

Study Tour to Japan and Korea
Delegation from the Government of Viet Nam
January 19-29, 2005

Description of Issues to be Discussed
and
Questions to be Raised*

1. Overview of the situation in Viet Nam with regard to laws affecting the not-for-profit sector

Vietnam is a socialist, civil law country with two legally recognized forms of not-for-profit (NFP) organizations, which loosely correspond to the typical civil law legal forms, associations and foundations. Freedom of association was officially recognized by the Constitution of the Socialist Republic of Vietnam, Article 69, in 1992, but it had been earlier established by the Law on the Right to Establish Associations of 1957.

The Civil Code of Vietnam, which was enacted in 1995, describes two types of NFP legal persons in Article 110 – socio and social-professional organizations (roughly corresponding to associations under civil law) and social and charity funds (roughly corresponding to foundations under civil law). There are some specialized types of organizations (e.g., scientific funds), but these are outside the scope of this note.

Subsequent to the enactment of the Civil Code, the government promulgated two decrees: in 1999 a Regulation on the Organization and Operation of Social and Charity Funds and in 2003 a Regulation on the Organization, Operations, and Management of Associations. Both of these stipulate various aspects of the establishment, public benefit status, internal governance, activities, and dissolution rules for NFP organizations.

There are currently no tax benefits available for Vietnamese NFP organizations or their donors.

For further information on the legal/fiscal situation for NFP organizations in Viet Nam, please see Appendix A.

2. General description of the questions for the participants in Japan and Korea

The delegation is seeking information on the legal and fiscal framework for not-for-profit activity in Korea and Japan; this will assist in the development of a legislative proposal for the NFP sector in Viet Nam and for the creation of fiscal incentives to encourage the sector. The delegation is also interested in the legal reform process; thus emphasis will be placed on the legal reform process in Japan (SNC and koeki hojin reforms).

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The delegation will prepare a report to follow-up on its visit, which will describe the situation in each of the countries visited. The report will be based on a literature review as well as an analysis of the questions described here (some background documents are already being translated into Vietnamese, and these will be reviewed in advance of the meetings).

The major questions that will be discussed during the visits to Japan and Korea can be grouped into categories, as follows:

- a. Questions about the general role of NFP organizations in the society and in social and economic development
- b. Questions about the legal framework for NFP organizations –
 - i. what are the rules for establishment of such organizations
 - ii. what are the rules for obtaining public benefit status
 - iii. what are the rules for termination/dissolution (enforcement of the non-distribution constraint)
 - iv. what are the rules for internal governance
 - v. what are the rules for external accountability
 - vi. what activities (such as business, political) are permitted for NFP organizations
- c. Questions about the rules for the fiscal framework for NFP organizations (tax benefits for organizations and their donors/ government grants and contracts); to what extent do the rules encourage corporate social responsibility
- d. Questions about the process for changes in the legal rules (this is particularly pertinent in Japan, where discussion of the SNC law and the proposed changes for koeki hojin are quite important)
 - i. focus on the 1998 SNC Act with the NGOs
 - ii. focus on the koeki hojin reforms with the government officials, JACO, Mr. Fukuhara, etc. (Appendix B contains a discussion of the anticipated reforms, but a more up-to-date discussion is needed)
- e. Questions about the judicial role in legal interpretation/application

Some questions are apposite for only certain groups of participant, and this questionnaire indicates which groups of people should be asked to discuss which questions.

In addition, any relevant information that is available in written form in the English language will also be useful.

- 3. Specific Questions about the NFP Sector in Japan/Korea (some of the questions that are designated for the Japan NPO Center may also be asked at the meetings with The C's and with the CSO Network – will need to review this after the meeting with Japan NPO Network) (if a written analysis of some of the issues is available, that would be most helpful)**

A. General role of NFP organizations in society

Please describe the size and composition of the NFP organization sector in Japan/Korea. (Japan NPO Center; academic research) (Prof. Junki Kim's research for Korea)

Please describe the roles that NFP organizations play in society. Are they involved with a) service provision; b) philanthropy; c) advocacy? (Japan NPO Center; academic research) (Prof. Junki Kim's research for Korea)

Do NFP organizations regularly interact with government on important policy issues (such as health, environment, overseas aid, etc.)? (Japan NPO Center; academic research) (Prof. Junki Kim's research for Korea)

