

HIGHER EDUCATION AND FOREIGN SCHOOLS IN CHINA

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I. INTRODUCTION

Despite sweeping reforms, higher education in China still falls short of international standards. Membership in the World Trade Organization (WTO), a vibrant economy, and an influx of foreign investors has heightened the demand for skilled professionals. Education drives

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government policies and Chinese society, but the People's Republic of China (PRC) work force still has a relatively low average education level, and higher education does not provide students with the skills necessary to compete in the global economy.¹ China's colleges and universities award four million degrees each year and the PRC has 700 million workers, but China still has only forty percent of the skilled laborers found in Organization for Economic Cooperation and Development (OECD) countries, and less than half of China's graduates can find jobs within months of leaving school.² In 2009, the Chinese labor force has been faced with absorbing more than six million new graduates, of whom less than half held concrete job offers as of June, while Chinese colleges and universities simultaneously increased enrollment of graduate students by five percent. In the wake of the financial crisis, average monthly salaries for recent graduates have fallen by more than twenty percent.³ Foreign-educated PRC nationals, on the other hand, command a premium in the marketplace due to their valuable skills and experiences abroad.⁴ The problem has become so pronounced that U.S. companies rate the lack of qualified Chinese employees as the top challenge of their PRC operations.⁵

China promised to allow parties from WTO member nations to provide "educational services" in China, subject to certain restrictions, when it joined the WTO in 2001.⁶ This promise meant that foreign schools could open high schools, colleges, and universities on the mainland, though primary and middle school education would remain the province of

1. See CARL DAHLMAN ET. AL., *ENHANCING CHINA'S COMPETITIVENESS THROUGH LIFELONG LEARNING* 3 (World Bank Institute 2007).

2. Yao Li et al., *The Higher Educational Transformation of China and its Global Implications* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 13849, 2008), available at <http://www.nber.org/papers/w13849>.

3. Cong Cao, *China's College Graduate Statistics*, UPI ASIA, NOTES ON CHINA BLOG (July 14, 2009), <http://bit.ly/AsAJu>. As the article notes, two different methodologies are offered for calculating the number of recent graduates considered to be "employed." The Chinese Ministry of Education method is to "count those entering domestic and foreign graduate schools as employed, as well as those who enlist in the military, both areas that have witnessed increases in recent years," while the alternative method used by MyCos, a Chinese human resources company, counts only those with "concrete job offers," as referenced above. *Id.* Therefore, according to the Ministry of Education, the figure of employment would be 68%, as opposed to MyCos' less sanguine 40% for bachelor's degrees and 30% for community college degrees. *Id.*

4. DAHLMAN ET. AL., *supra* note 1, at 142.

5. AMERICAN CHAMBER OF COMMERCE IN SHANGHAI, 2006 CHINA BUSINESS REPORT 23, available at <http://www.amcham-shanghai.org/NR/rdonlyres/450BBC10-E2F8-4EB7-B830-A1F340E9A4DD/3908/ChinaBusinessReport.pdf>.

6. WORLD TRADE ORGANIZATION, REPORT OF THE WORKING PARTY ON THE ACCESSION OF CHINA, *Addendum, Schedule CLII – The People's Republic of China*, WT/ACC/CHN/49/Add.2 (Oct. 10, 2001), available at <http://bit.ly/bskYuS> [hereinafter WTO Education Commitments].

domestic providers.⁷ Since China's accession to the WTO, a growing number of institutions of higher education ("IHEs") from western countries have relied on this promise and subsequent enabling laws to enter China's education market through partnerships and contracts with Chinese colleges and universities. In addition, a bilateral agreement between the United States and China has encouraged exchange programs, the organization of delegations and visiting groups, as well as data exchanges, subject to the laws and regulations of both countries.⁸ However, despite China's having somewhat opened the educational services sector to foreign participation, the degree of success among foreign schools in their China strategy varies broadly.⁹

On one end of the spectrum lie institutions that follow an oft-repeated pattern and encounter difficulties in achieving their objectives. After months of negotiation and trans-Pacific travel, a U.S. college or university signs a letter of intent with a peer Chinese school or, in some instances, a private PRC company.¹⁰ The parties publish a joint press release announcing the relationship, which typically involves a foreign exchange program, a research and development project, a joint degree program, a distance learning initiative, a Sino-foreign cooperative educational institution, or some combination thereof.¹¹ Sometime later, however, as the foreign party begins to implement its plans, it discovers that it must secure more or different approvals from ministries and bureaus within the Chinese government than it had originally anticipated, or that its own government lacks the capacity to process the volume of visa applications required to facilitate the travel of Chinese citizens to the foreign party's U.S. campus.¹² If the initiative involves educating Chinese citizens in China, the foreign party also learns that the PRC government maintains the authority to approve personnel, curriculum, tuition and fees.¹³ At this juncture, for reasons that vary depending upon the goals and the details of the proposed program, some projects languish, some fall apart and others

7. 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 Sino-Foreign Cooperative Education] (promulgated Mar. 1, 2003, effective Sept. 1, 2003) arts. 3, 65.

8. Agreement for Cooperation in Educational Exchanges, PRC-US, Mar. 28, 2000; see Welcoming Remarks for Don Q. Washington at the International Graduate Scholarship Conference, US EMBASSY IN BEIJING, available at <http://beijing.usembassy-china.org.cn/092107e.html>.

9. US TRADE REP., REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 94 (2006).

10. Elizabeth Redden, *The Phantom Campus in China*, INSIDE HIGHER ED, Feb. 12, 2008, <http://www.insidehighered.com/news/2008/02/12/china>.

11. See *id.*

12. *Id.*

13. See Ian Gow, *Removing the Rose-Tinted Spectacles*, in BRITISH UNIVERSITIES IN CHINA: THE REALITY BEYOND THE RHETORIC 7-8 (Anna Fazackerley ed., 2007).

require further negotiation.¹⁴

A few foreign institutions lie at the other end of the spectrum, having successfully navigated the path through thorny regulatory issues. The Hopkins Nanjing Center, a collaboration between Johns Hopkins University and Nanjing University that began in 1986, was the first joint academic program offering a full master's degree approved in both China and the United States.¹⁵ The University of Nottingham-Ningbo, thanks to strong financial support from the Ningbo local government, became the first partnership between a British institution and a Chinese university.¹⁶ A growing number of joint degree programs (1,300 as of 2006) include partnerships between Chinese IHEs and a diverse group of U.S. institutions. As of 2007, twenty-four percent of American graduate schools indicated in a survey that they had established one or more degree programs with Chinese institutions.¹⁷ An Australian company even bought a Chinese university outright, acquiring its entire physical plant and operations as a going concern.¹⁸ The successful Sino-foreign cooperative educational efforts, though differing in scale, complexity and structure, share two common attributes: extensive prior planning and successful navigation of the Chinese legal system.

To help institutions avoid the pitfalls of failed entry into China's education market, we have prepared the following article. We begin in Part II by identifying the unique characteristics of the Chinese education system and how it differs from education in the United States and other western countries. Part III explores the regulations governing foreign education providers in China by way of examples, where available. Finally, in Part IV, we discuss the results of China's educational reform efforts and opportunities for future change.

II. BACKGROUND

At first glance, education in China resembles education in western countries. Local governments fund the first nine years of schooling in part through funding from the central government.¹⁹ Children not only have the

14. See Redden, *supra* note 10.

15. Hopkins-Nanjing Center, HNC History, <http://nanjing.jhu.edu/about/index.htm> (last visited January 23, 2010).

16. See Gow, *supra* note 13, at 78.

17. Kenneth E. Redd, *Data Sources: International Dual, Joint, and Other Collaborative Degree Programs*, COUNCIL OF GRADUATE SCHOOLS, available at http://www.cgsnet.org/portals/0/pdf/DataSources_2007_10.pdf.

18. Geoff Maslen, *Australian Firm is First to Buy a Chinese University*, TIMES HIGHER ED. (UK), Feb. 21, 2003, (noting that Australian IT firm Amnet Limited became the first investor to acquire a Chinese IHE outright, buying Chongqing HaiLian University from its Principal for \$27 million Australian dollars), available at <http://www.timeshighereducation.co.uk/story.asp?storyCode=174918§ioncode=26>.

19. See ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD*

right, they “have the *obligation* to receive [such] compulsory education, regardless of gender, nationality, race, status of family property, religion, belief, etc.”²⁰ Government funding for education continues through middle school, which consists of two stages roughly analogous to junior high and high school, but high school and college are funded primarily by local governments and parents.²¹ After entering higher education, students can earn the equivalent of an associate’s, bachelor’s, master’s, or doctorate degree.²² Vocational training parallels high school and tertiary education, and provides post-baccalaureate training as well.²³ Despite some similarities in structure, education in China differs from that in western countries in several significant ways.

A. Education is Linked to National Policy

After Mao Zedong died, China’s leadership explicitly linked education with national development and reform policies. Deng Xiaoping, Mao’s successor, instituted a plan to modernize China by improving agriculture, industry, science and technology, and national defense.²⁴ The Four Modernizations, as they were called, prioritized education as a means of restoring national stability and unity after the ravages of the Cultural Revolution.²⁵ Over thirty years later, Deng’s plan continues to drive domestic policy-making, in that education remains the backbone of China’s five-year planning process. In 2003, for instance, the Central Committee of the Communist Party of China declared that:

We should introduce a modern system of national education and a lifelong learning system; build a society that keeps learning; push forward quality education in a comprehensive way; enhance citizens’

Economic Surveys: China 24 (2005) [hereinafter OECD 2005 SURVEY]; 中华人民共和国义务教育法 [Compulsory Education Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1984, amended June 29, 2006, effective Sept. 1, 2006), art. 2.

20. Compulsory Education Law of the People’s Republic of China, *supra* note 19, at art. 4 (emphasis added).

21. See Li Lixu, *China’s Higher Education Reform 1998-2003: A Summary*, 5 ASIA PAC. ED. REV. 14, 15–18 at 20 tbl. 5 (2004).

22. 中华人民共和国高等教育法 [Higher Education Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 1998, effective Jan. 1, 1999), art. 17; 中华人民共和国学位条例 (2004 修正 (2004 Revision) [Regulations of the People’s Republic of China on Academic Degree (2004 Revision)] (amended Aug. 28, 2004), art. 3.

23. 中华人民共和国职业教育法 [Vocational Education Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., May 15, 1996, effective May 15, 1996).

24. *International Rankings and Chinese Higher Education Reform*, WORLD ED. NEWS & REVIEWS (Oct. 2006), <http://www.wes.org/ewenr/06oct/practical.htm>.

25. See CHRISTOPHER R. HUGHES, *CHINESE NATIONALISM IN THE GLOBAL ERA* 24 (Routledge 2006).

capabilities in seeking employment, innovation, and entrepreneurship; and strive to turn the country's huge population into an advantageous ample supply of human capital.²⁶

In its 2003–2007 Action Plan for Revitalizing Education, the Ministry of Education simply stated that “[e]ducation represents the basis of fundamental long-term development.”²⁷ More recently, the Eleventh Five-Year Plan included specific measures for education under the banner of “Implementing the Strategy of Developing China Through Science and Education and the Strategy of Strengthening China Through Tapping Human Resources.”²⁸ In this way, education has become inextricably linked with national policy.

