

Cross-Border Philanthropy

**ALLIES OR ADVERSARIES?
FOUNDATION RESPONSES TO GOVERNMENT POLICING OF
CROSS-BORDER CHARITY**

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I. The Context for Cross-Border Philanthropy: Framing the Policy Issue

At what moment in time does government policing of cross-border charitable activities leave the realm of the regulation of civil society and enter the realm of civil society repression? Does the legitimacy of a measure restricting civil society action depend on the legal or political context in which it is made, or are such measures simply transplantable across jurisdictional lines? Research shows that authoritarian regimes are not alone in recent attempts to constrain civic space,¹ with examples of restrictive measures present in semi-authoritarian and democratic regimes alike. From east to west, new restrictions on the rights of NGOs to receive or use foreign funding in their philanthropic work are emerging. From Russia's foreign agents' laws² to Ethiopia's clampdown on human rights organizations supported by foreign aid³ to India's recent decision to disassociate itself from the UN HRC Consensus Resolution on Civil Society Space,⁴ there is growing evidence that countries are viewing NGOs as troublesome adversaries more than as supportive allies. This article seeks to explore the legal and policy underpinnings for these restrictions, which are often imposed in the name of enhancing development effectiveness or efficiency against a backdrop of the host country ownership of the deliberative space. Particular attention is paid to the drivers behind these restrictions and the context in which these measures arise.

Understanding the legal restrictions imposed in the name of host country ownership gives rise to two broader questions. First, to what extent should foreign foundations be free to fund

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¹ *Second Thematic Report of the Special Rapporteur to the UN on the rights to freedom of peaceful assembly and of association*, Maina Kiai (April 2013), A/HRC 23/39; ICNL, *Legal and Regulatory Framework for Civil Society: Global Trends in 2012-2013* (Vol. 4, Iss. 2, October 2013).

² See Russian Federation Laws on Introducing Amendments to Certain Legislative Acts of the Russian Federation 2006; and *Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Function of Foreign Agents* 2012.

³ Proclamation to Provide for the Registration and Regulation of Charities and Societies 2009 (restricting NGOs that receive more than 10 percent of their financing from foreign sources from engaging in essentially all human rights and advocacy activities).

⁴ Permanent Mission of India, Geneva, Agenda Item 3: Resolution on Civil Society Space, Statement by India in explanation of vote before the vote (27th Session of the Human Rights Council, September 26, 2014).

their own development priorities when engaged in cross-border philanthropy, or should such donors be required to abide by the policy priorities set by the host country or government? This first question examines the thorny issue of national sovereignty and a nation's autonomy over its destiny and its ability to exclude "outside influence," on the one hand; and the place of civil society—both local and international—in negotiating that space, on the other. The second separate, albeit related, question considers the extent to which a host country should be able, in the name of good regulation, to control local philanthropic activity supported by foreign foundation funding. When does a legitimate regulatory tool in one jurisdiction become a regulatory tool of oppression in another? Can an apparently measured requirement have a far more invidious practical effect on foreign foundations or foundations that enjoy foreign funding than on those organizations enjoying government favor? If the regulatory framework indirectly discriminates against foreign donors or local NGOs enjoying their support, is there a policy mechanism through which these issues can be discussed and resolved?

The context for this "country ownership" debate in philanthropy circles has, in the past and with good reason, focused on the area of development aid. Development experts and economists have debated whether the billions spent on aid for developing countries, particularly in Africa, has helped or hindered those nations and the individual citizens who most need assistance. In his works, *The White Man's Burden*⁵ and *The Tyranny of Experts*,⁶ Bill Easterly makes a strong case that the approach of those he refers to as the "development technocrats" or the "planners" (in short, the aid agencies, the NGOs, the development experts sent out to the field) has been far from successful. He argues that growth comes from within a nation and not from development, and he has urged donors to be much more modest about what they can achieve, bearing in mind the risk that in providing aid, a foreign donor may do more harm than good if such aid undermines the host country's ability to deliver on its national development strategy. Perhaps a more interesting critique, which follows in Easterly's vein, comes from Dambisa Moyo, a Zambian economist who, in her book *Dead Aid*,⁷ argues that development assistance has failed demonstrably and has in fact contributed to poverty in Africa. Moyo makes the case that there are more effective ways of accelerating development outside of foreign aid/philanthropy. The debate to date in this arena has focused very much on larger development/economic growth issues in teasing out the interplay between host country autonomy and foreign donor freedom. This article revisits the development arena but attempts to look at existing problems through a legal lens.

There are other spheres in which the ownership questions at the heart of this paper are equally relevant – for instance, in the sphere that I will call the "non-development arena." A foundation does not have to be operating in a development context before encountering legal restrictions that adversely affect cross-border philanthropic activity. In a first-world context, a foundation established in one country but wishing to operate in the territory of another state may find itself subject to restrictions that hinder or undermine its organization's ability to work or, at least, to work as effectively as it might otherwise do. These restrictions may arise in relation to

⁵ William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (OUP, 2007).

⁶ William Easterly, *The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor* (Basic Books, 2014).

⁷ Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (FSG, 2010).

issues of establishment or registration, or in the area of taxation or accountability. On occasion, they may spring from a governmental concern over state sovereignty or security or differing views on the role of democracy and the legitimacy and value of an unelected and perhaps “uncontrollable” civil society. Depending on the context, these restrictions can have serious consequences – sometimes unintended, sometimes very much intended – on a foreign NGO’s ability to fund or carry out activities in a host country. Consideration of these issues common to both the development and non-development spheres is important, as it forces us to adopt a critical and hopefully more honest approach to the feasibility of policy proposals.

Part II of this article focuses on the development aid arena, acknowledging the problems that have given rise to a loss of political momentum and the steps taken to reset the international development agenda. Moving away from development, Part III explores briefly the cross-border restrictions hampering philanthropic engagement in the areas of European and international law. To this end, attention is first focused on the European Commission’s ill-fated proposal to develop the European Foundation Statute (“EFS”) to facilitate greater foundation cross-border interaction within the EU and the legal and political difficulties that this proposal has encountered. Second, and more briefly, consideration is given to the policy reasons advanced to justify emerging, increasingly endemic government constraints on NGOs (whether foreign or foreign-supported) active in the area of democracy promotion and rights-based advocacy. Underlying all three case studies – development and non-development – is the common thread of “host country ownership” and autonomy. Part IV turns to this specific concept in light of the case studies and seeks to understand which institutions represent “the host country” and whether there is an agreed understanding of “ownership” – its scope and its limitations. This article concludes with a review of whether the balance of rights between country ownership and stakeholder/civil society participation therein has been properly struck, and provides a tentative outline of some of the possible tools open to recalibrate the balance between government and civil society power. Judicious use of these tools requires, in the spirit of the Serenity Prayer, knowledge of all avenues and their relationships to each other so that we might have the serenity to appreciate the things that we cannot change, the courage to change the things we can, and the all-important wisdom to know the difference.

II. Contextualizing the Development Aid Agenda – Identifying the Problems

The last forty years have seen dramatic changes in the traditional list of development aid recipient countries. Between 1970 and 2010, 15 new countries joined the list of OECD/DAC supported countries, with a further 35 leaving the aid recipient list during this period.⁸ This shift can be attributed both to the improved rate of economic development and rise in country income level (of those leaving) and to the emergence of new states in need of independent assistance upon the collapse of the former Soviet Union and the dismantling of the apartheid system in South Africa.⁹

⁸ OECD/DAC, Development Cooperation Report 2011 (50th anniversary ed., Paris) at 225. Among those joining the recipient list for the first time were China, Albania, Ukraine, and South Africa. Those leaving the list during this period included Cyprus, Singapore, Qatar, Portugal, and Korea.

⁹ Guido Ashoff and Stephan Klingebiel, *Transformation of a Policy Area: Development Policy is in a Systemic Crisis and Faces the Challenge of a More Complex System Environment* (German Development Institute Discussion Paper 9/2014) at 16.

The last ten years have witnessed growing concerns over the effectiveness of aid and the emergence of an international consensus that the aid system was in urgent need of reform. In the first instance, development aid was seen to be part of the problem that it wished to resolve. A proliferation in the number of donors to recipient countries led to a consequent fragmentation of projects.

For recipient host countries, this proliferation gave rise to a series of related problems. First, the large number of development actors increased transaction costs¹⁰ and administrative and reporting burdens on the recipient country.¹¹

Second, the sheer number of philanthropic and development projects (as opposed to more coherent programs) and the attendant complexity of interactions between foreign donors, local intermediaries, government agencies, and ultimate beneficiaries gave rise to principal-agent problems. Host country governments found it difficult to coordinate the various donors and to fully integrate them into the broader national development plan.¹² As effectiveness and efficiency were thereby adversely affected, so, too, ultimately was host country ownership.¹³

Third, aid conditionality could result in the host country being primarily answerable to the donor rather than through traditional parliamentary and budgetary processes of accountability, thereby unintentionally weakening further the domestic political infrastructure. In the words of Barder,

Donors can also have the perverse effect of reducing accountability by enabling line ministries to obtain resources in the form of projects and sector funding which releases ministers from the disciplines of the budget process. Neither the Parliament nor the Cabinet and Finance Ministry can effectively prioritize government spending or hold ministers to account for their performance if a substantial amount of discretionary spending is financed outside the fiscal systems that parliaments use to control the executive.¹⁴

This would present a problem in any well-developed economy but is particularly acute in the least-developed countries and lower-income countries that tend to be the traditional recipients of

¹⁰ William Easterly, "Are Aid Agencies Improving?" (2007), 52 *Economic Policy* 633, at 640-41; Arnab Acharya, Ana Teresa Fuzzo de Lima, & Mick Moore, "Proliferation and fragmentation: Transactions costs and the value of aid" (2006), 42(1) *Journal of Development Studies* 1.

¹¹ See Elliott Morss, "Institutional destruction resulting from donor and project proliferation in Sub-Saharan African countries" (1984), 12(4) *World Development* 465; Yutaka Arimoto and Hisaki Kono, "Foreign Aid and Recurrent Cost: Donor Competition, Aid Proliferation, and Budget Support" (2009), 13(2) *Review of Development Economics*, 276. In an effort to begin to address these issues, the OECD organised the first High Level Forum on Aid Effectiveness in Rome in 2003. It concluded with a commitment by donor governments to harmonize practices in view of reducing transaction costs for partner countries.

