by WANG Zhentao, chairman and CEO of the Aokang Group)\(^69\) and the Huamin Charity Foundation (initiated by LU Dezhi, CEO of the Tehua Investment Holding Ltd., and LI Guangrong, majority shareholder of the Tehua Investment Holding Ltd.)\(^70\). One foundation, the Aiyou Huaxia Charity Foundation, is an initiative of 33 CEOs and chairmen of internationally renowned enterprises like Alibaba, Baidu, Gome, TCL and Vanke.\(^71\) There are also foundations established under the initiative of enterprises like the COSCO Charitable Foundation (established by COSCO\(^22\)), the China Life Insurance Charitable Foundation (established by China Life Insurance \(^73\)), the Narada Foundation (established by Nandu Group\(^74\)), the Tiannuo Charitable Foundation (established by Hanlong Group\(^75\)) and the People’s Insurance Charity Foundation (established by People’s Insurance)\(^76\).

Even when a privately initiated foundation succeeds in finding a sponsor, the next problem is that the sponsor may exploit its indispensable position to directly influence the structuring of the foundation and appointments to its boards. This informal influence can extend to the naming of individual directors.\(^77\) The dominance of the sponsor organization in this phase derives from its ability to threaten withholding of consent.

The far-reaching power of the sponsor organization during this “preliminary approval procedure” is further strengthened by the fact that it is bound to no regulations, and in particular not by the “Administrative Licensing Law.”\(^78\) The Official Commentary on Foundations points out in particular that the consent of the sponsor organization is a pre-requisite for the commencement of the actual approval procedure.\(^79\)

\(^68\) See www.hkf.org.cn.
\(^69\) See www.aokang.com.
\(^70\) See Art. 4 of the statute of the Huamin Charity Foundation available at http://chinahuamin.org.
\(^71\) See www.hxcharity.org.
\(^72\) See Art. 4 of the statute of the COSCO Charitable Foundation available at the webpages of MoCA (supra note 13).
\(^73\) See Art. 4 of the statute of the China Life Insurance Charitable Foundation available at www.e-chinalife.com/elfoundation/.
\(^74\) See Art. 4 of the statute of the Narada Foundation available at www.naradafoundation.org.
\(^76\) See www.picc.com/picc/piccweb/picckg_v2.0/hxrb/shhd/gysy_news/zl_news_0002.html.
\(^77\) See Art. 9, No. 4, Foundation Regulations 2004, requiring that a list of directors’ names is to be submitted with the application.
\(^78\) See supra note 60.
\(^79\) See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 69 et seq.
c) Registration

Registration itself has to be conducted on the national level with the MoCA or with the corresponding departments for civil affairs on the level of provinces, autonomous region, and directly administered municipality.  

A conceivable solution to the problem of finding a sponsor organization is that the founder seeks a regional registration location through a form of nationwide “forum shopping,” in which sponsor organizations are easier to acquire. Basically, non-fundraising foundations and fundraising foundations that do no nationwide fundraising have to be registered at the departments of civil affairs of the provinces, autonomous regions, and municipalities directly under the central government, and are thereby dependent on the location of a sponsor in this administrative region. A form of “forum shopping” is particularly attractive for non-fundraising foundations. The choice of registration location has no effect on the field of activity of the foundation, but only in the field of public fundraising. It is accordingly quite conceivable that a non-fundraising foundation registers in the municipality of Shanghai, while supporting charitable activities exclusively in Tibet.

For capital-rich non-fundraising foundations with an initial endowment of over RMB 20 million Yuan (more than US$ 2.4 million), there is a further option. Art. 6, para. 1, No. 3, Foundation Regulations 2004 provides that the founder may alternatively file the application with the central state registration and administration authority, that is, the MoCA. The high minimum capital requirement is justified by the Official Commentary on Foundations in terms of the need to limit the workload of the MoCA.

In practice, of the 1,340 foundations existing at the end of 2007, only 107 (or about 8%) were registered with MoCA. Most of the foundations not registered on the national level with MoCA had filed registrations in the more developed regions of China. Very few foundations are registered in the central and western regions of China. Looking at the number of foundations according to their place of registration, MoCA registered foundations are surpassed by the number of locally registered foundations in Guangdong, Jiangsu and Zhejiang. Shanghai and Beijing, two directly administered municipalities, follow thereafter at ranks five and six. Qinghai and Guizhou, two of the poorest Chinese provinces, have the smallest concentration.

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80 See Art. 6 Foundation Regulations 2004:
MoCA is responsible for the registration and management of the following types of foundation:
1. public fundraising foundations conducting nationwide fundraising;
2. foundations that propose to appoint as their legal representatives persons who are not residents of mainland China;
3. non-public fundraising foundations whose initial endowment is in excess of RMB 20 million yuan and whose founder applies to establish as a foundation to the MoCA;
4. representative offices in China established by foreign foundations.

Departments for civil affairs on the level of provinces, autonomous region, and directly administered municipality are responsible for the registration of public fundraising foundations raising funds within their own administrative regions, and non-public fundraising foundations that are not covered by the list above.

81 See supra at II A 3 b.


84 See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 66 and supra at II A 1 a.

85 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 66.

of registration, with only seven (down from eight in 2006) and eight (up from five in 2006) foundations respectively. Tibet has nine foundations registered (up from eight in 2006).

d) Initial Endowment

Under the Foundation Measures 1988, the amount of uniform endowment capital was prescribed as RMB 100,000 Yuan (circa US$ 17,000), and all foundations were expressly granted the right to raise funds. By contrast, the Chinese Foundation Regulations 2004 take a markedly more restrictive stance, linking the endowment capital requirement with permission to raise funds in a way found nowhere else in the world.

It introduced foundations which are not permitted to publicly raise funds (endowment foundations) and, alternatively, foundations which may raise funds publicly (fundraising-oriented foundations). The latter fundraising-oriented foundations are further differentiated according to whether they raise funds nationally or only within the “administrative region” where they are registered. However, it should be noted that there is no distinction regarding the administrative region in which the foundation pursues public benefit purposes. The initial endowment has been markedly increased: RMB 8 million Yuan (circa US$ 1 million) is required for the foundation that raises funds nationally; RMB 4 million Yuan (circa US$ 500,000) is required for the foundation that raises funds only within the administrative region in which it is registered; RMB 2 million Yuan (circa US$ 250,000) is necessary as an initial endowment for foundations not publicly raising funds. In addition, the regulations require the full amount to be contributed in cash. While donations in kind may constitute an element of foundation assets, their value is not taken into account in the initial endowment.

The Official Commentary on Foundations justifies the reforms in terms of a desire to prevent the establishment of a large number of foundations, and in particular to limit the number of fundraising-oriented foundations. This especially explains the increased initial endowment.

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87 See supra note 25.
88 Art. 3, No. 2, Foundation Measures 1988 (supra note 25). The “Circular of the People’s Bank of China on Further Strengthening the Administration of Foundations” [中国人民银行关于进一步加强基金会管理的通知], dated April 4, 1995, required that alongside the registered capital, RMB 2 million Yuan or an equivalent amount in foreign currency must be available for the activities of the foundation.
89 Art. 4, Foundation Measures 1988 (supra note 25).
91 That is, within provinces, autonomous regions, and municipalities directly under the central government of China. In China there are 23 provinces varying in population from 20 to 100 million per province; four municipalities directly under the central government (i.e., cities having the status of provinces), namely Beijing, Shanghai, Tianjin, and Chongqing; and five autonomous regions peopled by non-Han minorities.
93 See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 57: A foundation registered in Guangdong province but pursuing public benefit purposes only in one region of the province should not for that reason be restricted to public fundraising only in that region, but may raise funds throughout the province.
95 Art. 8, No. 2, Foundation Regulations 2004. See further OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 77.
96 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 75 et seq.
The drastic increase in capital requirements, which also applies to existing foundations, will change the foundation landscape in China. Many existing Chinese foundations will be forced either to increase their endowment capital, or to register as non-fundraising foundations, or to dissolve. The elimination of small foundations is an equally-to-be-desired aim of the legislators. The Official Commentary explains that according to a 1999 statistic of the People’s Bank of China (the Chinese central bank), only half of all national foundations have assets of over RMB 8 million Yuan. In the case of foundations registered at the administrative region level, 40% fail to reach even the current minimum required initial endowment for non-fundraising foundations of RMB 2 million Yuan.

Apart from the initial endowment and the right to publicly raise funds, the distinction between the three foundation forms is largely immaterial. There are differences only in terms of the competent regulatory authorities, the requirement of timely disbursement, and, to a limited extent, requirements of the governance of the foundation.

While ultimately no clear distinction can be drawn between endowment foundations and fundraising-oriented foundations, the problem of delimitation arises in that non-fundraising foundations may accept donations but are not allowed to raise them “publicly.” The Official Commentary on Foundations explicitly excludes non-fundraising foundations from organizing charity events directed at an undefined circle of persons. However, it does permit a “communal coffee meeting or lunch” to raise funds among a defined circle of persons associated personally with the founder, such as acquaintances, friends, and fellow students of the founder. Since nowadays email and the Internet enable such circles to be expanded at will without addressing an undefined circle, there is in practice a seamless transition to public fundraising. It also remains unclear whether non-fundraising foundations, during an event attended by an undefined circle of persons and not primarily aimed at raising donations, may nevertheless advise on an appropriate manner of donation opportunities. A further issue is the extent to which a foundation may report on its activities in the media without explicitly soliciting donations. Further, the publicity duties which the new Foundation Regulations 2004 introduce themselves produce a certain advertising effect that could be seen as public fundraising. Finally, there is much to suggest that foundations with a high reputation or which attract attention through public activities with corresponding advertising effects could do without public fundraising.

4. Winding Up
The procedure for winding up a foundation is only vaguely provided for in the Foundation Regulations 2004.

According to the Foundation Regulations 2004, a foundation must apply for cancellation of the registration under the following circumstances:

- termination in accordance with the statutes of the foundation;

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97 With the existing foundations, a deadline of March 31, 2006, applied; see supra note 34.
98 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 76.
99 See below at IV B 1 a cc.
100 See below at V A 1 a cc.
101 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 56.
102 See below at V D 3.
103 This is also argued by the OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 56 et seq.
– if the foundation is incapable of carrying out further public benefit activities in accordance with its statutes; or
– termination on other grounds.  

Before cancelling the registration, the foundation must establish a liquidation organization and complete the work of liquidation under the guidance of the registration and administration authority and the sponsor organization.  

During the process of liquidation, the foundation is not allowed to carry out any other activities.  

Assets left over when a foundation is wound up must be used for public benefit ends as stipulated in the foundation’s statutes. Assets which cannot be used in this way are to be donated by the registration and administration authority to another public benefit organization with similar aims and objectives as the original foundation. Any such action must be made public.  

It is questionable whether the “Bankruptcy Law of the PR China” (Bankruptcy Law) of 2006 is applicable to foundations because it deals only with bankruptcy of “enterprise legal persons.”  

The term “enterprise legal person” is not defined, but from Chapter III of the GPCL follows that “enterprise legal persons” (Section 2 of that Chapter) are separated from “SOs as legal persons” (Section 3 of that Chapter). Thus there are good arguments to believe that the term “enterprise legal person” means the legal form of for-profit organizations and consequently does not include foundations. This is also the general view of the Chinese legal authorities. However, Art. 135 of the Bankruptcy Law stipulates that the bankruptcy liquidation of any organization other than an “enterprise legal person” shall make reference to the procedures stipulated in the Bankruptcy Law.

B. Social Organizations (Associations)

1. Purpose

According to Art. 2, SO Regulations, “social organizations” (社会团体，SO) should “promote the construction of socialist material and spiritual civilization.” The Official Commentary on SOs and CNIs explains that this expression makes

105 Art. 18, para. 1, Foundation Regulations 2004.  
109 Art. 2, Bankruptcy Law.  
110 See supra note 22.  
112 See supra note 28.
reference to a decision of the Chinese Communist Party dating back to 1993\textsuperscript{113} in which the Party was trying to strengthen the functions of “social intermediary organizations” like chambers of commerce and industrial federations. By gradually forming the “socialist market economy” and changing the tasks of the government, SOs would gather more and more functions of economic and social development.\textsuperscript{114}

\section*{2. Characteristics}

SOs are defined as “organizations voluntarily formed by Chinese citizens in order to realize a common intention by developing nonprofit activities in accordance with their statutes.”\textsuperscript{115} Although this definition does not refer to membership of an SO, membership is seen as one central characteristic of SOs, making this form of NPO different from foundations and CNIs.\textsuperscript{116}

Indisputable SOs are allowed to receive donations and financial aid.\textsuperscript{117} However, it is surprisingly not conclusively established to what extent the SO may undertake public fundraising.\textsuperscript{118} Since the new Foundation Regulations 2004 only allow public fundraising by selected foundations with a high initial endowment,\textsuperscript{119} it would seem to be only consistent for SOs to be equally subject to comparatively strict requirements for fundraising. The regulations on SOs are silent on this, suggesting a reverse inference with reference to the express permission in the Foundation Regulations 2004.\textsuperscript{120}

Up until now in practice, however, the concept does not seem to apply in a strict manner, a fact that might also be due to the unclear usage of the term “SO.”\textsuperscript{121} Consequently, there are SOs which undertake public fundraising (for example, the China Charity Federation, which is registered as an SO).\textsuperscript{122} The Deputy Secretary General of NPO Affairs Bureau of the MoCA, \textit{Li Yong}, has told the present authors that to his knowledge there is at the moment no prohibition against SOs and other organizations raising funds publicly, although the SOs and other organizations would have to expressly provide in their statutes that the scope of their statutory activities also includes public fundraising.\textsuperscript{123} As up until now there are only

\begin{enumerate}
\item\textsuperscript{113} [Decision of the Central Committee of the Communist Party of China on Some Questions Concerning the Establishment of a Socialist Market Economy] dated November 1993.
\item\textsuperscript{114} \textit{Official Commentary on SOs and CNIs} (supra note 111), p. 12.
\item\textsuperscript{115} Art. 2, SO Regulations.
\item\textsuperscript{116} \textit{Official Commentary on SOs and CNIs} (supra note 111), p. 14 (SOs are “implementing the system of democratic administration through members”).
\item\textsuperscript{117} This may be inferred from Art. 29, para. 3, SO Regulations, where reporting duties to the sponsor organization and certain publicity duties for SOs that receive donations or financial aid are stipulated; on this, see below at V D 1.
\item\textsuperscript{118} The \textit{Official Commentary on SOs and CNIs} (supra note 111) is silent on this issue.
\item\textsuperscript{119} See above at II A 3 d.
\item\textsuperscript{120} In this sense, also Elber (supra note 66), p. 229.
\item\textsuperscript{121} See supra at II.
\item\textsuperscript{122} See the articles of association at www.chinacharity.cn/wzwzlbservlet?flbm=gzzd&url=zhjs&lx=2 (visited on September 25, 2007).
\item\textsuperscript{123} According to Chinese corporation law, the organs of a Chinese organization may operate only within the business scope prescribed in its statutes (\textit{ultra vires} doctrine); see Wolff, \textit{The Disappearance of the Ultra Vires Doctrine in Greater China: Harmonized Legislative Action or (Simply) an Accident of History?} 23 NW. J. INT’L L. & BUS. 633, 638 et seq. (2003).
\end{enumerate}
rudimentary legal provisions for fundraising activities, there is in his view a need for further regulation of this matter. It is further remarkable that in practice some SOs are treated by the MoCA to a certain extent as foundations; for example, the China Charity Federation was included among the foundations that had passed the annual examination of foundations in the year 2005, in a list published by MoCA in September 2006.

3. Establishment

Compared with Chinese foundations, SOs are subject to rather low requirements. It must have at least 50 members (or at least 30 “work unit members”) and hold capital of at least RMB 30,000 yuan for local and inter-area SOs (RMB 100,000 yuan for national SOs).

Evidently, there are also several obstacles for SOs which cannot always be overcome.

First, as with the foundation, there is no positive right to establish an SO. Second, the so-called “dual management system” is also applicable here, so that the consent of a sponsor organization is necessary in the approval procedure for its establishment. Registration of the SO has to be carried out on the national level with the MoCA or with the corresponding departments for civil affairs at the county level and above. As with foundations, only a small portion (less than 1%) of SOs are registered on the national level and local registrations concentrate on the more developed regions, while in central and western regions of China there are fewer SOs (with the exception of Sichuan).

Third, unlike with the foundation, an SO may only be established provided there is no pre-existing SO with the same or similar purpose in the same administrative region. This means, for example, that in each province only one stamp-collecting club may operate. It is uncertain whether the purpose of an SO will be recognized where in the same administrative region there is already another SO with possibly very generally specified purposes.

125 Information of LI Yong, dated June 9, 2005, on file with the authors.
126 On file with the authors.
127 Art. 10, para. 1, No. 1, SO Regulations.
128 Art. 10, para. 1, No. 5, SO Regulations.
129 See supra at II A 3 a.
130 As pursuant to Art. 11, No. 5, SO Regulations, the statutes of an SO are to be included with the application for establishment, and the approval authority decides de facto whether the SO may undertake fundraising.
131 See Art. 6 and 7, SO Regulations.
132 See supra at II A 3 c.
133 Only 1,857 of the 354,393 SOs that existed at the end of 2006 were registered with the MoCA. See statistics of the NPO Affairs Bureau of the MoCA for the year 2006 (supra note 86).
134 Jiangsu has 15,058 SOs, Shandong 14,056 SOs, Sichuan 13,709 SOs, Zhejiang 12,470 SOs, and Guangdong 9,856 SOs. See statistics of the NPO Affairs Bureau of the MoCA for the year 2006 (supra note 86).
135 Tibet has only 252 SOs and Qinghai 1,341 SOs.
136 See Art. 13, No. 2, SO Regulations.
137 Minzner (supra note 64), p. 113; see also Elbern (supra note 66), p. 228.
The Official Commentary on SOs and CNIs gives no detailed explanation of how this restriction is applied in practice, but justifies it on the ground that otherwise there would be an “excessive establishing of SOs and disorderly development” that might lead to “double solicitation of membership” and “hefty economic burdens for members.” The Commentary also emphasizes that there could be “blind competition” between those SOs with a similar purpose in the same administrative region, causing “inappropriate international influences.”

To the extent that foreign nationals are concerned, it is additionally doubtful whether the establishment of an SO is permissible at all. The wording of the regulations for SOs suggests that only “Chinese citizens” are allowed to establish an SO. The Official Commentary on SOs and CNIs clearly states that “foreigners as well as representative offices established by foreign governments, enterprises and [other] NPOs within the boundaries [of the PR China] may not establish SOs within the boundaries [of the PR China].” Taken seriously, this would leave room for the establishment of SOs by foreign-invested enterprises (equity joint ventures, contractual joint ventures, and wholly foreign-owned enterprises), because these are Chinese legal persons that might qualify as a “work unit member.” In administrative practice, however, no establishment by foreign nationals has so far been permitted.

4. Winding Up

Some provisions on the winding up procedure are found in the SO Regulations and in the “Model Statutes for SOs,” promulgated by the MoCA, which are “principally” mandatory for all SOs.

Under the following circumstances, an SO must – after investigation and agreement by the sponsoring organization – apply for cancellation of its registration:

- the objective of the SO has been achieved;
- dissolution on its own initiative;
- separation of an organization into discrete groups, or combination with other organizations;
- other reasons for dissolution.

The motion of the board of directors (or the standing board of directors) for winding up the SO must be adopted by the membership meeting (or the standing board of directors).

