

## Legal Framework for Global Philanthropy: Barriers and Opportunities

*Prepared by the International Center for Not-for-Profit Law*

### I. Introduction

Recent years have witnessed a growth in philanthropy around the world. In **Brazil**, the number of private foundations increased 300% in twenty years; by 2008, Brazilian foundations gave away more than \$5.5 billion.<sup>1</sup> In **India**, philanthropy exceeded \$5 billion in 2006.<sup>2</sup> In **Russia**, corporate philanthropy was virtually non-existent in 1991 and by 2008 exceeded \$2.5 billion.<sup>3</sup> In **China**, more than 800 private foundations were established during the past five years, an increase of 88%.<sup>4</sup> In **Europe**, there are now over 95,000 public benefit foundations.<sup>5</sup> In nine European countries (Belgium, Estonia, France, Italy, Luxembourg, Slovakia, Spain and Sweden), 43% of foundations were established between 2003 and 2005.<sup>6</sup>

The growth of philanthropy has corresponded with a rise of private wealth in Brazil, India, Russia, China, and other countries. Revealingly, 16 of the top 50 billionaires in March 2010 are from India (6), Russia (4), China (3), Brazil (2) and Mexico (1).<sup>7</sup> **India** has registered the highest growth of donors anywhere in the world. The number of “high net worth individuals” in India has grown nearly 11% per year over the past decade and now totals more than 126,000 individuals.<sup>8</sup> **China** (including Hong Kong) currently has more than 100 billionaires.<sup>9</sup> **Singapore** has the highest concentration of millionaire households in the world, with 11.4% of families owning assets of \$1 million or more. Springing in part from this increase in personal wealth, donations to charitable organizations in Singapore grew from \$279 million in 2001 to \$504 million in 2009.<sup>10</sup>

Among other prominent features of current landscape of giving, philanthropy is increasingly cross-border.<sup>11</sup> International giving from the largest **U.S.** foundations rose from \$680 million in 1994 to \$6.2 billion in 2008.<sup>12</sup> More broadly, the flow of private philanthropy from **OECD** countries to developing countries grew from approximately \$5 billion in 1991 to \$53 billion in 2008.<sup>13</sup> International or cross-border philanthropy embraces giving by foundations, donor-advised funds, and corporations, as well as other private donors. Foundations may include corporate or community foundations.

#### *Barriers to Global Philanthropy*<sup>14</sup>

While the growth of cross-border philanthropy is impressive, the legal environment and other factors have limited global philanthropy from reaching its full potential. Indeed, “[philanthropic] institutions are not functioning optimally, constrained by policies, accepted practice, and legal and structural limitations.”<sup>15</sup> Legal barriers include constraints imposed by the “donor” country on the outflow of philanthropy, as well as constraints

imposed by the “recipient” country on the inflow of philanthropy. Global philanthropy is also impeded because some countries constrain the development of civil society, including the development of foundations and potential grantee organizations.

Donor country, or “outflow,” constraints include:

- significant limitations on foreign grantmaking by tax-exempt entities;
- advance governmental approval for cross-border giving;
- limited, or no, tax incentives for international philanthropy;
- burdensome procedural requirements for foreign grants;
- counter-terrorism measures; and
- restrictions on financial transactions with sanctioned countries.

Recipient country, or “inflow,” constraints include:

- advance government approval to receive foreign funding;
- restrictions on the types of activities that can be supported with foreign funding;
- mandatory routing of foreign funding through government channels;
- post-receipt procedural burdens, such as burdensome notification and reporting requirements;
- the taxation of global philanthropy; and
- foreign exchange requirements.

Legal barriers to the formation and operation of eligible nonprofit beneficiaries include, among others:

- high minimum thresholds for members or assets;
- burdensome registration procedures;
- excessive government discretion in registration and termination decisions;
- prohibitions on areas of activity;
- invasive supervisory oversight; and
- barriers to cross-border communication.

To close out the discussion of legal barriers, we highlight two thematic issues of specific concern to global philanthropists: disaster relief and the Millennium Development Goals.

### *Scope of Research*

Increasingly, foundations and the philanthropic community are called upon to help engage on issues of global concern, such as disaster relief,<sup>16</sup> the Millennium Development Goals (MDGs),<sup>17</sup> and other key development challenges.<sup>18</sup> Unfortunately, however, as noted above, the legal framework often impedes effective cross-border philanthropy to address global needs. While a comprehensive treatment of the impact of legal barriers on global philanthropy is beyond the scope of this paper, we note that legal constraints may deter global philanthropy in a number of ways. For example:

- some philanthropists choose not to engage in global philanthropy because the impediments are too daunting;
- some philanthropists – such as corporate foundations with employee matching programs – have chosen to end, or substantially limit, the international component of their philanthropy program;
- some philanthropists who do choose to engage in global philanthropy will, in the context of giving to some countries, only be able to accomplish philanthropic giving through complex tax planning; and
- in some circumstances, philanthropists seeking to fund local recipients default to funding international organizations.

Recognizing these challenges, the Council on Foundations commissioned ICNL to conduct research on two issues: (a) the legal barriers to cross-border philanthropy, and (b) potential options to address these barriers. The goal of this paper is to support upcoming deliberations of the Global Philanthropy Leadership Initiative Task Force (“Task Force” or “GPLI”).

Section II of this report provides a summary of the legal constraints and draws on illustrative examples from the U.S., Europe, and other regions. The examples are illustrative only; no attempt has been made to comprehensively index all existing barriers or all countries with barriers. Moreover, the research is confined to *legal* impediments to cross-border giving; the social, economic, cultural, and other barriers that may bear upon cross-border giving are excluded from the scope of this report.

Section III of this report sets forth potentially available options or “next steps” for the consideration of the Council on Foundations and the Task Force. Specifically, we recognize that the Council on Foundations and the Task Force are in the best position to develop and implement strategic solutions. Accordingly, we do not present “recommendations” but rather discuss a few “options,” some of which are currently being developed by Task Force members, such as the Mercator Fund.