¹² Easterly, n. 5, above.

¹³ David Booth, "Aid effectiveness: bringing country ownership (and politics) back in" (2012), 12(5) *Conflict, Security & Development*, 537-558.

¹⁴ Owen Barder, *Are the planned increases in aid too much of a good thing?*, Centre for Global Development, Working Paper Number 90, July 2006, at 17. See also the work of Tony Killick, "Principals, Agents and the Failings of Conditionality" (1997), 9(4) *Journal of International Development*, 483-495 (finding that "conditionality does not meet its promise of greater aid effectiveness . . . over-reliance on conditionality leads to major misallocations of resources and large-scale waste of public monies").

such aid.¹⁵ For recipient countries that rely heavily (or exclusively) on overseas development aid, such funding may diminish the host government's political and economic accountability.¹⁶ These countries share a plethora of problems characterized by an absence of working state structures and poorly functioning or insufficiently legitimate governments. The issues faced by fragile or failing states add further complexity to the picture, marked as they are by instability, insecurity, deficits in government, and limited implementation capacity.

Recent moves away from measuring development aid success solely in terms of development outputs ("bean-counting" donation amounts and the number of engagements through projects or otherwise with a host country) to a more systematic consideration of development outcomes achieved (such as achievement of the Millennium Development Goals) has both highlighted the very modest set of achievements made to date while simultaneously demonstrating the empirical difficulties of measuring effectiveness in host countries.¹⁷

In light of these acknowledged shortfalls in the development aid regime, international efforts to reform the aid system began in earnest in early 2000, and as outlined by Ashoff and Klingebiel,¹⁸ comprise four distinct aspects:

- 1) The development in 2000 of the UN's Millennium Development Goals ("MDGs"), representing for the first time goals as content-based yardsticks for measuring development;¹⁹
- 2) The provision of resources for achieving the MDGs in the form of the UN's 2002 Monterrey Consensus on Financing for Development and related EU measures;²⁰
- 3) The development and rollout of the Paris (2005), Accra (2008), and Busan (2011) Agendas,²¹ which set down principles and procedures designed to ensure effective resource deployment, thereby improving aid effectiveness;

¹⁵ Dean Chahim and Aseem Prakash, "NGOization, Foreign Funding and the Nicaraguan Civil Society" (2014), 24 *Voluntas* 487-513.

¹⁶ German Development Institute, n. 9 above. C.f. Almuth Scholl, "Aid effectiveness and limited enforceable conditionality" (2009), 12 *Review of Economic Dynamics* 377-391.

¹⁷ OECD, *Better Aid: Aid Effectiveness Survey 2011: Progress in Implementing the Paris Declaration* at 15. The report, which reviews the progress made in implementing the targets set by the 2005 Paris Declaration, reveals that at the global level, only one out of the 13 targets established for 2010 was met, however, considerable progress had been made towards many of the remaining 12 targets.

¹⁸ Above, n. 9.

¹⁹ See <http://www.un.org/millenniumgoals/>. The Millennium Development Goals (MDGs) are eight international development goals, established following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. All 189 United Nations member states (there are 193 currently) and at least 23 international organizations committed to help achieve these goals by 2015.

²⁰ See Monterrey Consensus (United Nations, 2003), <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> (last accessed September 18, 2014). See also EU Commission Communication to the Council and the European Parliament of March 5, 2004, Translating the Monterrey Consensus into practice: the contribution by the European Union, COM (2004), 150 final; and progress towards attaining the Millennium Development Goals - Financing for Development and Aid Effectiveness, COM (2005), 133 final.

²¹ OECD, Paris Declaration on Aid Effectiveness (2005) and OECD, Accra Agenda for Action (2008), available at <http://www.oecd.org/dac/effectiveness/34428351.pdf>; and Busan Partnership for Effective Development

- 4) The broader focus on creating greater policy coherence for international development.

A. *Highways and Byways from Paris to Busan*

From a legal policy perspective, the Paris Declaration, the Accra Agenda for Action, and the Busan Partnership attempt to renegotiate the “development contract” between donor and recipients countries in the first iteration, broadened in later instances to define “country” beyond an individual governing regime to include a role for parliament and civil society actors. The extent to which this latter broadening is fully accepted by all signatory stakeholders remains a question of some debate.²²

The 2005 Paris Declaration set down for the first time a framework of common principles to govern donor and recipient country government interaction, promoting the concept of “host country ownership.”²³ The idea behind this concept is not new – relating to the old principle of helping people to help themselves. The Paris Declaration expressed host country ownership as one of the key commitments of the OCED DAC donor, recipient country, and international organization signatories. Recipient governments agreed to exercise effective leadership over their development policies and strategies and to coordinate development actions, and, in return, donors committed to respect partner country leadership and help strengthen their capacity to exercise it.²⁴ The Paris Declaration, while emphasising the importance of host country ownership, did not spell out which institutions constituted the “host country,” leaving it open to states to define ownership very narrowly as being “host *government* ownership” to the exclusion of other relevant stakeholders. Moreover, it made no reference to the role of civil society in the delivery of effective aid.

The Accra Agenda for Action, which followed three years later in 2008 and again was initiated and driven by the OECD DAC countries, took a stronger political line than Paris. It highlighted the important roles that national parliaments and civil society play in host countries,²⁵ and it expressly called for more effective and inclusive partnerships to occur between civil society, the private sector, and host governments.²⁶ The Accra meeting was the first high-level forum to convene a parallel conference for 325 civil society organizations from more than 88 countries. The convening of civil society and the express recognition of its role in the Accra Agenda represented a deliberate attempt to overcome the latter’s glaring omission from the Paris Declaration.

Cooperation (2011), available at <http://www.oecd.org/dac/effectiveness/49650173.pdf> (last accessed September 18, 2014).

²² Carolyn Gibb Vogel and Mercedes Mas de Xaxás, Making Country Ownership a Reality: An NGO Perspective,(2007), 2(3) Population Action International, available at <http://populationaction.org/wp-content/uploads/2012/01/CountryOwnership.pdf> (last accessed February 3, 2015).

²³ The Paris High-Level Forum on Aid Effectiveness was not the first in the series. The first High-Level Forum took place in Rome in 2003, two years prior to the Paris forum. The Rome Forum discussions focused on why aid was not producing the desired results and how efforts to meet the MDG targets could be improved. It concluded with a commitment by donor governments to harmonize practices so as to reduce transaction costs for partner countries.

²⁴ Paris Declaration on Aid Effectiveness (2005) at [14]–[15].

²⁵ See Accra Agenda for Action (2008) at [13]–[15].

²⁶ *Ibid.* at [16].

B. *The Emergence of Civil Society: From Advisory Groups to Open Forums*

The greater visibility of civil society at Accra was no accident; it had been carefully orchestrated in the intervening years following the Paris Declaration. It began in 2007 when a steering group of civil society organizations (CSOs) called “the BetterAid Coordinating Group” came together with the support of some donor governments to form a temporary multi-stakeholder Advisory Group on Civil Society and Aid Effectiveness (AG-CS). AG-CS provided civil society with a formal link to the OECD and enabled discussions to be held whereby a common understanding could be reached on the part played by civil society in the international development system. The holding of the parallel CSO conference at Accra reflected the achievements of the AG-CS in bringing these issues into the room, if not quite to the table, although many civil society representatives feared that the references to civil society in the Accra Agenda amounted merely to lip service.²⁷

The Accra Agenda for Action (AAA) prompted the civil society community to come together and to initiate a consensus process to define the role of civil society in international development and specifically “to reflect on how [CSOs] can apply the Paris principles of aid effectiveness from a CSO perspective.”²⁸ Convening as the Open Forum for CSO Development Effectiveness, more than 70 CSO representatives embraced this challenge in 2008 by meeting to explore the roles played by CSOs in development and how these roles differed from those of official development institutions and donor governments. The objectives of the Open Forum for Development Effectiveness were threefold:

- To achieve a consensus on a set of global principles for development effectiveness;
- To develop guidelines for CSOs to implement these principles; and
- To advocate to governments for a more enabling environment for CSOs to operate.

Following a worldwide consultation process, involving thousands of CSOs in more 70 countries and two global assemblies (in Istanbul in 2010²⁹ and in Siem Reap in 2011), a consensus was reached on the content of the Principles and a Framework for Development Effectiveness. The Istanbul Principles, as they have become known, set out the conditions for effective CSO participation as development actors. They focus on civil society promotion of human rights, gender equality, people empowerment, and environmental sustainability. They also commit CSOs to realizing positive sustainable change, practicing transparency and accountability, sharing knowledge and mutual learning, and pursuing equitable partnerships.³⁰

²⁷ See Tina Wallace, “On the road to Accra, via Canada and County Kerry” (2009), 19(6) *Development in Practice* 759, at 762 (noting that civil society the delegates “were reminded – gently at first but then more persistently – by some of the donors and members of the advisory group that there was no chance of challenging or changing the PD at Accra; politically there was very little room for manoeuvre. All that was possible was to bring forward an amendment or two, acknowledging the role of CSOs and the need for their inclusion in future PD work.”).

²⁸ Accra Agenda for Action, [20].

²⁹ Involving the participation of 170 CSO delegates from 82 countries.

³⁰ See http://cso-effectiveness.org/IMG/pdf/final_istanbul_cso_development_effectiveness_principles_footnote_december_2010-2.pdf (last accessed September 25, 2014).