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138 The OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), on p. 36, provides for the example that the registration and administration authority would not permit an SO with a similar name (中国青年摄影协会 and 中华青年摄影协会). However, the example is not helpful in interpreting Art. 13 No. 2 SO Regulations, because this provision is dealing with SOs having the same or similar purpose but not name.
139 OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 36.
140 See Art. 2, SO Regulations, stating that an SO is formed of “Chinese citizens” [中国公民] as members.
141 OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 13.
142 No information in citable publications available, personal communication from Professor Karla Simon, Co-Director, Center for International Social Development, Catholic University of America, dated May 24, 2005, with reference to LI Yong, Deputy Secretary General of NPO Affairs Bureau of the MoCA.
143 社会团体章程示范文本 [Model Statutes for SOs], available at http://www.mca.gov.cn/artical/content/SDJ_BGXZ/20041402031.html (visited on September 25, 2007).
144 See No. 3 of the Preamble of the Model Statutes for SOs.
145 Art. 21, SO Regulations.
committee of the membership meeting) and needs the consent of the sponsoring organization.\textsuperscript{146}

Almost similar to foundations, before cancelling the registration SOs must establish a liquidation organization and complete the work of liquidation under the guidance of the sponsor organization and “other authorities in charge.”\textsuperscript{147} During the process of liquidation, the SO is not allowed to carry out any other activities.\textsuperscript{148}

Regarding the remaining assets of the SO, Art. 25, SO Regulations stipulates that these are to be treated “in accordance with relevant national provisions.”\textsuperscript{149} There is no hint in the Official Commentary on SOs and CNIs as to what provisions may be applicable on this question. However, the Model Statutes for SOs stipulate that “under the supervision of the sponsor organization and the registration and administration authority,” remaining assets must be used for the development of undertakings with similar aims to the original SO.\textsuperscript{150}

As in the case with foundations,\textsuperscript{151} the bankruptcy liquidation of the SO shall make reference to the procedures stipulated in the Bankruptcy Law.\textsuperscript{152}

C. Civil Non-business Institutions

1. Purpose

Since 1998, the CNI as a further form of NPO was introduced.\textsuperscript{153} Like the SO,\textsuperscript{154} the CNI should “promote the construction of socialist material and spiritual civilization.”\textsuperscript{155}

The CNI has no equivalent under German or U.S. law. It is unclear why this organization form was introduced in addition to the SO and the foundation. Perhaps the prohibition in the Foundation Measures 1988\textsuperscript{156} against foundations operating an enterprise\textsuperscript{157} was so understood that even the operation of nonprofit-oriented enterprises was impermissible.\textsuperscript{158} This would have created a gap which the organization form of the CNI would close. Now, however, this gap no longer exists,

\begin{itemize}
  \item \textsuperscript{146} Art. 41, 42 Model Statutes for SOs. For details on the organizational structure of SOs, see below at V A 2.
  \item \textsuperscript{147} Art. 22, clause 1, SO Regulations.
  \item \textsuperscript{148} Art. 22, clause 2, SO Regulations.
  \item \textsuperscript{149} Art. 25, SO Regulations.
  \item \textsuperscript{150} Art. 45, Model Statutes for SOs.
  \item \textsuperscript{151} See supra at II A 4.
  \item \textsuperscript{152} However, it is interesting to note that the OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 59, indicates that the Bankruptcy Law is not applicable to SOs.
  \item \textsuperscript{153} In August 1996, the General Office of the Central Committee of the Chinese Communist Party and the General Office of the State Council had already issued the “Circular for Strengthening the Administrative Work on SOs and CNIs” (关于加强社会团体和民办非企业单位管理工作的通知), introducing the “dual management system” for CNIs. Afterward the Circular served the MoCA as a guideline during the drafting process of the CNI Regulations (supra note 29), which were finally adopted in 1998. See OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 102 et seq.
  \item \textsuperscript{154} See supra at II B 1.
  \item \textsuperscript{155} Art. 1, CNI Regulations.
  \item \textsuperscript{156} See supra note 25.
  \item \textsuperscript{157} See below at VII A 1.
\end{itemize}

at least since the new Foundation Regulations 2004, under which foundations may operate any form of business.\textsuperscript{159}

2. Characteristics

CNIs are defined as social entities carrying out social service activities of a nonprofit nature, which are run by enterprises, institutional work units, social organizations, other social forces, or individual citizens using non-state assets.\textsuperscript{160} CNIs can therefore be characterized as “social enterprises” which in a nonprofit-oriented manner offer charitable services, such as hospitals, schools, and museums.\textsuperscript{161} The Official Commentary on SOs and CNIs explains that one characteristic of CNIs is to continuously provide services through an institutionalized organizational structure (组织结构具有实体性). In this, CNIs would be distinguished from SOs characterized by what the commentary calls a “loose institutionalized organizational structure” (组织结构具有松散性) and non-regular activities.\textsuperscript{162}

In practice, most CNIs work in the field of education, followed by health services, and labour services.\textsuperscript{163} Some CNIs also offer legal services.\textsuperscript{164}

3. Establishment

The CNI may be constituted as a legal person, partnership, or individual entrepreneur.\textsuperscript{165} It must provide social services in a nonprofit-oriented manner.\textsuperscript{166} Its capital must be appropriate to the volume of its social activities.\textsuperscript{167} As with other NPOs, there is no positive right to establish a CNI. Furthermore, the “dual management system” applies, so that the sponsor organization is involved in the establishment procedure.\textsuperscript{168} Registration of a CNI has to be carried out on the national level with the MoCA or with the corresponding departments for civil affairs at the county level and above.\textsuperscript{169} Even more than in the cases of foundations and SOs, only a tiny proportion (0.01\%) of CNIs are registered on the national level with the MoCA.\textsuperscript{170} Local registration clusters in the more developed regions\textsuperscript{171} and avoids central and western regions of China (again with the exception of Sichuan).\textsuperscript{172}

\textsuperscript{159} See below at VII A 1
\textsuperscript{160} Art. 1, CNI Regulations.
\textsuperscript{161} For a list of activities of CNIs, see OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 110 et seq.
\textsuperscript{162} OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 111.
\textsuperscript{163} Of the 161,303 CNIs that existed at the end of 2006, 80,666 CNIs were working in the field of education, while 28,050 offered health and 13,878 labour services. See statistics of the NPO Affairs Bureau of the MoCA for the year 2006 (supra note 86).
\textsuperscript{164} 682 CNI were offering legal services at the end of 2006. See statistics of the NPO Affairs Bureau of the MoCA for the year 2006 (supra note 86).
\textsuperscript{165} See Art. 12, CNI Regulations.
\textsuperscript{166} See the definition in Art. 2, CNI Regulations.
\textsuperscript{167} Art. 8, No. 4, CNI Regulations.
\textsuperscript{168} Art. 8, No. 1, CNI Regulations.
\textsuperscript{169} See Art. 6 and 7, CNI Regulations.
\textsuperscript{170} Of the 161,303 CNIs that existed at the end of 2006, only 88 CNIs were registered with the MoCA. See statistics of the NPO Affairs Bureau of the MoCA for the year 2006 (supra note 86).
\textsuperscript{171} Shandong has 33,218 CNIs, Sichuan 11,581 CNIs, Guangdong 11,060 CNIs, Zhejiang 10,810 CNIs. See statistics of the NPO Affairs Bureau of the MoCA for the year 2006 (supra note 86).
\textsuperscript{172} Tibet has only 7 CNIs, Ningxia has 373, and Qinghai 495 CNIs. See statistics of the NPO Affairs Bureau of the MoCA for the year 2006 (supra note 86).
Besides the conditions above, the CNI requires no members and, like the SO, is subject to annual inspection by the competent registration and administrative authority.\textsuperscript{173} Regarding acceptance of donations, the same principles apply as for the SO.\textsuperscript{174} Here again it is not entirely established if a CNI may undertake public fundraising.\textsuperscript{175}

Interestingly for the CNI, the rule for the SO applies that a CNI may only be established where there is no other CNI in the administrative region pursuing the same or a similar purpose.\textsuperscript{176} On a narrow interpretation, this rule does not seem to make sense in that only one CNI would be entitled to operate hospitals or schools within a particular administrative region – there is no apparent reason for this limitation. Interestingly, compared to SOs,\textsuperscript{177} the Official Commentary on SOs and CNIs leaves more space for interpreting this restriction regarding CNIs: It states that the registration and administration authority should follow the principles of “rational distribution” of SOs and of “monitoring the quantity” by not granting permission to establish a CNI if there are “relatively numerous” CNIs in the administrative region pursuing the same or a similar purpose.\textsuperscript{178}

Until the end of 2004, the wording of the law drew no distinction between the CNI as either legal person, partnership, or individual entrepreneur.\textsuperscript{179} Since the beginning of 2005, however, clear differences were established when the MoCA issued “Model Statutes” for all three legal forms of CNI,\textsuperscript{180} containing markedly different requirements for the governance structure. Thus a CNI with its own legal personality has to meet largely the same requirements as a foundation,\textsuperscript{181} while partnerships and individual entrepreneurs are subject to relatively fewer provisions. In practice, a CNI as a legal person and a CNI as an individual entrepreneur are by far the most preferred form.\textsuperscript{182}

Here, too, it is questionable whether foreign nationals are allowed to establish a CNI. The convergent wording of the regulations on SOs suggests that this possibility is open to foreign nationals.\textsuperscript{183} In administrative practice, however, such an

\textsuperscript{173} Art. 23, CNI Regulations.
\textsuperscript{174} Art. 21, clause 3, CNI Regulations permits acceptance of donations; see public fundraising supra at II B 2.
\textsuperscript{175} The OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111) is silent on this issue.
\textsuperscript{176} Art. 11, No. 3, CNI Regulations.
\textsuperscript{177} See supra at II B 3.
\textsuperscript{178} OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 133.
\textsuperscript{179} However, see Art. 12, clause 1, CNI Regulations, which points to different liabilities regarding these three forms of CNI.
\textsuperscript{180} “Model Statutes for CNIs (Legal Persons)” [民办非企业单位（法人）章程示范文本], “Model Statutes for CNIs (Partnerships)” [民办非企业单位（合伙）章程示范文本] and “Model Statutes for CNIs (Individual Entrepreneurs)” [民办非企业单位（个体）章程示范文本]. These three sets of Model Statutes were issued on February 3, 2005, by the MoCA through the “Circular for the Distribution of the ‘Model Statutes for CNIs’” [民政部关于印发《民办非企业单位章程示范文本》的通知] (Minhan [2005] No. 24), available at www.chinanpo.gov.cn.
\textsuperscript{181} This approach makes sense to the extent that there are overlaps between foundations and CNIs as legal persons.
\textsuperscript{182} According to statistics of the NPO Affairs Bureau of the MoCA, at the end of 2006 (supra note 86) there were 95,688 CNIs as legal persons and 58,971 CNIs as individual entrepreneurs, while only 6,640 CNIs existed as partnerships.
\textsuperscript{183} While under Art. 2, SO Regulations there is a strong argument that only “Chinese citizens” may become members (see supra note 140), with CNIs one finds only the expression “citizen” [公民]; see Art. 2 CNI Regulations. The expression “citizen” is used as a synonym for natural persons in the GPCL (supra note 22); see the title of the second chapter of the GPCL.

establishment has in general not been permitted. Nevertheless, there are indications that some Chinese-foreign cooperation in the field of education has been successfully established: An example is the United International College (UIC) in Zhuhai, Guangdong province, which has been registered as a joint-venture CNI between the Hong Kong Baptist University and the Beijing Normal University. However, it should be noted that these forms of Chinese-foreign cooperation in the field of education are subject to a special set of regulations.

4. Winding Up
The winding up procedure is stipulated rather vaguely in the CNI Regulations and the model statutes. The model statutes provide for dissimilar lists of circumstances under which each of the three forms of CNI must apply for cancellation of registration. Interestingly, the Official Commentary on SOs and CNIs contains a rather broad list of situations for mandatory cancellation of CNIs, expanding the lists in the model statutes and including a “fundamental change of purpose” and the case where the original sponsor organization is no longer willing to serve as a sponsor and the CNI is not able to find a new sponsor organization.

Like SOs, CNIs must establish a liquidation organization before cancelling the registration and complete the work of liquidation under the guidance of the “authorities in charge” and the sponsor organization. During the process of liquidation, the SO is not allowed to carry out any other activities.

The CNI Regulations are silent as regards the remaining assets of the CNI. Only the Model Statutes stipulate that these assets must be treated “in accordance with relevant national laws and provisions.” There is no indication of which laws and provisions might be applicable, and it therefore remains doubtful whether the non-distribution constraint applies in this situation.

As in the case with foundations and SOs, the bankruptcy liquidation of CNIs shall make reference to the procedures stipulated in the Bankruptcy Law.

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184 No information in citable publications is available; personal communication from Professor Karla Simon, Co-director, Center for International Social Development, Catholic University of America, dated May 24, 2005, with reference to Li Yong, Deputy Secretary General of NPO Affairs Bureau of the MoCA.
185 See www.uic.bbupe.com.
186 See 中华人民共和国中外合作办学条例 [Regulations of the People’s Republic of China on Chinese-Foreign Cooperation in Running Schools], promulgated by the State Council on March 1, 2003; and 中华人民共和国中外合作办学条例实施办法 [Measures for the Implementation of the Regulations of the People’s Republic of China on Chinese-Foreign Cooperation in Running Schools], promulgated by the Ministry of Education on June 2, 2004. These provisions are silent on the question of in which legal form the schools are to be established.
187 Supra note 29.
188 Art. 34, Model Statutes for CNIs (Legal Persons); Art. 28 Model Statutes for CNIs (Partnerships); Art. 15 Model Statutes for CNIs (Individual Entrepreneur).
189 OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 141.
190 For CNIs constituted as legal persons or partnerships, the Model Statutes state that the registration and administrative authority is the authority in charge; see Art. 36, para. 1, Model Statutes for CNIs (Legal Persons); Art. 30, para. 1, Model Statutes for CNIs (Partnerships).
191 Art. 16, clause 2, CNI Regulations.
192 Art. 16, clause 3, CNI Regulations.
193 Art. 36, para. 2, Model Statutes for CNIs (Legal Persons); Art. 30, para. 2, Model Statutes for CNIs (Partnerships); Art. 16, para. 2, Model Statutes for CNIs (Individual Entrepreneur).
194 See supra at II A 4.
195 See supra at II B 4.
D. Charitable Trusts

1. Purpose
The charitable trust (公益信托, “public benefit trust”) was introduced with the Trust Law.196 There is no statement of the law regarding the purpose of the charitable trust. More generally, the Trust Law itself is formulated “for the purpose of regulating trust relationships, standardizing trust conduct, protecting the legal rights and benefits of parties to a trust, and promoting the healthy development of trusts.”197 Chinese literature on the Trust Law describes the essential purpose to introduce the charitable trust being used as an efficient form for the development of the public benefit sector. It claims on the one hand that the charitable trust would be more efficient and flexible compared to the foundation.198 On the other hand, it emphasizes that foundations would miss efficient mechanisms regarding management and supervision leading to a misappropriation of funds. Furthermore, because directors of foundations are by and large persons with social prestige or with a cultural background but with no expertise in asset management, foundations would have difficulties to maintain and increase the assets of the foundation. Charitable trusts are seen by the authors as a remedy against these deficiencies, because the funds were to be trusted with a specialized trust institution.199

2. Characteristics
Trusts are defined as an act whereby a settlor entrusts property to a trustee based on confidence in that trustee, who then carries out management or disposition of the property in his/her own name in accordance with the wishes of the settlor for the benefit of the beneficiaries or for a specific purpose.200 A charitable trust must be established for a specific purpose, that is, a “public interest purpose” (公共利益目的).201 The following purposes are designated public benefit purposes in the Trust Law, which largely corresponds to the designation for public benefit purposes in the Donation Law:202
- poverty relief;
- relief of disaster victims;
- support for the disabled;
- the development of education, science and technology, culture, the arts, and sport;
- the development of medical and health services;
- the development of environmental protection and the preservation of the ecological environment;

196 See supra note 31.
197 Art. 1, Trust Law.
198 HU Jihua/ZHANG Guilong (eds.) [扈纪华/张桂龙 主编], COMMENTARY TO THE “TRUST LAW” [《中华人民共和国信托法》条文释义], Beijing 2001, p. 203.
199 HU Jihua/ZHANG Guilong (eds.) (supra note 198), p. 213.
200 Art. 2, Trust Law.
201 Art. 60, Trust Law.
202 See supra at II A 2.
– the development of other public interests.\textsuperscript{203}

As in the case of foundations,\textsuperscript{204} the concept of public interest purpose is moreover defined negatively as not for the purposes of certain designated beneficiaries.\textsuperscript{205} However, restrictions concerning specified categories of potential beneficiaries are permissible.\textsuperscript{206}

3. Establishment

In spite of the fact that the charitable trust was already introduced in 2001, up until now this legal instrument has not been used significantly in practice. One reason for this is that the Trust Law subjects the charitable trust to stricter establishment requirements and a more complex governance structure than the general (private) trust.\textsuperscript{207} Thus the charitable trust has to be approved by a “public benefit administrative body” (公益事业管理机构),\textsuperscript{208} which is functionally equivalent to the sponsor organization\textsuperscript{209} and which is equipped with far-reaching powers.\textsuperscript{210} An example of the more complex governance structure in comparison to general trusts is the fact that the charitable trust has to establish a so-called “trust supervisor” (信托监察人).\textsuperscript{211}

In addition, the charitable trust has the practical disadvantage that up until now there have been no administrative regulations for the registration and approval procedures.\textsuperscript{212} Commentaries on the Trust Law claim that state authorities might be reluctant to serve as a “public benefit administrative body,” especially in cases when the charitable trust is pursuing more than one public benefit purpose, because then state authorities could easily “shift responsibility onto others” (推委).\textsuperscript{213} This probably explains why, in early 2007 – over five years after the coming into force of the Trust Law in October 2001 – there is only one trust in existence in the PR China that is (at least by its name) a charitable trust.\textsuperscript{214}

\textsuperscript{203} Art. 60, Trust Law.
\textsuperscript{204} See supra at II A 2.
\textsuperscript{205} HU Jihua/ZHANG Guilong (eds.) (supra note 198), p. 211.
\textsuperscript{206} Id.
\textsuperscript{207} See HU Jihua/ZHANG Guilong (eds.) (supra note 198), p. 216, according to which the legislators adopted the supervisory model for the foundation.
\textsuperscript{208} Art. 62, Trust Law 2001 (Footnote 31).
\textsuperscript{209} See HU Jihua/ZHANG Guilong (eds.) (supra note 198), p. 216.
\textsuperscript{210} See below at V B 1.
\textsuperscript{211} See below at V C 4.
\textsuperscript{212} This fact is also emphasized as the major obstacle for establishing charitable trusts in China in an article of the Legal Daily (Fazhi Ribao), August 2, 2005, p. 5.
\textsuperscript{213} See HU Jihua/ZHANG Guilong (eds.) (supra note 198), p. 216; WANG Qing/GUO Ce [王清/郭策], COMMENTARY ON THE PROVISIONS OF THE TRUST LAW OF THE PR CHINA [中华人民共和国信托法条文诠释], Beijing 2001, p. 149 (WANG and GUO give the example of a charitable trust engaged in health services with the consequence that the department in charge of health would be the “public welfare administrative body,” while for a charitable trust financially supporting poor students the “public welfare administrative body” would be the department in charge of education). See also Center for NPOs Law of Peking University Law School (supra note 35), p. 54 (giving almost the same example as WANG and GUO).
4. Winding Up

The Trust Law does not define special circumstances under which a charitable trust must be terminated. Therefore, the provision on the termination of a general trust applies.\(^{215}\)

The reasons for termination stipulated in the trust document occur if

- the continued existence of the trust violates the purpose of the trust;
- the intent of the trust has already been realized or cannot be realized;
- parties to the trust consult and reach agreement on termination of the trust;
- the trust is revoked; or
- the trust is dissolved.\(^{216}\)

Where the charitable trust has been terminated, the trustee must prepare a liquidation report on the handling of trust affairs.\(^{217}\) After ratification of the report by the trust supervisor, the report must be submitted to the “public benefit administrative body” to be approved and the termination has to be announced by the trustee.\(^{218}\)

With regard to the remaining assets of the trust after termination, the Trust Law stipulates that, if “the rights of the trust property do not belong to anyone” (没有信托财产权利归属人) or “do belong to the non-specified public” (归属人是不特定的社会公众), after approval from the public welfare administration body the trustees must use the trust property for purposes that are “close to the original charitable trust purpose” or transfer the property to public benefit organizations (公益组织) or charitable trusts that have aims similar to those of the original trust purpose.

E. Foreign Nonprofit Organizations

In theory, it is possible for a foreign NPO to conduct activities in China without having established an NPO or representative office in China. However, this is advisable only where short-term engagement with relatively limited financial means is planned. Alongside the disadvantages associated with a lack of institutional organization, merely informal support carries risks in that only limited control is possible over the application of resources.

Therefore, in most cases a foreign NPO planning to conduct activities in China should consider whether to establish a Chinese NPO (if available) or a representative office. Such offices have significant practical advantages over the informal activity of NPOs in China. Thus long-term and multiple-entry visas for staff of the Chinese NPO or representative office can be applied for, business and residential premises rented, and bank accounts opened in the name of the Chinese NPO or representative office.\(^{219}\)

\(^{215}\) See Art. 59, clause 2, Trust Law: “Where there are no special provisions in this chapter [on charitable trusts], this Law and the provisions of other relevant laws are to be applied.”

\(^{216}\) Art. 53, Trust Law.

\(^{217}\) Art. 71, clause 1, Trust Law.

\(^{218}\) Art. 71, clause 2, Trust Law.

\(^{219}\) On the general advantages of representative offices see, Diem, Das Recht der Investitionen in China, Baden-Baden 2000, p. 106 et seq.
1. Establishing of a Chinese NPO

As already said, it is usually difficult for foreigners to establish a Chinese SO\textsuperscript{220} or CNI\textsuperscript{221}. For charitable trusts the question has not yet arisen because it is virtually unavailable, even for Chinese persons\textsuperscript{222}.

Interestingly, the situation for foreigners establishing a Chinese foundation is most promising: The fact that foreign nationals may establish foundations in the People’s Republic derives from Art. 2, Foundation Regulations 2004, according to which foundations may be established by any natural or legal person. The Official Commentary on Foundations explicitly emphasizes that the Foundation Regulations 2004 in this regard do not distinguish between domestic and foreign founders\textsuperscript{223}. However, the obstacles for Chinese to establish a foundation (no right to establish, dual management system, and high initial endowment requirements)\textsuperscript{224} apply also to foreign nationals.

2. Representative Offices of Foreign NPOs in China

a) Foreign Foundations’ Representative Offices

In contrast to the Foundation Measures 1988, the Foundation Regulations 2004 now permit foreign foundations to establish representative offices in China\textsuperscript{225}. According to the Foundation Regulations 2004, foreign foundation are foundations which are legally established in foreign countries or in the Special Administrative Region of Hong Kong and Macao or in Taiwan\textsuperscript{226}. Consequently, continental European foundations are allowed to set up a foundation representative office in China\textsuperscript{227}, but no other legal form of NPO (e.g., a German association or a charitable limited liability company) has such a right. It has not been established whether charities under common law legal systems will qualify as foreign foundations in accordance with the Foundation Regulations 2004, because there is no legal form under common law which would exactly correspond to the organizational concept of a “foundation” in China and the other civil law countries\textsuperscript{228}. In practice, however, some “foundations” from the USA have successfully established a representative office in China recently\textsuperscript{229}.

For representative offices of foreign foundations, the MoCA is the exclusively responsible registration and administrative authority\textsuperscript{230}. A sponsor, on which foreign foundations are also dependent for the establishment of a representative office,\textsuperscript{231} must thus be sought on the central state level alone.

\textsuperscript{220} See supra at II B 3.
\textsuperscript{221} See supra at II C 3.
\textsuperscript{222} See supra at II D 3.
\textsuperscript{223} OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 49.
\textsuperscript{224} See above at II A 3.
\textsuperscript{225} Art. 13, Foundation Regulations 2004.
\textsuperscript{226} Art. 46, Foundation Regulations 2004.
\textsuperscript{227} Cf. Süß, GRUNDZÜGE DES CHINESISCHEN INTERNATIONALEN PRIVATRECHTS (1991), p. 100 (explaining that the legal capacity of a foreign legal person will be recognized in China if it meets the conditions of its \textit{lex patriae}).
\textsuperscript{228} See the contributions of Fishman, Picarda and Dawes in this volume.
\textsuperscript{229} In summer 2007 the Gates Foundation and the Clinton Foundation opened representative offices in Beijing. See “Full steam ahead for ‘charity’ even as brakes are applied to NGOs”, www.chinadevelopmentbrief.com/node/1222.
\textsuperscript{230} § 6, No. 4, Foundation Regulations 2004.
\textsuperscript{231} § 13, para. 1, No. 5, Foundation Regulations 2004.
Representative offices of foreign foundations have to pursue charitable activities which are also recognized as charitable under Chinese law. They are prohibited from soliciting donations or even accepting donations within Chinese territory. In the scholarly literature it is at times held that only public fundraising is prohibited; however, this opinion fails to convince in view of the clear wording.

