

China's New INGO Law: A Brief Summary of Concerns Voiced by INGOs

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Background: Currently, and for the past three decades, most INGOs working in China have inhabited a legal 'grey zone' of sorts. In the absence of a clear legal framework, INGOs have managed their China programs with a hodgepodge of formal and informal arrangements, including: 1) signing MOUs with local, provincial, or central government ministries; 2) signing MOUs with quasi-governmental bodies, universities, hospitals, etc.; 3) establishing wholly foreign-owned enterprises; 4) registering as locally-owned (Chinese) businesses; or 5) making other ad-hoc agreements. Additionally, in recent years 29 foreign philanthropic foundations have registered with the Ministry of Civil Affairs under the 2004 Regulations on Foundations, although this represents only a portion of the total population of foreign foundations active in China. The legal framework governing INGO activities changed dramatically on April 28, 2016 when the Chinese government passed an INGO Law (aka Foreign NGO Law, or Overseas NGO Law). This new law aims to regulate the activities of INGOs in mainland China, including INGOs from Hong Kong, Macau, and Taiwan, and including all foreign-based nonprofit, non-governmental organizations who wish to operate in mainland China.

Given INGOs' and other stakeholders' intense interest in the law and its implications, this brief summary of concerns is offered here in hopes that it may help inform the development of more detailed implementation guidelines. This summary is based on a preliminary analysis of data I have gathered on this topic. It does not purport to reflect a consensus of all INGOs in China or of the participants in my research. It is, rather, only one source amongst many that may help inform the policymaking process.

Data Sources and Methodology: Between September 2013 and August 2016, I conducted five closed-door focus groups, over 70 interviews with INGO leaders in China, and a small survey of INGOs active in China. The earliest data were gathered before the law was announced in draft form and are utilized here to depict the backdrop to the INGO presence in China prior to the law's introduction. Additional insight was gained at several events in 2015 and 2016, in which various stakeholders gathered to discuss first the law's initial drafts and then the finalized version passed in 2016. In total, the perspectives of over 80 individual INGOs, around a dozen grassroots NGOs, and several government officials and academics (both Chinese and foreign) contributed to the brief analysis presented here.

Concerns Raised:

- 1) Support of a Professional Supervisory Agency (PSU):** An almost universal concern raised by INGO leaders relates to the law's requirement to seek official sponsorship from a PSU before registering with the Ministry of Public Security. In many cases, despite having worked closely with government partners for years or even decades, many INGOs cite the reluctance of those partners to serve as a PSU as the main obstacle to continuing their work in China under the new law. The concern is that

potential PSU heads see political risk – both for their own individual careers and their agency’s reputation – as outweighing any potential benefit they may gain from continued cooperation. In the absence of incentives or guarantees from the central government, many INGOs believe they will be unable to find a PSU. Since late July 2016, of over 20 INGOs who said they had approached a potential PSU, only one was optimistic about their long-term partner’s willingness to serve as a PSU. In another case, approaching four different potential PSUs had yielded answers including, “We need to wait to see if we will be on the PSU list,” “We need to wait on details,” and “We are not sure if we’ll be qualified.” These were very similar to the responses reported by other INGOs. Despite the possibilities implied by such responses, almost all of the INGOs who sought promises of support were pessimistic about their chances of succeeding at obtaining sponsorship from a qualified PSU.

- 2) Level of Potential PSUs:** The governmental and quasi-governmental partners of INGOs in China to date include all levels of government, from village level committees to central government ministries. For some INGOs that have operated programs in rural areas, their ideal PSUs are the local-level government partners with whom they currently work. The concern here is that if PSUs are restricted to central- or provincial-level government agencies, these INGOs will have no pre-existing relationships on which to build and thus will be at a loss for where to turn for a PSU.
- 3) List of Qualified PSUs:** Some groups work primarily with academic institutions. At one end of the spectrum are INGOs who partner with large national universities. At the other end are INGOs – including some from Hong Kong – who send groups of volunteers to elementary schools for short-term cultural exchange, teaching English, music, and other curriculum-enriching subjects that local schools might not typically provide. If the elementary schools that host these groups are not allowed to serve as PSUs, these volunteer-based INGOs are uncertain to whom they should turn. Other groups who work outside academic institutions – for example, in orphanages, in elder-care homes, or in collaboration with domestic Chinese charitable organizations – are concerned that their long-term partners may not be authorized as PSUs. But, again, these are the only Chinese entities with whom they have established ties. To continue their work, either their long-term partners need to be qualified as PSUs or they need introductions to other relevant PSUs who will support their work.
- 4) Cross-sectoral INGOs and the Search for an Appropriate PSU:** A number of INGOs work across multiple fields – environment, education, and health, for example – and are concerned that if they must find only one PSU, their request for support will be easily rejected. The Ministry of Education, for example, may be willing to support an INGOs’ education-focused projects but would decline to support health-related projects that are outside its area of competency and expertise. While many INGOs are sympathetic, to limit their work to only one area could require a drastic re-configuring of their organization’s mission. A number of INGOs have already approached potential PSUs but were declined, with their cross-sectoral work cited as an important reason. Many INGOs have asked whether the Ministry of Civil Affairs (and its branches at lower levels) could serve as the ‘default PSU’ for cases like these

but also for cases in which other potential PSUs are unwilling to shoulder any responsibility and risk.