The International Framework for CSO Development Effectiveness, agreed at the Siem Reap Global Assembly in Cambodia in 2011, expanded on the Istanbul Principles by explaining the significance of each principle and elaborating on how civil society is already implementing them. Starting from the Accra Agenda recognition that CSOs are “independent development actors in their own right” and the commitment of AAA signatories to deepen their engagement with them,³¹ the framework for CSO Development Effectiveness sought to identify the critical conditions for enabling CSO involvement in the development of government policies and practices. The need for an enabling environment for CSOs is captured well by the framework agreement, which notes:

In almost all countries, CSOs, their staff and volunteers are experiencing political, financial and institutional vulnerability, arising from the changing policies and restrictive practices of their governments. CSOs are concerned about the impact of these restrictive policies on democratic and legal space for CSOs. This CSO vulnerability is exemplified in the use of pervasive anti-terrorism legislation, more restrictive government financial and regulatory regimes and the exercise of government power to limit “political” activity and sometimes repress CSOs and their leaders, who may be human rights defenders or critical of government policies.³²

Institutional recognition of the difficulties facing civil society came with the UN Human Rights Council’s passing of Resolution on the rights to freedom of peaceful assembly and of association in 2010,³³ which bestowed further international recognition and legitimacy on the role played by CSOs. This Resolution mandated the establishment of a UN Special Rapporteur to monitor these rights with subsequent UN Resolution 21/16 emphasizing “the critical role of the rights to freedom of peaceful assembly and of association for civil society, and recogniz[ing] that civil society facilitates the achievement of the purposes and principles of the United Nations.”

With the holding of the Fourth High Level Forum on Development Aid in Busan, Korea in 2011, a new milestone was reached with civil society actors participating in the negotiations as full and equal participants for the first time. The Busan Partnership expressly affirmed the work of the Open Forum for CSO Development Effectiveness in recognizing the vital role of these organizations in “enabling people to claim their rights, in promoting rights-based approaches, in shaping development policies and partnerships, and in overseeing their implementation.”³⁴ It endorsed CSO usage of both the Istanbul Principles and the International Framework for CSO Development Effectiveness, and it called on signatories to Busan to:

implement fully our respective commitments to enable CSOs to exercise their roles as independent development actors, with a particular focus on an enabling environment,

³¹ See n. 28 above.

³² See n. 30 above, at 22.

³³ A/HRC/RES/15/21, October 6, 2010. The Human Rights Council renewed its commitment to promote and protect the rights to freedom of peaceful assembly and of association, by adopting [resolution 21/16](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/21/16), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/21/16 (October 2012) and [resolution 24/5](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/24/5), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/24/5 (October 2013).

³⁴ Busan Partnership for Effective Development Co-Operation, Fourth High Level Forum on Aid Effectiveness, Busan, Republic of Korea, 29 November-1 December 2011, at [22], available at <http://www.oecd.org/dac/effectiveness/49650173.pdf>.

consistent with agreed international rights, that maximises the contributions of CSOs to development.³⁵

To a degree, the Busan Partnership agreement reset the stakeholder debate in more ways than one. Civil society was joined at the negotiation table by another set of new entrants in the form of the BRICS countries,³⁶ enabling the reform process to be called a truly global partnership and recognizing the changes in development partnerships beyond North-South aid to South-South cooperation.³⁷ Complementing this move beyond DAC donor countries, a second change, in part spurred by the growing South-South interactions, was reflected in a language shift in Busan away from “aid effectiveness” towards a broader platform of “development effectiveness.”³⁸

C. *Post Busan – Current Developments*

Three years on from Busan, giving full effects to the commitments agreed in the Partnership Agreement remains difficult. Civic space continues to contract in a number of countries – not just in authoritarian and semi-authoritarian states but also more worryingly in nations held out as more normally adhering to the principles of democracy.³⁹ Most recently, the UN Human Rights Council adopted by consensus a resolution on civil society, tabled by Ireland, which enjoyed the support of more than 66 cosponsors.⁴⁰ Drawing on existing principles of international law, the Resolution highlighted crucial points of principle regarding the workings of civil society, restating that:

- The ability of people to collectively solicit, receive and utilise resources is a key component of the right of freedom of association;⁴¹
- National security and counter-terrorism legislation and provisions on funding should not be abused to hinder the work or safety of civil society;⁴²
- Civil society space is particularly important for minorities, the marginalised and other disadvantaged groups as well as those espousing minority or dissenting views or beliefs;⁴³

³⁵ Ibid.

³⁶ Brazil, Russia, India, China, and South Africa.

³⁷ This change is further evidenced by the replacement of the OECD/DAC secretariat, the Working Party for Aid Effectiveness (“WP-EFF” which oversaw Paris and Accra), with the Global Partnership for Effective Development Cooperation in 2012, the steering committee of which has one OECD and one civil society representative, and is charged with overseeing the Busan Partnership deliverables.

³⁸ Busan Partnership, [28]–[29]. On the difference between “aid effectiveness” and “development effectiveness” see Shannon Kindornay and Bill Morton, “Development Effectiveness: Towards New Understandings” in *Issues Brief* (North-South Institute, September 2009).

³⁹ See Douglas Rutzen, “Aid Barriers and the Rise of Philanthropic Protectionism,” in this issue; and Barbara L. Ibrahim, “States, Public Space and Cross-Border Philanthropy: Observations from within the Arab Transitions,” presented at Conference on Regulation or Repression: Government Policing of Cross-Border Charity, National Center on Philanthropy and the Law, New York University, October 23-24, 2014.

⁴⁰ UN Human Rights Council, Resolution on Civil Society Space, A/HRC/27/L.24 (September 23, 2014).

⁴¹ A/HRC/27/L.24 at 10.

⁴² A/HRC/27/L.24, Preamble.

- The real and effective participation of people in decision-making processes should be secured, including at the domestic level in the development, implementation or review of legislation, but also at the regional and international levels.⁴⁴

Ten countries proposed ultimately unsuccessful amendments to the initial Irish draft which would have seriously weakened the Resolution had they been adopted. Included among those ten were India and South Africa.⁴⁵ In light of this, India chose to disassociate itself from the Consensus Resolution on September 26. Pinning its objections to the very issue of host country ownership and autonomy, the Indian explanation of its position before the vote declared that:

Civil society must operate within national laws. To treat national laws with condescension is not the best way to protect human rights, even by civil society with the best of intentions. We wish that caution should be exercised in advocacy of the causes of civil society. The Resolution is unduly prescriptive on what domestic legislation should do and should not do. This is the prerogative of the citizens of those countries.⁴⁶

Accusing the Resolution of “fallaciously seek[ing] to make civil society a subject of law,”⁴⁷ the Indian Statement went on to expressly dissociate India from the paragraphs of the Resolution concerning the valuable role played by civil society in the decision-making process regarding legislation; the need to ensure a legally enabling environment for civil society; the right for CSOs to solicit, receive, and utilize funds; the work of the office of the UN High Commissioner for Human Rights in the promotion and protection of civil society space; and the right of civil society to unhindered access to regional and international bodies, including the UN.

The Indian perspective on civil society sits in stark contrast to the views expressed in the U.S. Presidential Memorandum to the heads of U.S. government executive departments and agencies, issued on the same day as the UN HRC Consensus Resolution. The memorandum, expressly acknowledging the participation of civil society as fundamental to democracy, directed U.S. agencies engaged abroad to “take actions that elevate and strengthen the role of civil society; challenge undue restrictions on civil society and foster constructive engagement between governments and civil society.”⁴⁸

Making sense of these very different attitudes toward the role of civil society in development, the civic space accorded to such entities, and the scope of those rights guaranteed requires a look at the larger policy picture beyond the minutiae of regulation. To appreciate the bigger picture, it is therefore useful to shift the lens of inquiry away from the development sphere and to look instead at the non-development arena in the context of, first, the role of

⁴³ A/HRC/27/L.24 at 4.

⁴⁴ A/HRC/27/L.24 at 8, 12 and 13.

⁴⁵ The other states that proposed constraining amendments were Bahrain, China, Cuba, Egypt, Russia, the United Arab Emirates, and Venezuela.

⁴⁶ Permanent Mission of India, Geneva, Agenda Item 3: Resolution on Civil Society Space, Statement by India in explanation of vote before the vote (27th Session of the Human Rights Council, September 26, 2014).

⁴⁷ *Ibid.*, at [2].

⁴⁸ Office of the Press Secretary, Presidential Memorandum: Deepening US Government Efforts to Collaborate with and Strengthen Civil Society (The White House, September 23, 2014).

foundations in the European Union, and, second, the role of foundations in opening democratic spaces outside of the international development law field.

III. The Non-Development Arena: Squaring the Circle

The pushback against civil society autonomy and the space in which it operates extends far beyond the realm of development aid and is not limited to authoritarian regimes. Part III seeks to explore the policy drivers behind current trends toward disabling civil society by examining, on the one hand, intentional pushback, and on the other, the apparently innocuous restrictions promoted in the name of good regulation and governance that have a disproportionately adverse effect on cross-border philanthropy.

A. The Proposal for a European Foundation Statute: Righting Unintentional Wrongs?

According to a 2009 European Commission Feasibility Study on a European Foundation Statute (EFS), an astonishingly high percentage of foundations based in the EU (in the region of 67 percent) engage in international activities.⁴⁹ Although doubts remain over the empirical reliability of the data,⁵⁰ the general trend towards increasing cross-border activities of national foundations in Europe is indisputable. With approximately 110,000 foundations in Europe holding assets in excess of €1,000bn and an approximate annual expenditure in the region of €153bn,⁵¹ it has been estimated that the economic importance of the sector outstrips that of the U.S. foundation sector.⁵² Notwithstanding its scale, foundations wishing to operate in more than one European Member State have faced legal and regulatory difficulties when it comes to establishment, registration, and operation from both a civil law and a tax law perspective. Apart from adversely affecting philanthropic activity, the associated legal costs of these legal barriers to foundations are substantial and estimated to cost foundations between €101m and €178m per annum.⁵³

Consequently, foundations face structural obstacles when they seek to operate on a cross-border basis across the EU. These obstacles take the form of differing legal and fiscal regimes that operate in each of the EU's Member States, with which foundations must comply if established in any of these States.⁵⁴ Imagine, for instance, a donor who wishes to establish a pan-European foundation enjoying charitable tax-exempt status in the EU Member States of Ireland, France, Germany, and Malta.⁵⁵ To establish the organization, French law requires both

⁴⁹ University of Heidelberg, Centre for Social Investment, *Feasibility Study on a European Foundation Statute – Final Report* (2009) at 149 available at http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf (last accessed March 11, 2013), hereinafter “*Feasibility Study*”.

⁵⁰ *Ibid.*, at 150–2.

⁵¹ *Ibid.*, at 18.

⁵² *Ibid.*, at 2.

⁵³ *Ibid.*, at 178.