Representative offices of foreign foundations are not domestic legal persons, so that the governance rules under the Foundation Regulations 2004 and the Model Statutes for Foundations do not apply. Like Chinese foundations, however, foreign foundations are treated as legal persons with regard to tax declaration and further duties. It should further be mentioned that representative offices of foreign foundations are subject to the annual inspection requirement and have to publicize an annual activities report. Finally, the persons responsible for the representative office of foreign foundations are subject to a residential requirement in China of at least three months in the year.

b) General Representative Offices

According to statistics of the NPO Affairs Bureau of the MoCA, until the end of 2006 there was no representative office of any foreign foundation established in China. Only recently some “foundations” from the USA and the (Davos) World Economic Forum, incorporated as a Swiss nonprofit foundation, have successfully established a representative office in China. This is due to the fact that, in practice, a way more favored by foreign NPOs to conduct activities in China is the establishment of a general representative office under the respective regulations and registration with the State Administration of Industry and Commerce (SAIC) instead of registering with the MoCA. Such a representative office, however, is not a

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232 § 13, para. 4, clause 1, Foundation Regulations 2004.
234 Thus Minzner (supra note 64), p. 114, noting that otherwise “this could create problems for the staff of foreign foundations engaged in fundraising activities directed at foreign governments and organizations, but conducted in China.”
235 See also OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 108, according to which the prohibition aims to prevent donations from Chinese assets from flowing abroad. It should be noted, however, that this danger could be countered by milder means (for example, by a prohibition on transferring funds received abroad).
236 Pursuant to § 13, para. 4, clause 2, Foundation Regulations 2004, foreign foundations must accept liability for the civil law acts of their representative bodies within Chinese territory.
237 See supra note 36.
238 See § 14, Foundation Regulations 2004. This is different for sub-branches and representative offices of Chinese foundations pursuant to § 12, Foundation Regulations 2004.
242 See supra note 229.
very suitable legal form for nonprofits because it is the usual means for for-profit enterprises. Consequently, the representative office of a foreign NPO generally has no tax benefits like the Chinese NPO. However, in practice, the Chinese government has granted the tax benefits for a number of representative offices of foreign NPOs. A corresponding list issued in 2004 by the State Administration of Taxation contains the following organizations to which tax benefits were granted:

1. Beijing Representative Office of Ford Foundation, the U.S.
2. Beijing Representative Office of Save the Children, UK
3. Beijing Representative Office of International Copper Association
4. Beijing Representative Office of Korea Land Corporation
5. Beijing Representative Office of Korea National Oil Corporation
6. Beijing Representative Office of Metal Mining Agency of Japan
8. Beijing Representative Office of PlaNet Finance, France
10. Beijing Representative Office of Bank of Japan
11. Beijing Representative Office of The Grain and Feed Trade Association of United Kingdom
12. Beijing Representative Office of CBN, the U.S.
13. Beijing Representative Office of U.S. Philip Hyde Foundation
14. Beijing Representative Office of Marie Stopes International, UK
15. Beijing Representative Office of Badi Foundation
16. Beijing Representative Office of International Federation of the Phonographic Industry
17. Beijing Representative Office U.S. Wheat Association
18. Beijing Representative Office of Italian-Chinese Institute
19. Beijing Representative Office of Japan Automobile Manufacturers Association
20. Beijing Office of Japan Oil Corporation
21. Beijing Representative Office of Potash and Phosphate Institute of Canada
22. Beijing Representative Office of Austrian-Chinese Economic Committee
23. Beijing Representative Office of Industrial & Engineering Inspection Co. of Iran
24. Beijing Representative Office of U.S. Junior Achievements China Corporation
25. Beijing Representative Office of Hong Kong Economic Reporter
27. Beijing Representative Office of Institut National de la Recherche Agronomique (INRA)
28. Beijing Representative Office of Japan-Sino Science and Technology Cultural Center of Japan Community
29. Beijing Representative Office of UK Children Daycare Co., Ltd.
30. Beijing Representative Office of Columbia Council for the Promotion of International Trade
31. Beijing Representative Office U.S. International Medical Association

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244 On tax benefits, see below at III.
32. Beijing Representative Office of Japan-Sino Cultural Exchange of Japan Financial Group

33. Beijing Representative Office of Spain Catalanian Council for the Promotion of Trade.  

However, the legality of the procedure to register a representative office of a foreign NPO was always in doubt, since only representative offices of foreign enterprises and other commercial organizations could be registered.  

It is questionable whether a foreign NPO can be subsumed under the concept of commercial organizations. 

Obviously this list proves that it is accepted in China for foreign NPOs to establish a general representative office. In practice, foreign NPOs (NGOs and even academic institutions) have established foreign domiciled consulting companies and subsequently Chinese representative offices where they can base personnel. Conceivably, “foreign foundations” have a choice whether to register a general representative office or a foundation’s representative office. If there were such a choice, establishing a general representative office would be the better alternative, because the general representative office is an established legal form which has been available to foreign enterprises since the beginning of the 1980s. While the establishment of a general representative office also requires the involvement of the sponsor organization, there is a familiar and established procedure, so that it is generally easier to find a sponsor organization for a general representative office than for the newly introduced foundation representative office.

3. Cooperation with a Chinese Organisation

Another possibility to establish a foundation-like organization while avoiding state involvement is not to be registered in China but to affiliate as an informal organisation with a pre-existing public institution, SO or foundation. 

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*245* See 北京市地方税务局转发国家税务总局关于美国福特基金会北京办事处等33家外国企业常驻代表机构免税问题的批复的通知 [Reply of State Administration of Taxation on Tax Exemption of 33 Permanent Representative Offices of Foreign Enterprises, such as Beijing Representative Office of Ford Foundation], promulgated by the State Administration of Taxation on June 11, 2004.  

*246* Art. 2, Procedures (supra note 243).  

*247* In 2005 there have been indications that NPOs previously registered with the SAIC are being called upon to again undergo the registration procedure with the MoCA or its regional counterpart. “China curbs civil society groups,” Asia Times, dated April 19, 2005, www.atimes.com/atimes/China/GD19Ad07.htm, last visited on July 12, 2005.  

*248* Art. 10, Detailed Rules (supra note 243).  

*249* See Zimmermann, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES, Chicago 1999, p. 49. Zimmermann remarks on the requirement of involving a sponsor organization with the establishment of a general representative office that “the sponsorship requirement does not have the same weight as in the past.”  

*250* See on the SO the obscurely formulated provision of Art. 3, para. 3, No. 3, SO-Regulations, which seems to expressly allow such constructions, in that it exempts SO from registration to the extent that they undertake activities within those public institutions, [registered] SOs, enterprises or public institutions, that approved their establishment. See also on this provision US Embassy: “This last loophole is an extremely important one for many NGO’s that have been able to establish themselves as programs associated with universities.”  

*251* See for example the „Beijing Energy Efficiency Center“, which falls under the Energy Research Institute of the State Planning Commission of the town council, in Cook et al., The Rise of Nongovernmental Organizations in China: Implications for Americans, National Committee China Policy Series, No. 8 (May 1998), p. 19. Also the Sino-German Centre for Research Promotion of the German Research Foundation (Deutschen Forschungsgemeinschaft, DFG) seems to have adopted this approach as
constellation has the advantage of being largely free of state regulation. One example of such a cooperation is the “Pfrang-Association” mentioned above. After Chinese authorities rejected the establishment of a foundation in 2000, the initiators of the Pfrang Association decided to affiliate informally with an Chinese foundation established in the 1980s, the Amity Foundation with seat in Nanjing. The Pfrang Association, as its title indicates, is a SO (an association) without its own legal personality with members and a members’ meeting, which in its statutes contains some features typical to foundation as an initial endowment, the duty of maintenance of initial endowment and a public benefit purpose. The agreement between the Pfrang Association and Amity Foundation itself resembles a “donation agreement” under which both sides decide together on the use of funds for charitable activities.

III. Tax Law Relating to Nonprofits

In the PR China, there are no specific tax laws for NPOs. Relevant provisions concerning the taxation of NPOs are found in special tax provisions in the general laws on NPOs and special provisions concerning NPOs in tax laws. It should be noted that tax treatment of trusts in general and especially charitable trusts is uncertain. The following is therefore focused primarily on taxation of SOs, CNIs, and foundations on the one hand, and taxation of donors donating to SOs, CNIs, and foundations as well as taxation of beneficiaries of foundations on the other hand.

A. Corporation Income Taxation of NPOs

First of all, income of foundations, SOs, and CNIs is generally subject to enterprise income tax in accordance with the “Enterprise Income Tax Law of the PR China” (Enterprise Income Tax Law), dated March 16, 2007. The Enterprise Income Tax Law of the PR China, promulgated on March 16, 2007, put into effect on January 1, 2008. Chinese-English in: CHINA LAW & PRACTICE, VOL. 21 (2007), No. 3, p. 21 et seq. Art. 1, Enterprise Income Tax Law stipulates that “enterprises and other organizations that obtain income in the People’s Republic of China are payers of enterprise income tax.” NPOs shall be subsumed under the term “other organizations.” Commentaries on Art. 1 of the Enterprise Income Tax Law generally agree that SOs and CNIs are to be subsumed under the term “other organizations”; see, e.g., YI Yunhe, COMMENTARY ON THE ENTERPRISE INCOME TAX LAW OF CHINA (CHINA LAW & PRACTICE, VOL. 21 (2007), No. 3, p. 21 et seq. Art. 1).
Law stipulates a tax rate of 25%. “Low-profit small scale” enterprises are eligible for a preferential rate of 20%.

Taxable “monetary and non-monetary revenue” is:

— revenue from the sale of goods;
— revenue from the provision of services;
— revenue from the transfer of property;
— returns on equity investment, such as dividends, bonuses, etc.;
— interest income;
— revenue from royalties;
— revenue from donations; and
— other revenue.

According to Art. 26, No. 4, Enterprise Income Tax Law, the revenue of “nonprofit organizations that satisfies the criteria” is tax-exempted.

The questions what “revenue” is tax-exempted and how to qualify as “nonprofit organizations that satisfies the criteria” in the sense of the Enterprise Income Tax Law are elaborated in the “Implementation Regulation of the Enterprise Income Tax Law of the People’s Republic of China” (Implementation Regulation of the Enterprise Income Tax Law) promulgated on December 6, 2007, and two Notices (No. 122 and No. 123) issued in November 2009.

First, Notice No. 122 stipulates that only the following income of qualified nonprofit organizations is tax-exempted:

— income obtained through the donations by other organizations or individuals;
— governmental subsidies other than fiscal allocations regulated in Art. 7 Enterprise Income Tax Law, but excluding income obtained through purchases of services by the government;
— membership fees that are collected in accordance with regulations promulgated by the departments of finance and civil affairs at provincial level or above;

THE PR CHINA [《中华人民共和国企业所得税法》释义], Beijing 2007, p. 36; SHI Yaobin [史耀斌], COMMENTARY AND HANDBOOK ON THE ENTERPRISE INCOME TAX LAW OF THE PR CHINA [《中华人民共和国企业所得税法》释义及适用指南], Beijing 2007, p. 47. Foundations are not mentioned here, but are included in the list of NPOs seen as eligible for the tax exemption in Art. 26, No. 4, Enterprise Income Tax Law; see YI Yunhe, p. 228 et seq. and DI Jiguang [翟继光], COMMENTARY ON THE ENTERPRISE INCOME TAX LAW OF THE PR CHINA [《中华人民共和国企业所得税法》释义], Shanghai 2007, p. 218 et seq.

258 Art. 4, para. 1, Enterprise Income Tax Law.
259 Art. 28, para. 1, Enterprise Income Tax Law. According to Art. 92 of the “Implementation Regulation of the Enterprise Income Tax Law of the People’s Republic of China” [中华人民共和国企业所得税法实施条例], promulgated by the State Council on December 6, 2007 the following enterprises qualify as “low-profit small scale”: (1) For industrial enterprises, the annual taxable income does not exceed RMB 300,000 Yuan, the number of employees does not exceed 100 and the total assets does not exceed RMB 30 million Yuan; (2) for other enterprises, the annual taxable income does not exceed RMB 300,000 Yuan, the number of employees does not exceed 80 and the total assets does not exceed RMB 10 million Yuan.
260 Art. 6, Enterprise Income Tax Law.
261 See supra note 259.
263 According to Art. 7 Enterprise Income Tax Law fiscal allocations are non-taxable revenue.
– interests of bank deposits and that stem from non-taxable and tax-exempt income; and
– other income stipulated by the Ministry of Finance and State Administration of Taxation.

Second, Notice No. 123 provides that nonprofit organizations like foundations, SOs, and CNI s are allowed to go through the proceedings to qualify as tax-exempted.\(^{264}\)

Third, the question, when an NPO “satisfies the criteria” is answered by Art. 84 of the “Implementation Regulation of the Enterprise Income Tax Law of the People’s Republic of China” (Implementation Regulation of the Enterprise Income Tax Law) promulgated on December 6, 2007\(^{265}\), which is supplemented by Notice No. 123:

– it has legally performed registration procedures as a nonprofit organization;
– it is engaged in public benefit or nonprofit activities, and the scope of its main activities is within China\(^{266}\);
– apart from using it for relevant and reasonable expenditures of such organization, all of the income derived is used for the public benefit or nonprofit making undertakings approved in registration or prescribed in its statutes;
– assets and interest derived from these assets are not to be used for distribution except reasonable salaries\(^ {267}\);
– as approved in registration or prescribed in its statutes, after the organization is deregistered, the remaining assets have to be used for public benefit or nonprofit making purposes, or they have to be donated through the registration and administration authorities to other organizations that have the same nature and aim as those of the deregistered organization, and the same is to be announced to the general public;
– the “investor”\(^{268}\) is not retaining or enjoying any property rights regarding the assets he invested in the organization; while the term “investor” refers to legal persons, natural persons, and other organizations, but excluding the peoples’ governments at all levels and their departments\(^{269}\);
– expenditures on salaries and welfare for staff are controlled within the prescribed percentage; the organization is not distributing its assets in any disguised form; whereby the staffs’ average salary should not be more than twice of the annual average salary of the preceding year at the place where the organization pay its tax; and the staffs’ benefits are subject to the relevant state regulations\(^{270}\);
– the NPO has passed the annual inspection in the preceding year unless they are newly established or registered in the present year\(^ {271}\); and

\(^{264}\) Section 1, No. 1 Circular No. 123 provides that public institutes (事业单位), SO, foundations, CNI and “religious sites” that have been established and registered under the relevant law and regulations as well as “other organizations” affirmed by Ministry of Finance and State Administration of Taxation may qualify for tax-exemption.

\(^{265}\) See supra note 259.

\(^{266}\) Section 1, No. 2 Circular No. 123.

\(^{267}\) Section 1, No. 4 Circular No. 123.

\(^{268}\) Chinese 投入人.

\(^{269}\) Section 1, No. 6 Circular No. 123.

\(^{270}\) Section 1, No. 7 Circular No. 123.

\(^{271}\) Section 1, No. 8 Circular No. 123.
the taxable income and related costs, fees, and losses are accounted separately from tax-exempted income and related costs, fees, and losses.\(^{272}\)

The procedure for the recognition of NPOs satisfying the above criteria are also found in Notice 123. Accordingly NPOs that were established or registered upon the approval of a provincial or higher level registration authority have to submit the application\(^{273}\) for tax-exempt qualifications to the provincial administration of taxation at its seat, while NPOs that were established or registered upon the approval of a municipal or county registration authority have to submit such an application to the municipal or county administration of taxation.\(^{274}\) The finance and tax departments are jointly in charge to confirm the NPOs’ tax-exempt qualifications and issue regular corresponding public notices.\(^{275}\) The qualification of tax-exemption lasts for five years, but may be renewed.\(^{276}\) NPOs, which were granted tax-exemption status, can be disqualified under certain circumstances, e.g. if a NPO does not take part in the annual inspection or if it transfers, conceals, or distributes its assets in disguise through related party transactions or un-related party transactions or services.\(^{277}\)

It should be noted that CNIs as partnerships or as individual entrepreneurs are not subject to the Enterprise Income Tax Law.\(^{278}\)

The taxation of income of charitable trusts is uncertain.

**B. Business Tax Levied on Activities of NPOs**

According to the “Provisional Regulations of the PR China on Business Tax”\(^{279}\) (Business Tax Regulations), business tax is levied on “all units and individuals, who provide labour services, assign intangible assets or sell immovable property within the territory of the PR China.”\(^{280}\) Therefore, all NPOs are payers of business tax if they are engaged in activities that are taxable under the business tax.\(^{281}\) Activities subject to business tax include, inter alia, “cultural activities and sport,” “entertainment,”\(^{282}\) and “services,”\(^{283}\) to which rates of 3%, 5-20%,\(^{284}\) and 5% apply respectively.\(^{285}\)

\(^{272}\) Section 1, No. 9 Circular No. 123.

\(^{273}\) Which materials a NPO has to submit is stipulated in Section 3 Circular No. 123.

\(^{274}\) Section 2 para. 1 Circular No. 123.

\(^{275}\) Section 2 para. 2 Circular No. 123.

\(^{276}\) Section 4 Circular No. 123. The NPOs must reapply for a re-approval three months prior to the lapse of the period.

\(^{277}\) Section 6 Circular No. 123.

\(^{278}\) See Art. 1, para. 2, Enterprise Income Tax Law (excluding individual sole investment enterprises and partnership enterprises from the applicability of this law).

\(^{279}\) 中华人民共和国营业税暂行条例 [Provisional Regulations of the PR China on Business Tax], promulgated on December 13, 1993; Chinese-English in: CCH Asia Pacific (Hrsg.): CCH China Laws for Foreign Business – Taxation & Customs, Volume 1-3, Hong Kong 1985 et seq. (cited as CCH Taxation), ¶31-739.

\(^{280}\) Art. 1, Business Tax Rules.

\(^{281}\) SOs explicitly fall under the definition of “units” provided by implementation rules to the Business Tax Regulations; see Art. 9, para. 1, 中华人民共和国营业税条例实施细则 [Detailed Rules for the Implementation of the Provisional Regulations of the PR China on Business Tax (Business Tax Implementation Rules)], promulgated on December 25, 1993; Chinese-English in: CCH Taxation (supra note 279), ¶31-740. CNIs as individual entrepreneurs are deemed to be “individuals”; see Art. 9, para. 2, Business Tax Implementation Rules.

\(^{282}\) Music halls, ballrooms, karaoke bars, music tea houses, billiard rooms, golf courses, bowling alleys, and recreation rooms.

The Business Tax Regulations comprise the following list of items that are exempt from business tax:

- educational and nursing services rendered by crèches, kindergartens, homes for the aged and welfare organs for the disabled, marriage agencies, and funeral services;
- services rendered by the disabled;\(^{286}\)
- medical services rendered by hospitals, clinics, or any other medical organ;\(^{287}\)
- educational services rendered by schools or any other educational organ;\(^{288}\)
- services rendered by students to pay for their education;
- business relating to agricultural machinery, plowing, irrigation and drainage, measures for the prevention and control of plant diseases and insect pests, for the protection of plants, agricultural insurance and related technical training and development services; breeding and disease prevention services for poultry, livestock, and aquatic animals;\(^{289}\)
- income from the sale of tickets for cultural activities launched by memorial centers, museums, cultural centers, art galleries, exhibition halls, painting and calligraphy institutions, libraries, cultural relics preservation units, as well as from the sale of tickets for cultural and religious activities organized at religious centers.\(^{290} \text{291}\)

Other items eligible for a reduction of or exemption from business tax may be determined by the State Council, but not by local authorities or departments.\(^{292}\) If the turnover of a taxpayer does not reach the taxable threshold specified by the Ministry of Finance, it is exempted from business tax.\(^{293}\) However, regarding NPOs this threshold only applies to CNIs as individual entrepreneurs.\(^{294}\)

C. Value-Added Tax Levied on NPOs

In accordance with the “Provisional Regulations of the PR China on Value-Added Tax”\(^{295}\) (Value-Added Tax Regulations), payers of value-added tax (VAT) are “all units and individuals that sell goods, providing processing, repair or replacement labour services and those that import goods” within the boundary of the PR China. Thus, as

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\(^{283}\) Agency services, hotels, restaurants and catering services, tourist services, storage, rental and leasing services, advertising, and other services.

\(^{284}\) The tax rates to taxpayers engaging in the entertainment business is determined within this range by the governments of provinces, autonomous regions, and directly administered municipalities; see Art. 2, para. 3, Business Tax Regulations.

\(^{285}\) See Art. 2, para. 1, Business Tax Regulations referring to the Appendix “Table of Taxable Items and Rates of Business Tax” attached to the Business Tax Regulations.

\(^{286}\) See also Art. 26, No. 1, Business Tax Implementation Rules for an interpretation of this clause.

\(^{287}\) See also Art. 26, No. 2, Business Tax Implementation Rules for an interpretation of this clause.

\(^{288}\) See also Art. 26, No. 3, Business Tax Implementation Rules for an interpretation of this clause.

\(^{289}\) See also Art. 26, No. 4, Business Tax Implementation Rules for an interpretation of this clause.

\(^{290}\) See also Art. 26, No. 5, Business Tax Implementation Rules for an interpretation of this clause.

\(^{291}\) Art. 6, para. 1, Business Tax Regulations.

\(^{292}\) Art. 6, para. 2, Business Tax Regulations. For an overview of further exemptions, see Deloitte Touche Tohmatsu, CHINA MASTER TAX GUIDE 2005, p. 446.

\(^{293}\) Art. 8, Business Tax Regulations. The threshold is specified by the Ministry of Finance in Art. 27, para. 1, Business Tax Implementation Rules: The taxable threshold for business tax paid on a fixed period basis is a monthly turnover of RMB 200 to 800 Yuan. The taxable threshold for business tax paid on a transaction basis is a transaction (daily) turnover of RMB 50 Yuan.

\(^{294}\) See Art. 27, para. 1, Business Tax Implementation Rules (providing that the business taxable threshold in Art. 8 of the Business Tax Regulations applies only to individuals).