B. Central Government Control

Unlike the federal government in the United States, the central government in China acts as the direct supervisor and administrator of higher education. Despite market reforms, the PRC remains a unitary, non-federated state in which state power emanates from the central organs of the national government.²⁹ Laws enacted by the National People's Congress, China's top legislature,³⁰ determine the composition and management of colleges and universities.³¹ The State Council, China's highest executive body, oversees and manages education on an ongoing basis in consultation with several entities under its direct authority,

26. 中共中央关于完善社会主义市场经济体制若干问题的决定[Decision of the Central Committee of the Communist Party of China on Some Issues Concerning the Improvement of the Socialist Market Economy] (promulgated Oct. 14, 2003, effective Oct. 14, 2003), art. 33.

27. MINISTRY OF EDUCATION, CHINA 2003–2007 ACTION PLAN FOR REVITALIZING EDUCATION: A LEARNING GUIDEBOOK (Beijing: Educational Science Press 2004).

28. NATIONAL DEVELOPMENT AND REFORM COMMISSION, THE OUTLINE OF THE ELEVENTH FIVE-YEAR PLAN FOR NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT OF THE PEOPLE'S REPUBLIC OF CHINA ch. 7, available at <http://bit.ly/9Eppa8>.

29. Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 369 (2002).

30. As defined by China's 1982 Constitution, the National People's Congress is the “highest organ of State power.” CHINA BUSINESS LAW GUIDE, Kluwer Law International, ¶1-230 (2005). As such, it has final authority over the judiciary and executive branches of government, in addition to legislative power. *Id.* Its main functions and powers include: to amend the Constitution and oversee its enforcement; to enact and amend basic statutes on criminal and civil law, the organization of the State and other matters; to elect and appoint members to central State organs; and to approve the national economic plan and hear reports on its implementation. *Id.* Readers curious about the government and political system of China are encouraged to consult other sources. *See, e.g.*, CHINA BUSINESS LAW GUIDE, Kluwer Law International, ¶1-200- ¶1-550 (2005).

31. 中华人民共和国教育法[Education Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 18, 1995, effective Sept. 1, 1995); Higher Education Law of the People's Republic of China, *supra* note 22; Vocational Education Law of the People's Republic of China, *supra* note 23.

including the Ministry of Education (MOE).³² The MOE in turn decides how many students will be admitted to colleges and universities each year, how much institutions can charge for tuition, what subjects will be taught, and which foreign institutions will receive licenses to operate in the PRC, among other matters.³³ Where independent non-profit institutions maintain quality standards through accreditation and testing in the United States, in China the MOE and local governments regulate education through a licensing system. The MOE also administers nationwide standardized testing.

C. Role of Education in the Chinese Family

Education is the central focus of Chinese family life.³⁴ Every June, graduating high school seniors take the national college entrance examination, a three-day event that captures national attention.³⁵ The entrance exam traces its roots to the seventh century, when the 科举 (*keju*, or imperial examination) was first used to examine officials selected to serve the Emperor.³⁶ The 高考 (*gaokao*, or high exam), the modern equivalent of the *keju*, sorts students into four hierarchical levels of tertiary schools based on their examination scores, a rite of passage associated with the growing opportunity for economic advancement through schooling.³⁷ Reflecting the importance of the exam and subsequent education in Chinese society, as well as the fact that China does not yet have a system for financing education similar to student loans in the United States, educational expenses for children represent the top consumption category for Chinese households, exceeding outlays for housing and pensions.³⁸ Notably, public opinion polls list higher education as one of the top three causes of discontent with China's central government.³⁹

32. See, e.g., Haisheng Li, *Chronicle of Major Educational Policies of China (1997-1999)*, CHINA EDUCATION AND RESEARCH NETWORK, Dec. 25, 2001, available at http://www.edu.cn/Researchedu_1498/index.shtml.

33. Robert Hartmann, *Chinese Higher Education Fails the Test*, ASIA TIMES, Dec. 21, 2006, available at <http://www.atimes.com/atimes/China/HL21Ad01.html>.

34. Lan Yu & Hoi K. Swen, *Historical and Contemporary Exam-Driven Education Fever in China*, 2 KEDI J. ED. POL'Y 17, 29 (2005), available at <http://suen.ed.psu.edu/~hsuen/pubs/KEDI%20Yu.pdf>.

35. See, e.g., *GaoKao Stars*, CHONGQING TIMES, June 24, 2008, available at http://www.danwei.org/front_page_of_the_day/the_gaokao_stars.php.

36. Yu & Swen, *supra* note 34, at 19.

37. *Id.* at 20; Gary S. Becker & Kevin M. Murphy, *The Upside of Income Inequality*, THE AMERICAN, May/June 2007, available at <http://www.american.com/archive/2007/may-june-magazine-contents/the-upside-of-income-inequality/>.

38. CHINESE ACADEMY OF SOCIAL SCIENCES (2005).

39. Hartmann, *supra* note 33.

D. Structural Changes Underway

Higher education in China is undergoing significant structural change. Between 2000 and 2005, for example, the number of short-term colleges grew by almost four hundred percent and the number of vocational-technical schools grew by more than five hundred percent.⁴⁰ In the past decade, the number of graduates from tertiary education grew four-fold, the number of IHEs reached 1,792, the number of enrolled undergraduates hit 16 million, and the number of enrolled postgraduates reached almost one million.⁴¹ While the United States had 16 million students enrolled in 4,000 colleges and universities in 2004, comprising fifty to sixty percent of the school-age population, China had almost the same number of people enrolled in just under 1,800 IHEs, comprising just fifteen percent of its school-age population. However, by 2008, more than four million Chinese students were enrolled in either short or long-term courses in private colleges and universities, a significant increase.⁴² Such increases in both the number of institutions and the number of enrollees seem likely to continue, especially given estimates that predict the number of college and university students worldwide will nearly double by 2020.⁴³

However, some have questioned whether China has been able to achieve improvements in quality as well as quantity.⁴⁴ To be sure, because of improvements in education, “the average quality of the labour [*sic*] force has also been improving significantly, with new entrants to the labour [*sic*] force having almost three times as many years of schooling as those who are retiring.”⁴⁵ But today, “[p]erhaps no tension in China is greater than that between the desire to provide increased access to education at all levels and the equally strong desire to maintain and increase educational quality to ‘world-class’ standards.”⁴⁶

E. Balancing National Priorities

Despite far-reaching reforms in commerce and industry, education in

40. Li et al., *supra* note 2; *see also* 国务院关于大力发展职业教育的决定 [Decision of the State Council on Vigorously Developing Vocational Education] (promulgated Oct. 28, 2005, effective Oct. 28, 2005).

41. Lixu, *supra* note 21.

42. NATIONAL BUREAU OF STATISTICS, <http://www.stats.gov.cn/english/>.

43. *See, e.g.,* Redden, Elizabeth, *In a Global Recession, Global Ed Still Growing*, INSIDE HIGHER EDUCATION, May 29, 2009, available at <http://www.insidehighered.com/news/2009/05/29/international>.

44. *See* Dahlman et al., *supra* note 1, at 32.

45. OECD 2005 SURVEY, *supra* note 19, at 17.

46. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *Governance in China: China in the Global Economy* 540 (2005) [hereinafter OECD CHINA GOVERNANCE REPORT].

China remains subject to strong political forces.⁴⁷ As a result, educational institutions must balance the changing demands of the professional marketplace with academic rigor, scientific development, and overarching political considerations.⁴⁸ In China:

Education must serve the socialist modernization drive and must be combined with production and physical labour in order to train for the socialist cause builders and successors who are developed in an all-round way—morally, intellectually and physically.⁴⁹

Not unlike governments in the United States, China's central government prioritizes other concerns when faced with footing the bill for its own policy mandates.⁵⁰ Granted, the PRC recently spent \$3.6 billion upgrading and consolidating the top 100 domestic IHEs, using a portion of that sum to position China's top nine universities as world-class competitors.⁵¹ But, while enrollments quadrupled, government tuition subsidies for students dropped to less than fifty percent of the cost of attendance, and expenditures per student fell by more than five percent.⁵² Today, learning facilities and teaching methods in many areas remain out of date, and modern information and communications technologies are not harnessed to the same degree as in comparable western institutions.⁵³ Compounding the issues posed by the generally low quality of many domestic IHEs is their wide dispersal across China, one of the world's largest and most populous countries. Despite the presence of a number of excellent universities in cities like Beijing, Shanghai, and Wuhan, the vast majority of college students in China do not attend universities in these 'first tier' or 'second tier' cities, further limiting their options upon graduation, especially for those students unwilling to relocate for work.⁵⁴ In addition, according to statistics from China's Ministry of Commerce (MOFCOM), virtually all (ninety-seven percent) foreign direct investment in the education sector through 2007 remains relegated to the 'Eastern' region of China, leaving only small-scale projects for the central and western provinces of China.⁵⁵

47. Hughes, *supra* note 25, at 26.

48. OECD CHINA GOVERNANCE REPORT, *supra* note 46, at 547.

49. Education Law of the People's Republic of China, *supra* note 31, at art. 5.

50. See Li et al., *supra* note 2.

51. *Id.* at 17; see Pallavi Aiyar, *China Hunts Abroad for Academic Talent*, ASIA TIMES, Feb. 18, 2006, http://atimes.com/atimes/china_business/hb18cb05.html.

52. See Li et al., *supra* note 2, at 24; Diana Farrell & Andrew Grant, *Addressing China's Looming Talent Shortage*, McKinsey & Company (Oct. 2005), available at http://www.mckinsey.com/mgi/reports/pdfs/China_talent/ChinaPerspective.pdf.

53. Dahlman et al., *supra* note 1.

54. See, e.g., Diana Farrell & Andrew Grant, *Addressing China's Looming Talent Shortage*, McKinsey & Company (Oct. 2005) at 7, available at http://www.mckinsey.com/mgi/reports/pdfs/China_talent/ChinaPerspective.pdf.

55. *The Survey of Foreign Investment in China's Education Industry of 2007*,

Educational institutions at all levels charge service fees in addition to tuition, and these expenses can prevent students in less-developed areas from progressing beyond junior high, let alone high school.⁵⁶ Faced with rising costs, growing enrollments, and limited capacity, MOFCOM has advocated increased foreign involvement in domestic education.⁵⁷ As one observer noted, “[i]f China is to catch up, and catch up fast, it needs to profit from the existing strengths of other nations.”⁵⁸

III. THE LAW OF HIGHER EDUCATION AND FOREIGN INSTITUTIONS IN CHINA

To the benefit of China, U.S. colleges and universities feel “intense pressure” to deepen exchanges with Chinese schools, to tap into the growing market of Chinese consumers who can now, or in the future, afford U.S. tuition rates, and to provide overseas programs for American students seeking experience in China.⁵⁹ And after years of successful student and faculty exchanges, “universities in China with strong international ties have begun to move towards more complex forms of international academic collaboration.”⁶⁰ As indicated above, such partnerships typically involve foreign exchange programs, distance education initiatives, joint research and development laboratories, joint degree programs, Sino-foreign cooperative educational institutions, or some combination thereof. In the section that follows, we first discuss issues that are common to most programs, and then we tackle issues that affect various types of programs, dividing them into programs that (1) grant a degree or certificate to Chinese nationals, (2) establish an institution, or (3) educate students in person or via the Internet.⁶¹

FOREIGN INVESTMENT ADMINISTRATION OF THE MINISTRY OF COMMERCE, Nov. 11, 2008, available at http://www.fdi.gov.cn/pub/FDI_EN/Economy/Sectors/Service/Education/t20081124_99522.htm.