Does the government have any special semi-independent organizations that work with the private organizations to fulfill certain objectives (e.g., the Japan Foundation)? How does this work? (Japan Foundation)

Does the government encourage corporations to set up foundations for public benefit purposes? (Japan Foundation; Chimaki Kurokawa; SPF; Nippon Foundation)

Does the government provide funding to any NFP organizations? (Japan NPO Center) (Prof. Junki Kim)

Are NFP organizations well-regarded in society? (Japan NPO Center; JACO) (Prof. Junki Kim)

B. The legal environment for the NFP sector in Japan/Korea

How many different types of NFP organizations are there? What are they called? (literature review)

What is the scope of activity each can engage in? (Japan NPO Center; JACO) (Prof. Junki Kim)

May they engage in business activities?
Political activities?

Is there a separate qualification to become a public benefit organization or to engage in public benefit activities? (literature review)

What are the establishment procedures for each type of NFP entity? (literature review for Japan) (Prof. Junki Kim for Korea)

Must an organization obtain permission in order to be registered?
From whom?

Must a line ministry also give permission/endorsement?
How long does it take for an NFP organization to be registered? (Statistics to be obtained if available)

Are there special rules with respect to the dissolution of NFP organizations that ensure that the non-distribution constraint is met (in other words – must the assets of an NFP organization go to a similar organization upon dissolution)? (literature)

C. Internal governance rules (Japan NPO Center; JACO) (Prof. Kim for Korea)

What does the law require with respect to the internal governance of NFP organizations?

Must an organization have a board of directors?
Who appoints the initial board members?
Who elects the subsequent members?
Are there conflict of interest rules that require independence of directors?
Does the law provide for annual and other meetings?

Must an organization have an audit committee or other financial control organ that is separate from the board of directors?
Who appoints the audit committee?
How is it structured?
Are there rules about how often it must meet?

Does the law provide special accounting rules for NFP organizations?

Does the law provide for any other internal accountability mechanisms?

D. External accountability rules (Japan NPO Center; JACO) (Prof. Junki Kim Korea)

What are the rules for external accountability?
Must annual reports be filed with the agency that oversees the organizations?
What is the content of those reports?
Are any other annual reports required (e.g., with the line ministries)?
Must the reports be made public?
Is there a practice of publishing annual reports on the websites of organizations? How many organizations do this?

Are there other mechanisms of external accountability (e.g., to beneficiaries)?

E. Fiscal benefits (literature; tax authorities)

What tax benefits (e.g., tax exemption under the income tax) are available for NFP organizations in Japan/Korea?

Must organizations qualify as “public benefit organizations” in order to qualify for these benefits?

Who determines whether an NFP organization is a public benefit organization?

Does the income tax exemption extend to all income:

-income from grants and gifts?

-income from passive investments?

-income from business activities?

Are there other tax benefits for organizations (e.g, special rates of VAT)?

What are the tax benefits available for donors to NFP organizations in Japan/Korea?

Are donations to NFP organizations tax deductible for individuals?

Are there limits on the amount of deduction for the income tax?

Are there special rules for the gift and estate taxes?

Are all citizens/taxpayers able to take advantage of income tax deductions?

Do you know of any statistics on the amounts of deductions/groups of taxpayers who give?

Are donations to NFP organizations tax deductible for corporations?

Are there limits on the amount of deductible contributions?

Does the income tax deduction encourage corporate social responsibility? (Chimaki Kurokawa; SPF; Nippon; JACO) (Prof. Junki Kim Korea)

To what extent do corporations participate in social and economic development through contributions to NFP organizations?

What recommendations would you make to increase the amount of citizen/corporate philanthropy in Japan/Korea? (Chimaki Kurokawa; SPF; Nippon; JACO) (Prof. Junki Kim Korea)

Are there special rules for NFP organizations with respect to access to government grants and contracts (e.g., special procurement rules)? If so, please describe them (Japan NPO Network; C’s; CSO Network)

4. Legislative Reform Efforts in Japan

A. 1998 Law on Special Nonprofit Corporations (C's; Japan NPO Center; CSO Network)

Please describe in detail the process of enacting the law on SNC's in 1998; what was the impetus for this law? How was it developed, etc.?

Please describe the way in which the SNC law differs from the other laws affecting public interest NFP organizations, on the one hand, and mutual interest (Chukan Hojin) organizations, on the other?

Please describe the tax benefits that are available for SNC's.