\(^{295}\) 中华人民共和国增值税暂行条例 [Regulations of the PR China on Value-Added Tax], promulgated on December 13, 1993, Chinese-English in: CCH Taxation (supra note 279), ¶31-736.
with business tax, all NPOs are liable for VAT if they engage in taxable activities that are subject to VAT.\textsuperscript{296}

The basic tax rate imposed on sales or imports of goods, and on the provision of processing repair or replacement labor services, is 17%.\textsuperscript{297} A reduced VAT of 13% is eligible for the sale and import of certain products prescribed in the Value-Added Tax Regulations.\textsuperscript{298} Further reductions (to 3%, 4%, or 6%) are also provided by circulars of the State Administration of Taxation and other taxation authorities.\textsuperscript{299} Furthermore, there is a reduced VAT rate of 6% for the sale of goods and other taxable labour services applicable to “small-scale taxpayers.”\textsuperscript{300} Certain goods are exempted from VAT, including “imported instruments and equipment used directly in scientific research, experiments and education” and “materials and equipment imported by foreign governments and international organizations.”\textsuperscript{301} There is also a VAT threshold, which is applicable only to CNIs as individual entrepreneurs.\textsuperscript{302}

D. Other Taxes Imposed on NPOs

Other taxes such as real estate tax,\textsuperscript{303} vehicle and vessel usage tax,\textsuperscript{304} urban land usage tax,\textsuperscript{305} land value-added tax,\textsuperscript{306} deed tax,\textsuperscript{307} stamp tax,\textsuperscript{308} as well as customs

\textsuperscript{296} SOs explicitly fall under the definition of “units” provided by implementation rules to the Value-Added Tax Regulations; see Art. 8, para. 1, [Detailed Rules for the Implementation of the Provisional Regulations of the PR China on Value-Added Tax (Value-Added Tax Implementation Rules)], promulgated on December 25, 1993; Chinese-English in: CCH Taxation (supra note 279), ¶31-737. CNIs as individual entrepreneurs are deemed to be “individuals”; see Art. 8, para. 2, Value-Added Tax Implementation Rules.

\textsuperscript{297} Art. 2, para. 1, and Art. 2, para. 4, Value-Added Tax Regulations.

\textsuperscript{298} Art. 2, para. 2, Value-Added Tax Regulations.

\textsuperscript{299} For an overview, see Deloitte Touche Tohmatsu (supra note 292), p. 365.

\textsuperscript{300} Art. 12, para. 1, Value-Added Tax Regulations. For a definition overview, Deloitte Touche Tohmatsu (supra note 292), p. 365.

\textsuperscript{301} Art. 16, Value-Added Tax Regulations; Art. 31, Value-Added Tax Implementation Rules. Other products exempted are agricultural products; contraceptive drugs and devices; antique books; free of charge, as aid, equipment and machinery imported for contract processing, assembly, and compensation trade; goods imported directly by organizations for the disabled for specific use by the disabled; and second-hand goods which have been used and sold by the individual sellers. For more details, see Deloitte Touche Tohmatsu (supra note 292), p. 361 et seq.

\textsuperscript{302} Art. 18, Value-Added Tax Regulations; Art. 32, Value-Added Tax Implementation Rules.

\textsuperscript{303} See [Provisional Regulations Governing the Urban Real Estate Tax], promulgated by the Administration Council on August 8, 1951, Chinese-English in: CCH Taxation (supra note 279), ¶39-500, and [Provisional Regulations of the PR China on Real Estate Tax], issued on September 15, 1986, by the State Council, Chinese-English in: CCH Taxation, ¶39-505. See further on the urban real estate tax and possible exemptions Deloitte Touche Tohmatsu (supra note 292), p. 485 et seq.

\textsuperscript{304} See [Provisional Regulations of the PR China on Vehicle and Vessel Usage Tax], issued on September 15, 1986, by the State Council; Chinese-English in: CCH Taxation, ¶34-568.

\textsuperscript{305} See [Provisional Regulations of the PR China Governing Land Use Tax in Cities and Towns], promulgated on September 27, 1988, by the State Council; Chinese-English in: CCH Taxation, ¶39-509.
duties\textsuperscript{309} also have to be paid by NPOs in the PR China.\textsuperscript{310} Some provisions of the relevant laws regarding these taxes explicitly provide for exemptions for "people’s organizations" \textit{（人民团体）}, a term that might be interpreted to refer to SOs. However, whether these exemptions are also available to foundations, CNIs, and charitable trusts remains unclear.

E. Taxation of Donors

1. Legal Framework

There is no comprehensive law covering all questions concerning tax benefits for donors in China. Instead, various laws and other normative documents apply. The relationship between these regulations is not always clear. They could be applied alternatively or cumulatively. From their conception, however, the conclusion should be drawn that they are to be applied cumulatively, because they regulate different questions, namely concerning potential donors, the purposes of donations for which such tax benefits are available, and recipients and limitations on the percentage of income for which tax benefits are offered.


\textsuperscript{308} See 中华人民共和国印花税暂行条例 [Provisional Regulations of the PR China on Stamp Duty], promulgated on August 6, 1988, by the State Council, Chinese-English in: CCH Taxation (supra note 279), ¶31-712; 中华人民共和国印花税暂行条例实施细则 [Detailed Rules for the Implementation of the Provisional Regulations of the PR China on Stamp Duty], promulgated on September 29, 1988, by the Ministry of Finance. See further on deed tax and possible exemptions Deloitte Touche Tohmatsu (supra note 292), p. 465 et seq.

\textsuperscript{309} See 中华人民共和国货物进出口条例 [Regulations of the PR China on the Import and Export of Goods], promulgated on December 10, 2001, Chinese-English in: CCH Taxation (supra note 279), ¶50-350

\textsuperscript{310} For more details, see generally Irish/JIN/Simon (supra note 255), p. 9 et seq.

2. Donor

Regarding the question of who are potential donors, the Donation Law\(^{311}\) determines that individuals, legal persons, and “other organizations” might donate.\(^{312}\)

3. Purpose

Concerning the purposes, the Donation Law (in a non-conclusive list) identifies public benefit purposes for which preferential tax treatment is available.\(^{313}\) The taxation laws also include just reference to “public benefit purposes” and (for donations of enterprises) a non-conclusive list.\(^{314}\)

The list of the Donation Law is further elaborated for donations of enterprises in a Notice of the Ministry of Finance of the year 2003.\(^{315}\) There it is stipulated that donations of enterprises might take the form of “public purpose donations,”\(^{316}\) “relief donations,”\(^{317}\) and “other donations.”\(^{318}\) These types of donations cannot be sharply distinguished. Delimitation, however, is not necessary, because the different types of donations all enjoy the same preferential tax treatment. The Notice 2003 has virtually only the single aim of systematizing the purposes for which preferential tax treatment is available by a list of public purpose donations and introduction of a new type of donations: the relief donations, i.e., donations for beneficiaries in difficult social and financial situations.

4. Recipients

Regarding recipients of donations, the implementation regulations on the taxation of individuals of 1995 on the one hand and of enterprises of 2007 on the other hand determine that the donations must pass through legally established public benefit

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311 See supra note 30.
312 Art. 2 and Art. 9, Donation Law. More precisely, Art. 24 to 27, Donation Law stipulate that companies and “other enterprises,” individuals, and “individual industrial and commercial households” enjoy preferential income tax treatment, while donations from outside the territory [of the PR China] enjoy reduction or elimination of import taxes and import procedural fees. However, all these preferential treatments are not specified but are to be handled “in accordance with the laws and administrative provision.”
313 Art. 3, Donation Law. See for this list supra at II A 2.
314 See below at III E 4.
316 According to this Notice, “public purpose donations” are – in accordance also with Art. 3, No. 2, Donation Law – those donations for education, sciences, culture, health and medical treatment, sport activities, environmental protection, and construction of public facilities.
317 “Relief donations” – itself a public benefit purpose under Art. 3, No. 1, Donation Law – are defined by the Notice to be donations to areas suffering from natural disasters or poor areas determined by the state, donations “to SOs like the China Charity Federation (慈善协会), the Red Cross (红十字会), the China Disabled Persons’ Federation (残疾人联合会), and the China Youth Development Foundation (青少年基金会),” or donations for the masses and individuals in social difficulties used for production, relief on livelihood, or financing.
318 “Other donations” in this Notice are donations by enterprises for the expansion of humanitarianism, for the promotion of social development, and the “improvement of other social public benefit undertakings.” This list is therefore again – like the Donation Law – not conclusive.
purpose SOs or government organs.\textsuperscript{319} For donations of enterprises, Art. 52 Implementation Regulation of the Enterprise Income Tax Law is setting up criteria that have to be satisfied by “foundations, charitable organisations and other SO” for being eligible to receive tax deductible donations:\textsuperscript{320}

- it is legally registered and have the status of a legal person;
- its aim is to develop public benefit undertakings and not to make profits;
- all of its assets and increments are owned by the legal person;
- its income and operational surplus are mainly used for the activities aimed at the purposes for its creation;
- after being terminated, its residual property cannot be attributed to any individual or for-profit organizations;
- it must not engage in any business activity unrelated to the purpose of its establishment;
- it has a sound financial and management system;
- donors are not participating by any means in the distribution of the assets of the SO;
- other conditions jointly prescribed by the in-charge finance and tax departments of the State Council and the registration and administration departments such as the MoCA.

For donations of individuals the Ministry of Finance together with the State Administration of Taxation issued a Notice in January 2007 on donations to SOs and foundations with a catalogue of quite similar criteria.\textsuperscript{321}

To sum up, the requirement for SOs and foundations for being eligible to directly receiving tax-deductible donations from enterprises and individuals essentially depends on compliance with the non-distribution constraint, which is, however, inherent to the definition of NPO in China.\textsuperscript{322} Instead, concerning foundations, another requirement of the Implementation Regulation of the Enterprise Income Tax Law and the Notice 2007 is remarkable: the prohibition to engage in any business activity unrelated to the public benefit purpose, since this is permitted under the Foundations Regulations 2004.\textsuperscript{323}

5. Limitations

Regarding limitations of tax-deductible donations of individuals, the Individual Income Tax Law\textsuperscript{324} and its Detailed Implementation Rules\textsuperscript{325} are applicable. These


\textsuperscript{320} Before the Implementation Regulation of the Enterprise Income Tax Law was promulgated in December 2007, similar criteria were prescribed in the “Notice of the Ministry of Finance and the State Administration of Taxation on the Policies and Related Administrative Issues Concerning Pre-tax Deduction of Public Benefit Relief Donations” Caishui (2007) Nr. 6 (财政部 国家税务总局关于公益救济性捐赠税前扣除政策及相关管理问题的通知 财税[2007]6 号), (Taxation Notice 2007), issued on January 8, 2007, effective from the date of its issuance. An English translation of this Notice is available at www.iccscl.org/pubs/China%20_January_18_Notice%20_2_.pdf (visited on September 25, 2007).

\textsuperscript{321} Supra note 320.

\textsuperscript{322} See supra at I A.

\textsuperscript{323} See below at VII A.

regulations stipulate that natural persons may deduct donations “to educational and other public benefit purposes and donations to areas hit by severe natural disasters and poverty-stricken areas” up to 30% of their income.  

For donations of enterprises, the recently amended Enterprise Income Tax Law applies. The law determines that enterprises may deduct “donations for public benefit purposes” to a level up to 12% of total annual profit. The amended law also applies to foreign invested enterprises, with the consequence that these enterprises lose the privilege to be allowed to deduct donations from income to any amount.

It is unclear whether further deductions of donations from income of enterprises (more than 12% of income) and natural persons (more than 30% of income) is possible. In the past, a further deduction of donations from income of enterprises and natural persons to any amount was possible under certain conditions.

F. Taxation of Beneficiaries

Finally, according to the Official Commentary on foundations, the beneficiaries of the foundation are not required to declare disbursements from the foundation for taxation purposes. However, the Commentary fails to cite the corresponding legal basis for such privileged treatment of beneficiaries.

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326 Art. 6, para. 2, Individual Income Tax Law (supra note 324) and Art. 24 Detailed Implementation Rules (supra note 325).
327 See supra note 257.
329 See von Hippel/Pißler (supra note 32), p. 741 et seq.; see also Irish/JIN/Simon (supra note 255), p. 12 et seq. and recently YANG Daobo [杨道波], On Tax Law Regarding Donations to Nonprofit Organizations [向非营利组织捐赠的税法研究], in: JOURNAL OF SOUTHWEST UNIVERSITY FOR POLITICAL SCIENCES AND LAW [西南政法大学学报], Vol. 9 (2007), No. 3, p. 73 et seq. (p. 74) (YANG provides a list of NPOs eligible to receive donations that may be partly or fully deducted from the income of enterprises and natural persons).
IV. Fiduciary Obligations of the Board Members

A. Duty of Loyalty

1. Institutional Law

a) General Rules

aa) Self-dealing

There are general rules in the Chinese civil law of agency which are also applicable in the law of NPOs.

First, it is regarded as a violation of law if one agent performs self-dealing both as agent and as party. Under the general rules of Chinese civil law, such a violation of law would generally mean that the transaction is void.\(^{332}\)

Collusion of the agent with the third party is subject to the rule in Art. 66, para. 3, GPCL.\(^{333}\) According to this provision, if an agent and a third party collaborate to harm the interests of the principal, the agent and the third party shall bear joint liability. The contract itself is void if the agent and the third party intentionally collaborate to harm the interests of the state, collective, or a third party under Art. 58, No. 4, GPCL. Consequently, whether or not the contract is void depends on proving the intent of the agent and the third party to harm the interest of the principal.

bb) Remuneration

In the Donation Law, there is a rule on remuneration that applies to all charities. According to Art. 23, Donation Law, “public benefit purpose social organizations have to rigorously practice economy and reduce management costs; employees’ salaries and office expenses should be derived from interest and other income, and be corresponding to standards specified by the government.”

Besides, the Notice of the Ministry of Finance and the State Administration of Taxation of 2007 includes the rule that SOs and foundations receiving tax-deductible donations must have “an organizational structure not aimed at profits for private persons.”\(^{334}\) The interpretation of this rule is unclear. Some legal scholars interpret this requirement in a way that “members of the board must be volunteers.”\(^{335}\) However, the wording leaves enough room to be interpreted only to prohibit excessive remuneration.

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\(^{332}\) Cf. Art. 58, No. 5, GPCL (supra note 22), under which legal transactions which infringe laws are invalid. On the prohibition of self-dealing transactions under Chinese civil law, see WANG Liming [王利明] in: WANG Liming/YANG Lixin/WANG Qin/CHENG Yan [王利明/杨立新/王轶/程啸], CIVIL LAW [民法学], Beijing 2005, p. 148 et seq. However, WANG makes certain exceptions from the general rule that self-dealings are void, e.g., in the case that there is no damage caused by the self-dealing to the principal, or in the case that the principal gives his consent to the self-dealing. Compare also Daentzer, DAS RECHT DER STELLVERTRETUNG IN DER VOLKSPUBLIK CHINA, Regensburg 2000, p. 139 et seq.

\(^{333}\) See supra note 22.

\(^{334}\) Section 2, No. 8, Taxation Notice 2007 (supra note 320).

b) Foundations
aa) Self-dealing
Duties of loyalty are expressly determined in the Foundation Regulations 2004. Directors of foundations may not participate in decisions that involve them in a conflict of interests.\(^{336}\) In addition, transactions between the foundation and directors and their close relatives are entirely prohibited.\(^{337}\) The Official Commentary on Foundations extends this first rule beyond its official wording, in that directors are not only barred from participating in decisions where their own interests are involved, but also where those of their close relatives or organizations controlled by their close relatives are involved.\(^{338}\) The commentary makes no mention of the legal consequences of any infringement,\(^{339}\) but according to the general rules of Chinese civil law there are good arguments that such self-dealing transactions would be void.\(^{340}\)

Consequently, these rules in the Foundation Regulations 2004 are partly of a declaratory nature, because the self-dealing should be void in accordance with the general rules of Chinese civil law.\(^{341}\) As far as these rules in the Foundation Regulations 2004 determine that transactions with relatives are void, they tighten the general rules.
bb) Remuneration
Only directors who are employed full-time may receive remuneration,\(^{342}\) and at least two-thirds of directors must serve on an honorary basis (un-remunerated).\(^{343}\) Supervisory board members may not be remunerated.\(^{344}\)

It should be noted that according to the Foundation Regulations 2004, the wage and social contributions for “staff”\(^{345}\) and administrative costs may not exceed 10% of total disbursements.\(^{346}\)

c) Social Organizations
aa) Self-dealing
Neither the SO Regulations nor the Model Statutes for SOs stipulate provisions regarding conflicts of interests. Consequently, the general rules are applicable: a “direct” self-dealing transaction is generally void, and deals with close relatives are (insofar different from the situation with foundations) only void if there is proof of the intent to harm the interest of the principal.

bb) Remuneration
Concerning remuneration there is only the general statement that wage, insurance, and social welfare benefits of “specialist staff”\(^{347}\) of SOs must comply with “relevant

\(^{338}\) OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 105 et seq.
\(^{339}\) OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 104, stating that an infringement would be seen as a legally prohibited self-dealing transaction.
\(^{340}\) See supra at IV A 1 a aa.
\(^{341}\) See supra at IV A 1 a aa.
\(^{342}\) Art. 23, para. 4, Foundation Regulations 2004.
\(^{343}\) Art. 20, para. 3, Foundation Regulations 2004.
\(^{344}\) Art. 23, para. 4, Foundation Regulations 2004; Art. 20, clause 2, Model Statutes for Foundations.
\(^{345}\) "工作人员".
\(^{346}\) Art. 29, para. 2, Foundation Regulations 2004. See below at IV B 1 a cc.
\(^{347}\) "专职工作人员".
regulations for public institutions.”348 The Official Commentary on SOs and CNIs mentions some provisions regarding the reform of wages for staff of public institutions.349 However, there is no discussion on questions of which persons qualify as “specialist staff” or concerning what level of financial compensation is allowed in Chinese SOs.

d) Civil Non-business Institutions

aa) Self-dealing

As with SOs, in the case of CNIs neither the CNI Regulations nor the relevant model statutes stipulate provisions regarding conflicts of interests, so the general rules apply.

bb) Remuneration

Regarding remuneration, the Model Statutes for CNIs as legal persons and for CNIs as partnerships determine that the board of directors or the assembly of partners respectively has the authority to make decisions concerning wages and remuneration of “employed personnel.”350 351

e) Charitable Trusts

aa) Self-dealing

The Trust Law stipulates that trustees must not carry out transactions between their own assets and those of the trust property or between the assets of different settlers, thereby prohibiting self-dealing transactions.352 However, an exception is made from this prohibition where trust documents have provisions stating otherwise or where permission from either the settlor or beneficiary has been obtained under the condition that a “fair market price” is used to carry out a transaction.353 Consequently, the trustees must not – apart from obtaining remuneration – use the trust property to gain benefits for themselves.354

bb) Remuneration

With regard to remuneration, the Trust Law determines that trustees have the right to obtain remuneration in accordance with arrangements set out in the trust document.355 It further stipulates that, where the trust document has not made prior

348 Art. 29, para. 4, SO Regulations.
350 See Art. 11, No. 10, Model Statutes for CNIs (Legal Persons); Art. 12, No. 9, Model Statutes for CNIs (Partnerships).
351 Art. 28, para. 1, Trust Law.
352 Art. 28, para. 1, Trust Law. See on this rule also Lusina Ho, TRUST LAW IN CHINA (2003), p. 105 et seq.
353 Art. 28, para. 1, Trust Law. See on this rule also Lusina Ho (supra note 353), p. 103 et seq.
354 Art. 35, para. 1, clause 1, Trust Law. The amount of the arranged remuneration may be increased or reduced after consultation with and agreement from the parties to the trust, Art. 35, para. 2, Trust Law.
arrangements, after consultation with and agreement from the parties to the trust, supplementary arrangements may be made.\footnote{Art. 35, para. 1, clause 2, Trust Law.} In the case that no prior arrangements or supplementary arrangements have been made, trustees are not allowed to collect any remuneration.\footnote{Art. 35, para. 1, clause 3, Trust Law.}

2. Tax Law

Chinese tax law does not provide for any requirements regarding the duty of loyalty.

B. Duty of Prudence (Investment of Assets)

1. Institutional Law

a) Foundations

aa) Maintenance of capital

The first issue to face under the heading of duty of prudence regarding foundations is whether there is a duty to maintain endowment capital.

Chinese law does not explicitly state such a rule.

But pursuant to Art. 28, Foundation Regulations 2004, foundations should “realise the maintenance or increase of value of funds according to the principles of legality, security and efficiency.” This provision largely follows the wording of Art. 17, para. 2, Donation Law, which stipulates that public benefit purpose SOs (including foundations\footnote{On the terminology in the Donation Law, see supra note 24.}) have to “actively realise the maintenance or increase of value of donations according to the principles of legality, security and efficiency.” These provisions could be interpreted as a duty to maintain capital, but obviously this is not the case: The Official Commentary on Foundations addresses the provision of Art. 28, Foundation Regulations 2004 in terms of the principles of legality, security, and efficiency, but does not discuss whether there is a duty regarding the maintenance and increase of asset value.\footnote{OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 112 et seq.}

However, there is at least a mandatory minimum capital for the establishment of a foundation.\footnote{See supra at II A 3 d.} According to the Official Commentary on Foundations, the minimum initial endowment may not be fallen short of in the annual audit,\footnote{OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 75.} which in itself would be the equivalent to a duty of capital maintenance. This view is not supported by the wording of the applicable regulations on the establishment and supervision of the foundation, but may be supported by the purpose of the minimum capital rules. The Official Commentary on Foundations explains the minimum capital for the establishment as an essential requirement of a foundation to conduct activities in accordance with its purpose and to be capable of independently bearing civil liability.\footnote{OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 75.} Therefore, the minimum capital requirement might be seen on the one...
hand as a kind of indication of seriousness. On the other hand, it becomes clear that the minimum capital requirement is a necessity for a foundation to be capable of independently bearing civil liability, which in turn is one further condition for the establishing of a foundation. Nevertheless, it is not entirely clear whether there is really a duty to maintain endowment capital.

It is equally unclear whether an infringement of a presumed duty to maintain endowment capital entails any consequences. There is at least no provision for an administrative sanction, and whether the directors incur any civil liability is also uncertain. It is conceivable that the annulment ground of Art. 16, No. 2, Foundation Regulations 2004 applies (impossibility of pursuit of charitable activities pursuant to the statutes of the foundation), which according to Art. 41, No. 2, Foundation Regulations 2004 leads to the withdrawal of registration by the regulatory and administrative authorities. In the view of the commentators, the legislators intended by Art. 16 to regulate the case of actual impossibility of foundation purpose, and to create a sanction for cases where the requirements of timely disbursement of Art. 29 are not fulfilled. However, this last infringement is already covered by Art. 42, Foundation Regulations 2004.