Illustrative options include:

- surveying philanthropists on legal barriers they confront;
- developing an index of barriers to cross-border philanthropy;
- expanding tools to help foundations navigate the legal environment for cross-border philanthropy;
- developing a more robust system to monitor and share information about legal developments affecting cross-border philanthropy;
- undertaking analytic work to help make the case to skeptical government officials that global philanthropy is in the interest of both donor and recipient countries;
- establishing principles for cross-border philanthropy;
- undertaking or supporting initiatives to reform of laws affecting cross-border philanthropy;

- developing a treaty on cross-border philanthropy; and
- “special initiatives” relating to disaster relief and the Millennium Development Goals.

We at ICNL welcome feedback on the report, and stand ready to address any concerns that the Council of Foundations or Task Force may have. We are honored to play a supportive role in this endeavor, and look forward to ongoing cooperation with the Council on Foundations and the Task Force.

## II. Barriers to Cross-Border Philanthropy

### A. Donor Country Restrictions (Outflow of Philanthropy)

This section will examine the legal barriers that donor countries place on the outflow of philanthropy – that is, the ability of philanthropic organizations to provide funding to recipients outside their home countries. Donor country constraints may prevent global philanthropy or otherwise burden the process of cross-border giving. Outflow barriers include (1) significant limitations on cross-border philanthropy by tax-exempt entities; (2) advance governmental approval to make foreign grants; (3) the limited availability of tax incentives for donations to foreign recipients; (4) burdensome procedural requirements to engage in global philanthropy; (5) counter-terrorism measures; and (6) restrictions on financial transactions with sanctioned countries.

#### (1) Significant Limitations on Cross-Border Philanthropy by Tax-Exempt Entities

Some countries limit the ability of tax-exempt and/or charitable organizations to engage in cross-border philanthropy. “It is striking that at the present time, the development of philanthropic organizations across borders is hampered to such extent by restrictions in tax regimes which can be summarized under the label of landlock.”<sup>19</sup> For example:

- In **India**, tax-exempt entities must apply their income within India. More specifically, if part of the income of the organizations is applied for a charitable purpose outside India, that income would be liable to tax. Trust income, however, may be spent outside India without being subject to income tax, if it is spent for a charitable purpose to promote international welfare “in which India is interested.”<sup>20</sup>
- In **Australia**, a tax-exempt organization must, in order to maintain the exempt status, meet the physical presence test, which requires that it pursue its objectives and incur its expenditure principally (i.e., mainly or chiefly) in Australia.<sup>21</sup>
- In **Brazil**, Article 14 of the National Tax Code stipulates that to obtain tax exemption, an educational or social assistance entity must, among other conditions, limit the use of its resources to the Brazilian territory.”<sup>22</sup>

## (2) Advance Governmental Approval

While some countries seek to prevent certain kinds of organizations from engaging in cross-border philanthropy, others require philanthropic organizations to receive governmental approval to engage in cross-border giving. Moreover, governments often have broad discretion in deciding whether or not to extend approval to entities seeking to engage in cross-border activities. Examples include:

- In **Egypt**, Article 17 of Law No. 84 (2002) prohibits domestic NGOs from sending funds or other materials (except for scientific and technical books, magazines, publications, and brochures) to foreign persons or organizations abroad without advance approval by the Minister of Social Solidarity.<sup>23</sup>
- In the **U.A.E.**, Article 43 of the Federal Law No. 2 (2008) prohibits the distribution of grants, gifts, donations, or other transfers to foreign entities without ministerial approval.
- In **Malaysia**, charitable organizations must conduct activities that “serve or benefit Malaysians” and may carry out charitable activities outside Malaysia only “with the prior consent of the Minister of Finance.”<sup>24</sup>
- In **Indonesia**, according to Regulation No. 38 of the Minister of Home Affairs (2008), social organizations wishing to give aid to foreign recipients must obtain approval from the Government. Aid can only be given to recipients in countries with diplomatic relations with Indonesia and only where it is “intended for humanitarian activities” and it does “not caus[e] negative impact on the domestic economy and social life.”<sup>25</sup>

## (3) Limited, or No, Tax Incentives for International Philanthropy

Tax incentives, in the form of tax deductions, credits, or other preferences, are often available to individuals and/or corporate entities that make donations to certain categories of CSOs. In most countries, however, such tax incentives are available only for donations to domestic recipients.<sup>26</sup>

This approach is another manifestation of “landlock” tax restrictions: “Where today international philanthropy is the area in international tax in which discrimination remains a common feature, the environment for cross-border philanthropy lags behind in this rapidly changing and increasingly internationalized society in which citizens move and trade, and investment has gone global.”<sup>27</sup> As but a few examples of this global phenomenon:

- In **Australia**, “deductible gift recipients” – that is, recipients eligible to receive gifts for which the donor may claim a deduction – must be in Australia. Recipients not in Australia cannot be deductible gift recipients. For example, a fund set up and operated in Australia that makes distributions for the construction of schools run by a religious institution in Europe cannot be endorsed as a deductible gift recipient, because the fund is not “in Australia.”<sup>28</sup>

- In **India**, in order to be eligible for a tax deduction, the donor must give to a recipient organization that has been created “for charitable purposes in India.”<sup>29</sup>
- In **Ireland**, donors are eligible for tax relief only when donations are made to charities with an Irish Charity number.<sup>30</sup> In other words, the Irish Revenue Commissioners will only grant tax relief to a charity that is registered in its list of bodies that are exempt from tax for charitable purposes.<sup>31</sup>

While tax codes often include donor incentives for domestic donations, few envision incentives for cross-border gifts. There are, however, important exceptions. Most recently, a decision by the European Court of Justice (“ECJ”) has led to an erosion of cross-border giving barriers within the European Union (“EU”). Specifically, in January 2009, the European Court of Justice issued its judgment in the case of *Hein Persche v Finanzamt Ludenscheid*.<sup>32</sup> The case was brought by Mr. Persche, a German national, who made a gift in kind, valued at about EUR 18,180, to the Centre Popular de Lagoa, in **Portugal** (a retirement home to which a children’s home is attached); claimed a tax deduction in his tax return; but was refused the deduction by the Finanzamt (District Tax Office) on the ground that the beneficiary of the gift was not established in Germany.<sup>33</sup> The ECJ ruled in favor of Mr. Persche.