56. OECD 2005 SURVEY, *supra* note 19, at 53; see also Xinhua News Agency, *Chinese Urban Students Will be Free from Tuition and other Fees*, CHINA VIEW, July 30, 2008, available at http://news.xinhuanet.com/english/2008-07/30/content_8862983.htm.

57. See *The Survey of Foreign Investment in China's Education Industry of 2005*, FOREIGN INVESTMENT ADMINISTRATION OF THE MINISTRY OF COMMERCE, Mar. 22, 2006, http://www.fdi.gov.cn/pub/FDI_EN/Economy/Sectors/Service/Education/t20060422_25535.htm.

58. Anna Fazackerley, *To Know the Road Ahead, Ask Those Coming Back*, in BRITISH UNIVERSITIES IN CHINA: THE REALITY BEYOND THE RHETORIC 1 (Anna Fazackerley ed., 2007).

59. *Morning Edition: US Schools Tap Growing Ranks of Chinese Students* (National Public Radio broadcast May 29, 2008), transcript available at <http://www.npr.org/templates/story/story.php?storyId=90931460>.

60. Madelyn C. Ross, *China's Universities Look Outward*, IIE NETWORKER MAG., Fall 2004, available at <http://www.iienetwork.org/?p=Ross>.

61. This section emphasizes the effect of Chinese law on foreign parties seeking to provide educational services in the PRC. Readers curious about US federal or state law

A. Common Issues

Before detailing the ways in which China regulates foreign providers of higher education, we note here that certain challenges confront all visitors in China. These issues span immigration, employment, taxation, dispute resolution, property and land use, as well as negotiations for government approval. To the extent that prior scholarship on foreign investment in China considers these topics, however, we review them here only briefly in the context of higher education.

Foreign citizens and entities must of course comply with China's immigration regulations.⁶² Students must apply to the Chinese embassy or consulate in their home country for a visa that will allow for study, but not employment, in the PRC.⁶³ Foreigners and their immediate family members may similarly apply for F Visas to "visit, investigate, lecture, do business, conduct scientific, technological and cultural exchanges, and take short-term refreshment courses and do practical training," but not to secure employment in the PRC.⁶⁴ Entities established in China, however, can hire foreigners by helping them secure a work visa, an Alien Employment Permit, and a Residence Permit.⁶⁵

that impacts educational initiatives in China are advised to consult other sources. *See, e.g.*, Kenneth D. Salomon, *A Primer on Distance Learning and Intellectual Property Issues*, 96 ED. LAW REP. 305 (1995); Bertrand Harding, *Federal Tax Issues Raised by International Study Abroad Programs*, 27 J.C. & U.L. 207 (2000); William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth...the Life of a Student*, 27 J.C. & U.L. 151 (2001); Jamie Lewis Keith, *The War on Terrorism Affects the Academy*, 30 J.C. & U.L. 239 (2004); Kam C. Wong, *Implementing the USA PATRIOT Act: A Case Study of the Student and Exchange Visitor Information System (SEVIS)*, 2006 B.Y.U. EDUC. & L.J. 379 (discussing registration of foreign students at U.S. colleges and universities in the wake of the terrorist attacks on the United States on September 11, 2001); Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309 (2006); William F. Ferreira, *Conducting Research and Sponsored Programs Overseas*, 7 MED. RES. L. & POL'Y REP. 441 (2008) (discussing a range of issues relating to the operation of research programs abroad).

62. *See* Ferreira, *supra* note 61, at 446.

63. 中华人民共和国外国人入境出境管理法实施细则[Rules for the Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners] (promulgated by the Ministry of Labor, the Ministry of Public Security, the Ministry of Foreign Affairs, and the Ministry of Foreign Trade and Economic Cooperation, Dec. 27, 1986, effective Dec. 27, 1986), art. 4 [hereinafter Visa Rules]; 劳动部, 公安部, 外交部, 外经贸部关于颁发《外国人在中国就业管理规定》的通知 (劳部发 (1996) 29号) [Regulations on the Management of Employment of Foreigners in China] (promulgated Jan. 22, 1996, effective May 1, 1996), art. 8 [hereinafter Foreign Worker Regulations].

64. *Id.*

65. *See, e.g.*, 劳动和社会保障部办公厅关于对外国人在中国就业管理有关问题的函(劳社厅函(2005) 231号) [Letter of the General Office of the Ministry of Labor and Social Security on the Relevant Issues concerning the Administration of Employment of Foreigners in China] (promulgated July 4, 2005, effective July 4, 2005).

The relevant procedures for obtaining a visa or permit are simplified in some instances if a foreign party forms a subsidiary in China, typically known as a wholly foreign-owned entity (WFOE).⁶⁶ For this reason, however, current regulatory policy in China limits the scope of educational activity in which a WFOE can engage, so parties to Sino-foreign cooperative educational institutions typically agree that the Chinese party will assist the cooperative institution in applying for visas and hiring Chinese personnel. In a few limited instances, however, foreign schools will form a WFOE, a type of limited liability company that reduces obstacles to employing both foreign citizens and Chinese nationals.⁶⁷ However, foreign schools may not form a WFOE to award degrees to Chinese citizens, and professors and other faculty must be hired as “education consultants” to work for a WFOE.⁶⁸ Thus, foreign schools typically only form a WFOE to hire persons responsible for logistics and administration, not instruction.

Labor laws likewise impact foreign schools. First and foremost, foreign employers cannot directly hire any Chinese nationals, and so must rely on an appropriate hiring relationship with a domestic entity or a contractual arrangement. The Labor Contract Law requires executed contracts for all “labor relationships,” regardless of whether the employee is a PRC national, and limits the employer’s ability to fire employees before the expiration of their contract term.⁶⁹ Schools employing Chinese nationals must contribute to social insurance accounts in amounts that vary depending upon the location of the employing entity and the form of insurance.⁷⁰ Regulations also prohibit workplace discrimination based

66. ALL ROADS LEAD TO CHINA, *Can a WFOE [sic] in China Provide Visas? How Many?* (Apr. 29, 2004), www.allroadsleadtochina.com/index.php/2008/04/29/can-a-wfoe-in-china-provide-visas-how-many/.

67. See Steven M. Dickinson, *Introduction to the New Company Law of the People’s Republic of China*, 16 PAC. RIM L. & POL’Y J. 1 (2007). Limitations under U.S. law may prevent certain institutions from forming such an entity. See Theodore J. Hopkins, Jr., *Foundations Supporting Colleges and Universities: Unrelated Business Income Taxation*, 40 S.C. L. REV. 597, 600 (1989).

68. See 外商投资产业指导目录(2007年修订) (国家发展和改革委员会, 商务部令(第57号) [Catalogue of Industries for Guiding Foreign Investment (Revised 2007), Catalogue of Industries Encouraged for Foreign Investment] (promulgated by National Development and Reform Commission and the Ministry of Commerce Order No. 57, Oct. 31, 2007, effective Dec. 1, 2007), art. X (1) (requiring that foreign investment in higher education occur through an equity or a contractual joint venture).

69. 中华人民共和国劳动合同法(promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008), arts. 10, 36–50.

70. See 北京市失业保险规定 (1999年9月14日北京市人民政府第38号令发布根据2007年6月14日北京市人民政府第190号令修改) [Provisions of Beijing Municipality on Unemployment Insurance] (promulgated by Beijing Government Order No. 38, Sept. 14, 1999, effective Nov. 11, 1999, amended June 14, 2007), art. 7; 深圳经济特区企业员工社会养老保险条例 (2006修正) [Regulation of Shenzhen Economic Zone on Social Endowment Insurance for Employees of Enterprises]

upon nationality, race, sex, and religious belief, and include specific measures designed to protect female employees, but such regulations typically have limited significance in a Chinese context.⁷¹

Local tax laws also impact both employees and their employers. Entities in China must withhold individual income tax payments for employees, though some U.S. citizens serving on the faculty of Sino-foreign cooperative educational institutions are exempt from withholding if they stay in China for less than three years. Other U.S. citizens are likewise exempt under a detailed set of rules agreed upon by the PRC and U.S. governments.⁷² Foreign entities must also pay taxes, but such entities are not double-taxed under the same agreement between the PRC and the US.⁷³ (As non-profit Chinese entities are extremely difficult for even *domestic* parties to register, foreign institutions typically do not enjoy tax-free status.)⁷⁴ China's enterprise income tax, business tax, value-added tax, and various consumption taxes typically apply to entity income, though the value-added tax and consumption taxes rarely apply in an educational context.⁷⁵ While in the past, foreign investors benefited from preferential tax treatment, such preference was largely repealed by the new enterprise income tax law that came into effect as of January 1, 2008.⁷⁶ Foreign parties that are not engaged in a cooperative institution (but that provide

(promulgated Jan. 1, 1999, effective July 26, 2006), art. 8; Cooperative Education Regulations, *supra* note 7, at art. 28.

71. See [Labor Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 12; 女职工劳动保护规定 [Regulations Concerning the Labor Protection of Female Staff and Workers] (promulgated July 21, 1988, effective Sept. 1 1988), art. 1.

72. 中华人民共和国个人所得税法 (2005修正) [Individual Income Tax Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, amended Oct. 27, 2005, effective Oct. 27, 2005), art. 8; Agreement for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, PRC-US, art. 19, Apr. 30, 1984, PRC-US Income Tax Convention, *available at* <http://www.irs.gov/pub/irs-trty/china.pdf> [hereinafter PRC-US Double Taxation Treaty].

73. Xinhua News Agency, *China Avoids Double Taxation on Expats*, PEOPLE'S DAILY, Aug. 3, 2004, http://english.peopledaily.com.cn/200408/02/eng20040802_151625.html; PRC-US Double Taxation Treaty; see Devin Xie et al., *Regulations Implement New Enterprise Income Tax Law*, HOGAN & HARTSON CHINA UPDATE, Dec. 2007/Jan. 2008 at 4.

74. See Karla W. Simon, *Reform of China's Laws for NPO's—A Discussion of Issues Related to Shiye Danwei Reform*, in ZEITSCHRIFT FUER CHINESISCHE RECHT 75 nt.42 (2005), *available at* http://www.iccs1.org/pubs/Aufsatz_Simon.pdf; 社会团体登记管理条例 [Regulations on Registration and Administration of Social Organizations] (promulgated Oct. 25, 1998, effective Oct. 25, 1998).