Additionally, non-conformity with the presumed duty to maintain endowment capital does not necessarily cause a foundation not to pass the annual examination conducted by MoCA: Only two of the six foundations that reported fewer assets than initial endowment at the end of 2005 in their annual working report failed the examination. In 2006 five foundations reported fewer assets than their initial endowment. Two foundations (both fundraising foundations) did not pass the annual examination in the year 2006, while the remaining three non-fundraising foundations passed the examination. While the following conclusion is not entirely true for the examinations occurring in the previous year, for 2006 it seems

363 Art. 10, No. 6, SO Regulations.
364 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 91 et seq.
365 On the annual examination, see below at V D 1.
366 Those were the International Scientific Exchange Foundation (中华国际科学交流基金会), with an initial endowment of RMB 2.1 million Yuan and assets of RMB 1.4 million yuan at the end of 2005, and the China Dunhuang Grottoes Conservation Research Foundation (中国敦煌石窟保护研究基金会), with corresponding figures of RMB 22 million yuan and RMB 18.5 million Yuan. However, both foundations also failed to meet the quota for the annual disbursement for fundraising foundations of 70% of total revenue for the previous year and had very high contributions for staff and administrative costs exceeding 10% of total disbursements (see below on these further duties of prudence).
367 Those were the Symphonic Music Development Foundation of China (中国交响乐发展基金会), with an initial endowment of RMB 2.18 million Yuan (RMB 8 million Yuan stipulated in its statutes) and assets of RMB 1.7 million Yuan at the end of 2005; the Audiology Development Foundation of China (中国听力医学发展基金会) – 2.1 million/1.6 million; the Southern Airlines 100% Care Foundation (南航“十分”关爱基金会) – 20 million/17.9 million; and the SUN Yefang Foundation for Economics (孙冶方经济科学基金会) – 2.1 million/791,000.
368 The Chinese Foundation for the Construction of a Culture of Good Citizens (中国益民文化建设基金会, 0039) with an initial endowment of RMB 8 million Yuan and assets of RMB 5.4 million Yuan at the end of 2006; and the Chinese Foundation for Oral Health (中国牙病防治基金会, 0042) also with an initial endowment of RMB 8 million Yuan and assets of RMB 7.7 million Yuan at the end of 2006.
369 The Heung Kong Bright Future Foundation (see note 67), the Beihang University Education Foundation [北京航空航天大学教育基金会, 1027] and the COSCO Charitable Foundation (see note 67).
370 See notes 367 and 368.
correct to say that MoCA was accepting non-fundraising foundations to use their initial endowment in pursuit of their respective purposes.

bb) Investment of assets

Regarding investment of assets, the new Foundation Regulations 2004 abolished the provisions which formerly limited the investment of foundation assets.\(^{371}\)

As already mentioned, both Art. 17, para. 2, Donation Law and Art. 28, Foundation Regulations 2004 oblige the foundation to administer foundation investments in accordance with the principles of legality, security, and efficiency.\(^{372}\)

From this, according to the Official Commentary on Foundations, is derived the duty for foundations to weigh the risks and opportunities of various forms of investment.\(^{373}\) Infringement of this duty can lead to personal liability for compensation on the part of directors.\(^{374}\) Actual examples of legal forms of investment as stated by the Official Commentary on Foundations are bank deposits, government bonds, and other securities as well as investment in growth undertakings.\(^{375}\) It is noticeable that investments in real estate are not mentioned.

It follows from the Foundation Regulations 2004 that directors may not pass an inappropriate resolution in contravention of the Foundation Regulations 2004 or the statutes of the foundation.\(^{376}\) However, only the directors participating in the passing of such resolutions incur liability.\(^{377}\)

The Official Commentary on Foundations on the general duty of care is brief and leaves a number of questions open.\(^{378}\) Thus it is unclear when a resolution is to be seen as “inappropriate.”\(^{379}\) Elsewhere the commentary cites misinvestment of foundation assets as an example of infringement of a duty.\(^{380}\)

It may be further asked whether the directors are liable for any inappropriate resolution or whether fault is additionally necessary.\(^{381}\) The commentary fails to address this question. As a general principle of Chinese civil law, fault is always required as an element of tortious behaviour, but not of contractual behaviour.\(^{382}\) Thus the fault requirement depends on whether the liability of the members of the board of directors is classified as contractual or tortious.

Another issue is the extent to which directors may discharge themselves from liability. According to the strict wording of the law, it suffices for the director to withhold his vote or not to attend the meeting at which the resolution is to be

\(^{371}\) Art. 7, Foundation Measures 1988 (supra note 25) provides that foundations may only invest their assets as bank deposits or in securities. For equities investments it was additionally provided that foundations may acquire a maximum of 20% of the stock of a company limited by shares.

\(^{372}\) Art. 28, Foundation Regulations 2004.

\(^{373}\) OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 112 et seq.

\(^{374}\) OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 113.

\(^{375}\) OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 112.

\(^{376}\) OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 134.

\(^{377}\) The term “inappropriate” in Art. 43, para. 1, Foundation Regulations 2004 (不当) is alien to Chinese compensatory law. It is employed in Art. 92, GPCL (supra note 22) which creates a claim for unjustified enrichment.

\(^{378}\) See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 112 et seq.

\(^{379}\) The question of the fault requirement is also controversially discussed in other areas of Chinese law, e.g., the liability of board members of a joint stock company in China (see Comberg, DIE ORGANSATIONSVERFASSUNG DER AKTIENGESELLSCHAFT IN CHINA (2000), p. 163 et seq.) and liability for false disclosure in Chinese securities laws (see Pißler, CHINESISCHES KAPITALMARKTRECHT (2004), p. 216 et seq.).

\(^{380}\) LING Bing, CONTRACT LAW IN CHINA, Hong Kong [etc.] 2002, p. 400.
However, the mandatory Model Statutes for Foundations require the stringent standard for potential exoneration derived from Chinese corporate law. Accordingly, board members can only discharge themselves from liability if they express reservations and these are recorded in the minutes of the meeting. However, this increase in stringency in the statutes of the foundation cannot be taken for granted as there is no indication either in the Foundation Regulations 2004 or the Official Commentary that the provisions of the Foundation Regulations 2004 are dispositive.

c) Timely Disbursement

It should be emphasized here that there are relatively strict and precise requirements of timely disbursement for foundations. The annual disbursement by fundraising foundations for charitable activities may not be less than 70% of total revenue for the previous year. With non-fundraising foundations, annual disbursements on public benefit purposes may not be less than 8% of the foundation’s assets from the previous year.

The Official Commentary on Foundations justifies this provision, introduced in 2004, on the grounds that the foundation should be encouraged to actively pursue public benefit purposes.

The duty to distribute assets will lead to a situation where existing fundraising foundations will generally have to be more active, because as of now they use an average of only 50% of the revenues from the previous year to promote charitable purposes. The distribution requirement will also have a decisive effect on non-fundraising foundations. According to the legislative concept, this type of foundation is financed at least predominantly from the proceeds of its initial endowment. This means a reduction of the initial endowment can only be avoided if proceeds of at least 8% are generated, which itself seems realistic only under highly favorable economic conditions. The situation is even more precarious when one presumes, as would seem justifiable, that foundations are under a duty to maintain their initial endowment, a duty which is, however, not enforced strictly.

Lastly, the Foundation Regulations 2004 lay down that the wage and social contributions for staff and administrative costs may not exceed 10% of total disbursements. Here the Official Commentary remarks that the equivalent expenses for foundations in the United States amount to an average of 15%, and therefore because China is an emerging country the disbursements have been limited to 10%.

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383 See Art. 43, para. 1, Foundation Regulations 2004.
384 See supra note 36.
385 See Art. 15, Model Statutes for Foundations; the dismissal of a director is not permissible “if it is proven that the resolution was objected to and this is recorded in the meeting minutes, […]”
386 See on corporate law Comberg (supra note 381), p. 165.
387 See also Art. 17, para. 1, clause 3, Donation Law (supra note 30) providing that “the proportion of their income that foundations give yearly in financial aid to public benefit undertakings may not be lower than the proportion specified by the state.”
389 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 114.
390 See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 114, for non-specific data on nationwide foundations.
391 The OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11) does not address this question.
392 See above at IV B 1 a aa.
394 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 114 et seq.

An infringement of the regulations for timely disbursement of assets is punishable by administrative sanction\(^{395}\) but not, on the other hand, an infringement of the limitations on expenditure for foundation staff wages, social contributions, and administrative costs. Here, however, directors may incur civil liability, although it cannot be accurately determined when such liability arises\(^{396}\) and how it can be enforced.

dd) Practical Experiences

In practice, quite a number of foundations have shown problems to satisfy the requirements for timely disbursement of assets and limitations on expenditure for foundation staff wages, social contributions, and administrative costs: Of the 68 fundraising foundations participating in the annual examination\(^{397}\) in the year 2005, only 36 (or 53\%) met the requirement of disbursing not less than 70\% of the previous year’s total revenue for charitable activities; 26 (or 38\%) did not.\(^{398}\) A further six fundraising foundations (9\%) refused to provide information about their disbursement. In the year 2006, 76 fundraising foundations participated in the annual examination. Again only 39 (51\%) fulfilled the requirements for timely disbursement, 13 (17\%) did not and for the remaining 24 fundraising foundations (32\%) no information about their disbursement was available on the webpages of MoCA.

Regarding non-fundraising foundations, eleven of the 18 foundations participating in the 2005 annual examination disbursed at least 8\% of the foundation’s assets from the previous year (61\%); five failed to do so (28\%).\(^{399}\) An additional two non-fundraising foundations did not provide any figures (11\%). In 2006, 19 non-fundraising foundations participated in the annual examination. Seven foundations (37\%) fulfilled the disbursement requirement; 9 of them (47\%) failed to satisfy it; three (16\%) did not provide data.

As to limitations on expenditures for foundation staff wages, social contributions, and administrative costs, 52 out of 86 foundations participating in the 2005 annual examination satisfied the requirement that the wage and social contributions for staff and administrative costs not exceed 10\% of total disbursement (60\%). 32 disclosed costs higher than 10\% of total disbursements (37\%).\(^{400}\) An additional two foundations declined to give information on this matter (3\%). In 2006, 48 of the 95 foundations that participated in the annual examination fulfilled the requirement concerning the amount of staff wages, social contributions, and administrative costs

\(^{395}\) Art. 42, No. 4, Foundation Regulations 2004.

\(^{396}\) E.g., it is somewhat unclear whether the directors are liable if revenues are less than expected and the costs are in consequence too high. Doubts arise with the question of which resolution of the board of directors should be the ground for a claim, whether the resolution is to be deemed “inappropriate,” and whether the claim requires fault.

\(^{397}\) On the annual examination, see below at V D 1.

\(^{398}\) According to the annual working reports published on the webpage of the NPO Affairs Bureau of MoCA, figures for those fundraising foundations failing to meet the requirement range from 0\% to 69.94\%.

\(^{399}\) According to the annual working reports published on the webpage of the NPO Affairs Bureau of MoCA, figures for those non-fundraising foundations failing to meet the requirement range from 0.26\% to 6.92\%.

\(^{400}\) One foundation – the “China Foundation for Guangcai Program” (中国光彩事业基金会, 0036) – had spent 100\% of total disbursements for staff wages, social contributions, and administrative costs (in its annual report for 2006 this figure surprisingly decreased to only 3\%). Other figures range from 10.1\% to 84.41\%.
(51%); 24 did not (25%). For 23 foundations no information was given in their annual reports from 2006 (24%).

The handling of these findings of misconduct by MoCA was inconsistent: In 2005, 22 of the 32 fundraising foundations that did not meet the requirements for timely disbursement (or did not provide information) passed the examination (69%). The label “mostly passed” was given to eight of those fundraising foundations (25%). Only two fundraising foundations did not pass the examination (6%). In 2006 eleven of the 37 fundraising foundations not fulfilling the requirement for timely disbursement (or not providing information) passed the examination nonetheless (30%). 15 fundraising foundations were assessed marked “mostly passed” (40%). The remaining eleven fundraising foundations were stigmatized with the stamp “not passed” (30%).

Of the seven non-fundraising foundations which did not meet the requirements for timely disbursement (or did not provide information), there were five in 2005 that passed the examination (71%). The remaining two “mostly passed” (29%). In 2006, only two of the 12 non-fundraising foundation that did not satisfy the distribution requirement (or did not provide information) passed (17%). Four non-fundraising foundations were marked “mostly passed” (33%) and six non-fundraising foundations were branded with the label “not passed” (50%).

b) Social Organizations

aa) Maintenance of capital

There is no explicit requirement for SOs regarding the maintenance of capital in the SO Regulations.

The rule of Art. 17, para. 2, Donation Law\(^{402}\) applies also to SOs, but – as already stated – this rule cannot be regarded as a duty to maintain the capital.

But there is at least a mandatory minimum capital for the establishment of SOs.\(^{403}\) According to the Official Commentary on SOs and CNIs, the financial resources are an essential requirement of the SO to conduct activities in accordance with its purpose and to be capable of independently bearing civil liability – this explanation is identical with the explanation of the minimum capital for a foundation.\(^{404}\) But, in contrast to the Official Commentary on Foundations law, the Official Commentary on SOs and CNIs fails to state that the minimum initial endowment may not be fallen short of in the annual audit. The Official Commentary also has no answer to the question of what should happen if an SO has lost its financial resources and therefore is not capable of independently bearing civil liability. One consequence could be the winding up of the SO, but this is everything but clear.

bb) Investment of assets

The SO Regulations are silent on investment of assets of SOs. The Commentary, in interpreting “nonprofit activities” in Art. 2 of the SO Regulations, states that these activities may include “certain economic relations and activities” under the

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\(^{401}\) The International Scientific Exchange Foundation (中华国际科学交流基金会, 3213) and the China Dunhuang Grottoes Conservation Research Foundation (中国敦煌石窟保护研究基金会, 4191) disbursed not a single yuan of total revenue for the previous year for charitable activities, but had wage and social contributions for staff and administrative costs at 43.68% and 75.86% of total disbursements respectively. Besides these two foundations also failed to maintain endowment capital (see supra note 366).

\(^{402}\) See supra note 30.

\(^{403}\) See supra at II B 3.

\(^{404}\) Commentary on SOs and CNIs (supra note 111), p. 32.
condition that those activities have their focus on the purpose of the SO and not on profit making.\textsuperscript{405} Most specifically, the SO Regulations provide that a social organization’s “asset resources” must be lawfully obtained.\textsuperscript{406} The Model Statutes for SOs contain a list of resources for expenditures of SOs, including the items “income from developing activities or services within the approved business scope” and “other legal income.”\textsuperscript{407} From this it may be concluded that channels through which an SO is allowed to invest its assets depend largely on the statutes of the SO in question and are subject to approval by the registration and administrative authority.\textsuperscript{408}

A duty of care is not stipulated in the SO Regulations. The Model Statutes for SOs provide that with regard to its “asset management,” an SO must abide by the “national provisions on the system for financial management.”\textsuperscript{409} Additionally, Art. 17, para. 2, Donation Law is applicable.

c) Civil Non-business Institutions

aa) Maintenance of capital

Similar to the SO, there is no statutory duty for a CNI to maintain its capital.

The mandatory minimum capital for the establishment of a CNI is vaguely stipulated in the formula that it must be appropriate to the volume of the social activities of the CNI.\textsuperscript{410} It serves the same functions as in the SO, namely indication of seriousness and being capable of independently bearing civil liability.\textsuperscript{411}

However, the general rule of the Donation Law\textsuperscript{412} should also apply to the CNI.

bb) Investment of assets

As in the case of SOs, the CNI Regulations do not contain any provisions on investment of assets of a CNI. “Nonprofit activities” in Art. 2 of the CNI Regulations are understood by the Commentary to allow income deriving from a CNI providing services.\textsuperscript{413} Similar to the SO, the CNI Regulations determine that “asset resources” must be lawfully obtained.\textsuperscript{414} The Commentary interprets assets as being all “economic resources” possessed and used by the CNI that may be calculated in cash, including all kinds of property, claims, and “other rights.”\textsuperscript{415} These resources would mainly derive from fundraising in between the promoters of the CNI, income for compensated services, the acceptance of financial aid and donations, and “other legal income.”\textsuperscript{416} All three Model Statutes for CNIs contain a list of resources for expenditures of CNIs that, like the corresponding list for SOs, includes the items “income from developing activities or services within the

\textsuperscript{405} \textit{OFFICIAL COMMENTARY ON SOS AND CNIS} (supra note 111), p. 14.
\textsuperscript{406} Art. 29, SO Regulations. The \textit{OFFICIAL COMMENTARY ON SOS AND CNIS} (supra note 111), p. 68, explains only vaguely that the methods for increasing the assets of SOs must “comply with the provisions on finance and banking” (财政金融管理). Interestingly the Commentary states here that the assets of Chinese SOs are part of the “socialist public property” (社会主义公共财产).
\textsuperscript{407} Art. 30, Model Statutes for SOs.
\textsuperscript{408} Regarding the approval requirement, see Art. 48, Model Statutes for SOs.
\textsuperscript{409} Art. 35, clause 1, Model Statutes for SOs. For economic activities of SOs, see below at VII A 2.
\textsuperscript{410} See supra at II C 3.
\textsuperscript{411} Commentary on SOS and CNIs (supra note 111), p. 125 et seq.
\textsuperscript{412} See supra at IV B 1 a aa.
\textsuperscript{413} \textit{OFFICIAL COMMENTARY ON SOS AND CNIS} (supra note 111), p. 110.
\textsuperscript{414} Art. 21, CNI Regulations.
\textsuperscript{415} \textit{OFFICIAL COMMENTARY ON SOS AND CNIS} (supra note 111), p. 150.
\textsuperscript{416} Id.
approved business scope” and “other legal income.” Investment opportunities seem therefore to depend on the statutes of the corresponding CNI approved by the registration and administrative authority.

A duty of care regarding investment of assets is stipulated neither in the CNI Regulations nor in the Model Statutes for CNIs. The only legal source for this duty is Art. 17, para. 2, Donation Law.

d) Charitable Trust

aa) Maintenance of capital
Regarding maintenance of capital in a charitable trust, the Trust Law contains no such statutory duty. In contrast, Art. 9, Trust Law leaves matters like the term of the trust, the method of administering the trust property, and the form and method by which the beneficiary is to receive the benefits of the trust to be determined by the trust document, i.e., the trust contract, will, or other written documentation. It can be concluded from this that there is freedom of contract to a certain degree concerning the question of maintenance of capital in a charitable trust.

bb) Investment of assets
Regarding investment of assets of a charitable trust, the Trust Law stipulates that the trust property and income must not be used for non-public benefit purposes. However, this clause does not prohibit a charitable trust from investing – e.g., in shares – and using the profits from this trading in shares for public benefit purposes. Whether the trustee is allowed to use trust property for investment and then use the profits from this investment for public benefit purposes, or whether the trust property must be used directly for public benefit purposes depends on the trust document.

On the subject of the duty of prudence, the Trust Law declares that in administering the trust property the trustees must “scrupulously carry out their duties” and “fulfill their obligation to administer the trust property honestly, in good faith, with caution and effectively.” However, how these duties should be interpreted and what precisely is expected from the trustee fulfilling these duties is not well established.

2. Tax Law
Chinese tax law is silent on the issue of duty of prudence.

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417 Art. 26, No. 3 and 6, Model Statutes for CNIs (Legal Persons); Art. 21, No. 3 and 6, Model Statutes for CNIs (Partnerships); Art. 9, No. 3 and 6, Model Statutes for CNIs (Individual Entrepreneur).
418 Regarding the approval requirement, see Art. 40, Model Statutes for CNIs (Legal Persons); Art. 33, Model Statutes for CNIs (Partnerships); Art. 18, Model Statutes for CNIs (Individual Entrepreneur).
419 On economic activities of CNIs, see below at VII A 3.
420 See Art. 8, para. 2, Trust Law.
421 Art. 25, Trust Law. On economic activities of a charitable trust, see below at VII A 4.
422 See Lusina Ho (supra note 353), p. 106 et seq.
Chinese tax law does not set up any requirements concerning the duty of prudence, but there are several rules in the Donation Law and the organizational laws for NPOs.

1. General Rules for Donations

The Donation Law stipulates that recipients who change the nature or use of a donation without the donor’s permission are to be ordered by a government department above the county level to correct their error, and are to be given a warning. If they refuse to correct their error, the government may, with the consent of the donor, turn over the donation to another public benefit SO or “public benefit purpose nonprofit public institution” with the same or similar purpose.

2. Foundations

It is commonly accepted that a significant feature of the foundation is that the purpose may only be altered in contravention of the founder’s intentions – if at all – under severely limited and exceptional circumstances. It is accordingly surprising that the wording of the law in China gives no corresponding protection against alteration of purposes. Rather, alteration of purposes is treated as a normal amendment of the statutes of the foundation, requiring a two-thirds majority of directors, consent of the sponsor organization, as well as the approval of the registration and administrative authority. There is no indication in either the Foundation Regulations 2004 or the Model Statutes for Foundations that these bodies have to observe founder intentions in approving any amendment to the statutes of the foundation.

This lack of protection in the wording of the law against alteration of foundation purposes not wished for by the founder is even more surprising in that Chinese law confers the right on the donor to object to such unwished for alterations by means of a “Donation Agreement.” It may therefore be asked whether the determination of purposes in the statutes of the foundation constitutes a “Donation Agreement.” However, this question is far from certain, as differing terminology is used for the initial endowment and donations. It would be possible to draw an inference by analogy, but no one could be sure whether the Chinese authorities or courts would follow this view. The Official Commentary on Foundations does not discuss this question, suggesting an oversight on the part of the legislators.

425 Art. 28, clause 1, Donation Law (supra note 30).
426 Public institutions that are out of the scope of this article (see supra at I B).
427 Art. 28, clause 2, Donation Law (supra note 30).
428 See Seifart/von Campenhausen/Hof (supra note 52), § 8 Rn. 104 et seq.
430 捐赠协议.
3. Social Organizations

Financial aid and donations to SOs must be used in compliance with purposes, methods, and timescale as agreed with the persons providing financial aid or donors respectively. The Official Commentary on SOs and CNIs does not deal with the question of how financial aid and donations are to be used if the parties do not agree on a specific purpose, method, and timescale.

4. Civil Non-business Institutions

The rule for SOs – that financial aid and donations must be used in compliance with purposes, methods, and timescale as agreed with the persons providing financial aid or with donors – applies also to CNIs.

5. Charitable Trust

In a (charitable) trust, the trustee has the duty to explain details about the administration, operation, and disposition of the trust assets as well as the income and expenses in relation to the trust assets to the settlor. Trustees must not violate the intent of the trust when carrying out the disposition of the trust assets and must not cause losses to the trust assets because of breaching their administrative duties or handling trust affairs in an inappropriate manner.

V. Governance and Enforcement

In the governance of NPOs in China there is no clear demarcation between internal governance and external state supervision. This is because the sponsor organization plays a role in both. On the one hand, the sponsor organization has certain rights concerning the appointment and dismissal in the board of directors and the supervisory board in foundations and in the CNIs as legal persons. On the other hand, along with the registration and administrative authorities, the sponsor organization is involved in state supervision of the establishment and operation of the NPO.