As explained by the European Foundation Centre: “The ECJ has ruled that tax laws which discriminate against donations to public-benefit organizations based in other EU Member States are against the EC Treaty, as long as the recipient organisations based in other Member States are to be considered ‘equivalent’ to resident public benefit foundations.”<sup>34</sup> In other words, where donor incentives are available for donations to domestic recipients, they must also be available for donations to foreign recipients based in EU Member States or the European Economic Area (EEA), provided they are equivalent to domestic public benefit organizations.

The ruling in the *Persche* case has triggered a wave of reform of tax legislation within the EU. Prior to the ruling, most national tax laws did not treat donations to domestic and foreign public benefit organizations on an equal footing. Subsequent to the ruling, most countries have now reformed tax laws to comply with the ECJ ruling<sup>35</sup> and recognize the ability of donors to claim deductions for gifts to qualifying foreign organizations resident in the EU or EEA.

While the Court’s judgment held clearly that tax deductions could not be restricted based on the nationality of the recipient alone, it also acknowledged that tax authorities may require taxpayers “to provide such proof as they may consider necessary to determine whether the conditions for deducting expenditure provided for in the legislation at issue have been met and, consequently, whether or not it is appropriate to allow the deduction claimed.”<sup>36</sup> As a result, in those countries that have reformed legislation to allow for tax relief for cross-border gifts (to recipients in the EU or countries in the EEA), procedural rules have also been established to help ensure that the foreign recipient is equivalent to resident public benefit organizations. For example:

- In **Austria**, in order to claim tax benefits for a donation to a foreign-based recipient, the recipient must be incorporated within the EU or EEA and must be comparable to an Austrian nonprofit corporation or public corporation, and must be registered on a list maintained by the fiscal authorities in Vienna. Foreign-based recipients must comply with the same criteria as Austrian organizations in order to be included on the list.
- In **Bulgaria**, in order to claim a tax deduction, the donor must prove that the foreign recipient is identical or similar to Bulgarian public benefit organizations, which can be accomplished by presenting to the National Revenue Agency an officially notarized document, issued and verified by the relevant foreign state authorities, which proves the status of the foreign recipient organization, alongside an official Bulgarian translation.
- In **France**, in order to benefit from tax relief, the foreign recipient must either be accredited by the French authorities or be comparable to a French tax-exempt organization. In the latter case, the donor must file evidence that the foreign recipient organization is comparable to a French tax-exempt organization.
- In **Germany**, in order to deduct charitable donations to EU or EEA based public benefit organizations in cases where the recipient solely pursues public benefit activities outside of Germany, the activities “either have to support individuals which have their permanent residence in Germany or the activities could benefit Germany’s reputation.”
- In the **Netherlands**, donors may receive tax benefits for a donation to a foreign recipient, provided that the Ministry of Finance has qualified it as an institution with a general interest purpose (or “ANBI”).<sup>37</sup>

In addition, in North America, countries have concluded bilateral treaties, which address cross-border giving. The scope of support for cross-border giving is, however, limited:

- The U.S.-Canada tax treaty permits U.S. taxpayers to receive a tax deduction for contributions to Canadian charities if certain requirements are met. Most importantly, the deduction may not exceed the amount of the donor's Canadian source income. Canadians may treat donations to U.S. 501(c)(3) organizations just as they treat contributions to Canadian registered charities, with the condition that gifts be limited to 70% of U.S. source income; the Canadian authorities interpret the tax treaty to place the same percentage limitation on gifts by Canadian registered charities to 501(c)(3) organizations.
- The U.S.-Mexico Double Taxation Treaty also envisions the possibility that contributions by a U.S. resident to a Mexican organization may constitute a charitable contribution and be tax deductible, “if the Contracting States agree that a provision of Mexican law provides standards for organizations authorized to receive deductible contributions that are essentially equivalent to the standards of United States law for public charities.”<sup>38</sup> Such contributions are deductible only for U.S. taxpayers with income from Mexican sources, and the extent of the deduction depends on the magnitude of the Mexican source income.<sup>39</sup> The Double Taxation

Treaty provides similar rules with respect to income tax deductions under Mexican law for Mexican residents who make contributions to U.S. public charities.

#### (4) Procedural Requirements

In some countries, foundations must comply with various procedural requirements before making a foreign grant. For example, in the **United States**, private foundations (including company-sponsored private foundations) and donor-advised funds<sup>40</sup> utilize two basic approaches when making grants to a foreign entity: “expenditure responsibility” and “equivalency determination.” Under “expenditure responsibility,” the donor must exert reasonable efforts and establish adequate procedures:

1. To see that the grant is spent only for the purpose for which it is made,
2. To obtain full and complete reports from the grantee organization on how the funds are spent, and
3. To make full and detailed reports on the expenditures to the IRS.<sup>41</sup>

“Equivalency determination” is a process designed to assess whether a potential non-U.S. grantee organization is the equivalent of a U.S. public charity. It typically involves the collection of extensive documentation, including the potential grantee’s governing documents, financial information, and other information in order to make the equivalency determination. If outside counsel is involved in the process, this process typically costs between \$5,000 and \$10,000.<sup>42</sup>

According to **Canada’s** Income Tax Act, a registered charity can only use its resources in two ways: on its own activities and on gifts to “qualified donees.”<sup>43</sup> The Income Tax Act specifies that “qualified donees” are organizations that can issue official donation receipts for gifts that individuals and corporations make to them. “Qualified donees” are almost exclusively Canadian, including, among others, a registered charity, a registered Canadian amateur athletic association, and a Canadian municipality.”<sup>44</sup>

The Canadian Revenue Authority has just released new guidance called “Canadian Registered Charities Carrying out Activities Outside Canada.”<sup>45</sup> This guidance document deals with the relationship between a Canadian charity and any non-qualified donee, whether in Canada or abroad; almost all organizations outside of Canada are non-qualified donees. In order to transfer resources to non-qualified donees, a Canadian charity needs to maintain “direction and control” over those resources. The guidance document helps a Canadian charity understand what is required for direction and control. Failure to maintain direction and control can result in a 105% penalty of the amount transferred and/or revocation of charitable status. A sample contractor agreement for a Canadian registered charity conducting foreign activities is also available.<sup>46</sup>