75. See James M. Zimmerman, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 336 (2d ed. 2005).

76. 中华人民共和国企业所得税法 (中华人民共和国主席令第63号) [Enterprise Income Tax Law of the People's Republic of China] (promulgated by Order of the President of the People's Republic of China No. 63, Mar. 16, 2007, effective Jan. 1, 2008).

educational services to Chinese parties) typically enjoy a five percent business tax rate, while parties operating a cooperative institution pay twenty-five percent on “reasonable returns,” once the MOE approves their disbursement.⁷⁷

To earn taxable income, however, a foreign entity and a Chinese party must execute a contract. In such a cross-border contract, foreign schools should be mindful of provisions regarding forum selection, indemnification, arbitration, intellectual property, and governing law.⁷⁸ Public institutions should also pay attention to language that operates to waive sovereign immunity or immunity from execution. Parties should note that, if a dispute arises, Chinese courts will only enforce a foreign judgment if China and the awarding jurisdiction have signed a treaty that allows for reciprocal recognition and enforcement of judgments.⁷⁹ As of 2007, China had thirty such treaties in force, but none with its largest trading partners, including the United States, the United Kingdom, and Japan.⁸⁰ As of August 1, 2008, however, parties may apply to PRC courts to enforce certain final judgments awarded in Hong Kong pursuant to an arrangement between the PRC Supreme People’s Court and the Hong Kong

77. When providing services in China, non-resident enterprises are subject to a 5% business tax, and may also be subject to a 25% enterprise income tax, with “income” calculated according to the following formula: total service fees × the profit margin (usually 10-40%), determined by the competent taxation authority. When a non-resident enterprise has a permanent establishment (*e.g.*, a representative office; a plant; a place where services are provided; a place where projects involving construction, installation, assembly, repair or exploration are carried out; or a place where production and business operations are carried out) in China, such enterprise must pay the 25% enterprise income tax on incomes derived from China and on incomes it earns outside China that have real connection with said establishment. However, under the PRC Enterprise Income Tax Law, when a non-resident enterprise does not have any permanent establishment in China, or when the incomes earned by a non-resident enterprise with a permanent establishment in China have no real connection to said establishment, such enterprise only has to pay the 10% withholding tax on incomes derived from China. Despite the letter of the Law, tax experts maintain that in practice the 10% withholding tax is only applicable to passive incomes (*e.g.*, interests, rental fees, royalties and dividends). When services are involved, a non-resident enterprise without any permanent establishment in China may still have to pay the 25% enterprise income tax (rather than the 10% withholding tax) on service incomes derived from China according to the abovementioned formula. However, it is also possible that such enterprise would not have to pay any enterprise income tax or withholding tax since the competent taxation authority has significant discretion on whether or not a foreign service provider without a permanent establishment in China should pay the 25% enterprise income tax (and what the deemed profit margin should be, if the taxation authority determines that the 25% enterprise income tax is applicable) on service incomes derived from China.

78. See Zimmerman, *supra* note 75, at 102.

79. See Graeme Johnston et al., *China*, in GETTING THE DEAL THROUGH: DISPUTE RESOLUTION 43 (2007), available at <http://www.chinalawblog.com/ChinaDisputeResolution.pdf>.

80. *Id.*

Special Administrative Region.⁸¹ Because the Arrangement is still relatively new, cross-border contracts typically include mandatory arbitration provisions, as PRC courts will enforce foreign arbitral awards under the New York Convention and a similar agreement with Hong Kong.⁸²

To the extent that a college or university intends to remit funds outside of China, such transfers are subject to the strict control measures governing all types of foreign exchange transactions that cross China's borders, as China's official currency, the *Renminbi* (RMB), is not freely convertible in the international foreign exchange market.⁸³ The State Administration of Foreign Exchange (SAFE), a bureau of China's central bank, regulates the movement and/or conversion of foreign exchange, both inward and outward.⁸⁴ Detailed rules specify the precise extent of approval authority that local banks and local branches of SAFE wield over each type of transaction. Such rules are changed periodically, but the general trend appears to be that SAFE is gradually delegating more authority to approve foreign exchange transactions to local banks. Thus, any IHE with a project in China that involves the inflow or outflow of currency should consider maintaining a good working relationship with a bank in China that is qualified to perform such foreign exchange related services.

With respect to government approvals, the many steps required to secure licenses and permits in China "make . . . the process lengthy and sometimes frustrating."⁸⁵ Like most nations, China has "its own laws, paperwork, and various approvals to obtain before it will allow program activities to begin."⁸⁶ While IHEs with experience in other countries may be accustomed to the need for translated documents and the administrative processes for obtaining properly authenticated documents, such requirements may sometimes seem daunting to IHEs embarking on their

81. Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, PRC-HK, art. 1, Aug. 1, 2008, *available at* <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandrej20060719e.pdf>.

82. Johnston, *supra* note 79, at 44; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 3, June 10, 1958, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf; Memorandum of Understanding on the Arrangement concerning Mutual Enforcement of Arbitral Awards, PRC-HK, art. 7, June 21, 1999, *available at* <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf>.

83. See Wayne M. Morrison & Marc Labonte, *China's Currency: A Summary of the Economic Issues*, CONGRESSIONAL RESEARCH SERVICE, No. RS21625, 1 (2007), *available at* <http://www.fas.org/sgp/crs/row/RS21625.pdf>.

84. See, e.g., 中华人民共和国外汇管理条例 (中华人民共和国国务院令 (第193号)) [Regulations of the People's Republic of China on Foreign Exchange Administration] (promulgated by Decree 193 of the State Council of the People's Republic of China, Jan. 29, 1996, effective Apr. 1, 1996).

85. Ferreira, *supra* note 61, at 442.

86. *Id.* at 444.

first international program in China. Overall, a foreign party seeking to provide educational services may need approvals from one or more of the following: the MOE, the Ministry of Human Resources and Social Security (formerly known as the Ministry of Labor and Social Security), or, MHRSS, the General Administration of Press and Publication (GAPP), the Ministry of Industry and Information Technology (MIIT), and the State Administration for Industry and Commerce (SAIC), as well as the local offices of those entities.⁸⁷ As this tangled web of jurisdiction indicates, “there is no single Chinese legal ‘system,’ . . . [but] instead many Chinese legal systems, each with its own jurisdiction, hierarchy of [legal] authority, and way of operating.”⁸⁸ Indeed, though China is a unitary government, significant authority nonetheless resides in administrative bodies and local governments.⁸⁹ Successful entrants therefore engage with the relevant agencies early and often.

B. Programs that do not grant degrees to Chinese citizens.

Educational programs that do not confer degrees or certificates on Chinese citizens fall beyond the scope of regulations governing cooperative education in China. The regulations specifically distinguish between programs that educate Chinese citizens and those that do not.⁹⁰ Exchanges that simply acknowledge credits from both institutions without aiming to enroll Chinese citizens or bringing in “substantial foreign educational resources” or research and development initiatives are explicitly excluded from mandatory approval processes.⁹¹

Foreign exchange programs in the United States typically function in one of four different ways.⁹² With respect to programs owned or operated by IHEs, the IHEs operate their facilities and programs abroad “as if they were extensions of the home campus.”⁹³ In contractual programs, one foreign institution will partner with one or more colleges or universities,

87. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 8. The Ministry of Information Industry was reorganized into the newly-formed MIIT in June of 2008, while the Ministry of Labor and Social Security will soon become the Ministry of Human Resources and Social Security under a plan approved by the NPC. See Xinhua News Agency, *Super Ministry Inaugurated in Beijing*, CHINA DAILY, June 29, 2008, available at <http://en.chinaelections.org/newsinfo.asp?newsid=18226>.

88. Donald C. Clarke, *How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China*, 19 COLUM. J. ASIAN L. 50, 64 (2005).

89. Corne, *supra* note 29, at 369-70.

90. See 中华人民共和国中外合作办学条例实施办法 (教育部令 (第20号)) [Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China] (promulgated June 2, 2004, effective July 1, 2004), art. 2.

91. *Id.* at arts. 2, 60.

92. Hoye & Rhodes, *supra* note 61, at 155.

93. *Id.*

typically under a contractual arrangement designed to allocate liabilities and revenue between the parties.⁹⁴ Under a “permissive” program, a college or university will allow a student or faculty member to study abroad on their own recognizance, essentially placing them on a leave of absence and not forming any relationship with the recipient institution.⁹⁵ Schools may also operate some combination of the options described above, such as a program that hires only a few employees in the foreign country, but also contracts with another foreign college or university for the purposes of revenue-sharing and risk allocation.⁹⁶

In programs like the Hopkins-Nanjing Center, foreign parties lease property from a Chinese partner, contract for revenue-sharing, allocate responsibility for securing government approvals, and may even require the Chinese party to pay PRC taxes. Contractual programs that involve foreign faculty teaching Chinese citizens require compliance with the appropriate immigration procedures, as well as approvals from the MOE and, in some circumstances, the partner university.⁹⁷ Simple student exchanges typically require compliance with immigration procedures and the negotiation of a contract. Again, for exchanges that do not involve teaching Chinese students, a foreign party need not partner with a Chinese IHE.⁹⁸ It is worth noting, however, that for a variety of reasons, partnering with a Chinese IHE provides significant practical advantages.

Perhaps for this reason, exchanges between western countries and China have grown significantly in the past ten years.⁹⁹ Educators in the United Kingdom recognize their financial dependence on “a tide of Chinese students flooding into [Great Britain] that could very easily be diverted elsewhere”¹⁰⁰ With respect to China and the United States, however, the statistics are astounding: the number of U.S. citizens studying in China grew by 543% in the last ten years.¹⁰¹ In the same period, the number of Chinese citizens studying in the United States expanded by 159%, with Chinese nationals comprising 11.6% of all foreign students in the United

94. *Id.* at 155-56.

95. *Id.* at 156.

96. *Id.*

97. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 2, 60. To qualify as a visiting scholar, faculty members must: (1) hold a masters degree or above; (2) have at least 5 years’ relevant working experience; (3) agree to comply with PRC laws and regulations during their stay in the PRC; (4) be in good physical condition; and (5) lack a criminal record.

98. *Id.* at art. 60.

99. Dahlman et al., *supra* note 1, at 5.

100. Fazackerley, *supra* note 58, at 1.

101. *Country Background: China*, INSTITUTE OF INTERNATIONAL EDUCATION, Nov. 7, 2007), available at <http://www.opendoors.iienetwork.org/page/113181/> [hereinafter IIE 2007 CHINA REPORT].

States as of 2007, second only to India.¹⁰² Fueled by an increase in income among Chinese families and the growth of a booming industry devoted to placing Chinese students in tuition-hungry American schools, many American institutions are experiencing exponential growth in the number of Chinese undergraduates. A few years ago, Carleton College in Minnesota enrolled only three or four Chinese students, none with the wealth to pay their own tuition. In 2009, Carleton enrolled eighteen, many of whom needed no financial aid at all.¹⁰³ Ohio University enrolled four times as many undergraduates from China in 2008 as it did in 2007, many paying full tuition in addition to fees paid to agents who help the students find a school.¹⁰⁴ With respect to faculty exchanges, China sends more scholars to the United States than any other nation, increasing exports between 2005–2006 and 2006–2007 by 20.5%.¹⁰⁵ Observers expect such exchanges to grow even further, both in terms of headcount and the overall number of programs.¹⁰⁶

Similarly, research and development initiatives are accorded considerable flexibility under China's Higher Education Law, which "encourages cooperation in diverse forms between institutions of higher learning and enterprises, institutions, societies and other social organizations in scientific research, technological development and extension."¹⁰⁷ To that end, the MOE and the Ministry of Science and Technology jointly formulated the "Outline for the Development Program of National University Science and Technology Parks" to promote the development and growth of technologically-advanced inventions and enterprises.¹⁰⁸ Chinese and foreign IHEs have formed so many different kinds of joint research and development programs that it would be impossible to catalogue them all in one place. Yale University has multiple cooperative programs in China, including one with Peking University

102. *Id.*

103. Scott Jaschik, *The Chinese Are Coming*, INSIDE HIGHER EDUCATION, Sept. 28, 2009, available at <http://www.insidehighered.com/news/2009/09/28/china>.

104. Tamar Lewin, *Matching Newcomer to College, While Both Pay*, N.Y. TIMES, May 11, 2008, <http://www.nytimes.com/2008/05/11/education/11agents.html?pagewanted=all>.

105. INSTITUTE OF INTERNATIONAL EDUCATION, OPEN DOORS REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE 2007, fig. 12c, <http://opendoors.iienetwork.org/page/113171/>.