The governance of Chinese-foreign cooperation in the field of education, which is established in the form of a (legal person or non-legal person) CNI, is subject to a special set of regulations.

A. Internal Governance

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432 Art. 29, para. 3, clause 1, SO Regulations.
433 See OFFICIAL COMMENTARY ON SOS AND CNIS (supra note 111), p. 69 et seq. (omitting to deal with this question).
434 Art. 21, para. 3, clause 1, CNI Regulations.
435 Art. 20, para. 1, clause 2, Trust Law (supra note 31).
436 Art. 22, para 1, clause 1, and Art. 23, Trust Law (note 31).
437 See below at V A 1 b and V A 3 b.
438 See below at V B 1.
439 See supra note 186.
1. Foundations

a) Board of Directors

For foundations, the board of directors is characterized under the Foundation Regulations 2004 as “the strategic decision-making body of the foundation.”

aa) Appointment and dismissal

The Foundation Regulations 2004 contain some provisions on the composition of the board of directors. It must comprise at least 5 and a maximum of 25 members. A director’s period of office may not exceed five years, but re-election is possible.

The procedure for appointment and dismissal of the directors is not stipulated in the Foundation Regulations 2004 itself but only in the Model Statutes for Foundations: Candidates for the initial board of directors are to be nominated by the sponsor organization, “important donors,” and the initiators of the foundation, with actual appointments made following “mutual consultation.” Also with the subsequent elections of the board of directors, the sponsor organization may nominate candidates alongside the directors and “important donors.” How these subsequent elections run in detail is only vaguely provided for in the Model Statutes for Foundations. The dismissal of directors and expansion of the number of members in the board of directors must be adopted by a decision of the board of directors and approved by the sponsor organization. Results of the elections and dismissals of directors must be put on file with the registration and administrative authority.

The directors elect a chair, vice-chair, and general secretary of the foundation from their number with a two-thirds majority.

bb) Tasks

The tasks of the board of directors of foundations are laid down not in the Regulations on Foundations 2004, but in Art. 12 of the Model Statutes for Foundations.

These include:

- formulation and amending the statutes of the foundation;
- election and dismissal of the chair, the vice-chair, and the general secretary;
- decision on plans for significant business activities including plans for the raising, management, and use of funds;
- examination and approval of the annual budget regarding income and expenses;
- establishing of the internal management system;

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440 Art. 21, para. 1, Foundation Regulations 2004.
441 Art. 20, para. 1, Foundation Regulations 2004.
443 Art. 10, No. 1, Model Statutes for Foundations.
444 Art. 10, No. 2, Model Statutes for Foundations provides that for subsequent elections, a “leading group for the change of office” must be organized which is obliged to arrange that a new board of directors is formed from all candidates. The composition of this “leading group” and who ultimately elects the new board of directors is not determined. It is conceivable that the members of the leading group have the function of electors and themselves choose from among the nominated candidates. The wording of the Model Statutes for Foundations also allows the construction, however, that the leading group merely serves to organize the election among the sponsor organization, the directors, and “important donors.”
446 Art. 10, No. 3, Model Statutes for Foundations.
decisions on the establishment of working bodies, branch offices, and representative offices;
– decisions on the appointment of a vice general secretary and important persons in charge for each body of the foundation nominated by the general secretary;
– hearing and deliberating the working report of the general secretary and examining the work of the general secretary;
– decisions on the division, merger, and termination of the foundation;
– decisions on other significant matters.

The chair of the board of directors acts as the so-called “legal representative” of the foundation. The Model Statutes for Foundations in addition empower the chair to convene and chair meetings of the board of directors, supervise implementation of board resolutions, and officially sign important documents on behalf of the foundation. No powers of the vice-chair and general secretary are provided for in either the Foundation Regulations 2004 or the Model Statutes for Foundations. However, the latter contain a clause providing that the vice-chair and general secretary work under the guidance of the chair.

cc) Internal structure of the board of directors

Close analysis of the provisions of the Foundation Regulations 2004 and the Model Statutes for Foundations reveals a distinction between executive directors and non-executive directors. First, the Model Statutes for Foundations provide that the board of directors is to decide as a body only on “significant matters.” In addition, the Model Statutes for Foundations contain a catalogue of powers in the field of day-to-day business management, which foundations may confer either on the general secretary or the chair. For example, the catalogue lists the power to guide the continuing work of the foundation and the various foundation bodies and to carry out resolutions of the board of directors. The powers listed in this catalogue of the general secretary or the chair may not overlap. Nothing further is said regarding the powers of the vice-chair.

According to the conception of the Model Statutes for Foundations, the general secretary and/or the chair are seen as executive bodies.

There are indications that the Model Statutes for Foundations rather assumed that the general secretary conducts day-to-day business of the foundation, because under Art. 12, No. 8, Model Statutes for Foundations, not the chair but rather the general secretary has to present a working report to the board.

A further indication of this separation between executive and non-executive directors and of the function of the general secretary as executive director is found in the remuneration provisions: Only directors who are employed full-time may receive remuneration, and at least two-thirds of directors must serve on an honorary basis (un-remunerated). The general secretary must serve full-time. Hence, assuming the smallest possible board of five members, only the general

449 Art. 28, para. 1, Model Statutes for Foundations.
450 Art. 28, para. 2, Model Statutes for Foundations.
451 Art. 12, No. 10, Model Statutes for Foundations. Generally a simple majority is required for the adoption of a resolution, with a two-thirds majority for important resolutions, Art. 21, para. 3, Foundation Regulations 2004. For example, amendments to the statutes of the foundation and resolutions on significant fundraising and investment activities require a qualified majority of directors.
452 Art. 20, para. 3, Model Statutes for Foundations.
455 Art. 23, No. 2, Model Statutes for Foundations.
secretary (one-third of the members) may be remunerated, thus also acting as executive director according to the conception of the Model Statutes for Foundations.

This separation between executive and non-executive directors is at the same time an internal regulatory mechanism, through which the non-executive directors supervise the executive directors. To this extent, the Chinese governance of foundations resembles the Anglo-American board system.

This internal regulatory function is strengthened by the personal requirements that Chinese law imposes on directors.

No person may be elected as chair, vice-chair, or general secretary who has been convicted of criminal offense or who is held to be unreliable in that they previously served as chair, vice-chair, or general secretary to a foundation whose registration was withdrawn because of illegal activities.\(^\text{456}\)

In order to guarantee the independence of directors from one another, no close family relationships between directors of a fundraising foundation are allowed. However, in a non-fundraising foundation, up to a third of directors are allowed to be closely related\(^\text{457}\) – this limited privilege constituting the sole legal difference in the governance of fundraising and non-fundraising foundations.\(^\text{458}\) The Official Commentary fails to explain what constitutes a “close family relationship.” This concept arises under Chinese law in various legal contexts, albeit defined in different ways.\(^\text{459}\)

As a further limitation, the Foundation Regulations 2004 lays down that chair, vice-chair, and general secretary of the foundation may not at the same time be “state employees.”\(^\text{460}\) This regulation, previously laid down with slightly different wording in the Foundation Measures 1988,\(^\text{461}\) is seemingly intended to effect a certain independence from the state authorities, which can be quite desirable from the viewpoint of the founder. It is, however, unclear who is to be regarded as a “state employee.” According to the Official Commentary on Foundations, the broad definition of the concept of “state employees” under the Chinese Criminal Law\(^\text{462}\) should be construed more narrowly in its application to foundation law.\(^\text{463}\) However,
there is no justification given in the commentary for the divergence in meaning of the concept from criminal law. 464

Finally, the Foundation Regulations 2004 provide that the chair, as legal representative of the foundation, may not at the same time be the legal representative of another organization. 465 This ruling is intended to avoid any potential conflicts of interests. 466

Particular limitations apply to foreign nationals. A foreign national may only serve as chair of fundraising foundations whose initial endowment originates from abroad. 467 The Official Commentary on Foundations justifies this in that foreign nationals are as a rule less reliable. 468 In addition in this case, the MoCA is the responsible registration and administrative authority. 469 Finally, foreign nationals acting as chair, vice-chair, or general secretary of a Chinese foundation are subject to a residence requirement in China of at least three months in the year. 470

b) Supervisory Board

A further controlling body of the foundation alongside the non-executive directors 471 is the supervisory board. 472 This involves the combination of the Anglo-American one-tier and European two-tier systems, unusual in other countries, but also prescribed as compulsory in China for listed companies limited by shares. 473

The term of office of supervisory board members corresponds to that of directors, and re-election is also possible. 474

The supervisory board of the foundation is empowered to oversee board compliance with laws and the statutes of the foundation and to check foundation accounts. 475 For this, supervisory board members have rights of attendance, interpellation, and to make proposals in the board of directors. 476

The Official Commentary on Foundations emphasizes the function of the supervisory board to oversee the work of the foundation in the interests of the owners and the public. 477 In undertaking regulation, the supervisory board has the duty to work together with the registration and administrative authority, the sponsor

464 The reason for the narrower construction of the concept is clear: as the foundation in China hitherto has been established by state bodies or with state support, there is a strong tendency to appoint state employees to leading positions in the foundation. Already during the validity of the Foundation Measures 1988, the prohibition (supra note 461) was apparently not strictly observed. See Estes, Emerging Chinese Foundations: The Role of Private Philanthropy in the New China, in: REGIONAL DEVELOPMENT STUDIES, Vol. 4 (1998), p. 165 et seq. (at 174): “Government approval of foundation activities is often made easy by the fact that the majority of the members of their boards of directors are either retired senior civil servants or persons who hold important posts in the ministry under whose sponsorship the foundation operates. In the largest and most prestigious foundations, a government minister will often serve as the foundation’s honorary chairperson.”
466 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 104.
468 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 105.
471 See above at V A 1 a cc.
472 Art. 22, para. 1, clause 1 and clause 2, Foundation Regulations 2004.
477 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 100.
organization, and also the responsible finance and taxation authorities, and to inform
them of problems which may arise.\textsuperscript{478}

This position of the supervisory board is reflected in the composition of its
members, who are appointed and dismissed by “important donors,” the sponsor
organization, and the registration and administrative authority.\textsuperscript{479} The Foundation
Regulations 2004 and Model Statutes for Foundations contained no provision on the
number of supervisory board members. By assuming the standard situation in which
nobody is willing to waive his or her rights, one might conclude that foundations
should have at least three supervisory board members. However, an analysis of the
statutes of foundations available in the Internet reveals that supervisory boards with
three members are the exception, while most of the supervisory boards have one or
two members.\textsuperscript{480}

Supervisory board members must not be remunerated.\textsuperscript{481}

2. SOs

Regarding SOs, no detailed rules on the organizational structure is provided by the
SO Regulations,\textsuperscript{482} but more details can be found in the Model Statutes for SOs.

There are two organs of SOs, namely the general meeting of members and the
board of directors. There is no supervisory board in an SO.

a) General Meeting of Members

According to the Model Statutes, in an SO the body with the highest authority is the
general meeting of members (or the members’ congress).\textsuperscript{483} It has the following
functions and powers:

\begin{itemize}
  \item formulation and amending the statutes of the SO;
  \item election and dismissal of directors;
  \item deliberating the working report and the financial report;
  \item deciding on the termination of the SO;
  \item decisions on other significant matters.\textsuperscript{484}
\end{itemize}

The list is not conclusive.

The general meeting of members (or the members’ congress) must convene at
least every five years and must be determined in the statutes of the SO.\textsuperscript{485} However,
if special circumstances require, the meeting may be advanced or postponed after
reporting to the sponsoring organization and approval by the registration and
administrative authority.\textsuperscript{486} Postponing the meeting must not exceed one year.\textsuperscript{487}

\textsuperscript{478} Art. 22, para. 3, Foundation Regulations 2004.
\textsuperscript{479} Art. 18, No. 1 and No. 2, Model Statutes for Foundations.
\textsuperscript{480} See von HippeI/Pißler (supra note 32), p. 714.
\textsuperscript{481} Art. 23, para. 4, Foundation Regulations 2004, Art. 20, clause 2, Model Statutes for Foundations.
\textsuperscript{482} Art. 14, SO Regulations only stipulates that “the system of democratic organization and administration
and the procedure for generating the executive organ” must be determined in the statutes of the SO.
\textsuperscript{483} Art. 14, Model Statutes for SOs.
\textsuperscript{484} Art. 14, Model Statutes for SOs.
\textsuperscript{485} Art. 16, clause 1, Model Statutes for SOs.
\textsuperscript{486} Art. 16, clause 2, Model Statutes for SOs.
\textsuperscript{487} Art. 16, clause 3, Model Statutes for SOs.
b) Board of Directors

aa) Appointment and dismissal
According to the Model Statutes, SOs also have a board of directors serving as the “executive organ of the general meeting of members (or the members’ congress).”\(^{488}\) Directors are elected and dismissed by the general meeting of members (or the members’ congress) of the SO.\(^{489}\) SOs with “relatively many directors” may also establish a standing committee of the board of directors.\(^{490}\) The standing committee may only comprise up to one-third of the members of the board of directors.\(^{491}\) Members of this standing committee are elected by the board of directors.\(^{492}\) The board of directors (not its standing committee\(^{493}\)) elects (and dismisses) a chair (or president), vice-chair (or vice-president), and general secretary of the SO.\(^{494}\) There are certain conditions stipulated regarding the position of a chair (or president), vice-chair (or vice-president), and general secretary in an SO, e.g., the person must “uphold the line, guiding principles, policy and politics of the [Communist] Party” and must generally not be older than 70 years.\(^{495}\)

bb) Tasks
In an SO, the board of directors must perform the following tasks in accordance with Art. 18 of the Model Statutes for SOs:

- executing the decisions of the general meeting of members (or the members’ congress);
- election and dismissal of the chair (or president), vice-chair (or vice-president), and general secretary;
- preparation and convening of the general meeting of members (or the members’ congress);
- reporting to the general meeting of members (or the members’ congress) about the work of the SO and the financial situation;
- decisions on the enrollment and removal of members;
- decisions on the establishment of working bodies, branch offices, representative offices, and “substantive bodies”;
- decisions on the appointment of vice general secretary and important persons in charge for each body of the SO;
- guiding the work carried out by each body of the SO;
- establishing of the internal management system;
- decisions on other significant matters.

The list is not conclusive.

The standing committee of the board of directors of an SO may exercise functions and powers of the board of directors in No. 1, 3, 5, 6, 7, 8, and 9 while the board of

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\(^{488}\) Art. 17, Model Statutes for SOs.
\(^{489}\) Art. 14, No. 2, Model Statutes for SOs.
\(^{490}\) Art. 21, clause 1, Model Statutes for SOs.
\(^{491}\) Art. 21, clause 2, Model Statutes for SOs.
\(^{492}\) Art. 21, clause 2, Model Statutes for SOs.
\(^{493}\) See Art. 21, clause 2, Model Statutes for SOs.
\(^{494}\) Art. 18, No. 2, Model Statutes for SOs.
\(^{495}\) Art. 24, Model Statutes for CNIs as legal persons. But see Art. 25, Model Statutes for CNIs as legal persons: after reporting to the sponsor organization and approval of the registration and administrative authority, a person older than 70 years may also hold the position in question.
directors is not in session.\textsuperscript{496} The standing committee is responsible to the board of
directors.\textsuperscript{497}

In general, the chair (or president) of the SO holds the post of the “legal
representative” of the SO.\textsuperscript{498} However, the Model Statutes for SOs stipulate that “if
necessary under special circumstances” also the vice-chair or the general secretary is
allowed to act as “legal representative” after reporting accordingly to the sponsor
organization and receiving the approval of the registration and administrative
authority.\textsuperscript{499}

The functions and powers of the chair (or president) and the general secretary are
also listed in the Model Statutes for SOs.

Art. 28 of the Model Statutes for SOs stipulate the following not conclusive list
of functions and powers of the chair (or president):

– convening and chairing the meetings of the board of directors (or of its standing
  committee);
– examining the implementation of decisions of the general meeting of members
  (or the members’ congress) and of the board of directors (or of its standing
  committee);
– signing important documents on behalf of the SO.

According to Art. 29 of the Model Statutes for SOs, the general secretary has the
subsequent functions and powers, which are not conclusive:

– directing the daily work carried out by the working bodies and organizing the
  implementation of the annual working plans;
– coordinating the work carried out by branch offices, representative offices, and
  “substantive bodies”;
– nomination of the vice general secretary and important persons in charge for the
  working bodies, branch offices, representative offices, and “substantive bodies”
  and delivering the nomination to the board of directors (or of its standing
  committee) for decision;
– decisions on the appointment of full-time working personnel, working bodies,
  representative offices, and “substantive bodies”;
– handling of other day-to-day matters.

From the division of tasks in Art. 18, 28, and 29 of the Model Statutes for SOs
follows – similar to the structure of the board of directors in foundations – the
distribution of tasks between executive and non-executive directors: The general
secretary is supposed to be the executive director because he carries out the daily
work, while the members of the board of directors have only the right to decide on
more important decisions.

3. CNIs

Similarly to SOs, for CNIs there are no comprehensive rules on the organizational
structure in the CNI Regulations.\textsuperscript{500} Furthermore, only the Model Statutes for CNIs

\textsuperscript{496} Art. 21, clause 2, Model Statutes for SOs.
\textsuperscript{497} Art. 21, clause 2, Model Statutes for SOs.
\textsuperscript{498} Art. 27, para. 1, Model Statutes for SOs.
\textsuperscript{499} Art. 27, para. 1, Model Statutes for SOs.
\textsuperscript{500} Art. 10, No. 3, CNI Regulations leave the decision on “the system of organization and administration”
to the statutes.
as legal persons require for the establishment of a board of directors as the “the strategic decision-making body” in a CNI. 501

a) CNIs as individual entrepreneurs
There are no organs required in a CNI as individual entrepreneur.

b) CNIs as partnerships
In a CNI as a partnership, a meeting of partners is obligatory. 502 The meeting of partners is composed of all partners – “the strategic decision-making body” of the CNI – and has the following decision-making powers largely similar to the powers of the board of directors in CNIs as legal persons: 503

– formulation and amending the statutes of the CNI;
– business activities planning;
– the annual budget regarding income and expenses and the outline for the final accounting of revenue and expenditure;
– the outline for increasing the initial funds;
– division, merger, and termination of the CNI;
– appointment and dismissal of the chief of the unit (or head of the institute, chairman, etc.) and a deputy chief of the unit (and corresponding positions for the other titles), the person in charge of financial affairs and management personnel;
– the setting up of internal bodies;
– establishing of the internal management system;
– wages and remuneration for employed personnel;
– disposal of property of the CNI;
– changes of the name of the CNI;
– entry and exit of partners. 504

The list is not conclusive.

The meeting of partners or all partners have to decide to entrust a person (or persons) in charge of the partnership. 505 This person (or these persons) in charge of the partnership has (or have) the following functions and powers:

– convening and chairing the meeting of partners;
– examining the implementation of decisions of the meeting of partners;
– officially signing documents on behalf of the CNI;
– other functions and powers provided by laws, provisions, and the statutes of the CNI. 506

501 Art. 10, para. 1, Model Statutes for CNIs as legal persons.
502 Art. 10, et seq. Model Statutes for CNIs as partnerships.
503 See below at V A 3 b.
504 Art. 12, Model Statutes for CNIs as partnerships.
505 Art. 13, Model Statutes for CNIs as partnerships.
506 Art. 15, Model Statutes for CNIs as partnerships.
c) CNIs as legal persons

Only the Model Statutes for CNIs as legal persons require the establishment of a board of directors as the “the strategic decision-making body” in a CNI. It must comprise at least 3 and a maximum of 25 members. A director’s period of office may not exceed three or four years. Directors are elected by the initiators (including the “contributors [of assets]”), employees’ representatives (themselves elected by all employees), and “corresponding units” (the sponsoring organization). The board of directors appoints (and dismisses) a chief of the unit (or dean, head of the institute, chairman, etc.) and a vice-chief of the unit (and corresponding positions for the other titles) and the person in charge of financial affairs. In addition, the board of directors also appoints and dismisses a president and vice-president with a majority vote of all members of the board of directors.

In a CNI as a legal person, the board of directors has the following decision-making powers according to Art. 11 of the Model Statutes for CNIs as legal persons:

– amendments of the statutes;
– plans for business activities;
– the annual budget regarding income and expenses and the outline for the final accounting of revenue and expenditure;
– the outline for increasing the initial funds;
– division, merger, and termination of the CNI;
– appointment and dismissal of the chief of the unit (or dean, head of the institute, chairman, etc.) and a deputy chief of the unit (and corresponding positions for the other titles) and the person in charge of financial affairs;
– dismissal of directors and expansion of the number of members in the board of directors;
– the setting up of internal bodies;
– establishing of the internal management system;
– wages and remuneration for employed personnel.

In addition, the members of the board of directors appoint and dismiss the president and vice-president with a majority vote of all its members, according to Art. 13 of Model Statutes for CNIs as legal persons.

The president of a CNI has the subsequent functions and powers:

– convening and chairing the meetings of the board of directors;
– examining the implementation of decisions of the board of directors;
– other functions and powers stipulated in laws, provisions, and in the statutes of the CNI.

The chief of the unit (or dean, head of the institute, chairman, etc.) is responsible to the board of directors and exercises the following functions and powers:

– directing the daily work carried out by the CNI and organizing the implementation of the decisions of the board of directors;

507 Art. 10, para. 1, Model Statutes for CNIs as legal persons.
508 Official Annotation to Art. 10 in the Model Statutes for CNIs as legal persons.
509 Official Annotation to Art. 10 in the Model Statutes for CNIs as legal persons. Whether re-election is possible is not clear.
510 Art. 10, para. 2, Model Statutes for CNIs as legal persons.
511 Art. 11, No. 6, Model Statutes for CNIs as legal persons.
512 Art. 13, Model Statutes for CNIs as legal persons.
513 Art. 28, Model Statutes for CNIs as legal persons.
Organizing the implementation of the annual plans for business activities of the CNI;

drafting the outline of the setting up of internal bodies;

drafting of the internal management system;

submitting the appointment or dismissal of deputy chiefs and the person in charge of financial affairs;

appointment and dismissal of the person in charge of internal bodies.\(^{514}\)

The list is not conclusive.