#### (5) Counter-Terrorism Measures

As part of counter-terrorism efforts, countries and international bodies, such as the United Nations, have imposed rules and restrictions that, among other things, restrict giving –



often in the form of outright prohibitions – to designated individuals and entities. Recent years have witnessed laws, regulations, and “voluntary” guidelines that impact cross-border giving. Indeed, it has been suggested that “philanthropic organizations are finding themselves in an era when the regulatory paradigm is shifting from a tax-based regulatory environment to a regulatory environment modeled on the fight against money laundering and terrorism.”<sup>47</sup> Recognizing that a tremendous amount of commentary and research has already been produced to identify, explain and analyze counter-terrorism measures, we do not seek to provide comprehensive treatment of the topic in this brief section, but rather to highlight a few illustrative country examples:

- The **U.K. Terrorism (United Nations Measures) Order 2006** prohibits any U.K. national or other person within the U.K. jurisdiction from knowingly “deal[ing] with funds or economic resources” belonging to listed persons without prior authorization by the Treasury. Such lists include individuals related to al-Qaida and the Taliban, as well as those related to a number of states, including Belarus, Myanmar (Burma), DRC, Eritrea, Iran, Iraq, Cote d’Ivoire, Liberia, Somalia, Sudan, and Zimbabwe.<sup>48</sup>
- In **Canada**, under the *Charities Registration (Security Information) Act* and the *Income Tax Act*, a charity’s status may be revoked if it operates in a way that makes its resources available, either directly or indirectly, to an entity that is a *listed entity* as defined in subsection 83.01(1) of the *Criminal Code*; or to any other entity (person, group, trust, partnership, or fund, or an unincorporated association or organization) that engages in terrorist activities or activities in support of them.<sup>49</sup>
- The **United States** has a complex web of counter-terrorism measures, including the Antiterrorism and Effective Death Penalty Act, which criminalizes “material support” to designated entities; the International Emergency Economic Powers Act, which prohibits transactions with designated entities; Executive Order 13224, which allows for the freezing of assets and other measures; and, the Patriot Act, which expanded the “material support” prohibition to further bar “expert advice or assistance” to terrorist organizations, a provision that has been extended to charities and was the subject of a recent Supreme Court case.<sup>50</sup>
- In addition, the **U.S. Treasury Department** issued the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities* in late 2002. The Guidelines included suggested steps for charitable and philanthropic organizations to take when engaged in cross-border giving. These steps included the collection of considerably more information about grantees than is often available, the vetting of grantees, extensive donor review of financial operations, and other requirements in quite detailed terms. In response to criticism, the Treasury Department revised the Guidelines in December 2005, but significant issues remain.<sup>51</sup> As but one example, the Guidelines advise grantmakers to check federal terrorist lists; this vetting process could be deemed necessary even where a corporation is providing small amounts (e.g., \$20) as part of an employee matching gift program. In such case, the cost of administering the cross-border transfer could exceed the amount of the matching gift itself.

## (6) Restrictions on Financial Transactions with Sanctioned Countries

In addition to restrictions emanating from counter-terrorism measures, countries and international bodies sometimes seek to prohibit financial transactions with, or exports to, designated countries. Philanthropic giving is often impacted by such restrictions. For example:

- Through the Office of Foreign Assets Control (OFAC) at the Department of Treasury, the **U.S.** Government imposes sanctions on several countries, from Belarus to Zimbabwe.<sup>52</sup> As part of any given sanctions regime, philanthropic donations may be subject to restrictions. For example, the U.S. permits donations of in-kind humanitarian articles (e.g., food, clothing, and medicine) and gifts valued only up to \$100 or less to Iran. The export of gift parcels and humanitarian goods to Cuba is subject to limitations and licensing requirement by the OFAC and Department of Commerce.
- **Canada's** *Export and Import Permits Act* allows the Government to control the export of any goods to countries included on the *Area Control List*, a list of countries that currently includes Belarus and Myanmar (Burma). Permits are required for exports to these two countries. "Permits for humanitarian goods, including food, clothing, medicines, medical supplies, information material, casual gifts and personal effects belonging to persons leaving Canada for Belarus, will generally be approved. Permits for other items will generally be denied."<sup>53</sup>
- The **United Nations**, on June 9, 2010, imposed additional sanctions against Iran through Security Council Resolution SC/9948. Among other provisions, the Resolution calls upon all States to "prevent the provision of financial services . . . or the transfer to, through, or from their territory, or to or by their nationals or entities organized under their laws (including branches abroad), or persons or financial institutions in their territory, of any financial or other assets or resources if they have information that provides reasonable grounds to believe that such services, assets or resources could contribute to Iran's proliferation-sensitive nuclear activities, or the development of nuclear weapon delivery systems ..." <sup>54</sup>
- Sanctions or other related measures have been frequently imposed by the **European Union** (EU) in recent years, either on an autonomous EU basis or implementing binding Resolutions of the Security Council of the United Nations.<sup>55</sup> On July 27, 2010, the EU imposed sanctions on Iran that are considerably broader and more stringent than UN sanctions. Specifically, member states of the EU are required to exercise enhanced monitoring over activities of specific financial institutions within their jurisdiction, including banks domiciled in Iran, and their EU and non-EU based branches and subsidiaries. Funds being transferred to or from Iran are subject to new reporting requirements:
  - transfers of funds for foodstuffs, healthcare, or humanitarian purposes may be carried out without prior authorization, but transfers above €10,000 must be notified to the relevant competent authority of the member state;

- any other transfer under €40,000 may be carried out without prior authorization, but must be notified to the relevant competent authority if above €10,000;
- all transfers above €40,000 must be authorized prior to the transfer by the relevant competent authority. Member States are required to inform other Member States of any rejected authorizations;
- all relevant transfers of funds in respect of Iranian interests must be notified to the relevant competent authority within five working days;
- all transactional records must be kept for five years.<sup>56</sup>

Having considered the legal constraints imposed by donor countries on the outflow of philanthropic giving, we now turn to the recipient country barriers on the inflow of philanthropy.