106. Johnson, *supra* note 61, at 309.

107. Higher Education Law of the People's Republic of China, *supra* note 22, at art. 35.

108. 科技部, 教育部关于印发《国家大学科技园“十五”发展规划纲要》的通知(2001年6月6日国科发高字(2001)184号) [Circular of the Ministry of Science and Technology and the Ministry of Education Concerning the Distribution of the Outline for the Development Program of National University Science and Technology Parks During the Tenth Five-Year Period] (promulgated June 6, 2001, effective June 6, 2001).

founded in 2001,¹⁰⁹ while more recent examples include a relationship between the University of Massachusetts and Tsinghua University that began in 2006,¹¹⁰ as well as the preliminary 2009 extension of a corporate-sponsored research partnership between an American company and University of California, Los Angeles to include Peking University.¹¹¹ Tsinghua and the Brookings Institution also formed the Brookings-Tsinghua Center for Public Policy in Beijing.¹¹² The history department at Fudan University established the Center for Asian Studies with the Korean Higher Education Consortium, as well as several technology development projects with non-educational partners, including Lucent Technologies, Cisco, and Toshiba.¹¹³ Intel sponsors courses at several Chinese universities, as well as several research and development laboratories, under the aptly-named “multi-core” program.¹¹⁴ As these programs typically do not involve a foreign institution granting degrees or certificates to Chinese students, they are not required to partner with a Chinese IHE.¹¹⁵

As with exchange programs, the same issues concerning contractual provisions apply to research and development initiatives. Where research and development initiatives differ, however, is with respect to the joint ownership of intellectual property (IP), in that parties must negotiate the use of existing IP, as well as the ownership and use of any IP created by the partnership. In our practice, we have seen a spectrum of different arrangements, ranging from partnerships in which the foreign party owns all of the resulting IP and grants the Chinese party a license, to initiatives in which both parties decide to jointly own any IP produced by the initiative.

C. Education of PRC Nationals.

China encourages foreign education for Chinese nationals.¹¹⁶

109. See, e.g., *Beijing University, Yale Found Joint Research Center*, PEOPLES DAILY, May 7, 2001, available at http://english.people.com.cn/200105/07/eng20010507_69374.html.

110. *University of Massachusetts the First Foreign College to Offer (Online) Classes in China*, STRAITS TIMES, Apr. 1, 2008 [hereinafter UMass].

111. *Xilinx Sponsors Peking University-UCLA Joint Research Institute of Science & Engineering*, REUTERS, June 17, 2007, available at <http://www.reuters.com/article/pressRelease/idUS99343+17-Jun-2009+PRN20090617>.

112. Brookings-Tsinghua Center, About Us, <http://www.brookings.edu/brookings-tsinghua/about.aspx> (last visited July 30, 2008).

113. Fudan University, Joint Program (2003), available at <http://www.fudan.edu.cn/englishnew/research/program.html>; Fudan University, Joint Project (2003), available at <http://www.fudan.edu.cn/englishnew/research/project.html>.

114. Boon-Lock Yeo, *Innovation & Collaboration with Chinese Universities: Multi-Core and Beyond*, INTEL CORPORATION, http://cache-www.intel.com/cd/00/00/33/05/330513_330513.pdf.

115. Implementation Measures for the Cooperative Education Regulations of the People's Republic of China, *supra* note 90, art. 2.

116. Catalogue of Industries for Guiding Foreign Investment (Revised 2007),

Regulations and guidance from both the State Council and the MOE establish the framework for entry, allowing foreign schools to educate students on the mainland in partnership with peer Chinese IHEs so long as the foreign school is not religiously affiliated and restricts its activities to upper middle and higher education.¹¹⁷ The Cooperative Education Regulations “encourage leading western institutions to come to China, bringing teaching and research systems and staff to carry out research-led teaching, in English, on undergraduate and postgraduate degrees which are internationally excellent.”¹¹⁸ The MOE’s Implementation Measures for the Cooperative Education Regulations, which clarify the Regulations, likewise promote “cooperative education between Chinese education institutions and foreign education institutions whose academic level and educational and teaching quality are universally acknowledged.”¹¹⁹ China specifically hopes to draw “cooperative education activities relating to the subjects, specialties and fields that are new and badly demanded in China[,]” as well as “Chinese-foreign cooperative education in China’s [western], remote and poverty-stricken regions.”¹²⁰ To date, however, much of the activity has taken place in the coastal cities, although programs such as the University of Montana’s association with Xinjiang Normal University seek to extend the cooperation to inland cities.

“Chinese-foreign cooperative education must . . . implement Chinese education policies”¹²¹ Foreign schools should, therefore, recognize that in 2006, in addition to the priorities identified above, the MOE emphasized public interest principles when it declared that education is not a “trade in goods,” and that it would “strictly put an end to the acts of

Catalogue of Industries Encouraged for Foreign Investment, *supra* note 68, at art. X (1); *see also* 人事部, 教育部, 科技部, 公安部, 财政部关于印发《关于鼓励海外留学人员以多种形式为国服务的若干意见》的通知 (人发(2001)49号) [Circular of Ministry of Personnel, Ministry of Education, Ministry of Science and Technology, Ministry of Public Security and Ministry of Finance on Printing and Distributing Some Opinions on Encouraging Those Having Studied Abroad to Render Their Services to the Motherland in Multi-Ways (No. 49 (2001) issued by Ministry of Personnel)].

117. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7; 教育部关于当前中外合作办学若干问题的意见 (教外综(2006)5号) [Opinions of the Ministry of Education on Some Issues Concerning Current Sino-Foreign Cooperative Education] (promulgated Feb. 7, 2006, effective Feb. 7, 2006) [hereinafter 2006 MOE Opinion on Cooperative Education].

118. Press Release, Univ. of Nottingham, Bridge from China to the World: Official opening by Deputy PM (Feb. 23, 2006), *available at* http://www.nottingham.ac.uk/public-affairs/press-releases/index.phtml?menu=pressreleases&code=BRI30a/06&create_date=23-feb-2006.

119. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 3.

120. *Id.*

121. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 5.

arbitrary charges and high charges in the name of Sino-foreign cooperative education, and prevent the trend of educational industrialization.”¹²² The MOE also highlighted the need to strengthen “political sensitivity . . . so as to maintain national security, social stability, and normal educational order[,]” as well as the “leading position of Chinese institutions”¹²³ Finally, the Implementation Measures specified that cooperative education must remain a non-profit activity, though cooperative educational initiatives are allowed to remit “reasonable returns” to the parties involved.¹²⁴ This concept of “reasonable returns” leaves open to interpretation the issue of whether any surplus generated from fees and tuition can be returned to the respective parties, and there is little regulatory guidance on this issue.

Through the approval system, the MOE and the governments of provinces, autonomous regions and municipalities directly under the central government wield significant authority over both higher education and vocational training in China.¹²⁵ Labor bureaus of provincial-level governments, for instance, approve vocational training programs.¹²⁶ The MOE approves diploma-granting higher education initiatives based upon the parties’ application materials, as well as an opinion from the provincial-level government responsible for the area in which the parties want to conduct the program.¹²⁷ The governments of provinces, autonomous regions and municipalities directly under the central government approve higher education initiatives that do not grant diplomas.¹²⁸ Programs or institutions involving a “double campus” approach must obtain a special license from the MOE, must include a course of study in which more than one third of the classes and teaching hours are provided by the foreign partner, and must be taught primarily at the campus of the Chinese partner.¹²⁹ Regardless of the proposed program, however, both the applications and their review must comply with detailed rules and regulations published by the MOE in accordance with China’s law on administrative licensing.¹³⁰

122. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 1.

123. *Id.* at art. 2.

124. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 28, 43.

125. *See* Higher Education Law of the People’s Republic of China, *supra* note 22, at art. 29.

126. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 12.

127. *See id.* at art. 12; Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 5, 35, 36.

128. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 5, 35, 36.

129. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 5.

130. 实施教育行政许可若干规定[Several Provisions on the Implementation of Educational Administrative Licensing] (promulgated Apr. 21, 2005; effective June 1,

Parties must submit applications for higher education initiatives in March or September, and experts from the approval authority must examine the application. Approvals typically take at least a month,¹³¹ though it is not unheard of for approvals to take considerably longer. The MOE looks at whether an application involves a famous foreign school, a foreign school with famous programs or professors, or a foreign provider that already operates a similar initiative, as well as considering school rankings and whether the initiative will serve central or western China.¹³² The MOE wants to attract foreign partners who can help build vocational institutions that increase the quality of labor in “the advanced manufacturing industry, modern agriculture and modern service industry, especially, in the fields of energy, minerals, environmental protection and banking,”¹³³ and not “low-level educational programs of business, management, computer, IT and other subjects (specialties) whose cost is relatively cheap.”¹³⁴

Once parties secure the necessary approvals, certain rules govern the ongoing management of both projects and institutions. Textbooks must come through “lawful” channels.¹³⁵ Cooperative initiatives must have an appropriate ratio of Chinese and foreign instructors.¹³⁶ The relevant approval authority must receive book lists and course lists, and the parties must comply with the rules and bylaws that govern the management of student records and teaching, not to mention advertisements and enrollment brochures.¹³⁷ Institutions must publicize the items and standards for all charges, but only after receiving approvals from the relevant pricing, financial, and educational authorities.¹³⁸ School financial departments must collect tuition in RMB pursuant to permits issued by designated pricing authorities.¹³⁹ Tuition rates must conform to standards set by the

2005), art. 1.

131. See Implementation Measures for the Cooperative Education Regulations, *supra* note 90, at arts. 38-39; 中华人民共和国行政许可法 [Administrative License Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 27, 2003, effective July 1, 2004), art. 42.

132. 教育部关于进一步规范中外合作办学秩序的通知 [Notice of the Ministry of Education on Further Regulating Sino-Foreign Cooperation in Running Schools] (promulgated & effective Apr. 6, 2007), art. 3 [hereinafter 2007 MOE Cooperative Education Notice]; 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 3.

133. 2007 MOE Cooperative Education Notice, *supra* note 132, at art. 4.

134. 2007 MOE Cooperative Education Notice, *supra* note 132, pmbl.

135. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 44.

136. 2007 MOE Cooperative Education Notice, *supra* note 132, pmbl.

137. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at arts. 44-47.

138. 2007 MOE Cooperative Education Notice, *supra* note 132, at art. 2.

139. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 38; see, e.g., Provisional Measures for the

provincial-level government, which also sets a maximum ratio between tuition and other costs, and may not be increased without prior approval.¹⁴⁰ With respect to tuition charged by the Chinese party, PRC nationals and ethnically Chinese foreign citizens pay lower tuition than non-Chinese foreign citizens,¹⁴¹ so IHEs need to consider whether this is a potential cause of concern under the relevant anti-discrimination laws which they are subject to in the United States. Diplomas issued by a foreign institution to graduates of a project or initiative must match those issued to graduates of the foreign institution not enrolled in the project or initiative.¹⁴² Relevant regulations provide that in granting diplomas, parties may not recognize credits for preparatory foreign-language training.¹⁴³ This may impact students' choice with regard to such preparatory training. Finally, parties may only use tuition to establish and repair schools, to pay salaries for teaching and administrative personnel, and to cover other select operating expenses; they may not use it for "profit-making purposes."¹⁴⁴

Programs that confer degrees from a Chinese IHE must comply with two recent notices promulgated by the MOE concerning electronic registration.¹⁴⁵ The regulations require that both foreign students beginning a formal course of study at a four-year college level or above,

Administration of Fee Collection of Secondary Vocational Schools (1996); Provisional Measures for the Administration of Fee Collection of Higher Education (1996); Public Notice System of Education Fee Collection (2002).