- 5) Need for Clarification of ‘Political Activities’:** A number of INGOs expressed concern about whether their activities in China would be considered ‘political’ and thus breach Article 5 or Article 47.4 of the law. For example, groups that promote positive and constructive relations between the PRC and foreign countries, while registered as nonprofits in their home jurisdiction, would seemingly be conducting political activities but have operated for years with the consent and support of relevant Chinese ministries. Other examples abound, including: groups engaged in promoting educational innovations that may imply or suggest a need to change education policy; environmental INGOs that reveal breaches of existing Chinese law or the need for improved regulation; and INGOs that aid research on the development of a legal framework for philanthropy in China. As some people understand ‘political activity’ very narrowly or specifically defined, others may have a very broad definition. Clarifying the definition of ‘political activity’ under this law would help INGOs assess whether their work will be seen as helpful or harmful and thus welcomed or prohibited. For reference, when over two dozen INGOs were asked to list their current activities in China, the answers revealed a great diversity and potential for confusion over what activities would be defined as ‘political’. These answers included: access to justice, advocacy training, arts, Asia Pacific regional security issues, capacity building, child education, child health, child protection, children's rights, civil society development, climate change, consumer education, continued professional development, corporate social and environmental impact, disaster relief and rehabilitation, economic policy, education, energy, climate and environmental issues, environmental protection, gender, governance, green finance, health, human rights education, human rights pilot projects, human rights research, industrial pollution, labor rights, law, medicine, NGO capacity building, nursing, nutrition, philanthropy, poverty alleviation, promotion of responsible overseas business, public health, public participation, research, rule of law, rural development, sustainable development, trade and investment, trade promotion, US-China relations, US-China trade and investment issues, and women's rights.
- 6) INGO Scale and Budget:** While some INGOs have budgets of US\$20 million and above, others with current programs in China have budgets of only around US\$10,000 for their China work. Larger organizations should have little concern hiring a local accountant and assigning full-time staff to their operations in China. The smallest groups, however – including many from Hong Kong – lack the human and financial resources to devote to staffing and maintaining a representative office in China. In these cases, are they to choose between either repeatedly applying for temporary activities permits or choosing to withdraw from China altogether? The burden placed on such small groups is quite great and may result in an outflow of groups that do small but meaningful work in China.
- 7) Prevention of New Groups Seeking to Work in China:** For the many INGOs with current operations in China, having long-term partners gives them a ‘first-comer advantage’ in terms of finding a PSU and opening an office or successfully applying

for a temporary activities permit. For new groups, the prohibition against unregistered INGOs “conducting activities” in China (Article 9) leaves open the possibility that sending a representative to China to talk with a PSU will be construed as “conducting activities” by an unregistered INGO. Clarification on this point is desired.

- 8) Need for Clarification of “Activity”:** Following from points 5 and 7 above, what constitutes an ‘activity’ (see, especially, Article 9, Article 32, and Article 46.1) is unclear. In the most extreme case, would a Chinese high school student who has won admission to a private university overseas – where that university is registered as a nonprofit organization – and accepts a scholarship from that university be charged with breaching Article 32 – “Units or individuals in China shall not be hired by, accept financial support from, or represent or covertly represent overseas NGOs that have not legally registered a representative office or filed temporary activities within China” (Article 32)? If said university pays for transportation and accommodation costs for the student to join a pre-departure orientation meeting with other newly-accepted students in China – and/or organizes said gathering – would such activities constitute a breach of the law? The notion of ‘activity’ is quite broad. Further clarification and specification may help avoid confusion on all sides.
- 9) Role of Ministry of Public Security:** A number of INGOs raised the concern that due to the law’s requirement for the Ministry of Public Security to serve as the ultimate registration authority, confusion may ensue as to the delineation of specific roles and obligations between the PSU and the Public Security authorities. Related to this, as many INGOs have had little direct contact with Public Security authorities in the past, there is concern that the INGO work may not be well understood, that a trust gap may exist between the two parties, and that ultimately their registration and activities may not proceed smoothly. A mechanism or platform for mutual exchange and communication is urgently needed, especially in the period leading up to the law’s implementation.

Note: Other interpretations and concerns about the law, with related questions as to its meanings, are available on the American Chamber of Commerce website (in English) at: <http://www.amchamchina.org/policy-advocacy/what-does-chinas-new-foreign-ngo-law-mean-for-your-organization> (about the law in general) and <http://www.amchamchina.org/policy-advocacy/still-implicated-chinas-foreign-ngo-law-and-schools> (concerning educational institutions)

Anthony J. Spires
Associate Professor, Department of Sociology
Director, Centre for Social Innovation Studies
The Chinese University of Hong Kong

(Email: ajspires@cuhk.edu.hk)