Please describe whether you think the SNC is a useful type of NFP legal entity.

Have organizations found it easy to register as an SNC? How many have registered as of end of 2004?

If you could change anything about the legal/fiscal regime for SNC's, what would it be?

B. Koeki Hojin Reform (Administrative Reform Promotion Office; Koeki Hojin Administration Promotion Office; Mr. Fukuhara; Mr. Iriyama; JACO)

Please describe the process of keoki hojin reform (documents are available for this, so it may be possible to simply use those, with the delegation asking questions about parts they do not understand).

Do you think the koeki hojin reform process was necessary? Why?

Do you think the koeki hojin reform process has been successful? Why or why not?

What would you do to change/reform the koeki hojin reform process to make it more successful?

5. Questions on role of courts in Japan (for Prof. Nomi, Tokyo University)

Please describe the role that courts play in the oversight process for NFP organizations in Japan.

How does this comport with the general role of courts in the democratic inter-workings of the three branches of government in Japan?

What is the structure of the Japanese court system? What are the different courts?
What are their roles and jurisdiction?

What is the responsibility of judges in Japan?

Please describe the appeal process and procedures.

Please describe the court cases, if any, that have affected the legal framework for
NFP organizations in Japan.

**Do not currently know whether there will be anyone to address these issues in
Korea.**

Appendix A

Description of Laws Affecting NFP Organizations in Viet Nam

a. Establishment of the organizations (documents, permissions required)

The process of establishment for both associations and funds is quite cumbersome, with several different steps required.

Requirements for and process of establishing an Association

In order to establish an association, the following are necessary:

- A permit from the “relevant Government Authority” (GA)—Art. 3 (1);
- A Regulation, which will govern its operations, and which is approved by the GA—Art. 3 (2);
- A Mobilization Committee (MC), which is recognized by the GA, and which mobilizes the citizens and organizations to join an association and complete the application documents—Art. 7; and
- Premises within which to carry out its activities and “a sufficient number of people” as members—Art. 6.

After a permit for establishing an association has been granted, the MC must organize a Congress on the establishment of the association within 90 days. This means that prior to having the organizational Congress, the persons who seek to establish an association must draft a Regulation for it and submit all the required documentation to the GA in order to obtain the permit.

At the Congress the actual “Regulation” of the association must be adopted along with the “Action Programme” and the “Resolution.” The leadership of the association is required to be elected at this meeting. After the Congress has been held, the documents evidencing that these various things happened at the Congress must be forwarded to the GA, which will approve or require amendment of the Regulation. Only when the final GA approval has been given does the Regulation come into force—and presumably that is the date when the association obtains legal personality.

Requirements for and process of establishing a Fund/Foundation

Three members in their capacity as founding members must apply for fund establishment (Art.5);

There must be a “complete dossier” prepared (Art 6), which includes the draft Charter of the fund and the plan for collection, management and use of the fund’s assets; and

The various agencies permitted to establish funds must “evaluate the dossiers of application for fund establishment.” (Art. 7 (3))

No time limit is given for evaluation of the proposed fund/foundation.

b. Public benefit status of the organizations

There are no special rules elaborated for obtaining public benefit status for either associations or foundations/funds. The associations are presumably differentiated when

they are formed, between mutual benefit professional associations and clubs, on the one hand, and public benefit associations, on the other.

Associations. Although the Civil Code does not clearly indicate that associations may be established for public benefit, the new Association Regulations state that they may be established for the purpose of “contributing to the country’s socio-economic development.” Art. 2. Associations that engage in activities pursuant to such purposes are to be “linked to the Government’s tasks and supported by the State Budget according to the Prime Minister’s instructions.” Art. 4 (2). Because of the elaborate establishment process required for such organizations, it is likely that they will in fact carry out many public benefit purposes that are tied to the State’s development objectives.

In general, other social and socio-professional organizations, as described in the Civil Code and the regulations (e.g., clubs, professional associations), would tend not to be established for public benefit. The “socio-professional” organizations are closely linked to the state and political structures.

Funds/foundations. Social funds and charitable funds, must, pursuant to Art. 115 of the Civil Code, “operate for the purpose of promoting the development of culture, science, charity and other social and humanitarian purposes, which are not for-profit making.” Decree No. 177/1999, promulgating the Regulation on Organization and Management of Social Funds and Charitable Funds, employs a slightly different formulation of permissible purposes, stating that these funds must “be set up and operate[d] for humanitarian and charity purposes to promote cultural, sport, scientific and social development” (Art 2).