The chief of the unit (etc.) attends the sessions of the board of directors as a nonvoting delegate.\(^{515}\)

“Legal representative” of the CNI might be the president of the board of directors or the chief of the unit (etc.)\(^{516}\) There are certain situations stipulated concerning persons who might not become a “legal representative,” e.g., a person who is not a resident of the PR China.\(^{517}\)

From the Model Statutes for CNIs as legal persons, the following distribution of tasks may be concluded: The chief of the unit is supposed to be the executive manager because he carries out the daily work, while the members of the board of directors have the right to decide on more important decisions. The board of directors has a very powerful position combining the rights of a shareholders’ meeting and the board of directors in a for-profit business corporation. However, the right to appoint members of the board of directors is vested with initiators, employees’ representatives, and “corresponding units” without a clear procedure for their appointment.

d) Supervisory Board

It is compulsory for a CNI as a legal person to have a supervisory board.

As in the foundation, the term of office of supervisory board members of CNIs corresponds to that of directors, and re-election is also possible.\(^{518}\)

The supervisory board in a CNI has the following functions and powers:

- examining the finances of the CNI;

- supervision of acts of directors and of the chief of the unit (or dean, head of the institute, chairman, etc.) in violation of laws, provisions, or the statutes;

- demanding correction of acts of directors and of the chief of the unit (or dean, head of the institute, chairman, etc.) that are damaging to the interests of the CNI.\(^{519}\)

Supervisors attend the sessions of the board of directors as nonvoting delegates.\(^{520}\)

Supervisors are produced and replaced from persons recommended by the initiators (including the “contributors [of assets]”), the employed personnel of the CNI, and by “corresponding units” (most importantly by the sponsoring organization).\(^{521}\) The representatives of the employed personnel are to be produced

\(^{514}\) Art. 29, Model Statutes for CNIs as legal persons.
\(^{515}\) Art. 29, para. 2, Model Statutes for CNIs as legal persons.
\(^{516}\) Art. 24, Model Statutes for CNIs as legal persons.
\(^{517}\) Art. 25, Model Statutes for CNIs as legal persons.
\(^{518}\) Art. 20, para. 2, Model Statutes for CNIs as legal persons.
\(^{519}\) Art. 22, para. 1, Model Statutes for CNIs as legal persons.
\(^{520}\) Art. 22, para. 2, Model Statutes for CNIs as legal persons.
\(^{521}\) Art. 21, para. 1, clause 1, Model Statutes for CNIs as legal persons.

by democratic elections of employed personnel of the CNI. Directors, the chief of the unit (or dean, head of the institute, chairman, etc.) and the person in charge of financial affairs may not take the position of a supervisor.

3. Charitable Trust

In a charitable trust, the establishment of a trust supervisor is mandatory. Trust supervisors are to be stipulated by the trust document. Where the trust document has not made a stipulation, a supervisor is appointed by the “public benefit administrative body.” The trust supervisor has the right to protect the interests of beneficiaries in his/her own name and to file a suit or carry out other legal acts. Besides, the trust supervisor has to ratify the annual report on their handling of trust affairs and the state of trust assets and – in the case of the termination of a charitable trust – the liquidation report, both prepared by the trustees.

4. The Individual Member and Its Protection

The SO Regulations do not provide for any rules regarding the protection of the members of SOs. It just stipulates that “the qualification, rights, and duties of members” must be determined in the statutes of the SO. The Model Statutes for SOs list the following rights of members:

- active and passive voting rights and decision-making rights;
- participating in activities of the SO;
- priority right to receive services of the SO;
- right to criticize, to make proposals, and to supervise the work of the SO;
- voluntarily joining and being free to exit the SO.

The list is not conclusive.

In a CNI as a legal person or partnership, “initiators” or “partners” might be seen to be functionally comparable to members in an SO.

B. State Supervision (External Supervision)

1. Supervision with Regard to the Establishment and Operation of Nonprofit Organizations

The competences in state supervision of nonprofit organizations are not clearly demarcated between the registration and administrative authorities and the sponsor organizations.

522 Art. 21, para. 1, clause 2, Model Statutes for CNIs as legal persons.
523 Art. 21, para. 2, Model Statutes for CNIs as legal persons.
524 Art. 64, para. 1, Trust Law.
525 Art. 64, para. 2, Trust Law.
526 Art. 65, Trust Law.
527 Art. 67, Art. 71, Trust Law.
528 The duties of members are listed in Art. 11, Model Statutes for SOs.
529 Art. 10, Model Statutes for SOs.
530 On the rights of “initiators” and “partners” below at V C 5.
531 Also noted by ZHU Weiguo, Analysis of the Regulations of the Administration of Foundations [《基金会管理条例》评析], in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11) p. 421, 431.
Both the registration and administrative authorities and the sponsor organizations are involved in the establishing procedure of foundations, SOs, and CNIs. However, for charitable trusts, as regards the wording of the Trust Law, only the approval of the “public benefit administrative body” is required.

Under the Foundation Regulations 2004, the registration and administration authority is responsible for the day-to-day regulation of the activities, while the sponsor organization should guide and supervise the charitable activities. Regarding SOs and CNIs, the sponsor organization supervises and guides these nonprofit organizations “to carry out activities in accordance with the constitution, laws, provisions, state policies, and with the statutes.” The registration and administration authority is only concerned with supervising and examining violations against the SO Regulations and the CNI Regulations. In a charitable trust, the public welfare administrative bodies have to examine the trustee’s handling of the affairs and the state of the trust’s assets.

The registration and administrative authorities as well as the sponsor organizations are additionally involved in the annual inspection of foundations, SOs, and CNIs. For charitable trusts, the annual report of the trustees on their handling of trust affairs and the state of trust assets must be submitted to the public benefit administrative body to be verified and approved.

The registration and administrative authorities and the sponsor organizations work together equally on the prosecution of illegal activities, although only the registration and administration authority is empowered to impose “administrative sanctions” against foundations, SOs, and CNIs. Concerning charitable trusts, the public benefit administrative body is not authorized to impose “administrative sanctions,” but may under certain circumstances change the trustee or alter the trust agreement.

It should be noted that registration and administrative authorities may appoint members to the supervisory board of a foundation. The sponsor organizations appoint members to the board of directors and to the supervisory board of foundations and CNIs as legal persons.

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532 Art. 9, Foundation Regulations 2004.
533 Art. 27, No. 1, Art. 28, No. 1 SO Regulations.
534 Art. 19, No. 1, Art. 20, No. 1, CNI Regulations.
535 Art. 62, Trust Law. Registration of a trust is only necessary regarding the trust property if this property is required to carry out registration procedures by law and administrative regulations, Art. 10, Trust Law.
536 Art. 34, No. 2, Art. 35, No. 1, Foundation Regulations 2004
537 Art. 28, No. 2, SO Regulations; Art. 20, No. 2, CNI Regulations.
538 Art. 27, No. 3, SO Regulations; Art. 19, No. 3, CNI Regulations.
539 Art. 67, para. 1, Trust Law.
541 Art. 27, No. 2, Art. 28, No. 3, SO Regulations.
542 Art. 19, No. 2, Art. 20, No. 3, CNI Regulations.
543 Art. 67, para. 2, Trust Law.
545 Art. 27, No. 3, Art. 28, No. 4, Art. 33, SO Regulations.
546 Art. 19, No. 3, Art. 20, No. 4, Art. 25, CNI Regulations.
547 Art. 68, 69, Trust Law.
548 Art. 18, No. 2, Model Statutes for Foundations.
549 Art. 10, No. 1 and Art. 18 No. 1 Model Statutes for Foundations.
550 Art. 10, para. 2 and Art. 21, para. 1, clause 1, Model Statutes for CNIs as legal persons.
2. Supervision with Regard to Tax Matters

Foundations, CNIs as partnership, and CNIs as legal persons are explicitly subject to regulation by the competent taxation authorities.\footnote{Art. 37, para. 2, Foundation Regulations 2004; Art. 23, para. 2, Model Statutes for CNIs as partnerships; Art. 28, para. 2, Model Statutes for CNIs as legal persons.}

3. Supervision with Regard to Other Matters

Foundations, CNIs as partnerships, and CNIs as legal persons are explicitly subject to regulation by the competent auditing authorities.\footnote{Art. 37, para. 2, Foundation Regulations 2004; Art. 23, para. 2, Model Statutes for CNIs as partnerships; Art. 28, para. 2, Model Statutes for CNIs as legal persons.} Furthermore, SOs and CNIs with asset resources granted by the state or receiving donations or financial aid from the public must accept supervision of an auditing organ.\footnote{Art. 30, para. 1, SO Regulations; Art. 22, clause 1, CNI Regulations.}

The asset management system of SOs and CNIs is also subject to the supervision of the financial departments.\footnote{Art. 30, para. 1, SO Regulations; Art. 22, clause 1, CNI Regulations.}

4. Evaluation

China is considering introducing an evaluation mechanism regarding foundations.\footnote{See below at VIII C.}

C. Rights of Third Parties

1. Founders

Whereas most civil law countries emphasize that the “founder” in a foundation (the person who establishes a foundation and transfers a portion of his assets to the foundation) has a very strong position, Chinese foundation law does not even use the concept of a “founder” in this civil law sense.\footnote{Contrast with Taiwanese foundation law which confers on the founder [捐助人] the power to lay down in the statutes the governance of the foundation; see Art. 62, Civil Code of the Republic of China.} The Foundation Regulations 2004 distinguish between the person who applies for the establishment of the foundation (the “initiator”) and the donor, who gives assets to the foundation.\footnote{See Art., 6 para. 2, No. 3 (initiator, 发起人) and Art. 2 (donor, 捐赠人), Foundation Regulations 2004.} The Model Statutes for Foundations introduce the concept of an “important donor,”\footnote{See Art. 10, No. 1, Model Statutes for Foundations (主要捐赠人).} although who precisely qualifies for this status remains unclear. On the one hand, persons could be meant who contribute the initial endowment assets. On the other hand, however, important donors could be seen as those making large donations or endowments after the establishment. It follows in addition from the Model Statutes for Foundations that the person applying to establish the foundation and important donors may be different persons, so that the founder himself need not make a financial contribution to the establishment of the foundation at all.\footnote{See Art. 10, No. 1, Model Statutes for Foundations.}
Assuming the customary picture of an “endowment founder” who establishes a foundation and transfers a portion of his assets to the foundation, according to the Chinese understanding such an “endowment founder” is both initiator and donor. According to the Foundation Regulations 2004, both initiators and important donors have the task of determining the public benefit purpose in the statutes of the foundation. In addition, the initiator and important donor may determine the statutes of the foundation, within the scope of the Model Statutes for Foundations, and nominate candidates for the initial board of directors. The initiator also has the task of filing the application for the establishment of the foundation with the responsible registration and administrative authority. In his capacity as important donor he may also appoint members of the supervisory board.

2. Donor
The donor has relatively powerful rights of control in Chinese laws.

a) Inquiry Rights
According to Art. 21, Donation Law, donors have the right to inquire to receivers about the use and management of donations, and to put forward their opinions and suggestions. The recipients must respond truthfully to the donor’s inquiries. This right of donors is reiterated by the Foundations Regulations 2004.

b) Right to Supervise the Use of Donations
Donors may determine the use of donated assets by means of a “Donation Agreement” with the recipient. If donors donate for “public benefit purpose construction projects” they must conclude such an agreement with the recipients determining the project’s funding, construction, management, and use.

Under Art. 18, Donation Law, recipients may not on their own authority change the use of the donation after reaching a “Donation Agreement” with the donor. If there is an “authentic need” to change the use of the donation, the receiver has to solicit the donor’s consent.

If recipients have changed the nature or use of donations without the donor’s permission, they are to be ordered by a government department above the county level to correct their error, and are to be given a warning. If they refuse to correct their error, the government may with the consent of the donor turn over the donation

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561 Art. 10, No. 1, Model Statutes for Foundations.
562 Art. 6, para. 1, No. 3, Foundation Regulations 2004. See the related application form for the establishment of foundations, to be signed and sealed by the founder, in: OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 192.
563 Art. 10, No. 1 and No. 2, Art. 18, No. 1, Model Statutes for Foundations.
564 Art. 21, clause 2, Donation Law (supra note 30).
566 Art. 12, para. 1, Donation Law.
567 Art. 13, Donation Law.
568 Art. 18, clause 2, Donation Law.
569 Art. 28, clause 1, Donation Law.
to another public benefit SO or “public benefit purpose nonprofit public institution” with the same or similar purpose.

The Foundations Regulations 2004 also include a provision on the “Donation Agreement.” However, unlike in the Donation Law, the task for enforcing the agreement is not vested with the state, but with the donor: According to Art. 39, para. 2, Foundation Regulations 2004, the donor may require compliance with the agreement terms or apply for recovery of the donation before the courts, if the foundation should fail to use the donated assets in accordance with the “Donation Agreement.”

For SOs and CNIs, the donors and persons providing financial aid are not granted any explicit rights to enforce their agreement with the SO or CNI on the use of financial aid and donations.

3. Settlor

a) Inquiry Rights

Settlers in a (charitable) trust have the right to know details about the administration, operation, and disposition of their trust property as well as the income and expenses in relation to the trust property. They also have the right to demand the trustee to provide explanations of such matters and have the right to check, make an excerpt from, or copy trust accounts related to their trust property and to handle other trust documents.

b) Right to Supervise the Use of Trust Assets

When special circumstances unforeseen at the time of setting up the trust lead to the method of administering the trust assets being unfavorable to the realization of the intent of the trust, or to not being in accordance with the interests of the beneficiary, the settlor has the right to require the trustees to adjust the method of administering the trust assets.

Where trustees violate the intent of the trust when carrying out the disposition of the trust assets or cause losses to the trust assets because of breaching their administrative duties or handling trust affairs in an inappropriate manner, the settlor has the right to apply to a people's court to revoke the act of disposition as well as the right to require the trustees to restore the trust assets to its original state or pay compensation.

Where the trustees have violated the intent of the trust when carrying out the disposition of the trust assets or there is gross negligence in the administering, operating, and disposition of the trust assets, the settlor has the right to dismiss the trustees from their position in accordance with the provisions of the trust.

570 Public institutions that are out of the scope of this article (see supra at I B).
571 Art. 28, clause 2, Donation Law.
573 See supra at IV C 3 and IV C 4.
574 Art. 20, para. 1, clause 1, Trust Law (supra note 31).
575 Art. 20, para. 1, clause 2, Trust Law.
576 Art. 20, para. 2, Trust Law.
577 Art. 21, Trust Law.
578 Art. 22, para 1, clause 1, Trust Law.
documentation, or to make application to a people's court for the dismissal of the trustees. 579

4. Beneficiaries

The beneficiary of a trust first of all has the right to receive the trust benefits. 580

According to Art. 49, Trust Law, beneficiaries may exercise the rights enjoyed by settlors stipulated in Art. 20 to 23, Trust Law.

With regard to the charitable trust, a trust supervisor has the right to protect the interests of beneficiaries in his own name and to file a suit or carry out other legal acts. The Commentaries on the Trust Law explain that this arrangement is necessary because the beneficiaries in a charitable trust are generally unspecific, but only become individualized by the time the charitable trust is disbursing benefits. Therefore, the trust supervisor is established by the Trust Law to execute the rights vested within the beneficiaries. 581

5. Initiators or Partners in a CNI

In a CNI as a legal person or partnership, “initiators” or “partners” are given certain rights. In a CNI as partnership, “partners” have the following rights:

– participating in the meeting of partners, exercising the voting right;
– active and passive voting right regarding the person (or persons) in charge of the partnership;
– applying for an amendment of the statutes and relevant rules;
– supervising the financial affairs and implementation of [decisions] of the meeting of the partners;
– exiting the partnership;
– inspecting the minutes of the meeting of the partners and the financial report;
– understanding the business and financial situation of the CNI. 582

The list is not conclusive.

“Initiators” of a CNI as legal person are given the subsequent rights:

– understanding the business and financial situation of the CNI;
– recommending members of the board of directors and the board of supervisors;
– having the right to inspect the minutes of the board of directors and the financial report.

The list is also not conclusive.

6. Employed Personnel in a CNI

Employed personnel of a CNI as legal person have the right to elect employees’ representatives in the board of directors 583 and of the supervisory board. 584

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579 Art. 23, Trust Law.
580 Art. 43 to 48, Trust Law.
581 HU Jihua/ZHANG Guilong (eds.) (supra note 198), p. 220 et seq.; WANG Qing/GUO Ce (supra note 213), p. 154 et seq.
582 Art. 10, Model Statutes for CNIs as partnerships.
583 Art. 10, para. 2, Model Statutes for CNIs as legal persons.
584 Art. 21, para. 1, Model Statutes for CNIs as legal persons.

1. Reporting/Accounting

Art. 20 of the Donation Law proclaims the principle that each fiscal year, recipients of donations must report to the relevant departments of government on the use and management of donations and accept supervision. If necessary, the relevant departments of government may at any time conduct an audit of their financial affairs. These provisions are further elaborated for foundations, SOs, CNIs, and charitable trusts in the relevant laws and regulations.

Foundations, SOs, and CNIs are under the obligation to file annual working reports (年度工作报告) with the registration and administration authority until March 31 of every year for the annual examination. There is also an obligation of trustees to prepare a report for charitable trusts.

However, so far detailed provisions on the annual working reports and the annual examination were issued by the MoCA only for foundations. Foundations not filing the annual reports for the annual examination are subject to “administrative sanctions” that might even lead to the revocation of the registration of the foundation. Although not explicitly stated for SOs and CNIs, this penalty might also apply to these NPOs. The legal consequences for trustees in a charitable trust that do not comply with the duty to prepare an annual report are unclear.

The annual report of foundations has the following content:

- a financial report;
- an auditing report;
- information about activities carried out like fundraising, receiving of donations, and granting of financial aid;
- information about changes regarding personnel and bodies of the foundation.

Content of the annual reports of SOs and CNIs is the same. It must include information about:

- the compliance of the SO or CNI with laws, provisions, and state policies;
- the fulfillment of registration requirements;
- activities carried out in accordance with the statutes of the SO or CNI;
- changes regarding personnel and bodies of the SO or CNI;
- the situation of financial managing.

The Trust Law requires the trustees to prepare the annual report “on their handling of trust affairs and the state of trust assets.”

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585 Art. 36, Foundations Regulations 2004; Art. 31, SO Regulations; Art. 23, CNI Regulations.
586 Art. 67, para. 2, Trust Law.
587 基金会年度检查办法 [Measures for the Annual Examination of Foundations], issued on January 1, 2006.
589 See Art. 33, No. 3, SO Regulations; Art. 25, No. 3, CNI Regulations (providing for “administrative sanctions” in the case that SOs or CNIs do not accept examination and supervision at all or do not accept examination and supervision “in accordance with the provisions”).
591 Art. 31, para. 1, clause 2, SO Regulations; Art. 23, clause 2, CNI Regulations.
592 Art. 67, para. 2, clause 1, Trust Law.
There is more specification on the content of the annual report of foundations in the provisions of the MoCA: First, its financial report must conform with the NPO Accounting System. The NPO Accounting System includes detailed rules on the estimation and valuation of assets and obligations of NPOs as well as on the compilation of a balance sheet. The NPO Accounting System draws from the (even more detailed) “Accounting System for Enterprises” enacted in 2001. The auditing report of foundations must be prepared by a registered auditor and must include an attestation and the mandate contract between the foundation and the auditor. The information about activities carried out – like fundraising, reception of donations, and granting of financial aid – must provide evidence that the foundation has fulfilled its disclosure duties. Finally, the information about changes regarding personnel and bodies of the foundation have to provide evidence that the changes in question have been registered in accordance with relevant provisions with the registration and administration authority; one also has to attach the minutes of the session of the board of directors at the expiration of the office term and the auditing report before the change of the legal representative of the foundation (i.e., the president).

Before filing the annual working report of foundations, SOs, and CNIs with the registration and administration authority, it must be examined and approved by the sponsor organization. The annual report of charitable trusts must be ratified by the trust supervisor and then must be submitted to the “public benefit administrative body” to be verified and approved.

SOs and CNIs are also under an obligation to report to the sponsor organization about receiving and usage of donations and financial aid.

2. Auditors
For foundations, besides the auditing of the financial report in the annual working report, a further audit is required at the expiration of the office term of directors and in the case of a change of the legal representative of the foundation.

SOs and CNIs are required to have an external audit (by a state auditing organ) if they are granted asset resources by the state or if they are receiving donations or financial aid from the public. Auditing is also required at the expiration of the office term of the general meeting of members (or the members’ congress) in SOs and of the person in charge of the CNI as well as in the case of a change of the legal representative of the CNI.
representative of the SO and CNI (if any).\textsuperscript{607} However, it is left open whether this auditing is carried out internally or externally and whether the external auditing is conducted by a state auditing organ or by a registered auditor.\textsuperscript{608}

There is nothing stipulated in the Trust Law on auditing of charitable trusts.

3. Disclosure

Disclosure requirements exist for all forms of NPOs in the PR China. For foundations they are laid down in detail in a provision promulgated by the MoCA in 2006.\textsuperscript{609}

The disclosure duties for NPOs in the PR China are far reaching and to a certain degree resemble the disclosure requirements for listed companies.\textsuperscript{610}

Foundations and representative offices of foreign foundations in the PR China have to publish their annual working report, at the latest 30 days after the examination and approval of the report by the registration and administration authority; the reports must be published in line with formats set and in media designated by the MoCA.\textsuperscript{611}

SOs that are required to do an external auditing because they are granted asset resources by the state or are receiving donations or financial aid from the public, also must make public “the corresponding situation in an appropriate form.”\textsuperscript{612} Furthermore, SOs and CNIs must disclose “in an appropriate form” about receiving and usage of donations and financial aid after reporting to the sponsor organization.\textsuperscript{613}

The annual reports by the trustees of a charitable trust have to be announced by the trustees after ratification of the report by the trust supervisor and verification and approval by the “public benefit administrative body.”\textsuperscript{614}

Foundations additionally have to report continuously on fundraising activities and granting of financial aid, and have to act in response to negative reports in the media.