⁵⁴ Information for this comparison is drawn primarily from the European Foundation Centre, *Foundations' Legal and Fiscal Environments — Mapping the European Union of 27* (2007).

⁵⁵ These four States are chosen simply to illustrate existing national regulatory divergences — a combination of other Member States might not provide the same logistical difficulties but would provide others. Thus as Dube, Rossi & Surmatz point out in *EFFECT* 13 (Summer, 2007), “While you need at least 3,000 Euros to start a foundation in Copenhagen, Denmark, just a short drive across the Oresund Bridge in Malmö, Sweden, there is no such fixed requirement, although your assets should be adequate to pursue your planned purpose for five years.

registration and State approval, and approval is subject in practice (although not in law) to a minimum capital requirement of €1 million. Germany also requires registration and State approval, but the State enjoys no discretion regarding approval; although there is no official minimum capital requirement for establishment, the foundation must have sufficient assets to carry out its purpose, which generally requires a minimum capital requirement of €50,000. Ireland requires registration with the Revenue Commissioners and the Charities Regulatory Authority, with no minimum capital requirement. An organization in Malta must register and, if it wishes to take the form of a “voluntary organization,” must seek State approval. There are *de minimis* Maltese minimum capital requirements, with the prescribed amount being €240 for social purpose foundations and €1,200 for all others.

Once an organization is established, it faces a variety of governance requirements. Ireland alone requires that a majority of the governing board reside within the jurisdiction. French law requires all foundations to appoint an auditor and a substitute and to file annual returns and financial statements with administrative authorities. These reports must be made publicly available only if the foundation receives annual gifts in excess of €153,000 or support from public authorities. By contrast, German law does not have any publication requirement, although if tax exemption is sought, dual filing is required both to State authorities and to the relevant financial authorities. Irish law requires all charities with an annual income of over €100,000 to prepare audited accounts, and until 2014, it imposed a public filing requirement only on incorporated charities.⁵⁶

Concerted efforts by a number of stakeholders in the EU over the past decade have made headway in dismantling existing obstacles to free movement of philanthropy.⁵⁷ The European Court of Justice’s growing jurisprudence has affirmed that the right of free movement of capital extends to non-profit entities.⁵⁸ The Court, spurred on by an active European Commission, has also prohibited tax discrimination between charities based on whether the donor/recipient is domestic or foreign-based.⁵⁹ As a result of Commission infringement actions since 2005, 28 cases have been successfully closed due to changes in Member State legislation, eliminating discriminatory tax treatment.⁶⁰ Private initiatives, in the form of the Transnational Giving Europe

And if you set up a foundation in Cieszyn, Poland, you can run a business activity to generate income for it, but you can’t do so if you set one up just across the Friendship Bridge in Tešín, Czech Republic.”

⁵⁶ Revised reporting requirements are currently being introduced in Ireland as a result of the newly commenced Charities Act 2009. The more stringent reporting requirements are expected to come into effect in late 2015.

⁵⁷ The EU is founded upon a series of fundamental freedoms laid down in the Treaty of Rome, namely free movement of workers, free movement of goods, free movement of capital and freedom of establishment, thereby creating a common market between European Member States in which goods, services, and people flow freely, uninhibited by country barriers. The term “free movement of philanthropy” is used in this vein to express the aspiration of inter-state free movement of charitable donations and activities unencumbered by legal or taxation barriers.

⁵⁸ See Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203.

⁵⁹ Case C-318/07 *Hein Persche v. Finanzamt Lüdenscheid*, [2009] ECR I-359; Case C-25/10 *Missionswerk Werner Heukelbach v. Belgium*, [2011] 2 C.M.L.R. 35; Case C-10/10 *Re Taxation of Gifts to Research and Teaching Institutions: European Commission v. Austria*, [2011] 3 C.M.L.R. 26.

⁶⁰ See European Foundation Centre and the Transnational Giving Europe network, *Taxation of cross-border philanthropy in Europe after Persche and Stauffer - From landlock to free movement?* (2014), at [3.1],

(TGE) Network, have also sought to assist donors in making tax-efficient charitable donations to foreign charities. Established in 1999 and covering 17 European countries, the TGE network assisted more than 6,800 donors to channel €8.5 million to chosen charities across Europe in 2013.⁶¹ Notwithstanding all of these initiatives, foundations across Europe have long called for the creation of a supranational legal form for public benefit foundations to enable them to operate seamlessly throughout the European Union.⁶²

In February 2012, the European Commission published its proposal for a Council Regulation for the EFS⁶³ which, if adopted, would establish a new European legal structure for certain public benefit organizations. Use of this new European form would enable foundations and other incorporated public benefit organizations (but not charitable trusts) to operate uniformly across EU Member States in a recognizable form, thereby dispensing with separate national legal and administrative establishment requirements and barriers to operation. The proposal for the Statute faced innumerable legal and political difficulties. To take effect, the Statute required the unanimous consent of all 28 Member State governments – a feat that the consecutive Irish, Greek, Lithuanian and Italian Presidencies of the European Council ultimately failed to bring about.

So, what made this proposal, concerning as it does a scheme to enable public benefit purposes to be advanced more freely across the EU, so controversial? Or to put the question another way, if it was generally agreed that the introduction of a European Foundation Statute would make philanthropy more effective in the EU, freeing up resources currently spent surmounting legal and fiscal obstacles so that they could be dedicated to achieving public benefit purposes instead, how could Member State objections to its introduction be justified?

Comprising 28 Member States of both common law and civil law legal systems, the EU's lack of a harmonized approach to charitable giving and the absence of a shared definition or indeed common understanding of "charitable purpose" or "public benefit" should not, perhaps, be surprising.⁶⁴ In many cases, the regulation of charitable foundations in a Member State is closely linked to valuable tax exemptions and deductions such that the right to claim this status is

available at http://www.efc.be/programmes_services/resources/Documents/TGE-web.pdf; see also F. Liberatore (2012), "Tax Aspects of the Commission's Proposal for a European Foundation Statute," presented at ERA, A New Legal Form for European Philanthropy: The Commission's Proposal for a European Foundation (FE) Statute, Brussels, October 30–31.

⁶¹ See EFC and TGE, n. 60, above. See also <http://www.transnationalgiving.eu/tge/default.aspx?id=219948&langtype=1033> (last accessed January 30, 15).

⁶² See European Commission, DG for Internal Market and Services, *Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union* (2006) at 26, available at http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf; European Foundation Centre 18th Annual General Assembly (AGA) and Conference, *Why is a European statute for foundations needed?*, Madrid, June 1-3, 2007; University of Heidelberg, *Feasibility Study* (2009), supra n. 49; European Foundation Centre, *It's Time for a European Statute* (2012a), available at http://www.efc.be/programmes_services/resources/Documents/EFS_brochure_2012_FINAL.pdf (last accessed March 21, 2013).

⁶³ Proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final.

⁶⁴ For an informative discussion of the differing approaches of common law and civil law jurisdictions to the categorization of non-profit organizations, see *ECNL Study on Recent Public and Self-regulatory Initiatives Improving Transparency and Accountability of Non-profit Organisations in the European Union* (2009) at 123-125.

tightly regulated. Tax law is an area in which Member States have retained their sovereignty and so it follows that Member States are anxious to keep a firm control over which organizations can claim either tax-exempt status or tax rebate privileges. Traditionally, tax exemptions on charitable donations were reserved solely for donations to domestic charities. The European Court of Justice, however, in a series of judgments has ruled that when it comes to charitable tax exemptions or tax reliefs, a member state must treat EU charities – whether established domestically or established in another Member State but operating in that jurisdiction – equivalently. In other words, it cannot discriminate against a foreign charity (and I use this term narrowly to mean a charity coming from another EU Member State) for tax purposes if that charity is equivalent to the national charity in all other respects other than the place of its establishment.

As initially proposed, the European Foundation Statute would have provided for a new legal vehicle – a European Foundation (FE) – that could be established in any one Member State and be active in any other Member State, in line with the requirements of the EFS, without any further national formalities being required. In the initial Commission draft, the FE would have enjoyed, without any further proof being necessary, the same tax advantages bestowed on domestic charities in those host Member States in which it carried out its activities by virtue of its formation as an FE.⁶⁵ The proposed statute also allowed for the de novo creation of FEs and for the conversion of existing national foundations into FEs provided that certain requirements were met.⁶⁶

Although enjoying the support of the European Parliament, the European Committee of the Regions, and the European Economic and Social Council, the proposed statute met with opposition in the European Council, which began its scrutiny in 2012. For many Member States the automatic entitlement to tax relief by virtue of formation of an FE was a step too far. Taxation policy remains a matter within the competence of national member states and not an area in which the EU enjoys federal competence. The matter was complicated by the scope of the EFS's definition of what constituted a "public benefit purpose."⁶⁷ Representing the first attempt ever to define what constitutes public benefit activity at the European level, the scope of this definition proved to be an issue of extreme political sensitivity from the outset. When the rewards for qualifying as an FE under the EFS are borne in mind – automatic tax equivalency for tax exemption purposes with domestic public benefit entities – it is no wonder that this perceived backdoor to national charitable tax exemption was the subject of such scrutiny.

The list of public benefit purposes in Article 5 of the EFS caused much concern in this regard given that in some instances it was both wider and narrower than existing national definitions.⁶⁸ Thus, on the one hand, the European definition included reference to the promotion of amateur sports, civil rights, and human rights, matters that were deliberately excluded from the Irish definition of charitable purpose. On the other hand, to garner the support of certain secular civil law states, the European definition excluded the advancement of religion as a public

⁶⁵ European Commission, Proposal for a Council Regulation on the Statute for a European Foundation (FE), COM(2012) 35 final (Brussels, February 8, 2012).

⁶⁶ *Ibid.*, Article 12.

⁶⁷ *Ibid.*, Article 5.