The Regulation further elaborates this purpose clause by permitting such organizations to “provide financial support for activities which conform to the fund’s principles and purposes.” See also Decree No. 177/1999 at Articles 8 and 14. Thus, both operating and grant-making organizations that are formed to pursue public benefit purposes appear to be allowed in Vietnam.

c. Dissolution of the organizations – non-distribution constraint

The Civil Code provision on Dissolution of Legal Persons (Art. 107) does not explicitly deal with matters regarding the destination of an organization’s assets upon dissolution. But in the descriptions of both social and socio-professional organizations and social and charitable funds, the Civil Code does state that “the property of [an organization] shall not be divided up among its members [“founding” members, in the case of funds] but must be settled in accordance with the provisions of law.”

Funds/foundations. Article 21 of the Regulations on Funds require that “all remaining properties and money of the fund [after payment of creditors] shall be remitted to the State budget of the level that has permitted the fund establishment.”

Associations. Articles 6 and 8 of Law No. 102 (1957 Law) provide that the assets of certain involuntarily dissolved associations “may be confiscated.” In contrast, in the event of voluntary dissolution, the disposition of the remaining assets “shall be approved by the authorized bodies” and distributed according to the organization’s statute. These rules are updated by the 2003 regulations, which state that “with regard to [the] assets, funds, and other property provided by domestic and foreign organizations and by the Government... the utilization [upon dissolution] shall be decided by the relevant Government Authority.” Art. 30 (1)(a). However, certain “self-generated funds and other property” may be distributed in accordance with the associations governing documents.
Activities of the organizations

1. General Activities

The laws and regulations governing both associations and foundations contemplate that NPOs will only perform activities that are authorized by the unit of government that authorizes their establishment. The Civil Code does not deal with this matter in any way.

2. Public Benefit Activities

Social funds and charitable funds, must, pursuant to Art. 115 of the Civil Code, “operate for the purpose of promoting the development of culture, science, charity and other social and humanitarian purposes, which are not for-profit making.” Decree No. 177/1999, promulgating the regulation on the organization and operation of social funds and charitable funds, employs a slightly different formulation of permissible purposes, stating that these funds must “be set up and operate[d] for humanitarian and charity purposes to promote cultural, sport, scientific and social development.” (Article 2) Under the 2003 regulations, associations may be set up to conduct public benefit activities.

3. Economic or Business Activities

Associations. Article 5 of the Law No. 102 (1957), grants to associations the right to “buy, sell and barter assets, being necessary for the operations of the associations and done with the consent of the court.” The 2003 regulations state specifically that associations may generate revenue from “business activities and services.” Art. 22 (9). Commentators note that if an association carries out such activities as business activities, they will be taxed.

Funds/Foundations. The Regulations on Funds do not authorize business activities to be conducted by such entities. (Art. 13).

4. Political Activities

Article 69 of the Constitution appears to state that citizens and their associations may “hold demonstrations in accordance with the law.” However, both the Constitution (Art. 10) and the Civil Code (Art. 110, which distinguishes political and socio-political

organizations from those discussed here) appear to limit other political activities of NPOs.

On the other hand, the Association Regulations do allow associations to “provide comments on normative legal documents” related to their operations and to make “recommendations/proposals” to their oversight agency. This appears to permit a bit of “political” activity, but it is not clear to what extent associations will be allowed to conduct such activities.

d. Internal governance of the organizations

Associations

Role of the Government Authority (GA)

The GA must manage an association operating in its field of expertise/oversight. Art. 23 (2). Various details of the “management” interaction between an association and the GA are contained in Art. 23. The GA also has the power to permit the division, separation, affiliation, merger and dissolution of associations, in addition to their establishment. Art. 15 (1). These responsibilities are delegated to the Chairperson of the Provincial People’s Committee in the case of associations operating only at the provincial level.

Role of the Congress

According to Art. 19, the Congress is the “most powerful body” of an association. A Congress is elected to a term of no more than five years. It is responsible for the financial and programmatic activities of the organization. And, consistent with the requirements of Art. 15, the Congress may also decide on division, affiliation, etc., of the association.

Role of the Inspectorate

Although the regulation not clear on this point, it appears that associations are also required to have another governance body, which oversees what the Congress does.