Fundraising foundations must publish a detailed plan on the proposed use of funds to be raised by the time the fundraising takes place.\textsuperscript{615} During the fundraising activities the actual income and its use must be published “immediately.”\textsuperscript{616} After the fundraising activities the total income and its use must also be published.\textsuperscript{617}
Moreover, a foundation granting financial aid has to publish information on the available programs as well as on the procedures for application and assessment. 618 Results of the assessment have to be published and announced to the applicant. 619 After the end of the program granting financial aid, the use of the used funds and the results of an evaluation (if any) have to be published. 620

Another special disclosure duty arises in the form of a response to reports in the media on the foundation that might have a negative impact. 621 “Disclosure” is defined in the corresponding provisions of the MoCA for foundations as “the disclosure of information […] by foundations and representative offices of foreign foundations in the PR China through the media in the public.” 622 Regarding the continuous disclosure duties, addressees of these duties may choose whether they want to publish the information in print media, radio, television, or on the Internet. 623 However, they must make sure that the information spreads throughout the area where the foundation is carrying out its activities. 624 With regard to the annual working report, the MoCA designates the media where these reports must be published in full text and as a summary. 625 At the beginning of 2006, MoCA designated the webpage of the NPO Affairs Bureau as the medium where the annual working reports should be published. 626 Eighty-four annual working reports were published on that webpage in early 2007. The results of the annual examination of foundations were also published on the webpage of the NPO Affairs Bureau of the MoCA: 73 of 87 foundations listed on three “public announcements” of the NPO Affairs Bureau 627 passed the annual examination. Twelve foundations were found to have “mostly passed” (基本合格). Two foundations did not pass the examination, 628 and one foundation did not participate. 629

VI. Charitable Solicitation

According to the Donation Law, 630 all public benefit SOs, foundations, and “other charitable organizations” (慈善组织) are allowed to receive donations. 631 However, the Donation Law is silent on the issue of solicitation of these donations.

“Measures for Solicitation of Social Welfare Donations on Charity Events” were issued by MoCA in 1994. 632 These Measures – consisting of a meager fifteen articles

621 Art. 8, Measures on Information Disclosure of Foundations (supra note 609).
625 Art. 5, clause 2, Measures on Information Disclosure of Foundations (supra note 609).
626 See Circular, dated January 20, 2006 (Minhan 2006 Nr. 23), supra note 611.
627 These three announcements were issued on June 26, 2006, September 22, 2006, and December 25, 2006 (on file with the authors).
628 Those were the International Scientific Exchange Foundation (中华国际科学交流基金会) and the China Dunhuang Grottoes Conservation Research Foundation (中国敦煌石窟保护研究基金会).
629 This was the Foundation for Revitalizing Chinese Education and Sciences (振兴中华教育科学基金会).
630 See supra note 30.
631 Art. 10, para. 1 and 2, Donation Law.
– set up an approval procedure, but obviously apply only to charitable solicitation carried out at charity events like charity bazaars, charity exhibitions, charity auctions, and so on. They do not provide for rules regarding charitable solicitation in general. On the other hand, the Measures do not limit the undertaking of charity events to a certain form of NPO and do not set up conditions for such undertakings, instead leaving the approval to the discretion of the appropriate approval authority.

For foundations, the rule applies that only fundraising foundations may carry out solicitation of donations “publicly,” while a clear distinction is hard to draw between accepting of donations by non-fundraising foundations and raising them “publicly” by fundraising foundations.

All NPOs receiving donations have to meet certain auditing and disclosure requirements. Fundraising foundations also have to report continuously on fundraising activities.

VII. Economic Activities, Enterprises, and Creditor Protection

A. Economic Activities

1. Foundations

The new Foundation Regulations 2004 have lifted the prohibition to carry out a business in its own name. The Official Commentary on Foundations justifies this in that nonprofit foundations may undertake for-profit commercial activity provided the generated profits are utilized for the public benefit purpose. Consequently, the NPO Accounting System, which is followed by all foundations, defines income to include “donations, membership fees, income from rendering of services, government subsidies, investment returns, sales, and other revenue.”

However, foundations directly receiving tax-deductible donations are not allowed to engage in any business activity unrelated to the public benefit purposes under the

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633 See the preamble of the circular accompanying the Measures (supra note 632).
634 Art. 2 of the Measures (supra note 632) reads: “State organs specialized in carrying out social welfare undertakings, SO and other organizations may conduct solicitation of social welfare donations on charity events on their own. If other [state] organs, SO and enterprise and institutional units or individuals apply to conduct solicitation of social welfare donations on charity events, they must conduct [the charity event] together with the recipient of the donations.”
635 Art. 5 of the Measures (supra note 632) determines that organizations registered centrally have to apply to MoCA, while organizations registered locally have to apply to the civil affairs departments on the provincial level.
636 See supra at II A 3 d.
637 See supra at V D.
638 See above at V D.
639 See Art. 6, clause 2, Foundation Measures 1988 (supra note 25): “Foundations must not operate or manage enterprises.”
640 See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 52.
641 See supra note 7.
642 See the statistics of the NPO Affairs Bureau of the MoCA for 2006 (supra note 86), in which all foundations are listed to follow the NPO Accounting System.
2. **SOs**

It follows from the NPO Accounting System, applied by most of the SOs,\(^{644}\) that SOs might conduct economic activities like rendering of services or sales. However, as in the case of investment of assets of SOs,\(^{645}\) whether or not the specific SO is allowed to carry out economic activities will depend largely on the statutes of the SO in question, subject to approval by the registration and administrative authority.\(^{646}\)

As with foundations, the Notice of the Ministry of Finance and the State Administration for Taxation of 2007\(^{647}\) forbids SOs to directly receive tax-deductible donations to engage in any business activity unrelated to the public benefit purposes.

3. **CNIs**

Instead of applying the NPO Accounting System, quite a number of CNIs are virtually operating following the accounting system of (for-profit) enterprises and are explicitly listing business income in their balance sheet.\(^{648}\) As in the case of SOs, however, economic activities depend on the statutes of the corresponding CNI approved by the registration and administrative authority.\(^{649}\)

4. **Charitable Trusts**

The Trust Law does not contain any provision on economic activities of a charitable trust.

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\(^{643}\) See supra at III E 4.

\(^{644}\) See the statistics of the NPO Affairs Bureau of the MoCA for 2006 (supra note 86), in which all SOs are listed to follow the NPO Accounting System or the accounting system for public institutions.

\(^{645}\) See supra at IV B 1 b bb.

\(^{646}\) Regarding the approval requirement, see Art. 48, Model Statutes for SOs.

\(^{647}\) See supra at III E 4.

\(^{648}\) See the statistics of the NPO Affairs Bureau of the MoCA for 2006 (supra note 86), in which all CNIs are listed to follow the NPO Accounting System, the accounting system of enterprises, or the accounting system for public institutions.

\(^{649}\) See supra at IV B 1 b bb (on SOs) and IV B 1 c bb (on investment activities of CNIs).

\(^{650}\) See above at IV B 1 a bb (on foundations), IV B 1 b bb (on SOs), IV B 1 c bb (on CNIs), and IV B 1 d bb (on charitable trusts).
C. Creditor Protection

The concept of minimum registered capital requirements is known in Chinese company law. However, there are no special provisions for protecting creditors from circumventing such requirements by establishing an NPO.

VIII. Recent Reforms, Reform Proposals, Standards of Best Practice

A. Recent Reforms

The reform of the regulations on foundations in 2004 had major impacts on foundations in China. Most of the reform measures have led to more restrictions and control. First, by contrast to the Foundation Measures 1988, the new regulations take a markedly more restrictive stance regarding the endowment capital requirement, and link this requirement with the permission to raise funds. The new regulations thereby introduced two foundation types, namely the non-fundraising foundation (endowment foundations) and the fundraising foundation (fundraising-oriented foundations). The second major change can be seen in the fact that until 2004 there were no compulsory requirements regarding the governance of foundations in China, whereby the Foundation Regulations 2004 introduced an extensive regulatory system with a number of regulatory mechanisms. In addition to the regulations, the MoCA has published “Model Statutes for Foundations,” mandatory for all foundations, which further define the requirements for the governance of foundations. New requirements were also introduced regarding the annual disbursement and costs for wage and social contributions for staff and administrative as well as a presumed duty to maintain endowment capital. Besides, the Foundation Regulations 2004 have set up disclosure requirements, leading not only to more control but also to more transparency.

On the other hand, the reform lifted some restrictions formerly in place under the Foundation Measures 1988: First, the Foundation Regulations 2004 have lifted the prohibition for a foundation to carry out a business in its own name. Furthermore, regarding investment of assets, the reform abolished all provisions which formerly limited the investment of foundation assets. However, since 2007, foundations

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651 According to Art. 26, para. 2, Company Law of the People’s Republic of China (中华人民共和国公司法), promulgated on December 29, 1993, last amended on October 27, 2005 (Chinese-English in: CCH Business Regulation [supra note 22] ¶13-518), the minimum registered capital for limited liability companies is RMB 30,000 Yuan. The minimum registered capital of one-person limited liability companies is RMB 100,000 Yuan, Art. 59 para. 1 Company Law. The minimum registered capital for companies limited by shares is RMB 5 million Yuan, Art. 81 para. 3 Company Law.

652 See supra note 25.

653 See supra at II A 3 d.

654 See supra at II A 1 a.

655 See supra note 36.

656 See supra at V A 1.

657 See supra at IV B 1 a.

658 See supra at V D 3.

659 See supra at VII A 1.

660 See supra at IV 1 a bb.
directly receiving tax-deductible donations are not allowed to engage in any business activity unrelated to the public benefit purposes. $^{661}$

Lastly, the reform in foundation legislation leaves room for the development of the concept of “public benefit purposes” by no longer defining which purposes are to be seen as public benefit. $^{662}$

Another reform, which is of course to be seen only as a minor change to the reform in foundation regulations, concerns the CNI and its distinction as either legal person or partnership or individual entrepreneur. The MoCA issued three sets of “Model Statutes” for all three legal forms of CNI, containing markedly different requirements for the governance structure. $^{663}$

**B. Reform Proposals**

Currently there are two major reform proposals being discussed.

1. **SO Regulation**

The first proposal concerns the SO Regulations, which are at present under revision.

Minister LI Xueju (李学举) of the MoCA revealed in March 2007 that his ministry had already finished the work revising the regulations and that the revised SO Regulations had been forwarded for approval to the State Council. $^{664}$ According to LI, the revised SO Regulations cover “foreign-related NPOs” (涉外民间组织) and provide them with the possibility to register in China. However, such NPOs, like their domestic counterparts, would have to receive the consent of a sponsor organization in China. $^{665}$

In this context there are also discussions about reforming this “dual management system” that requires the consent of a sponsor organization in the approval procedure for the establishment of an NPO in China. $^{666}$ WANG Ming (王名), Associate Dean of the School of Public Policy and Management and director of the Nongovernment Organization Research Center at Tsinghua University, sees the requirement for the consent of a sponsor organization as the reason why out of approximately 3 million NPOs in China, only 320,000 are registered with MoCA. Some were registered with the State Administration for Industry and Commerce – as for-profit enterprises – because potential sponsor organizations, reluctant to “invite trouble,” refused to act as a sponsor organization. $^{667}$ Professor WANG is proposing a three-stage procedure for establishing NPOs without the involvement of any sponsor organization: In the first stage, NPOs would simply have to file the establishment of the NPO with the competent state authority without the need for any approval. In the

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$^{661}$ See supra at III E 4.

$^{662}$ See supra at II A 2.

$^{663}$ See supra at V 3.


$^{665}$ Id. WANG Ming (王名), Associate Dean of the School of Public Policy and Management and director of the Nongovernmental Organization Research Center at Tsinghua University explains in the same article that as the 1998 SO Regulations had no rules for foreign NPOs in China, the registration and administration authorities for SOs on every level adopted an attitude of “no contact, no recognition, and no prohibiting” (不接触、不承认、不取缔) toward the approximately 10,000 such NPOs in China.

$^{666}$ See supra at II A 3 b.

$^{667}$ Drafting on Legal Registration of Foreign-Related NPOs (supra note 664).
second stage, NPOs with larger expenditures for activities and more employees would have to go through a registration and licensing procedure. In the last stage, NPOs that wanted to conduct charity solicitation would have to be recognized as “public benefit” and granted the right to raise funds.\textsuperscript{668}

2. Fundraising Regulation

The second major reform proposal, the drafting of a “Charity Law of the PR China,”\textsuperscript{669} includes a procedure for granting the right to raise funds to specially qualified NPOs.

A draft “for internal discussion” was prepared by MoCA in September 2006, followed by a second draft in May 2008.\textsuperscript{670} The drafts state that only organizations granted a “Certificate of the Verification for Charitable Organizations” may engage in fundraising activities.\textsuperscript{671} However, while the draft of 2006 furthermore stipulated that the corresponding charitable organization must apply for approval of the fundraising, the draft of 2008 just demands to file such activities to the files of the local department for civil affairs.\textsuperscript{672} The draft of 2006 limited legal forms of charitable organizations to foundations, SOs, and CNIs.\textsuperscript{673} The draft of 2008 does not contain this limitation anymore and is therefore opening the availability of charitable organizations to all legal persons, who satisfy the requirements stipulated in the draft. It remains to be seen, however, whether this will help to address the problem that there are still no registration and approval procedures in place for the charitable trust.\textsuperscript{674}

C. Best Practice

There are also discussions in China to enforce duties through rules of best practice. At an international conference in Beijing in 2005,\textsuperscript{675} a “Foundation Evaluation Index”\textsuperscript{676} was under debate. The index was created to serve as an instrument to evaluate the work of foundations (according to a scale of points). Chinese participants at the conference argued for giving the mandate of evaluating the foundations to a (trustworthy) private organization known from Taiwanese foundation law.

However, the draft of the evaluation index is raising some questions: It is composed of one part titled “Basic Index,” which includes compulsory duties of the existing foundation laws, and a second part titled “Excellence Index,” which comprises non-compulsory recommendations. It is deemed to be methodologically problematic to reward compliance with compulsory duties in the form of better evaluation results and to punish non-compliance with compulsory duties in the form of poorer evaluation results. This is due to the fact that the first situation is a breach

\textsuperscript{668} Id.

\textsuperscript{669} 中华人民共和国慈善法草案框架稿 [Charity Law of the PR China (draft frame proposal)], dated September 15, 2006 and May 2008; Chinese-German in: ZChinR Vol. 16 (2009), p. 304 et seq. and p. 319 et seq. respectively.

\textsuperscript{670} See infra note 669. For further information about the drafts see Asche (supra note 35), p. 276 et seq.


\textsuperscript{672} Id.

\textsuperscript{673} Art. 7, Charity Law of the PR China (draft frame proposal) (supra note 669).

\textsuperscript{674} See supra at II D 3.

\textsuperscript{675} “International Conference on Mechanisms for the Evaluation of Foundations,” November 14 and 15, 2005, with the participation of the present authors.

\textsuperscript{676} On file with the authors.
of legal obligations, which should be subject to legal sanctions, while the second situation constitutes a breach of “soft law,” which should be subject to extra-legal sanction (such as lower ranking in the evaluation or cancellation of a “seal of quality”).

The mixing of compulsory duties arising from law with some form of “soft law” might be seen from two perspectives: First, it could mean that there is a tendency in Chinese NPO law to “privatize” the supervision, i.e., to leave the task of supervising the enforcement of legal duties to private organizations, with state supervision still existing but on a diminished level. Second, the side-by-side standing of compulsory duties and “soft law” could serve as an instrument to make the compliance of compulsory duties not as crucial as it would seem from the wording of the law; compliance with the wording of the law would have some negative effects, e.g., the fulfillment of the requirements regarding minimum capital of foundations.677

IX. Conclusion

A. Growing Significance of NPOs

The steady growth in numbers of all three forms of NPOs (foundations, SOs, and CNIs)678 proves that this sector is becoming a more and more important part of China’s economic system. The Chinese legislators are aware of this fact and are actively trying to regulate all different aspects of NPOs (establishing, organization, taxation, and supervision). However, the legal academia in China has yet to discover this field as a promising topic for research.

B. Increased Regulation

Since the end of the 1990s, Chinese legislators have put an emphasis on regulating NPOs, first through the amendment of the SO Regulations and the introduction of the CNI in 1998. Interestingly, the three years before 1998 saw a drop in the numbers of SOs, as was the case in the last two years before the amendment of the Foundations Regulations 2004. This might be due to the fact that the amendments (or their anticipation) increased administrative stringency in the governance of these forms of NPO. The amendment of the regulations on foundations in 2004 introduced a significantly higher minimum capital requirement, a complex organization structure, and duties of accounting, disclosure, and the requirement of timely disbursement. At the same time, the situation was eased regarding the investment rules and the economic activities of foundations, though the latter was again restricted through taxation legislation in the same year. The recent promulgation of model statutes for foundations, SOs, and three different types of CNI also fits into this picture of a significant increase of regulation.

From a comparative law perspective, the unusually complex governance of foundations and CNIs as legal persons is especially remarkable. It becomes obvious that those Chinese regulations are by their nature suitable only to large NPOs, thereby creating an oligopoly structure, especially for fundraising foundations, but –

677 See supra at II A 3 d.
678 See supra at I B.
due to the regional restrictions of NPOs pursuing a similar purpose – also for SOs and CNIs.

This intensification of regulation is not only seen in organizational laws, but also in taxation laws. Here, the Chinese state has already decided that it is willing to grant tax incentives to NPOs, donors, and beneficiaries.

C. Skepticism Regarding NPOs

The increased regulation of NPOs shows not only an awareness among Chinese legislators regarding the rising importance of this sector, but also bears witness to the general skepticism toward privately initiated NPOs. This skepticism must be seen in the context of the Chinese political system, which is still based on a centralized socialist party dictatorship with a cadre party organized according to Leninist principles and exercising effectively unlimited decision-making and intervention powers in politics, administration, the economy, and society.679 It is therefore not self-evident that the Chinese authoritarian state will tolerate (privately initiated) NPOs. While present regulations allow private assets and human resources to be made available for public benefit purposes, the state wishes to exert a strong influence on the operation of NPOs. The involvement of the sponsor organization in the procedure for establishing and in day-to-day running of NPOs effectively prevents any political activity or other activities by NPOs which in the view of the Chinese government pose a challenge to its own power or the unity of the country.

D. Thoughts on Liberalizing NPO Regulations

Chinese legislators are aware that the strong influence of sponsor organizations may deter potential initiators of NPOs. Hence it is not surprising that there were voices in the drafting procedures of the revised Foundations Regulations 2004 calling for their influence to be restricted. Thus it was proposed to do without the collaboration of a sponsor organization in non-fundraising foundations, as the sponsor function of government bodies could have a negative influence in cases where such foundations stem from private initiatives.680 It was to be feared that private persons, enterprises, and foreign nationals would be deterred from participating in the foundation scene in China. However, the proposal found no majority – and the Official Commentary justifies this with the formal argument that the “dual management system” is the traditional and central principle for the supervision of Chinese NPOs.681 Even the comparatively limited suggested amendment met with no success to confine the power of the sponsor organization in the “pre-approval procedure,” in that the registration and administrative authorities are under an obligation to appoint a sponsor for the foundation, or to allow the registration and administrative authorities themselves to act as sponsor.682

680 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 54; see also Elbern (supra note 66), p. 229. Elbern reports on a draft of the Foundation Regulations 2004 dated July 2003, in which it was provided that non-fundraising foundations – Elbern misleadingly talks of “private foundations” – could be registered directly with the MoCA without requiring the consent of a sponsor organization.
681 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 54.
682 See OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 72. See also Minzner (supra note 64), p. 112, who surmises, in view of reports on early drafts of the Foundation Regulations 2004 which
The Official Commentary allows the inference that the commentary authors are critical of the inflexible regulation adopted, demonstrating a certain doubt regarding the competence of their own state regulatory authorities. Thus there is a remark on this problem that a solution will gradually be found that “corresponds to the actual social circumstances,”683 a frequent formulation in official Chinese commentaries when the authors acknowledge a certain need for reform. A conceivable compromise for future reform may be to eliminate the sponsor organization for at least some NPOs. This seems plausible, particularly for foundations whose assets do not originate from the state sector, while strengthening state control is justifiable where state assets are transferred to a foundation and dedicated to public benefit purposes.684

This policy dispute within the Chinese government between a rather restrictive and a rather liberal view of regulating NPOs is also a possible reason why the provisions for the new organizational form of charitable trusts have up until now been implemented rather slowly. The critical view of Chinese literature on the Trust Law concerning the inefficiency and inflexibility of foundations685 is also proof of this imminent dispute.

E. Legal Uncertainty

While the recent reforms provide increased transparency in several respects, a number of questions remain open. In part, this lack of clarity is inevitable given the nature of the subject matter – for example, the distinction between public fundraising and non-public fundraising.686 In part, it may be due to the lack of familiarity among Chinese legislators with the problems of regulating NPOs. The unfamiliarity of the material may also explain why even fundamental questions, at least for the continental European understanding, are left unanswered – for example, with regard to departure from founder intentions in foundation law, or the duty to maintain capital.

Despite detailed provisions, several questions are also unclear in the regulatory system of NPOs in China.

First, the law and model statutes provide no clear demarcation of competences, for example, in state regulation (sponsor organization) or in the appointment of members in the various organs in the organizational structure of NPOs. Certainly these questions may be resolved by precise statutes of the foundation or an agreement between the relevant authorities.687

Second, the current situation for foreign NPOs is unsatisfying because it is not predictable for how long administrative practice will continue to register foreign

lacked any requirement of a sponsor organization, that the liberalizers were to be found within the MoCA, the Legal Affairs Office of the State Council opposed to relaxing government control.

683 OFFICIAL COMMENTARY ON FOUNDATIONS (supra note 11), p. 72.

684 By contrast, a distinction based on fundraising activities, as unsuccessfully proposed, is less convincing.

685 See supra at II D 1.

686 This legal uncertainty for a non-fundraising foundation is anything but pleasant, however, because exceeding the scope of activity of foundations may lead to an administrative sanction or withdrawal of registration; see § 42, No. 1, Foundation Regulations 2004.

687 In the matter of clearly regulating the appointment of the board of directors and the supervisory board in the statutes of foundations, there is much to suggest that a power struggle will arise between the sponsor organization and the founder at the outset during the pre-approval procedure (see supra at II A 3 b). The sponsor organization will typically threaten to withhold its consent, while the founder can threaten not to make his funding available.
NPOs as (commercial) representative offices and grant them preferential tax treatment. At least for foreign foundations, it would seem safer to register as a special representative office with MoCA, a possibility introduced by the revised Foundations Regulations 2004, though it has only recently been implemented in practice.

Third, there is uncertainty regarding the enforcement of duties. As shown in the context of the legal requirements for timely disbursement of assets and for limitations on expenditure for staff wages, social contributions, and administrative costs, not all duties are enforced in administrative practice. This finding corresponds to the proposed introduction of a “Foundation Evaluation Index” which would mix compulsory duties arising from law with some form of “soft law,” with the result of giving more discretion in supervising NPOs and more uncertainty for those being supervised.

\[\text{See supra at II E 2 b.}\]
\[\text{See supra at II E 2 a.}\]
\[\text{See supra at IV B 1 a.}\]
\[\text{See supra at VIII C.}\]
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