## **B. Recipient Country Restrictions (Inflow of Philanthropy)**

This section will examine the legal barriers that recipient countries place on the inflow of philanthropy – that is, the ability of CSOs to receive funding from outside their home countries. Recipient country constraints may prevent CSOs from receiving philanthropic contributions or otherwise burden the process of receiving philanthropic contributions. The most common inflow legal barriers include: (1) the requirement of advance government approval to receive funding from abroad; (2) restricted purposes and activities that can be supported through foreign funding; (3) mandatory routing of funding through government channels; (4) post-receipt procedural burdens, such as burdensome notification and reporting requirements; (5) onerous tax treatment of foreign funding received; and (6) foreign exchange requirements.

As a threshold matter, it is worth noting that the law or practice in some countries may prohibit the receipt of foreign funding altogether, but this is rare. In Afghanistan, for example, social organizations are legally banned from receiving foreign funds, although the legal prohibition is not, in practice, enforced; moreover, another organizational form, so-called “non-governmental organizations,” are permitted to receive foreign funding. The converse is true in Saudi Arabia, where there is no *de jure* barrier to the receipt of foreign funding, but *de facto*, most Saudi CSOs are prevented from receiving any foreign funding.

### (1) Advance Government Approval

The law in several countries requires advance government approval for the inflow of philanthropic funding. In other words, organizations are prohibited from receiving funding from outside their home countries without their government’s prior approval. Such requirements open the door for the exercise of governmental discretion and may result in the denial of permission to receive funding from abroad.

a. Express approval required

An approval requirement is common in the Middle East/North Africa (MENA) region. **Egypt** is perhaps the most prominent example. Egyptian law prohibits any association from receiving foreign funds – whether from foreign individuals or from foreign authorities (including their representatives inside Egypt) – without advance approval from the Minister of Social Solidarity. Securing ministerial approval may require a two-month wait during which time the Ministry reviews the request for approval. And the failure to secure approval can lead to dissolution. For example, on April 27, 2009, the Egyptian Organization for Human Rights (EOHR) received a dissolution decree alleging that the EOHR received foreign funding without authorization; the dissolution order reportedly came soon after EOHR published its 2008 Annual Report, criticizing the Egyptian Government.<sup>57</sup>

Additional illustrative examples from the MENA region include:<sup>58</sup>

- In **Algeria**, foreign donations must be pre-approved by the Ministry of the Interior. The criteria under which the Ministry of the Interior can deny approval are not specified, and an association that wishes to appeal an adverse decision has no recourse with the courts.<sup>59</sup>
- In **Jordan**, foreign funding to societies is subject to the approval of the Council of Ministers. The request for approval should include the source of funding, the amount of funding, the means of transfer, and the objectives for which the funding will be spent, in addition to any special conditions <sup>60</sup>

At the same time, the issue is not limited to the MENA region. In **Eritrea**, foreign foundations may fund CSOs only if the Ministry of Labor and Human Welfare determines that it cannot provide the service in question, a determination that is rarely made. Otherwise, foreign foundations may only provide funding to the Government of Eritrea. In **Belarus**, in order to receive foreign funds, organizations must register the transfer agreement with a sub-department of the presidential administration, which grants such registrations only rarely.<sup>61</sup> In **Uzbekistan**, in order to receive a foreign grant, an NGO must secure a special opinion from the Commission under the Cabinet of Ministers that the project to be supported by the grant is indeed worthy of support.<sup>62</sup>

b. Procedural requirements

In other countries, the receipt of foreign funding is impeded by burdensome procedural requirements. For example, in **China**, the State Administration of Foreign Exchange recently issued *Notice 63 on Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions* that, on paper, requires certain domestic nonprofit organizations to comply with new and more complex rules for receiving and using foreign donations. These requirements include an application attesting to the authority of the domestic organization and the foreign donor; the domestic group's business license; a notarized donation agreement between the domestic group and the foreign donor

organization with the purpose of the donation prescribed; and a registration certificate for the foreign nonprofit group.

In **Azerbaijan**, the Law on Grants of 1998, as reinforced by Presidential Decree of 2004,<sup>63</sup> requires that non-commercial organizations (“NCOs”) register grant agreements with the Ministry of Justice. The failure to register a grant makes NCOs vulnerable, as the fines for failure to register a grant agreement are so high that such penalties can result in severe hardship or even termination of the organization.<sup>64</sup> The Administrative Code provides financial penalties for the failure to register a grant; in December 2008, fines were increased from 50 AZN (\$63) to an amount ranging from 1000 AZN (\$1,250) to 2500 AZN (\$3,125). Moreover, a presidential decree was issued in December 2009, which provides that no transactions may be made with funds provided under grant agreements unless the agreement is registered with the Ministry of Justice.

In addition, **Indonesia** requires social organizations<sup>65</sup> that seek to receive or provide donations to or from foreign entities to engage in a detailed approval and reporting process. Regulation No. 38 of 2008, issued by the Minister of Home Affairs, requires NGOs to register with the government and seek Ministry of Home Affairs' approval for foreign funding.<sup>66</sup> More specifically:

- social organizations must report “the aid receipt plan”<sup>67</sup> to the Minister of Home Affairs (or governor);
- the “aid receipt plan” must include information relating to the source, aim, nature, and amount of aid, as well as the “aid utilization plan” and “availability of match fund owned by social organizations and its use plan”<sup>68</sup>;
- the Minister of Home Affairs can approve the “aid receipt plan” after coordinating with related departments<sup>69</sup>; and
- the Ministry may take up to 14 days to provide approval.<sup>70</sup>

In **India**, the Foreign Contribution (Regulation) Act 1976<sup>71</sup> requires all nonprofit organizations wishing to accept foreign contributions to (a) register with the central government; (b) agree to accept contributions through designated banks; and (c) maintain separate books of accounts with regard to all receipts and disbursements of funds.<sup>72</sup>

## (2) Restricted Purposes and Activities

Other countries erect barriers to funding certain spheres of activity. For example, in **Zimbabwe** existing law prohibits the use of foreign funds for voter-education projects conducted by independent NGOs; instead, such funds may be contributed directly to the Electoral Commission.<sup>73</sup> But it is Ethiopia that serves as the seminal example.