Funds/Foundations

A fund/foundation has a Management Board (MB), which must be nominated by the founding members and approved by the competent authorities that approve the establishment. (Art 9) The MB must deal with all the day-to-day activities of the fund. There is also a director of the fund, as well as other subordinate officers, such as an accountant. (Art 10)

A fund must also have a Control Board (Art 12), whose duty it is to supervise the fund’s operations and to control its financial situation. This is an independent committee and it must be composed of three members.

e. Accountability

Associations and Foundations/Funds

The filing of annual reports is required by Art. 23 (11) for associations and Art. 15 (3) for funds.

Appendix B

Interim Report on Public Interest Corporation Reforms Stirs Further Debate (NB – this is the most up-to-date article we have; once there is a newer one, we will substitute it)

by Hideko Katsumata

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Public Interest Corporation Reforms*

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As reported in Issue 8, the Japanese government's proposal to reform the legal framework for public interest corporations in Japan has been met with mixed reaction within the nonprofit sector, primarily due to certain items with potentially negative implications not just for public interest corporations but for the sector as a whole. Since announcing its initial scheme in the summer of 2002, the government has held discussions on the reforms with advisory councils consisting of scholars and practitioners and working groups of legal experts with the goal of drafting concrete reform guidelines and passing a bill by the end of FY2005.

On March 31, 2004, the government released an interim report on the nine rounds of reform discussions that had been held up to that point, listing up an agenda of items for consideration in drafting the reform guidelines. This report has received criticism from various quarters of the nonprofit sector for several reasons, including the sparseness of information on the substance of the discussions and the lack of major departures from the original guidelines passed last June. More importantly, it contains two new items that are again fueling concerns about the potential negative impact of the proposed reforms on the sector.

The first point concerns the treatment of surplus assets. The report states that, upon dissolution, an organization shall not be prohibited from distributing its surplus assets among its members based on a resolution by the members. This principle goes against the fundamental nature of nonprofits and is raising concerns that the proposed new category of nonprofit corporations will be treated more as mutual benefit corporations, which are allowed to distribute their surplus assets, and therefore be more susceptible to taxation.

The second point concerns the system of awarding favorable treatment to a nonprofit corporation based on an assessment of whether it is contributing to the public interest and to society. Two options were discussed in the council meetings as possible methods of making this evaluation: 1) use the Civil Code to officially create a neutral third-party public institution to make the judgment, or 2) treat "public interest" status solely as a means of obtaining preferential tax treatment and therefore designate an institution such as the National Tax Agency to make the judgment. Despite the fact that the majority of the council members are in favor of the first option, the report gives equal weight to the

second option. These two points have led to protests from the nonprofit sector concerning what appears to be an inclination toward a policy of regarding nonprofit corporations as taxable in principle.

On April 28, the advisory council on the public interest corporation system met for the first time since the report was issued and confirmed that the purpose of the report ultimately was to provide an agenda of issues for consideration rather than serve as a guideline for their recommendations. In addition, the council agreed to continue its discussions with a focus on the first option for determining "public interest" status based on the majority opinion of the parties concerned.

This author shares the opinion of some advisory council members and other parties concerned, that, building on its progress thus far, the council should focus on the following perspectives in its deliberations:

1. If the government's fundamental stance is that the nonprofit sector is useful and necessary for the revitalization of society, a concrete policy for supporting the sector's activities should be proposed.
2. A clear definition of "nonprofit corporation" should be provided in the context of the new nonprofit corporation system.
3. If mutual benefit corporations are to be included within the new nonprofit corporation framework, a clear boundary should be set to demarcate them from nonprofit corporations that do not distribute profits or surplus revenues.
4. The government secretariat of the advisory council is hesitant to have the council discuss tax matters, as the Tax Commission (viewed to be the most influential among government advisory boards) is deemed to have sole authority in all matters pertaining to the tax system. However, if the government is to encourage nonprofit activities that contribute to the revitalization of society, tax exemption for nonprofit corporations should be viewed as a matter of course. As such, any favorable treatment or support policy should go beyond simply awarding corporate-tax exemption. The advisory council should propose to the Tax Commission a desirable framework for tax treatment within the public interest corporation system.

The advisory council is expected to present its viewpoints to the Tax Commission this summer. It is hoped that the government ultimately will proceed to build a fully enabling environment for the nonprofit sector, but at this stage, the outcome remains unclear.