140. Provisional Measures for the Administration of Fee Collection of Secondary Vocational Schools (1996); Provisional Measures for the Administration of Fee Collection of Higher Education (1996); Public Notice System of Education Fee Collection (2002).

141. 教育部、国家发展改革委、财政部、国务院侨务办公室关于调整国内普通高校招收海外华侨学生收费标准及有关政策问题的通知 (教财(2006)7号)[Notice of the Ministry of Education, the National Development and Reform Commission, the Ministry of Finance and the Overseas Chinese Affairs Office of the State Council on Adjusting the Charging Rates for Overseas Chinese Students by Domestic Regular Higher Educational institutions and Relevant Policies] (promulgated July 11, 2006, effective Sept. 1, 2006), art. 1.

142. Implementation Measures for the Cooperative Education Regulations of the People's Republic of China, *supra* note 90, at art. 49.

143. 2007 MOE Cooperative Education Notice, *supra* note 132, at art. 5.

144. Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 39.

145. 教育部关于印发《普通高等学校新生学籍电子注册暂行办法》的通知 (教学(2007)3号) [Notice of the Ministry of Education on Printing and Distributing the Interim Measures for the Electronic Registration of New Students of General Institutions of Higher Education] (promulgated Mar. 13, 2007, Sept. 1, 2007) [hereinafter Domestic Student Electronic Registration Notice]; 教育部办公厅关于试行普通高等学校外国留学生新生学籍和外国留学生学历证书电子注册的通知 (教外厅(2007)5号) [Notice of the General Office of the Ministry of Education on the Trial Implementation of Electronic Registration of Enrollment of New Foreign Students and Academic Education Certificates of Foreign Students in Ordinary Institutions of Higher Learning] (promulgated Nov. 22, 2007, effective Nov. 22, 2007) [hereinafter Foreign Student Electronic Registration Notice].

and Chinese students entering an institution at a two-year college level or above, register electronically.¹⁴⁶ If the IHE fails to electronically register the enrollment of a student, the MOE will not recognize any coursework that the student completes, and will not allow the IHE to grant the student a degree.¹⁴⁷ As a result, parties should be careful to ensure the registration of all students with the MOE by the prescribed deadlines, and be sure that any related contracts include provisions to allocate related liabilities. Moreover, given the recent riots at independent colleges that failed to grant graduates diplomas from their more prestigious parent universities, parties should be careful to specify in both contracts and marketing materials which institution will ultimately confer the degree awarded, if any.¹⁴⁸

1. "Projects"

Again, as mentioned above, regulations distinguish between cooperative projects and cooperative institutions that grant diplomas or certificates. Diploma-granting projects are a popular approach for foreign IHEs in China, in part because they place fewer burdens on the foreign institution.¹⁴⁹ To create a cooperative educational project, institutions of the same level and type must develop curricula and courses in subjects already offered by both institutions or, if the project will introduce a new subject to the Chinese institution, the Chinese institution must have sufficient resources and faculty to handle the new subject.¹⁵⁰ The parties must also execute a cooperative agreement that describes the goals of the program and sets a project term, and they must apply to the appropriate approval authority.¹⁵¹ According to recent guidance from the MOE, project partners should ensure that "the educational and teaching plan, fostering plan, courses, and contents of teaching formulated by them jointly shall not be inferior to the standards and academic requirements of the foreign education institution in the country where it is located."¹⁵² Beyond that, however, all of the same rules listed above apply.

146. Domestic Student Electronic Registration Notice, *supra* note 145, at art. 3; Foreign Student Electronic Registration Notice, *supra* note 145, at art. 4.

147. Domestic Student Electronic Registration Notice, *supra* note 145, at art. 14; Foreign Student Electronic Registration Notice, *supra* note 145, at art. 4, ¶7.

148. See Joseph Kahn, *Rioting in China Over Label on College Diplomas*, N.Y. TIMES, June 22, 2006, available at <http://www.nytimes.com/2006/06/22/world/asia/22china.html>.

149. OBSERVATORY ON BORDERLESS HIGHER EDUCATION, SINO-FOREIGN JOINT EDUCATION VENTURES: A NATIONAL, REGIONAL AND INSTITUTIONAL ANALYSIS (2006) (noting that Chinese and foreign IHEs entered into more than 1,300 joint degree programs as of 2006 and had planned an additional 400 more).

150. Implementation Measures for the Cooperative Education Regulations of the People's Republic of China, *supra* note 90, at art. 33.

151. *Id.* at art. 5.

152. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 4, ¶2.

2. "Institutions"

Establishing a cooperative educational institution involves more steps than a "project,"¹⁵³ and the obstacles to a United States IHE's involvement in such an institution are daunting. Parties first submit a preliminary application, which the approval authority must process within 45 working days, and then submit a second formal application within three years after the approval of the preliminary application.¹⁵⁴ Upon accepting a formal application, authorities must decide whether or not to license a vocational institution within three months or a college or university within six months.¹⁵⁵ Proposed schools (including vocational schools, colleges and universities) must have qualified teachers, facilities and equipment, as well as sufficient funds to support current and long term operations, and proposed universities must have at least three "major" departments, as designated by the State.¹⁵⁶ Colleges and universities, in particular, must possess a "strong teaching and scientific research ability, have a higher level and scope of teaching and scientific research, and be in a position to impart undergraduate and post-graduate education."¹⁵⁷ All in all, 230 foreign schools met these requirements in 2006, a figure that includes not only IHEs, but also private primary and middle schools.¹⁵⁸

In terms of structure and governance, vocational institutions operate as joint ventures with legal person status and higher education institutions operate as contractual joint ventures with status analogous to a partnership.¹⁵⁹ The principal or chief executive must be a PRC citizen and permanent resident in China with teaching experience who "loves the country" and "observes high moral standards."¹⁶⁰ The board of directors or

153. Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 13.

154. *Id.* at arts. 15, 18. Schools may not enroll Chinese students until approval of a final application.

155. *Id.* at art. 18.

156. See Education Law of the People's Republic of China, *supra* note 31, at art. 26; Higher Education Law of the People's Republic of China, *supra* note 22, at art. 25.

157. Higher Education Law of the People's Republic of China, *supra* note 22, at art. 25.

158. *The Survey of Foreign Investment in China's Education Industry of 2005*, FOREIGN INVESTMENT ADMINISTRATION OF THE MINISTRY OF COMMERCE, Mar. 22, 2006, *available at* http://www.fdi.gov.cn/pub/FDI_EN/Economy/Sectors/Service/Education/t20060422_25535.htm.

159. See Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 11; 民政部关于对中外合作办学机构登记有关问题的通知 [Notice of the Ministry of Civil Affairs on the Issues concerning the Registration of Sino-Foreign Cooperative Educational Institutions] (promulgated Dec. 12, 2003, effective Dec. 12, 2003), art. 4.

160. *Survey of US Posts, International Education: Obstacles and Opportunities*, INTERNATIONAL EDUCATION STUDY TEAM 11 (2001); Regulations of the People's Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at arts. 21,

management committee must have at least five members, at least half of whom are Chinese citizens, at least two thirds of whom have five or more years of teaching experience, and all of whom must be approved by the relevant approval authority.¹⁶¹ In addition, the institution may not establish any branches or subsidiary entities.¹⁶²

With respect to funding, cooperative vocational institutions must maintain a minimum amount of registered capital, since Chinese law emphasizes registered capital to protect creditors.¹⁶³ Less clear, however, are MOE regulations which specify that “[t]he operators who run Sino-foreign cooperative schools or establish Sino-foreign cooperative educational institutions or projects shall have corresponding capital investment for the education.”¹⁶⁴ In essence, this requirement means that the MOE decides when Chinese and foreign partners have invested sufficient capital in a proposed institution or project. Notably, institutions that bring in “foreign quality education resources” may partner with private organizations or individuals to secure funding, as well as funding for ongoing operations.¹⁶⁵ In addition, non-cash assets like intellectual property can serve as registered capital, but such contributions are limited to one third of the foreign party’s total contribution unless the MOE or a local government authority invites the party to invest more, and the parties comply with specific procedures regarding the calculation and certification of such non-cash assets.¹⁶⁶ Land use rights may be contributed as well, and last for 50 years in the event that the land is owned by a Chinese IHE, and

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161. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at art. 21.

162. Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 7.

163. Dickinson, *supra* note 67, at 3; 中华人民共和国公司法(2005修订) [Company Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 26.

164. 2006 MOE Opinion on Cooperative Education, *supra* note 117, at art. 6.

165. *See* Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, *supra* note 90, at art. 8.

166. Regulations of the People’s Republic of China on Sino-Foreign Cooperative Education, *supra* note 7, at arts. 10, 27. According to the Implementation Measures for the Cooperative Education Regulations of the People’s Republic of China, the value of capital contributions in the form of IP may be determined in one of two ways: either the Chinese and foreign partners must agree on a value for the IP, or they must engage a qualified asset appraisal institution to determine the value for them. *Id.* The Ministry of Finance (MOF) and the State Intellectual Property Office (SIPO) monitor the activities of asset appraisal institutions and hold regular training and certification sessions for appraisers in order to enhance their IP appraisal capacity. *See, e.g.,* 财政部、国家知识产权局关于加强知识产权资产评估管理工作若干问题的通知 (财企[2006]109号) [Notice of the Ministry of Finance concerning Several Issues related to Strengthening the Regulation on the Appraisal of Intellectual Property Asset] (promulgated Apr. 19, 2006, effective 19, 2006).

not a third party.¹⁶⁷ Parties should be aware, however, that additional requirements apply if the Chinese party is either state-owned or intends to contribute state-owned property to a joint venture.¹⁶⁸

Finally, joint ventures in which the partners pay separate taxes must maintain joint accounting records that reflect the separate records of each joint venture partner.¹⁶⁹ Cooperative educational institutions that enter into contractual relationships must therefore make special provisions to comply with Chinese accounting procedures.¹⁷⁰

CIBT, a Canadian company that has several activities in China, is one example of a foreign company operating educational services using in China, including operating a business school offering an MBA degree through the Beijing University of Technology and City University of Seattle,¹⁷¹ as well as a consulting company, a vocational college and a vocational institute teaching auto repair. The company operates a network of community colleges in Canada and is publicly listed on both American and Canadian stock exchanges. CIBT is relatively unique in that it operates a consulting company, its own independent vocational schools, and an international degree program in cooperation with a Chinese university. As a listed company, its relative success or failure may be instructive for other education management companies seeking to enter the China market.¹⁷²

D. Distance Education Initiatives

Distance education initiatives involve their own complexities. In the US, private and public institutions have developed their own distance learning initiatives, many forming for-profit subsidiaries that allow for the development and marketing of e-learning in China, albeit without the necessary approvals.¹⁷³ Institutions need to appreciate the pervasive

167. See WTO Education Commitments, *supra* note 6, at 3.

168. See, e.g., Provisional Regulations on Using Foreign Investment to Reorganize State-Owned Enterprises (2003); Provisional Measures on the Administration of the Transfer of State-Owned Property Rights in Enterprises (2004); Rules on the Evaluation and Management of State Assets, art. 3 (1991); Research Center of the State-Owned Asset Supervision and Management Commission of the State Council, Adhere to the Orientation of State-Owned Enterprise Reform to Propel the Standardized State-Owned Enterprise Restructuring (Apr. 18, 2006); ORGANISATION OF ECONOMIC COOPERATION AND DEVELOPMENT, *China: Open Policies Towards Mergers And Acquisitions* 53-54 (2006).