In **Ethiopia**, where the Parliament enacted the highly controversial *Proclamation to Provide for the Registration and Regulation of Charities and Societies* in February 2009, income from foreign sources may amount to no more than 10% of the total organizational income used by “Ethiopian” charities and societies. And it is only “Ethiopian” charities and societies that

are legally allowed to advance human rights, the rights of children and the disabled, gender equality, nations and nationalities, good governance and conflict resolution, as well as the efficiency of the justice system. "Income from foreign sources" is defined as "a donation or delivery or transfer made from foreign source of any article, currency or security. Foreign sources include the government agency or company of any foreign country; international agency or any person in a foreign country."<sup>74</sup>

"There is no substantial indigenous funding that can compensate for the loss of resources engendered by the restrictions. Consequently, the restrictions will likely create a severe financial crisis for CSOs, which might result in their being crippled."<sup>75</sup> Consequently, the bottom line for many Ethiopian organizations is to choose between giving up almost all of their funding, or giving up their work on human rights, gender equality, disability rights, children's rights, or other proscribed fields. "You are doomed either way," says Kumlachew Dagne, a lawyer and executive member of the Ethiopian Bar Association.<sup>76</sup>

While the Ethiopian law is relatively specific in its purpose/activity restrictions, many other countries rely on vague statutory formulations to restrict purposes/activities that civil society can pursue with the support of foreign funding. For example, in **Indonesia**, the 2008 regulation on the *Receipt and Giving of Social Organization Aids from and to Foreign Parties* prohibits foreign assistance causing "social anxiety and disorder of national and regional economy."<sup>77</sup> In **Bolivia**, Supreme Decree No. 29308 bans foreign assistance that carries "implied political or ideological conditions." Without defining these terms, the law leaves enforcement of these restrictions to the full discretion of the state.

It should be noted that many other countries prohibit NGO participation in various legitimate spheres of activity, regardless of the source of funding. The examples in this section were more narrowly concerned with limits on what activities may be supported *with foreign funding*. The blanket prohibitions applicable more broadly to NGO activities also, of course, directly impede the ability of international grantmakers and donors to provide funding for such activities. Such activity restrictions are considered in section II.C below.

### (3) Mandatory Routing of Funding through Government Channels

In an effort to monitor and control the flow of foreign funding to a country's civic sector, some countries require that foreign funding be routed through a governmental body, ministry, or government-controlled bank. In this way, governments can more easily monitor and in some cases obstruct the flow of funding to CSOs. For example:

- **Eritrea's** Proclamation No. 145/2005 requires that international NGOs engage in activities only through "the Ministry or other concerned Government entity."<sup>78</sup> As noted above, this rule allows NGOs to receive grant support only if the Ministry of Labor and Human Welfare determines that it lacks capacity to address the area of concern directly.

- In **Sierra Leone**, assets transferred to build the capacity of local NGOs should be routed through the Sierra Leone Association of Non-Governmental Organizations and the Ministry of Finance and Economic Development. (It is unclear how this will be implemented in practice.)
- **Sri Lanka** appears to be prepared to follow the same model. In March 2009, Sri Lankan Defense Spokesman Minister Keheliya Rambukwella said, “The aid or grants coming from other foreign countries should not directly go to the INGOs or NGOs and should be channeled through the government’s management and the administration.”<sup>79</sup> The Social Services Ministry expects to get the “necessary” legislation approved soon for an NGO law under which all INGOs and NGOs would have to be registered with a central Agency.<sup>80</sup>
- In **Venezuela**, a draft Law on International Cooperation was introduced and passed its first reading within the National Assembly in 2006 and was then shelved until March 2009, when the National Assembly announced that it will renew consideration of the draft Law.<sup>81</sup> If enacted, the Law would give the President and Cabinet of Venezuela unprecedented authority to organize, control, direct, and coordinate all “activities of international cooperation,” including transfers of assets, technology, and other forms of material support. Under the draft law, all foreign funds would have to be routed through a “Fund for International Cooperation and Assistance,” allowing the government discretion to determine which local organizations could receive financing.

#### (4) Burdensome Notification and Reporting Requirements

After the receipt of funding from abroad, recipients may be subject to additional requirements – such as the obligation to notify the government or comply with burdensome reporting rules – which, while less intrusive than securing advance governmental approval, may nonetheless act as deterrents to the receipt of philanthropic funding. Certainly, such procedural burdens impede the smooth flow of funding to potential recipient organizations. For example:

- On June 18, 2010, President Martinelli of **Panama** issued Executive Decree No. 57, which requires every Panamanian not-for-profit association to publish online extensive information about all donations received, including the donor’s contact information and the size of the donation.
- In **Turkey**, the law imposes notification requirements relating to the receipt of foreign funding. Foundations must notify public authorities within one month after receiving the funding, while associations must notify the Government before *using* the funding.<sup>82</sup>
- In **Uzbekistan**, after receiving approval to receive grant funding, the NGO must provide several reports to a special government body operating under the Ministry of Finance. The reports can be divided into two groups: (a) monthly reports; and (b) transactional reports, which are required following each financial transaction relating to the use of the grant funding, no how matter how small the transaction.

For example, if an NGO buys a pen or a desk with grant funding, then it needs to submit a report *on the next business day*.<sup>83</sup>

- In **India**, the Foreign Contribution (Regulation) Act 1976 requires that all nonprofit organizations must report to the central government all foreign contributions received within 30 days of the receipt of the contribution, and must file annual reports with the Home Ministry. The entity must report the amount of the foreign contribution, its source, the manner in which it was received, the purpose for which it was intended, and the manner in which it was used.<sup>84</sup>
- Following the receipt of grants (defined as “revenue ... in the form of money or in kind, including experts and trainings that do not need to be returned”), social organizations operating at the national level in **Indonesia** must submit a copy of the grant agreement to the Minister of Home Affairs, while those operating at the provincial and district levels must submit documentation to the governors and mayors, respectively.<sup>85</sup> In addition, recipients of foreign funding must publicize foreign-funded activities through the media, no later than 14 working days after the date of activity implementation.<sup>86</sup>

#### (5) Onerous Tax Treatment of Recipient<sup>87</sup>

As a general rule, voluntary contributions to CSOs, including donations, gifts, and grants, are treated as tax-exempt income, if they are considered to be income at all. The source of the contribution is normally not a relevant consideration; in other words, the receipt of donations or grants will typically be tax-free, regardless of whether the donor or grantor is domestic or international. Only in exceptional cases are such categories of income subject to taxation for the recipient.