⁶⁸ See Oonagh B. Breen, "The European Foundation Statute Proposal: Striking the Balance between Supervising and Supporting European Philanthropy?" (2013) 5(1) *Nonprofit Policy Forum*, 5-43.

benefit purpose, a decision that did not sit well with the common law Member States (which recognize advancement of religion as charitable) or indeed with religious foundations operating in civil law jurisdictions. Moreover, the use of the wording “public benefit purpose” caused angst for the common law member states, which operate a two-stage test for charitable status under which an entity must both have a charitable purpose (akin to those listed in Article 5) *and* demonstrate sufficient public benefit (an entirely separate concept that looks to the emotional and obligational distance between the donor and donee and seeks to measure the negligibility of any related private benefit and the size of the benefitting class). The confusion caused by the truncated European public benefit definition approach made it particularly difficult for common law countries to see their way through to its ratification.

The widespread Member State discomfort with the proposed tax provisions ultimately resulted in the Lithuanian Presidency of the European Council agreeing to drop universal tax exemption entirely from the proposal in 2013. Without the tax albatross, one might have assumed that promulgation of the EFS would have been fairly plain sailing, but this turned out not to be the case. Host country ownership issues once more came to the fore with Member States experiencing difficulty agreeing on principles relating to minimum capital and formation requirements, and supervision of the new entity that differed from the current practice in their own home jurisdictions. A last-ditch attempt to salvage a compromise proposal by the Italian EU Presidency proved unsuccessful in November 2014, with some Member States rejecting entirely the principle of an EFS initiative while others were unhappy with the proposed compromise text.⁶⁹ In the face of such host country opposition, the European Commission decided to withdraw the EFS proposal from its legislative agenda in December 2014.⁷⁰

The journey of the EFS proposal is informative if we reflect upon the issues it raises for us in the broader theme of enhancing policy effectiveness and efficiency in the context of cross-border philanthropy. Here is an idea, which at its heart, sets out to tackle administrative, fiscal, and legal difficulties that national foundations experience when they wish to work internationally within the context of the EU’s common market. Provision of a new European legal structure for philanthropic cross-border purposes availing of universally recognized and coherent formation requirements that can operate effectively in any Member State would seem to be a positive development. And yet, even in its slimmed-down form (minus the up-front tax recognition that would have made it exceptionally appealing to foundations), the viability of the proposed Statute’s hung in the balance⁷¹ before falling off the legislative agenda entirely.

⁶⁹ Gail Moss, “European Foundation Statute suffers setback,” *Investments & Pensions Europe* (November 28, 2014), available at <http://www.ipe.com/news/regulation/european-foundation-statute-suffers-setback/10005189.fullarticle> (last accessed January 29, 2015).

⁷⁰ European Foundation Centre Press Release, “European Commission halts negotiations on the European Foundation Statute – What’s next?” (December 16, 2014).

⁷¹ It is notable that no mention was made of the need to progress on the European Foundation Statute in the priority list of the Italian Presidency of the European Council. See “Italian Presidency Priorities Discussed by EP committees” (2014 0722 IPR53208), available at <http://www.europarl.europa.eu/news/en/news-room/content/20140722IPR53208/pdf>. By contrast in its full program for the Italian Presidency, the EFS merited a fleeting reference to the effect that “the Italian Presidency will pursue a thorough examination of the recently adopted Proposal for a Directive on single-member private limited liability companies, *and will follow up on the work carried out by the Greek Presidency on the Regulation on the Statute of the European foundation*” (emphasis added), in *Europe - A Fresh Start: Programme of the Italian Presidency of the Council of the European Union* at 50

Understanding the politics of the EFS provides a useful insight into the concept of host-country ownership principles in action in first-world states. Notwithstanding the broader societal benefits that might flow from the passage of the EFS, national priorities influenced each Member State's support or lack thereof for the proposal. Foundations throughout the EU, many of which are members of the European Foundation Centre, consistently lobbied Member State governments in seeking their support for the Statute.⁷² Introduction of the EFS would have required Member States to make a national agency responsible for the oversight and registration of these European entities formed in their jurisdiction. As the recognized supervisory authority, that national agency would bear responsibilities, if called upon by a neighbor state in which the FE was active, to investigate its activities and ensure its compliance with the foundation's own statutes, the FE statute and any other relevant governing law. At a time when the budgets of many state agencies are shrinking, the capacity-building required to take on additional monitoring responsibilities for a new European legal structure proved to be far from enticing.⁷³

Moreover, the proposed definition of "public benefit purpose entity" in the EFS would have excluded both charitable trusts and charitable companies (whether limited by guarantee or in the new CIO form) from becoming FEs. As originally drafted, Article 2(5) defined a public-benefit-purpose entity as "a foundation with a public benefit purpose and/or similar public benefit purpose corporate body without membership formed in accordance with the law of one of the Member States." The requirement of incorporation precluded charitable trusts from enjoying the benefits of the statute, whereas the insistence upon absence of members prevented charitable companies from constituting a public-benefit-purpose entity. With limited public budgets, there was little incentive for Member States with few foundations to expend time or money on an area not viewed as a political priority.⁷⁴ Acceptance of the regulation, which would have been directly applicable in all Member States, would have required states to host and facilitate FEs with all the associated administrative costs of so doing (in terms of registration, supervision, and reporting), in a situation in which common-law domestic charities (in the forms of trusts and companies)

(available at <http://italia2014.eu/en/presidency-and-eu/programme-and-priorities/programme-of-the-italian-presidency-of-the-council-of-the-european-union/>).

⁷² See Gerry Salole, "Why is the European Foundation Statute Needed?" (2008), 11(1) *International Journal for Not-for-Profit Law* 75, available at http://www.icnl.org/research/journal/vol11iss1/special_5.htm; European Foundation Centre, *Let's Move the European Foundation Statute Forward* (June 2012); EFC, *It's time for a European Foundation Statute* (2012), available at http://www.efc.be/programmes_services/resources/Documents/EFS_brochure_2012_FINAL.pdf (last accessed October 3, 2014); EFC, *Philanthropy sector urges Governments to adopt the European Foundation Statute* (November 19, 2013) available at http://www.efc.be/programmes_services/resources/Documents/EFSappel_November2013.pdf

⁷³ In this regard, the Charity Commission for England and Wales, the likely statutory agency in the UK that would be assigned the task of overseeing the FE, has seen a budget cut of almost 50 percent in real terms since 2007-2008, when it received a settlement of £32.6m from the British government.

⁷⁴ In 1999, Ireland's foundation sector was rated by the European Foundation Centre to be the smallest in Europe, with just 0.7 grant-making foundations per 100,000 inhabitants. While the Celtic Tiger fuelled the growth of the sector by 257 percent, Ireland still lags behind the European average of 20 foundations per 100,000 inhabitants. See further Oonagh B. Breen, "In Search of Terra Firma: The Unpacking of Charitable Foundations in Ireland," in Chiara Prele (ed.), *Developments in Foundation Law in Europe* (Springer Publications, 2014). Equally, speaking under Chatham House Rules at a conference on the European Foundation Statute at the Office of the Attorney General for Northern Ireland, on February 14, 2014, an informed source made the point that British foundations had not been strongly lobbying Westminster in favor of the introduction of the EFS.

would have been precluded from using the structure to further their philanthropic efforts abroad. Given that the Treaty basis for the EFS regulation is Article 352 TFEU, which requires Member State unanimity for the EFS to pass, it took only one uninterested or disengaged (as opposed to even hostile) Member State to veto the proposal.⁷⁵

In a nutshell, the difficulties encountered in the unsuccessful negotiation of the EFS reveal the delicacies of host-country ownership as a controlling concept. Each Member State has developed its own internally consistent way to regulate charitable foundations. Those rules, informed by the distinct culture and legal system of each Member State, differ from one another. From a foundational perspective, these variances in reporting and registration procedures are cumbersome, costly, and unnecessary. From a Member State perspective, the rationality of the variance or whether the underlying *raison d'être* can be achieved in a less administratively burdensome way matter less than the fact that each Member State individually controls the political process by which foundations are formed at present, but this control would be diluted if the EFS were to enter into force.

B. Forging Democracy in a Shrinking Civic Space: The Legal Repression of CSOs

In 2014, the Carnegie Endowment for International Peace published an influential report, *Closing Space: Democracy and Human Rights Support Under Fire*,⁷⁶ that sought to analyze current trends in governmental restrictions on civil society, as well as to identify the causes for such pushback and the underlying shifts in international politics fuelling this movement, before considering the responses of affected organizations, their relative success to date, and the need for a more coordinated coherent international response to these worrying developments. This report was not the first to highlight the shrinking legal space for civil society⁷⁷ but it does provide a thoughtful reflection on the broader political explanations for the current hostilities.

The global reach of the current political and legal pushback against CSOs transcends the usual suspects of authoritarian and semi-authoritarian⁷⁸ regimes, although the latter remain responsible for the introduction of the vast majority of new restrictions. The nature of the civic space available in semi-authoritarian regimes such as Venezuela, Cambodia, Azerbaijan, and Ethiopia is always tentative in nature – being a reluctantly conceded and bounded space that is liable to contract if government perceives any significant challenge to its political hold.⁷⁹ Authoritarian regimes such as Uzbekistan, the United Arab Emirates, Zimbabwe, and Belarus, by

⁷⁵ In the end, there were far more than one: the UK, the Netherlands, Denmark, Austria, and Slovakia all rejected the principle of the EFS initiative.

⁷⁶ Thomas Carothers & Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire* (Carnegie Endowment for International Peace, 2014).

⁷⁷ See, for instance, the individual reviews of 48 countries in the International Center for Not-for-Profit Law (ICNL) NGO Law Monitor series, available at <http://www.icnl.org/research/monitor/> (last accessed October 5, 2014); ICNL & World Movement for Democracy Secretariat at the National Endowment for Democracy, *Defending Civil Society Report* (2nd ed., June 2012); ICNL, “Barred from the Debate: Restrictions on NGO Public Policy Activities,” in *Global Trends in NGO Law* (2009); ICNL, “Wave of Constraint: Recent Developments in Venezuela, Ecuador, Honduras, Iran, Bahrain, and Cambodia,” in *Global Trends in NGO Law* (2010).

⁷⁸ Defined in *Closing Space Report*, n.76 above, at 6, as “a regime that attempts a continual balancing act between maintaining sufficient control over the political process to secure an indefinite hold on power while allowing enough pluralism and openness to preserve at least some international political legitimacy.”