169. Zimmerman, *supra* note 75, at 472.

170. 2007 MOE Cooperative Education Notice, *supra* note 132, pmb1.

171. See, e.g., City University of Seattle—Asia, China, Beijing, <http://www.cityu.edu/locations/beijing.htm>, and 美国城市大学 Beijing University of Technology CIBI School of Business, <http://www.cibt.edu/zhaosheng/meiguo.html>.

172. See, e.g., CIBT Corporation Homepage, *available at* <http://www.cibt.net/>; Jinhua College of Vocation and Technology Homepage, *available at* <http://www.jhc.cn/>.

173. See Risa L. Lieberwitz, *The Corporatization of the University: Distance*

regulation of content on the Internet by the Chinese government and should only consider marketing e-learning programs to students in China after gaining an understanding of the specific issues that can impact such programs. Such e-learning programs vary widely.

These programs take diverse forms, including: partnerships between public or private sector colleges and universities and for-profit corporations to market distance learning; for-profit subsidiaries, wholly-owned by a public or private nonprofit college or university; for-profit subsidiaries of a public or private nonprofit college or university, funded by venture capital; and for-profit distance learning institutions created and owned by a for-profit corporation.¹⁷⁴

Similar models exist in China, and several have expanded considerably in recent years, as domestic authorities encourage the use of distance learning in higher education, but require that providers obtain several approvals and licenses before an entity can even establish the necessary infrastructure and websites, let alone confer a degree upon a student.¹⁷⁵ It is important to note, however, that private entities may only provide the technical platform to provide distance education in China and must partner with an IHE in order to confer a degree.¹⁷⁶ That is, as a legal matter, private entities themselves may not provide “educational services” as that term is thought of under Chinese law, only the websites and other means of access from which educational services are delivered.

Specifically, educational websites and online education schools may provide higher education, teacher education, vocational education, adult education and other public educational information to Chinese citizens in the form of online content or through other means not involving a classroom.¹⁷⁷ The term “educational websites” refers to organizations

Learning at the Cost of Academic Freedom?, 12 B.U. PUB. INT. L.J. 73, 74 (2002). These programs are available in China simply via Internet access.

174. *Id.* at 104.

175. See Higher Education Law of the People’s Republic of China, *supra* note 22, at art. 16; Decision on Setting Down Administrative Licenses for the Administrative Examination and Approval Items Really Necessary to be Retained (State Council, June 29, 2004).

176. Four such entities were among a larger wave of initial public offerings recently concluded by Chinese entities in the United States. See New Oriental Education & Technology Group Inc., Prospectus (Form 424(b)(4)), at 93 (Sep. 6, 2006), available at <http://www.sec.gov/Archives/edgar/data/1372920/000119312506186897/d424b4.htm> [hereinafter New Oriental Prospectus]; ChinaCast Education Corp., Prospectus (Rule 424(b)(3)), at 27 (June 25, 2007), available at <http://files.shareholder.com/downloads/CCHYY/0x0xS950134-08-1203/1261888/filing.pdf> [hereinafter ChinaCast Prospectus]; ChinaEdu Co., Prospectus (Form 424(b)(4)), at 118 (Dec. 11, 2007), available at <http://bit.ly/bKKiCY> [hereinafter ChinaEdu Prospectus]; Rick Aristotle Munarriz, *A Chinese IPO for Thinkers*, MOTLEY FOOL (Nov. 27, 2007), <http://www.fool.com/investing/international/2007/11/27/a-chinese-ipo-for-thinkers.aspx>.

177. Administrative Regulations on Educational Websites and Online and Distance

providing education or education-related information services to website visitors by means of a database or online education platform connected via the Internet or an educational television station.¹⁷⁸ “Online education schools” refer to education websites that issue educational certificates in connection with education services or training.¹⁷⁹ In marketing their services, online education schools may not recruit existing full-time students, and schools offering online degrees may only recruit working adults.¹⁸⁰ Moreover, service providers may not set up stand-alone websites without coupling them to a physical, brick-and-mortar presence.¹⁸¹

Indeed, for online degree programs, Chinese law requires the establishment of physical support centers (typically referred to as “learning centers”) to assist enrolled students.¹⁸² The centers may not recruit students, teach students, or issue degrees in their own right; rather, these activities must be conducted in conjunction with the IHEs awarding the actual degrees.¹⁸³ In addition, learning centers may not conduct any business that is irrelevant to online education services.¹⁸⁴ Each learning center is required to be associated with at least one educational institution or other entity approved by the MOE to provide online education services, and can only provide logistics services to educational institutions for the recruitment of students and the administration of examinations.¹⁸⁵

Moreover, each learning center and the educational institution with which it is associated must jointly apply to the education authorities for approval before the learning center can provide services to any online education program.¹⁸⁶ Additional approvals are required for a learning

Education Schools (2000).

178. *Id.*

179. *Id.*

180. Circular on the Student Enrollment of Online Degree Education by the Pilot Universities Which Are Permitted to Operate Online Degree Education (MOE, Feb. 27, 2004).

181. *Id.*

182. Principles on the Establishment and Administration of Modern Distance Education Off-Campus Learning Center (Pilot) (MOE 2002); Interim Provisions on Administration of Modern Distance Education Off-Campus Learning Center (MOE 2003).

183. Principles on the Establishment and Administration of Modern Distance Education Off-Campus Learning Center (Pilot) (MOE 2002).

184. *Id.*

185. *Id.*

186. ChinaEdu Co. Prospectus, *supra* note 176, at 119; 关于现代远程教育校外学习中心(点)建设和管理的原则意见 (教高厅 (2002) 1号) [Opinions on the Principles Regarding the Establishment and Management of Modern Distance Education Local Learning Centers] (promulgated Jan. 7, 2002, effective Jan. 7, 2002), art. 4; 现代远程教育校外学习中心(点)暂行管理办法 (教高厅(2003)2号) [Provisional Measures Concerning the Management of Modern Distance Education Local Learning Centers] (promulgated Mar. 10, 2003, effective Mar. 10, 2003), arts. 6, 7.

center if it intends to provide support services to additional educational institutions.¹⁸⁷ The education authorities have the authority to supervise, inspect and evaluate the learning centers from time to time.¹⁸⁸ A learning center's approvals may be withdrawn by the education authorities if during a periodic inspection they determine that the learning center is unqualified to continue operations.¹⁸⁹

To date, however, there has been no reported instance of a foreign provider receiving the appropriate approvals to operate a distance learning initiative. This is not to say that foreign providers are prohibited from providing distance education in China, just that none has yet received the approval to do so.

Notably, online education requires compliance with several rules and regulations beyond those described above, including some that require schools to simply register the fact that they are offering an online degree program.¹⁹⁰ For example, "Internet content providers," like e-learning companies, are prohibited from producing, copying, publishing or distributing information that opposes fundamental principles outlined in the Constitution, disrupts social stability, insults or slanders a third party, infringes the lawful rights and interests of others, or otherwise violates relevant laws and administrative regulations.¹⁹¹ Internet content providers operating bulletin board services may not disclose personal user information to any third party without the user's consent, absent compulsory legal processes.¹⁹² Chinese parties licensed to provide online content for profit, typically private companies, may not lease, transfer, or sell that license to a foreign provider, or provide transmission facilities.¹⁹³ Under rules issued jointly by GAPP and the MIIT, distance learning providers must secure approvals if they plan to:

[S]elect, edit and process works created by themselves or others (including content from books, newspapers, periodicals, audio and video products, electronic publications, and other sources that have already been formally published or works that have been made public

187. Opinions on the Principles Regarding the Establishment and Management of Modern Distance Education Local Learning Center, *supra* note 186, at art. 4.

188. *Id.*

189. *Id.*

190. Yong Zhao, Gaoming Zhang, & Ning Li, *The Life of "Internet Colleges": Policies, Problems, and Prospects of Online Higher Education in China*, 41 *EDUCAUSE REV.* 48 n.6 (Nov.–Dec. 2006), available at <http://connect.educause.edu/Library/EDUCAUSE+Review/TheLifeofInternetColleges/40672?time=1234422882>.

191. Nick Abrahams & Trent Lyndon, *Digital Content Distribution in the Asia Pacific Region*, 25 *COM. & MEDIA LAW ASS'N INC.* 1 (Sep. 2006), available at <http://www.camla.org.au/clb/CLB%20-%20Volume%2025,%20Issue%201.pdf>.

192. See Internet Electronic Bulletin Board Service Administrative Measures.

193. Notice on Strengthening Management of Foreign Investment in Operating Value-Added Telecom Services (MII, July 2006).

in other media) and subsequently post this content on the Internet or transmit it to users over the Internet for browsing, use or downloading by the public.¹⁹⁴

Distance learning providers must also secure a license from the State Administration of Radio, Film, & Television (SARFT) to transmit any audio-visual material over the Internet, a television, or a mobile phone.¹⁹⁵ Moreover, as in most western countries, institutions are also liable for publishing copyrighted material on the Internet without prior authorization from the copyright holder.¹⁹⁶

Foreign IHEs only recently began to apply for the licenses that would allow them to award degrees in China based entirely on distance learning programs.¹⁹⁷ The Stevens Institute of Technology and the University of Massachusetts offer online degree programs in China, such degrees, while they may be recognized in the United States, are not officially recognized or approved by the MOE or other agencies.¹⁹⁸ Some foreign colleges and universities have instead opted to offer non-degree, stand-alone educational content in partnership with commercial distance education providers, as demonstrated by the Western Institute of Technology at Taranaki, New Zealand, and the British Columbia Institute of Technology, both of whom partnered with ChinaEdu to provide in-room classes under ChinaEdu's private international curriculum program.¹⁹⁹ As of November 2007, however, no foreign educational provider had partnered with a Chinese IHE to offer Ministry-approved, degree-awarding higher education online.²⁰⁰ Instead, as of December 2007, the MOE had licensed 68 *domestic* colleges and universities to offer such programs under a special pilot initiative.²⁰¹

194. ChinaEdu Prospectus, *supra* note 176, at 123-24; 互联网出版管理暂行规定 (新闻出版总署, 信息产业部令第17号) [Provisional Regulations for the Administration of Internet Publishing] (promulgated by the State Press and Publications Administration and the Ministry of the Information Industry, Jun. 27, 2002, effective Aug. 1, 2002), arts. 5, 6.

195. 互联网等信息网络传播视听节目管理办法 (国家广播电影电视总局令第39号) [Measures for the Administration of the Publication of Audio-Visual Programs through the Internet and Other Information Networks] (promulgated by State Administration of Radio, Film and Television Order No. 39, Jul. 6, 2004, effective Oct. 11, 2004), art. 6.

196. 互联网著作权行政保护办法 (国家版权局、信息产业部令2005年第5号) [Measures for the Administrative Protection of Internet Copyright] (promulgated by National Copyright Administration, Ministry of Information Industry of the People's Republic of China, Apr. 29, 2005, effective May 30, 2005), art. 2.

197. UMass, *supra* note 110. While Stevens Institute of Technology and other schools have offered online degree programs in China for quite some time, such degrees are not officially recognized or approved of by the Ministry of Education.

198. *Id.*

199. ChinaEdu Prospectus, *supra* note 176, at 110-11.

200. *See id.* at 110.