In several countries of the former Soviet Union, income from foreign grantmakers is subject to taxation unless the foreign grantmaker is included on a government-approved list. Such lists have been in place, at varying times, in Belarus, Kazakhstan, and Turkmenistan. In **Russia**, grants can be extended from foreign or international organizations to Russian citizens or CSOs on a tax-exempt basis *only if* the grant-giver is included on a list of organizations approved by the Russian Government and the grant is made for an approved public benefit purpose. The government list is tightly controlled and the number of approved organizations was reduced in 2008 by Decree #485 to an insignificant number. Prior to the issuance of Decree #485, approximately 100 organizations were on the list, including several private foundations. The decree reduced the number of approved organizations to a mere 12 and eliminated all private foundations. As a result, grants from private foundations are potentially liable to a 24% tax.<sup>88</sup>

#### (6) Foreign Exchange Restrictions

Foreign exchange rates, where the value of foreign currencies is set at official rates far below the parallel market rates, may serve as a legal barrier to cross-border giving, as recipients must exchange funding received at highly unfavorable rates. For example:



- Prior to the introduction of the multiple currency system in **Zimbabwe** in February 2009, all transactions within Zimbabwe had to be concluded in Zimbabwe dollars, and all foreign funds were pegged at official rates that were set far below the parallel market rates. This resulted in substantial losses for recipients receiving cross-border grants, as recipients had to convert the grants, according to official exchange rates, into Zimbabwe dollars in order to engage in programming activity.<sup>89</sup>
- In **Venezuela**, foreign exchange controls have been in place since 2003. Currently, only transactions through the Central Bank of Venezuela (BCV) are approved, and only at the official rate of 4.3 Venezuelan Bolivar (VEB) per 1 USD. This has a deleterious financial impact on recipients of foreign funding, as the actual rate of exchange is closer to a rate of 8 VEB per 1 USD. Moreover, anyone receiving funds outside the BCV channel is subject to severe penalties, including imprisonment, according to the 2005 Law on Unlawful Exchanges.

### C. Legal Barriers to the Nonprofit Beneficiaries of Philanthropy

This section will explore legal barriers that impede the development of indigenous CSOs that might receive global philanthropy. Without a pool of eligible beneficiaries operating in any given country, the very basis for international philanthropic efforts is undermined. Indeed, one of the Task Force members supported ICNL engagement in Kosovo after the 1999 transition, specifically because there were so few CSOs active in the territory, which therefore limited local capacity to implement programs supported by private philanthropy.<sup>90</sup> Barriers have been comprehensively surveyed in other reports<sup>91</sup>, so this section addresses only three illustrative barriers, namely constraints on their formation and operational activity, as well as international contact and communication with these organizations.

#### (1) Barriers to Formation of Organizations

In some countries, the law is used to discourage, burden, and even prevent the formation of CSOs. Barriers include burdensome registration or incorporation requirements, vague grounds for denial, or limitations on permissible program activity. As but a few examples<sup>92</sup>:

- *Limited right to associate.* In **Saudi Arabia**, only organizations established by royal decree are allowed.
- *Restrictions on founders.* In **Turkmenistan**, national-level associations can only be established with a minimum of 500 founders.
- *High minimum capital requirements.* In **Eritrea**, Proclamation No. 145/2005 provides as follows: “Local NGOs may be authorized to engage in relief and/or rehabilitation work if ... they establish that they have at their disposal in Eritrea one million US dollars or its equivalent in convertible currency ...” (Article 8(1))
- *Burdensome registration procedures.* In **China**, registration procedures are complex and cumbersome, with extensive documentation and approval requirements. Organizations are required to operate under a system of “dual management” in

which they must generally first obtain the sponsorship of a “professional leading agency” such as a government ministry or provincial government agency, then seek registration and approval from the Ministry of Civil Affairs in Beijing or a local civil affairs bureau, and remain under the dual control of both agencies throughout their organizational life.

- *Vague grounds for denial.* In **Bahrain**, the government can refuse registration of an application association if “society does not need its services or if there are other associations that fulfill society’s needs in the [same] field of activity.”

## (2) Barriers to Operational Activity

Once formed, CSOs may struggle to operate effectively. Legal burdens may come through direct prohibitions on certain areas of activity, invasive supervisory oversight, and arbitrary termination and dissolution, among other constraints. For example:

- *Direct prohibitions on spheres of activity.* **Eritrea** limits the activities of every NGO to “relief and/or rehabilitation works,” thereby preventing NGO engagement in human rights and other issues that may be of interest to the foundation community (Proclamation No. 145/2005). In **Afghanistan**, the Law on NGOs prohibits participation in construction projects and contracts (Law on Non-Governmental Organizations, Article 8).
- *Advance notification and approval.* In **Cambodia**, local NGOs that wish to conduct activities in a province other than where they are registered must inform the local authority five days in advance according to Ministry of Interior guidelines; in some provinces the guidelines are interpreted as directives that require approval by provincial authorities.
- *Invasive supervisory oversight.* In **Russia**, the law allows governmental representatives to attend all of the organization’s events, without restriction, including internal strategy sessions. A more commonly used supervisory tool is the power to conduct audits and demand documents dealing with the details of an organization’s governance, including day-to-day policy decisions, supervision of the organization’s management, and oversight of its finances.<sup>93</sup> In **Senegal**, the Law on Foundations (Law No. 95-11 of 1995) authorizes the State to designate representatives who sit on the foundation councils (internal governing bodies) with a deliberative vote. These representatives are accountable to the administrative authority that named them.
- *Termination and dissolution.* In **Argentina**, the law permits the termination of an NGO when it is “necessary” or “in the best interests of the public.” In **Paraguay**, the Civil Code grants similarly broad discretion to dissolve and liquidate foundations in cases where the objectives of the organization become impossible, or where the organization's activities would [negatively] impact the public interest. In **Palestine**, since the split between Hamas and Fatah in 2006, government authorities have been routinely ignoring the provisions of the law governing charitable associations and community organizations. Hamas has

reportedly shut down most independent CSOs in the Gaza Strip, while Fatah has unilaterally dissolved more than 100 CSOs.<sup>94</sup>

### (3) Barriers to International Contact and Communication

Closely related to the cross-border flow of philanthropic funding is the flow of ideas and network building that takes place both through in-person meetings, workshops and conferences, and through virtual communication, including through new media.