⁷⁹ *Ibid.*

contrast, already severely restrict NGO freedom to engage in democratic rights programs within their territories, leaving little room for additional pressure other than to further restrict external funding.⁸⁰ More worrying still, many commentators note the growing tendency of relatively democratic governments to engage in similar restrictive sanctioning of NGOs' freedom of association.⁸¹

1. The Scope of Existing Restrictions

The authors of *Closing Space* identify many of the legal restrictions that have been the subject of discussion. Noting the reality that many countries that had previously allowed or even welcomed democracy and rights support activities inside their borders are now working to stop them, reference is made to the many measures to block external support for civil society through funding restrictions, the increased level of vilification and harassment of foreign-funded NGOs, and the creation of political climates in which foreign-funded civil society is viewed with suspicion, subject to intimidation in carrying out its activities, and publicly delegitimized.

The number of national governments imposing restrictions on foreign funding of NGOs has increased exponentially over the past decade. In a CIVICUS survey of civil society organizations in 33 countries in 2011, 87 percent identified national or internal factors constraining funding.⁸² More recent research has found that out of 98 countries for which comprehensive data was available, 39 countries now restrict foreign funding of NGOs and a further 12 countries prohibit it.⁸³ Examples cited in the *Closing Space Report* range from the Ethiopian Charities and Societies Proclamation 2009, which defines any NGO that receives more than 10 percent of its funding from a foreign source as a "foreign charity" and prohibits such bodies from implementing politically related activities or those related to human rights or rules of law; Algeria's Law on Associations 2012, which precludes Algerian NGOs from receiving foreign funding outside of "official cooperation relationships," a term left undefined by the Act; and India's revised Foreign Contribution (Regulation) Act 2010, which prohibits foreign funding for "any organisations of a political nature" as defined by central government.⁸⁴

⁸⁰ Since 2004, Uzbekistan has required all foreign assistance of NGOs to be transmitted through one of two government-controlled banks and to be subject to additional government scrutiny. This regulation has enabled the Uzbek government to obstruct the transfer of more than 80 percent of foreign grants to local NGOs. See David Moore, "Civil Society Under Threat: Common Legal Barriers and Potential Responses," *Briefing Paper* (DG for External Policy Affairs, European Parliament, Brussels, September 2006), at 8. Available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/civil_society_under_threat/civil_society_under_threat_en.pdf (last accessed October 5, 2014).

⁸¹ See *Closing Space Report*, above n. 76, at 7 referring to Bangladesh, Ecuador, Honduras, India, Kenya, Nicaragua, and Peru as all taking steps to limit external resources and support for civil society organizations, labelling such assistance as "foreign political meddling." See also Moore, above n. 80, at 8, noting Latvian proposals to ban NGOs that receive foreign financing from participating in the political process or from receiving state financing for any research that could influence the choices of the electorate.

⁸² Cited in *Closing Space*, above n. 76, at 7.

⁸³ Darin Christensen and Jeremy Weinstein, "Defunding Dissent: Restrictions on Aid to NGOs" (April 2013), 24(2) *Journal of Democracy* 77-91.

⁸⁴ According to the *Closing Space Report*, above n. 76, at 9, the Act has resulted in the revocation of foreign funding permission from more than 4,000 small NGOs since its introduction. Ironically, India's revision of the Foreign Contributions Act was in response to an FATF finding that India was non-compliant with then Special Recommendation VIII of the FATF. According to Hayes, U.S. Treasury officials welcomed the Act's 2010 reform as "an excellent example to other countries in South Asia region." See Ben Hayes, "How International Rules on

The restrictions go beyond funding. The governmental use of tax laws, registration laws, auditing, and reporting regulatory procedures are increasingly used to harass and stymie NGOs in receipt of foreign funding. Examples of such restrictions in action abound in Russia,⁸⁵ Egypt, and Uzbekistan.⁸⁶

2. The Drivers of Civic Space Constraint

What has triggered such endemic governmental hostility towards CSO activity in the sphere of democracy promotion and rights-based programs across such a broad range of political regimes? What are the underlying causes? Can they be classified as transitory hiccups in the evolution of new(er) nation states, perhaps attributable to personality clashes? Or should such developments be categorized as more deeply seated political problems that give rise not to a short-lived hiatus in the creation of civic space but rather to an ongoing, chronic political condition?

The *Closing Space* report provides valuable insights into the underlying causes for the rights retrenchment experienced by civil society organizations over the past decade. The 1990s ushered in the end of the Cold War and a rapid expansion in democracy and rights support, a phenomenon that was not lost on aid providers who began funding NGOs rather than government in aid-recipient countries in the name of civil society development. Recipient post-communist and developing countries tolerated this more politically focused aid for two reasons: first, many of them were attempting to transition from authoritarian rule; and second, the provision of aid to such scattered, small-scale NGO initiatives often appeared to lack significant organizational weight or coherence, with the result that recipient governments did not take democracy and rights-support aid seriously. As Carothers and Brechenmacher put it, “resistance to international support for democracy and rights seemed out of synch with the prevailing global zeitgeist.”⁸⁷ With the fall of the Berlin Wall and disintegration of geopolitical superpowers, cross-border political interventionism in the developing world could no longer be automatically labelled as political manipulation.⁸⁸

With the turn of the 21st century, “democratic recession” set in,⁸⁹ leaving many former authoritarian regimes that were transitioning to democracy in the 1990s in a hybrid state of

Countering the Financing of Terrorism Impact Civil Society,” in *State of Civil Society 2013: Creating an Enabling Environment*, 120 (CIVICUS, 2013), available at http://socs.civicus.org/wp-content/uploads/2013/04/2013StateofCivilSocietyReport_full.pdf.

⁸⁵ The Russian Federation Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation (the 2006 Russian Non-Commercial Organizations Law) introduced burdensome and difficult-to-meet reporting requirements for NCOs, accompanied by severe penalties for non-compliance; new and similarly burdensome registration procedures for Russian and foreign NCOs operating in Russia; and new broad powers for the registration bodies to audit the activities of NCOs. President Putin took these measures further in 2012 and 2014, legislating to increase the extent of the restrictions that can be imposed. The law requires all NCOs to register in the registry of NCOs, which is maintained by the Ministry of Justice, before receiving funding from any foreign sources if they intend to conduct political activities. Such NCOs are called “NCOs carrying functions of a foreign agent.”

⁸⁶ See n. 80, above.

⁸⁷ *Closing Space Report*, n. 76 above, at 22.

⁸⁸ *Ibid.*, at 23.

⁸⁹ Larry Diamond, “The Democratic Rollback: The Resurgence of the Predatory State,” *Foreign Affairs* (March/April 2008); Diamond, “Democracy’s Deepening Recession” *Atlantic* (May 2, 2014).

partial democratization. Into this political void, the Western-coordinated overthrow of Serbia's Slobodan Milosevic and the success of the Color Revolutions in Georgia, the Ukraine, and Kyrgyzstan⁹⁰ led many power-holders in post-Soviet countries to question whether the innocuous agenda of democracy promotion was actually more closely related to invidious, Western-imposed attempts at regime change. The legitimacy of democracy assistance to civil society in developing countries was thus called into question and gained "the (inflated) reputation of being almost uncannily effective at helping civic and political opposition forces mobilize against undemocratic regimes."⁹¹ Added to these factors were the growing concerns over development aid effectiveness and the new emphasis on host country ownership as a means to achieve better local development outcomes through greater recipient country control, an opening that encouraged some regimes to repress civil society under the banner of ensuring greater accountability and aid effectiveness. The emergence of social media and the ability of individuals (as well as CSOs) to share their grievances with the broader world in an uncensored and immediate fashion has also caused great unease among semi- and fully authoritarian regimes, giving rise to government fears of NGO-western government conspiracy theories (which in themselves are seen as justification for limiting foreign funding or influence). Social media also create new fears of the extreme vulnerability of what before were viewed as the impenetrable powers of the governing elite by the uncontrollable and unpredictable power of the citizenry, as evidenced during the Arab Spring.

IV. The Concept of Host Country Ownership

The concept of host country ownership – whether arising in the development or non-development arena, and whether defined narrowly to refer simply to "government or regime ownership" or more broadly to include stakeholder ownership of parliamentarians, civil society, and the private sector – is a central concept. Host country ownership envisages a state being responsible for its own policy direction and acting autonomously in its achievement. The flipside of "the country ownership" coin, however, is the assumption that a state has engaged in the necessary capacity building (whether political, organizational, or structural) to enable it to exercise this leadership role in a responsible, sustainable, and effective manner.⁹²

In the development context, the term came to the fore in the 2005 *Paris Declaration on Aid Effectiveness*. Countries, territories, and international organizations adhering to the Declaration agreed that partner countries would commit to exercise effective leadership over their development policies and strategies, and to coordinate development actions, while donors would commit to respect such country leadership and to help strengthen their capacity to exercise it.⁹³ The movement away from donor-driven aid relief was seen as part of the solution to the "failed aid" crisis in international development. If aid were now to be viewed as only one part of the development solution, its purpose would have to lead to recipient country self-sustainability

⁹⁰ Georgia's Rose Revolution occurred in 2003, followed by Ukraine's Orange Revolution in 2004 and Kyrgyzstan's Pink (or Tulip) Revolution in 2005.

⁹¹ *Closing Space Report*, n. 76 above, at 25.

⁹² Jessica Goldberg and Malcolm Bryant, "Country ownership and capacity building: the next buzzwords in health systems strengthening or a truly new approach to development?" (2012), 12 *BMC Public Health* 531.

⁹³ Paris Declaration on Aid Effectiveness (2005).

rather than long-term over-reliance. This result, it was felt, was more likely to be achieved if the recipient country bought into its own development future and played a role in its attainment.