201. ChinaCast Prospectus, *supra* note 176, at 28.

IV. RESULTS AND FUTURE REFORMS

The challenges China faces in developing and increasing the education of its present and future workforce are daunting, but receiving considerable attention from policy experts and Chinese officials alike. According to the Vice Minister of the Development Research Center of China's State Council, Li Jiange, in China "[f]ormal education falls short. . . in terms of teaching methods, curriculum, and pedagogies, and needs to be adjusted to respond to the new demands of economic and social development."²⁰² Li believes that "[t]he role of government needs to shift from that of key decision maker and sole provider of education and training to that of system architect, rule-maker and promoter."²⁰³ He therefore advocates lowering barriers to private capital and transforming government from a direct manager of education into a policy-making body focused on quality concerns and financing, much like the Department of Education in the United States.²⁰⁴ To successfully affect this transition, however, several additional changes must occur.

First, Chinese colleges and universities must institute modern, effective governance. To its credit, the central government has paved a path towards greater institutional autonomy, carrying out decentralization and market-based reforms beginning in the mid-1980s to reduce the burden of education on the central government, and letting local governments and individual institutions play a greater role in management and financing.²⁰⁵ As of 2001, 71 IHEs were under the direct control of the central government, while the number under the leadership of local governments had reached 896.²⁰⁶ Moreover, the MOE sends 100 college and university presidents and party secretaries abroad each year to learn about leadership and management from top-flight research institutions like the University of Michigan and Yale University.²⁰⁷ Nonetheless, in China education is still viewed as a mechanism for spreading official ideology,²⁰⁸ and colleges and universities still follow the Mao-era model in which Party leadership within each IHE controls policy-making, budgets, and personnel decisions, while administrators implement Party directives.²⁰⁹ Moreover, the consolidation of institutions mentioned above has created an often bizarre mix of

202. Dalhman et al., *supra* note 1, at xvi.

203. *Id.*

204. *See id.*

205. Ngok King Lun & Chan Kin Keung, *Towards Centralization and Decentralization in Educational Development in China: The Case of Shanghai*, in *CENTRALIZATION AND DECENTRALIZATION: EDUCATIONAL REFORMS AND CHANGING GOVERNANCE IN CHINESE SOCIETIES* 81 (Ka-ho Mok, ed. 2003).

206. Lixu, *supra* note 19, at 16.

207. *See* Constance Ewing Cook, *How China is Reforming Higher Education*, *CHANGE*, May/June 2008, 33.

208. Lun & Keung, *supra* note 205, at 82.

209. Cook, *supra* note 207, at 33, 34.

institutions with different disciplinary focuses and cultures, as well as geographic locations, which further complicates attempts to institute effective governance.²¹⁰ As one scholar pointed out, the state of governance in China's top universities makes the goal of becoming a world leader in education particularly unrealistic: even Tsinghua University and Peking University, among the most renowned universities in China, have between twelve and sixteen people serving simultaneously as university head.²¹¹

Second, China must establish and refine a reliable system for enhancing and measuring quality. For students, the "normative pedagogy is the lecture, and many university curricula still focus on narrow occupational preparation as opposed to a liberal arts education that teaches critical thinking and problem-solving."²¹² For teachers, institutions have begun to stress publications in international journals, international citations, and involvement in international faculty exchange programs as qualitative measures.²¹³ For the overall system, six organizations publish rankings of the top Chinese universities.²¹⁴ Of the rankings, however, none provides a stable data set or a sufficiently transparent methodology that can be used to reliably measure performance.²¹⁵ Meanwhile, inconsistent standards for faculty evaluations, promotions based on seniority, and problems of corruption and plagiarism undermine any quality improvements that have been made.²¹⁶ Moreover, if Chinese IHEs are to maintain the 14:1 mandatory student-to-teacher ratio in higher education and the requirement that professors hold at least a master's degree in their field, then China needs to produce an additional 220,000 qualified professors in the near term.²¹⁷ The State Council has called for "[r]aising the quality of higher education" and deepening the reform of "the system for measuring educational quality[.]" but has no plans as of yet for a formal measurement mechanism.²¹⁸

Third, China needs a better system of financing for higher education. Educational expenditures are undertaken by lower levels of government that lack independent sources of revenue and must rely upon wealth

210. *Id.* at 34; *see also* Li et al., *supra* note 2, at 11 (discussing, for example, the incorporation of Beijing Medical University into Peking University in 2000).

211. Lixu, *supra* note 21, at 21.

212. Cook, *supra* note 207, at 34.

213. Li et al., *supra* note 2, at 12.

214. Nian Cai Liu & Li Liu, *University Rankings in China*, 30 HIGHER EDUC. IN EUROPE 217 (2005).

215. *Id.* at 226.

216. Cook, *supra* note 207, at 34.

217. Lixu, *supra* note 21, at 21.

218. 国务院关于印发2008年工作要点的通知 (国发(2008)15号) [Notice of the State Council on Printing and Distributing the Major Tasks for 2008] (promulgated & effective Mar. 29, 2008), arts. 30, 31.

transfers from the central government.²¹⁹ Thus, the government needs to design a system of fiscal transfers between the different levels of government that ensures that the money reaches the administrative bodies that are responsible for delivering such services.²²⁰

For now, the latest central plan emphasizes student loans to help poorer students gain access to higher education.²²¹ But lenders, in particular the four biggest commercial banks in China, are wary of providing money to poor Chinese citizens, and often ask them to pay back the balance of loan payments as soon as they graduate.²²² Indeed, if students do not pay back their loans before they graduate, then they may not be granted whatever degree or certificate for which they took out the loans, which drastically reduces their chances of finding employment that would enable them to pay back the loans in the first place.²²³ Though the government does not currently tax the interest on savings accounts opened specifically for education, clearly more must be done.²²⁴

Other developing nations have shored up deficiencies in domestic education systems by using sovereign wealth to import educational services, a phenomenon that one observer described as an “educational gold rush.”²²⁵ Qatar used wealth from its natural gas reserves to fund branch campuses for five American universities in Education City, a brand-new complex just outside Doha.²²⁶ Singapore’s sovereign wealth funded overseas offerings for the University of Nevada, Las Vegas, New York University, Duke, the University of Chicago and Australia’s University of New South Wales.²²⁷ Three of the United Arab Emirates poured petrodollars into branch campuses for George Mason, NYU and Michigan State.²²⁸ As host governments often pay all start-up and operational expenses, including salaries for faculty members and administrators, the willingness of other nations to import education has helped U.S. institutions expand overseas without incurring heavy up-front costs.²²⁹

219. OECD 2005 SURVEY, *supra* note 19, at 24.

220. *Id.* at 53.

221. Li et al., *supra* note 2, at 27.

222. *Id.* at 27.

223. *Id.*

224. See OECD 2005 SURVEY, *supra* note 17, at 192.

225. Tamar Lewin, *US Universities Rush to Set Up Outposts Abroad*, N.Y. TIMES, Feb. 10, 2008, <http://www.nytimes.com/2008/02/10/education/10global.html>.

226. Lucy Hodges, *Qatar: An Oasis of Education in the Desert*, INDEPENDENT (UK), May 15, 2008, <http://www.independent.co.uk/news/education/higher/qatar-an-oasis-of-learning-in-the-desert-828049.html>.

227. John Austin, *New Center Helps Make A&M a Pioneer*, FORT WORTH STAR-TELEGRAM, Mar. 19, 2007, at A9.

228. Lewin, *supra* note 225.

229. See Jodi S. Cohen, *NU Expands 2 Schools to Mideast: Qatar to pay start-up costs and salaries*, CHIC. TRIB., Nov. 8, 2007, at 7.

Indeed, overseas education is now a billion-dollar business for U.S. colleges and universities.²³⁰ There are now more than one hundred and sixty branch campuses worldwide, a dramatic increase from thirty-five just a decade ago, with China playing host to fifteen such campuses.²³¹

China, on the other hand, does not yet use its budget or its sovereign wealth to fund branch campus build-outs for foreign institutions.²³² Were China to use its sovereign wealth to attract schools from the United States and the United Kingdom, or even simply reduce restrictions on their involvement in the Chinese educational system, these institutions could provide China with instant access to quality resources and more spots for Chinese nationals to earn reputable degrees from programs conducted at home.²³³ In addition, supplementing local provision of higher education with foreign education in the PRC would not only postpone the expensive task of building local infrastructure, but also aid in the improvement of local educational providers.²³⁴ Like it or not, the United States and the United Kingdom dominate education, and the Chinese government stands to benefit from their expertise.²³⁵ But as it stands, Chinese law often inhibits IHEs from entering China by placing too much power in the hands of Chinese partners and the Chinese government and by focusing too much attention on brand names.²³⁶

V. CONCLUSION

We hope that in writing this Article we have helped to smooth the road for future partnerships between PRC and foreign IHEs by (1) providing a background on the Chinese educational system, (2) reviewing the laws and regulations governing foreign involvement in higher education in the PRC, and (3) highlighting areas for future reform and change. We note that the ground covered in this Article is neither exhaustive nor static. As in the United States, Chinese laws are frequently updated and amended, and those laws involving foreign parties are prone to even more change than bodies of law focused solely on Chinese companies and citizens.

We also hope that this Article provides strategic insight into those areas in which foreign IHEs can lend assistance. To reiterate, there are three

230. Ann McClure, *Made in America: IHEs Strive to Ensure Academic Quality as they Expand Globally*, U. BUS., Oct. 1, 2006, at 50.

231. Scott Jaschik, *International Campuses on the Rise*, INSIDE HIGHER ED, Sept. 3, 2009, available at <http://www.insidehighered.com/news/2009/09/03/branch>.

232. See, e.g., MICHAEL F. MARTIN, CHINA'S SOVEREIGN WEALTH FUND, CRS REPORT FOR CONGRESS ORDER CODE RL34337, at 9-10 (Jan. 22, 2008) (describing investments by the China Investment Corporation).

233. See Simon Marginson, *Dynamics of Global Competition in Higher Education*, 52 HIGHER ED. 1, 19-21 (2006).

234. *Id.* at 20.

235. *Id.* at 25.

236. See Gow, *supra* note 13, at 7-8.

main areas in higher education that the Chinese government hopes to improve: the quality of education provided by Chinese schools, the research and innovation conducted in Chinese universities, and the ranking of China's leading universities as world-class institutions.²³⁷ Foreign college and universities that can find synergies between their own goals and the Chinese government's policies, as well as the needs of the Chinese people, will be better served in the long run than those that look toward China solely as a potential revenue source, given its huge population. China hopes to match international standards rather quickly, but some college and university leaders think it could take as long as fifty years before reforms in education help China reach its goals.²³⁸ Any party that can help China achieve this goal in a shorter time frame would, we think, find both substantial success and strong support in the PRC.

Finally, we should note that it is not uncommon to see Chinese and foreign parties have disputes after years of successful collaboration.²³⁹ In 2001, for example, the University of Colorado at Denver attempted to unilaterally raise tuition in a joint degree program offered in partnership with China Agricultural University.²⁴⁰ The program fell apart in 2005, only to be resurrected in 2007.²⁴¹ Of course, such problems can occur in any relationship, so it is best for institutions considering such a partnership to "choose wisely."²⁴²

237. See Cook, *supra* note 207, at 37–38.

238. *Id.*

239. Bruce Finley, *Rising China Carving its own Path*, DENVER POST, Apr. 8, 2001, available at <http://extras.denverpost.com/news/news0408e.htm>.

240. *Id.*

241. University of Colorado at Denver and Health Sciences Center, *Chinese Students, UCDHSC Ready for Reintroduction* (Aug. 14, 2007).

242. INDIANA JONES AND THE LAST CRUSADE (Lucasfilm 1989).