By loosening the bonds on the ownership of aid/development, the hope was that such aid would thus have a “crowding in” as opposed to a “crowding out” effect on other resources that might assist a state. The international support for a shift from donor-country-driven to recipient-country-driven development remains visible in both the Accra Agenda and the Busan Partnership Agreements. In prioritizing the importance of host-country ownership, the AAA declared:

Country ownership is key. Developing country governments will take stronger leadership of their own development policies, and will engage with their parliaments and citizens in shaping those policies. Donors will support them by respecting countries’ priorities, investing in their human resources and institutions, making greater use of their systems to deliver aid, and increasing the predictability of aid flows.⁹⁴

Thus, ownership of development was not to be the sole prerogative of the executive, a view further specifically elaborated upon in the Busan Partnership Agreement in relation to the roles of parliament and local government⁹⁵ but only implicitly referenced with regard to the role of civil society.⁹⁶ Nonetheless, the High Level Forum commitments indicate that ownership refers to wider national ownership of the decisions relating to how aid should be allocated. A well-intentioned principle, it nevertheless raises serious implementation challenges in practice. First, it requires a recipient country to develop a meaningful and useful statement of the country’s directions and priorities with regards to development and aid expenditure.⁹⁷ Second, it raises the related challenge of ensuring that the national plan, as presented, properly reflects the priorities of the whole country – including those who are the most marginalized or poor – and not just the views of the country’s elite.⁹⁸ In the words of then-Secretary Hillary Rodham Clinton in 2012,

⁹⁴ OECD, Accra Agenda for Action (2008) at [8].

⁹⁵ Busan Partnership Agreement 2011, at [21] noting “Parliaments and local governments play critical roles in linking citizens with government, and in ensuring broad-based and democratic ownership of countries’ development agendas”.

⁹⁶ Ibid. at [22], noting “Civil society organisations (CSOs) play a vital role in enabling people to claim their rights, in promoting rights-based approaches, in shaping development policies and partnerships, and in overseeing their implementation.

⁹⁷ See, in this regard, the World Bank Definition of “country ownership” as being the existence of “sufficient political support within a country to implement its developmental strategy, including the projects, programs, and policies for which external partners provide assistance,” at http://web.worldbank.org/archive/website01013/WEB/0_CON-5.HTM, defined within the context of the “comprehensive development framework” (last accessed on February 3, 2015).

⁹⁸ See to this effect the definitions of “country ownership” of InterAction Aid Effectiveness Working Group as “the full and effective participation of a country’s population via legislative bodies, civil society, the private sector, and local, regional and national government in conceptualizing, implementing, monitoring and evaluating development policies, programs and processes,” in *Country Ownership: Moving from Rhetoric to Action*. (InterAction, Washington DC, 2011); and the Millennium Challenge Corporation, “Country ownership ... occurs when a country’s national government controls the prioritization process during compact development, is responsible for implementation, and is accountable to its domestic stakeholders for both decision-making and results,” in *MCC’s Approach to Country Ownership* (2009), Working Paper, MCC, Washington, DC.

“country ownership is about far more than funding. It is principally about building capacity to set priorities, manage resources, develop plans, and carry them out.”⁹⁹

By their very nature, aid recipient countries rank among the least-developed and lowest-income countries. Giving effect to the principles of host-country ownership is difficult in an environment in which the government may be, at best, dysfunctional due to poor political or economic infrastructure, or, at worst, hostile to foreign assistance/influence. The capacity of a recipient country to develop a national development plan depends greatly on the availability of reliable empirical information on the extent of a country’s problems, data which may be hard to come by.¹⁰⁰ If the government has newly come to power, it may lack experience but not want to show weakness and so keep its counsel close, excluding local stakeholders from participatory decision-making. If the government regime has long enjoyed unchallenged power, its ability to engage in creative or innovative policy planning may be paralyzed, either because it is heavily aid-dependent¹⁰¹ or because the regime is corrupt yet politically untouchable.

In either instance, there may not be a strong political opposition to challenge government decisions, or there may be no incentives to raise domestic funding through increased domestic taxation. In both cases, government may be suspicious of civil society input (even at the local level), viewing it as threat to government legitimacy (particularly if the incumbent government came to power through popular revolt or social movement agitation) or as a pseudo-opposition party, particularly if the latter is absent and civil society organizations fill this void by calling the government to account and advocating for social justice. Suspicions of civil society in this latter vein would equally be a cause for disenfranchisement in regimes where democracy assistance more than development assistance is on the agenda.

There is a very clear temptation for recipient countries to fund only those projects or programs that fall within their own bailiwick, ignoring perhaps the needs of more marginalized citizens whose activities are viewed with contempt or as criminal by the ruling party. This is a particular risk in aid areas relating to health, gender, and equality. Examples abound, with donors reporting cases in which recipient governments’ own sense of beneficiary legitimacy controlled whether funded healthcare reached the intended target population.¹⁰²

In the non-development context, the concept of country ownership remains equally important. In the case of the EFS proposal, the fact that the legal basis for the proposal required unanimous support from Member States for the EFS to pass provided an extreme example of the

⁹⁹ Remarks of Secretary of State Hillary Rodham Clinton, *A world in transition: charting a new path in global health*, June 1, 2012, Oslo, Norway, available at www.state.gov/secretary/rm/2012/06/191633.htm.

¹⁰⁰ See “The Power of Information: New Technologies for Philanthropy and Development” conference hosted by the Indigo Trust in collaboration with The Institute for Philanthropy and The Omidyar Network (September 15, 2011).

¹⁰¹ Ongoing aid dependence adversely impacts domestic accountability and can weaken existing parliamentary processes.

¹⁰² See USAID, PEPFAR, AMFAR, Planned Parenthood, and IPPF, *Advancing Country Ownership: Civil Society's Role in Sustaining Public Health* (June 2013), drawing on examples from Romania, Peru, and other Latin American countries to illustrate the point that where at-risk populations (e.g., sex workers, people who use drugs, gay men) are criminalized in-country for their behaviors, the likelihood of a recipient country providing the necessary resources to target these populations was low and required continual international donor direct intervention.

effect of national government resistance to an idea which was broadly supported by CSOs in civil law countries and which enjoyed the backing of EU institutions. Capacity issues trumped the EFS proposal in a context in which country ownership ultimately was king.

V. Conclusion: Is Philanthropic Effectiveness in the Eye of the Beholder?

If we accept that the freedoms of association, assembly, and expression protect CSOs just as much as individuals, the importance of a legally enabled civic space within which these rights can be exercised becomes a *sine quo non*. If, at the same time, we accept and acknowledge the fact that national governments enjoy political sovereignty and are entitled to set limits on what outside actors can do to influence domestic political life, it follows that a contested space will emerge when civil society organizations working within a given nation state are either funded, supported, or influenced by “outsiders” that overstep this line. Reconciling these competing interests will not always be possible.¹⁰³ Deciding which right (national sovereignty versus foundational autonomy) takes precedence, and under what circumstances, and according to whom, are questions to which answers are not readily available; in fact, they may vary according to the vested interests of those asking the question. The democracy-aid community has not, for one, been very good at defining for itself or conveying to others what it believes those limits should be.¹⁰⁴

As philanthropic donors, knowing the limits of our knowledge is important. Even the most well-intentioned donor will not always know best, and the need to learn from past mistakes and from the indigenous philanthropic cultures and experiences of the recipient society are messages that resonate from commentators on both sides of the debate.¹⁰⁵ This matters as much if you are the European Commission hoping to introduce a new legal form that will be directly applicable in all European Member States but is not known as an existing legal concept in all, or if you are the Ford Foundation intent on introducing the alien concept of community foundations in Africa where indigenous philanthropy has no analogue with which to compare.¹⁰⁶ In both instances, walking in the shoes of the recipient government/people and seeing the activity and its implications through their eyes is an important part of the process of successful collaboration.¹⁰⁷

To this end, what follows is a list of possible avenues to consider as one contemplates the balancing of rights and duties of stakeholders within a state in which the deepening of democratic ownership, the role of civil society within that process, and the special

¹⁰³ Some countries, for instance, do not grant the right to associate or form organizations, e.g., Saudi Arabia, Libya, and China. See ICNL, “Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations” (2006), 8(4) *International Journal for Not-for-Profit Law*, 76, at 78.

¹⁰⁴ *Closing Space Report*, n. 76, above.

¹⁰⁵ See Tade Akin Aina & Bhekinkosi Moyo, *Giving to Help, Helping to Give: The Context and Politics of African Philanthropy* (Trust Africa, 2013); Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How There is a Better Way For Africa* (Penguin, 2009); William Easterly, *The White Man’s Burden* (OUP, 2006).

¹⁰⁶ Christiana Akpilima-Atibil, Panel on *The Role of Philanthropy in Civil Society under Siege: Historical Perspectives for Contemporary Practice* at International Society for Third Sector Research Conference, Muenster Germany, July 2014.

¹⁰⁷ Bhekinkosi Moyo, Panel on *The Role of Philanthropy in Civil Society under Siege: Historical Perspectives for Contemporary Practice* at International Society for Third Sector Research Conference, Muenster Germany, July 2014.

responsibilities of foreign foundations that become involved either directly in the field or through support of local NGOs on the ground are issues of concern.

Reserving the right not to follow local laws . . .

What if a host country imposes restrictive conditions on local NGOs working in its territory, making it difficult for them to register or to receive funding for the work they were set up to carry out? Should the donor respect the requirements of the local law? In what circumstances is it justifiable to ignore the law and to engage with or fund those organizations directly? Given the growing difficulties for NGOs to meet newly restrictive registration requirements in many countries, such quandaries are no longer merely hypothetical in nature. Is local law – in the name of the rule of law – sacrosanct? Some might argue that if one is sincerely concerned with legally enabling civil society, such enablement can only come about from within the legal system which requires respect for existing laws and a willingness to work for their reform from within, as opposed to without the system.¹⁰⁸

Another policy approach that eschews this softly incremental approach is that proposed by then U.S. Secretary of State Hillary Clinton, whereby the U.S. Government reserves the right not to respect local laws that it believes impede legitimate democracy and rights support.¹⁰⁹ Such a policy, if it is to have any legitimacy, would have to appeal to a higher source of rights as a justification for this stance, such as the Universal Declaration of Rights, and even then any such reliance could be subject to question if the same respect was not accorded to CSOs at home as abroad.

Taking the diplomatic route of sharing best practice . . .

Sharing best practices on the legal enablement of civil society, while engaging in better-coordinated diplomatic discouragement of restrictive NGO laws, can be a useful avenue. The diplomatic route, however, is a two-way street, and governments should be aware that it is not only best practice that is disseminated between nations.¹¹⁰ Broadly (or badly) drafted legislation to regulate political activity (whether in the form of pre-registration requirements for the funding of NGO advocacy or a complete prohibition on foreign funding of NGOs' domestic activities in areas such as right-based work) may be something that we more readily associate with repressive regimes.¹¹¹ Yet liberal democracies do not always have a clean slate in this regard and may have been the source of inspiration for the legislation that now actively restricts civil society in another jurisdiction.

It is thus interesting on the one hand to see Ireland tabling the UN HRC Resolution on Civil Society that respects the rights of CSOs to solicit and utilize (foreign) funds while simultaneously maintaining a provision on its own statute books that requires NGOs engaged in

¹⁰⁸ John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy*, S. Hook (ed.), (New York: New York University Press, 1964).

¹⁰⁹ Cited in *Closing Space Report*, n. 76, at 52. Legal philosophers, like legal positivist Joseph Raz, have also made strong arguments in support of the right not to follow an unjust law. See Raz, *The Moral Authority of the Law* (Clarendon Press, 1979).

¹¹⁰ See ICNL, "Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations" (2006), 8(4) *International Journal for Not-for-Profit Law*, 76, at 77 (detailing the sharing of legislative restrictions on NGOs between sister regimes, such as Belarus, Russia and the Middle East).

¹¹¹ *Ibid.*

advocacy (where this falls within the definition of “political purposes” – a term not defined in the legislation) to register with the Standards in Public Office Commission and not only to account for all funding received in support of such activity but to be absolutely prohibited from accepting foreign funding in support of such activity by law.¹¹² Claims that the statutory provisions are not intended to dampen NGO activity and would not be interpreted in this manner have less resonance when NGOs claim that such provisions have a chilling effect on nonprofit advocacy.¹¹³ Thus, the stance of Department of Foreign Affairs (in promoting the protection of civic space at UN level) does not always tally with the domestic treatment of civil society by the Department of Justice (in charge of charity legislation that deliberately omits the promotion of human rights as a charity purpose) or the Department of Local Government, Heritage and the Environment (responsible for the Electoral Acts referred to above restricting funding for NGO advocacy).

Taking the economic route to shore up civil society . . .

Deciding in which pack of cards the “civil society” ace sits is another issue worth pondering. Is it better to channel development-aid funding through a bilateral agency or to house it under the control of the Department for Foreign Affairs? What message does the home of development aid send to recipient countries? And in the context of country diplomacy, what issues trump aid? To what extent are we even aware of the trade-offs made at the government level between competing trade or even competing security interests?¹¹⁴ These issues remain outside the current scope of this article, but it would be folly to ignore more broadly the impact and the relevance of agreements like Cotonou, which combines commitments between the EU and ACP countries on development cooperation, peace and security, arms trade, and migration with commitments on trade cooperation.¹¹⁵

Within the economic sphere, if the political will existed, there would be potential to use bilateral investment treaties to protect NGO foreign funding by making it a breach of the treaty’s

¹¹² Electoral (Amendment) Act 2001, (no. 38 of 2001), s.49, inserting s.23A in the Electoral Act 1997. See also Standards in Public Office Commission, *Third Parties and the Referendum on The Treaty of Lisbon: Report to the Minister for the Environment, Heritage and Local Government* (March 2009), at 19-24.

¹¹³ *Standards in Public Office Commission Report*, n. 112 above, at 20 (citing the charity Barnados, “the real effect of this legislation, whatever its purpose, will be to slowly stifle an important voice.... The Standards in Public Office Commission has pointed out that the flaw in the legislation is that it generates an unnecessary and undesirable impediment to that voice. What is surprising is that the Standards Commission has made its views known to Government, and the reaction of Government has so far been a deafening silence.”).

¹¹⁴ Ngaire Woods, “Whose aid? Whose influence? China, emerging donors and the silent revolution in development assistance,” (2008), 84(6) *International Affairs*, 1205-1221.

¹¹⁵ See http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r12101_en.htm; for a critique of the Cotonou Agreement in terms of civil society interaction, see UN HRC Working Group on the Right to Development High Level Task Force on the Implementation of the Right to Development, fifth session, Geneva, April 1-9, 2009, A/HRC/12/WG.2/TF/CRP.3/Rev.1, at [6] (noting “From a Right to Development viewpoint, the [Economic Partnership Agreements (EPAs)] fall short of a number of set standards. This includes the manner in which the negotiation process was carried out, the lack of consultation with civil society organizations and the lack of ownership by the ACP states. It also includes the lack of evidence of positive impact predictions of EPAs on development and the lack of Human Rights benchmarks.”).

obligations on permitting free investment-related transfers for a recipient government to prohibit or restrict foreign funding to a foreign NGO.¹¹⁶

Still in an economic vein, there is, as there was in the diplomatic setting, a need to avoid double standards when it comes to what we expect nonprofits to achieve when working abroad vis-à-vis our expectations around for-profit enterprise undertaken abroad. The latitude for failure in the for-profit arena is far more broadly accepted, and it is arguable that the freedom to fail accorded to for-profits is what ultimately contributes to their success. In the words of David Damberger, the problem with NGOs is that they do not fail often enough or learn from those failings.¹¹⁷ Foundations active in the field or funding those who are active can contribute to our understanding of development effectiveness by sharing not just stories of success but also, more importantly, stories of failure. Thus Engineers Without Borders' decision to publish an annual Failure Report since 2010, outlining matters that they could have handled better, as well as facilitating a website that seeks to learn from the failures of other NGOs is an innovative and brave decision.¹¹⁸

Taking account of cultural and historical backgrounds . . .

No country has a blank slate when it comes to matters of philanthropy and charitable giving. Foundations working outside of their home territory will arguably fare better when their actions are informed by an appreciation of the historical and cultural background that permeates the host country's understanding of that concept. Lack of awareness can adversely affect the ability to deliver cross-border philanthropy effectively.

In a European historical context, part of the rationale for the slow emergence and recognition of philanthropic mobility lies in the focus in the Rome Treaty on establishing the European Economic Community. The EEC, as established, was intended as an economic union. Nowhere is this more apparent than in Article 58 EEC's exclusion of not-for-profit bodies from those bodies eligible to benefit from the right of establishment.¹¹⁹ The exclusion of nonprofit bodies lives on today in Article 54 TFEU.¹²⁰ This historical context has political implications when it comes to finding a valid legal basis from which to regulate nonprofits at a European level. From a cultural perspective, the differences between civil law and common law understanding of the nature of a foundation, coupled with a lack of European consensus on fundamental matters such as the meaning of public benefit, has made the achievement of European-wide regulation extremely difficult. That is not to imply the impossibility of building a

¹¹⁶ See further Nick Gallus, "Protection of U.S. Nongovernmental Organizations in Egypt Under the Egypt-U.S. Bilateral Investment Treaty" (2012), 14(3) *International Journal for Not-for-Profit Law* 62; see also, CCIC, *Bilateral Investment Treaties: A Canadian Primer*, available at http://www.ccic.ca/files/en/what_we_do/trade_2010-04_investmt_treaties_primer_e.pdf; Nick Gallus & Luke Eric Peterson, "International Investment Treaty Protection of NGOs" (2006), 22(4) *Arbitration International* 527-548.

¹¹⁷ David Damberger, Engineers Without Borders, "Learning From Failure," at TEDxYYC 2011, available at <http://www.youtube.com/watch?v=HGjHU-agsGY>. Engineers Without Borders maintains a website devoted to NGO failure stories and what can be learned from them at <http://www.admittingfailure.com/>.

¹¹⁸ Engineers Without Borders website, above n. 117.

¹¹⁹ See Arts. 52 & 58 EEC. Article 58 EEC provided "Companies or firms' means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

¹²⁰ Article 58 EEC became Article 48 EC before becoming Article 54 TFEU.

European consensus on the regulation and/or facilitation of nonprofit activity within the EU, but rather to recognize that achievement of any such agenda is much more likely to occur slowly and incrementally over time rather than be ushered in with a legislative flurry.¹²¹

Similar issues arise in the context of development aid to Africa and the attempts of some foundations to transplant western concepts of philanthropy without necessarily appreciating the indigenous forms of and different approaches to strengthening philanthropy in these developing nations. Examples of the difficulties experienced in embedding community foundations in Africa¹²² point to the newness of the Community Foundation concept with case studies indicating the need to further adapt the community concept “to suit the context of different societies because the political, economic, and legal environment varies from country to country [resulting in] a lot of unexpected problems, and no roadmap to show the way.”¹²³ Recognition at the 2014 High Level Meeting of the Global Partnership for Effective Development Cooperation in Mexico of the need for a mix of funding mechanisms that support locally owned and demand-driven objectives that draw on CSO-defined objectives alongside complementary government defined objectives further emphasizes the need to take cultural and historical perspectives into account.¹²⁴

Engaging academia . . .

Conference meetings hosted by ARNOVA, ISTR, and the National Centre on Philanthropy and the Law at New York University, which bring nonprofit academics from different disciplines, also play an important role in allowing all sides of the issue to be considered and enabling us to gain a better understanding of the complexity of the problem at hand. Sometimes the role of the academic may not be to find the answer but rather to pose or rephrase the question, thereby crystallizing the issue, perhaps, in a way that enables the practitioner, policymaker, or foundation donor to reconsider the matter afresh. The role of the foundation in enhancing efficiency and development effectiveness will depend on whether one views foundation involvement as part of the problem or part of the solution. The larger questions concerning the role of civil society in making a better society – whether through development aid, democracy assistance, or public benefit enhancement – and how this role is undertaken and the principles underpinning it, are issues deserving constant analysis and discussion on an ongoing basis.

¹²¹ See Oonagh B. Breen, “EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society” (2008), 10(3) *International Journal of Not-for-Profit Law* 50.

¹²² See, for example, Joyce Malombe, *Community Development Foundations: Emerging Partnerships* (World Bank, 2000), at 37-64; and more generally Tade Akin Aina & Bhekinkosi Moyo (eds.), *Giving to Help, Helping to Give: The Context and Politics of African Philanthropy* (Trust Africa, 2013).

¹²³ Malombe, above n. 122, at 37.

¹²⁴ Task Team on Civil Society Development Effectiveness and Enabling Environment, Key Messages: An Extract for the 2014 Mexico High Level Meeting of the Global Partnership for Effective Development Cooperation (April 2014).