- *Barriers to international contact.* **Egypt's** Law 84/2002 restricts the right of NGO to join with non-Egyptian NGOs, and “to communicate with non-governmental or inter-governmental organizations.” Moreover the law threatens NGOs that interact with foreign organizations with dissolution. In **Kenya**, the NGO Coordination Act Regulations provide that no NGO can become a branch of or affiliated to or connected with any organization or group of a political nature established outside Kenya, except with the prior consent in writing of the NGO Coordination Board, obtained upon written application addressed to the Director and signed by three officers of the NGO.
- *Barriers to communication.* In **Uzbekistan**, NGOs seeking to conduct a conference and to invite international participants to the conference must secure advance approval from the Ministry of Justice. In practice, NGOs submit a letter to the Ministry of Justice, describing a proposed conference (goals, date, participants, etc.). If the Ministry grants permission for the conference, the NGO can move forward with planning; if the Ministry refuses permission, then there will be no conference.

We focus here on the pool of eligible beneficiaries, since this issue has been raised as an issue of concern by members of the Task Force. We are also aware, however, that many of these restrictions also apply to the formation and operation of grantmaking organizations. For example, in **Eritrea** the US \$1 million capitalization requirement applies to NGOs, presumably including grantmaking organizations – a nearly impossible threshold in that country. In addition, legal constraints on the establishment of foreign NGOs may impede international philanthropy. For example, in **Rwanda**, foreign organizations are required to submit a long list of documentation and information, including the implementation schedule and its various stages of planning, detailed costs estimates with data, the contemplated successors for the launched activities, and “all information relating to its geographical establishment throughout the world.”<sup>95</sup>

## D. Legal Barriers Affecting Disaster Relief and Millennium Development Goals

In this section, we illustrate how the barriers discussed above affect two areas of concern prioritized by the Council on Foundations: (1) disaster relief and (2) the Millennium Development Goals (“MDGs”).

### (1) Disaster Relief

Cross-border philanthropy in the aftermath of a disaster is affected by donor country constraints, recipient country constraints, and restrictions on the development of domestic nonprofit organizations.

As discussed in Section II(A), donor country constraints include:

- advance governmental approval for cross-border giving;
- limited, or no, tax incentives for international philanthropy;
- burdensome procedural requirements for foreign grants; and
- counter-terrorism measures.

Making this concrete, CSOs in the **United Arab Emirates** (UAE) are not allowed to collect money and send it abroad for foreign disaster relief. Instead, CSOs in the UAE that wish to send money abroad must collect and send the money through the only authorized institution, which is the Red Crescent Society of the UAE.

In addition, as discussed above, few countries offer incentives for international philanthropy. Accordingly, foreigner taxpayers generally received no tax benefits for direction contributions to Haitian, Chilean, Chinese, or Pakistani organizations engaged in local disaster relief efforts.

Rules and procedures also impede disaster relief. As discussed in Section II(A)(4), US private foundations (as well as donor-advised funds) must comply with “equivalency determination” or “expenditure responsibility” requirements in order to make an international grant. The equivalency determination process often takes time,<sup>96</sup> thus impeding swift assistance when disaster strikes. Of course, a private foundation could undertake expenditure responsibility, but this requires the foundation to comply with complex rules, including detailed reporting requirements on how a grant is spent. These rules impede private foundations interested in supporting disaster relief efforts.

In the **United States**, complexities also arise for companies seeking to provide assistance to employees affected by a disaster. Company-sponsored private foundations are generally prohibited from making grants to employees. Of course, the company could also give an employee money to cover emergency food and shelter, but this could constitute taxable income for the employee. The rules change, however, if a “qualified disaster” is declared. In this situation, a company is allowed to make qualified disaster relief payments to employees, and these payments are generally exempt from tax. In addition, company-

sponsored private foundations are allowed to make grants to employees, provided specific requirements are met. For example:

- the class of beneficiaries must be large or indefinite,
- the recipients must be selected based on objective determinations of need, and
- the selection must be made using either an independent selection committee or adequate substitute procedures to ensure that any benefit to the employer is incidental and tenuous.<sup>97</sup>

These are but a few of the complexities that arise under US law when a corporation seeks to provide assistance to employees affected by a disaster. There are also special rules on scholarships given to employees and complex rules on the cost basis of inventory that a corporation may deduct on in-kind contributions.

Counter-terrorism measures, discussed in Section II(A)(5) of this report, may also impede disaster relief. Specifically, a number of grantmakers engage in “list checking” and other counter-terrorism measures. The burden is magnified when a donor is making a large number of relatively small grants – for example, subsistence funds to a large number of people in a community affected by a natural disaster. Counter-terrorism concerns have also posed challenges for private foundations seeking to support flood relief efforts in Pakistan.

At the same time, recipient country restrictions can be similarly problematic. As discussed in Section III(B) of this report, some countries require advance government approval before a grantee can receive a foreign grant, even for disaster relief. This is true in **Egypt**, for example. Foreign funding requirements also caused concern immediately after the tsunami in **India**, leading the Ministry of Home Affairs to waive elements of the Foreign Contribution (Regulation) Act on December 30, 2004.<sup>98</sup>

Disaster relief is also impeded by restrictions impeding the development of domestic CSOs. As illustrated by the challenges confronting the United States after Hurricane Katrina and the Chinese government after the Sichuan earthquake, disasters often exceed the capacity of even large, well-resourced governments. Domestic CSOs therefore have a vital role in supplementing other disaster relief efforts and in providing absorptive capacity for funding by the international community. But in countries such as **Burma**, donors have been reticent to provide funding for disaster relief because of governmental control over the process and constraints imposed on independent CSOs.<sup>99</sup>

In summary, the three types of barriers presented above – donor country constraints, recipient country constraints, and impediments to the development of domestic CSOs – affect the ability of the international grantmaking community to engage in disaster relief.

At the same time, some countries have taken measures to promote global philanthropy after a disaster. The Canadian Government created donor country incentives when it recently earmarked C\$50 million to match donations to Canadian charities aiding relief efforts in Haiti.<sup>100</sup> Over the years, the US Government has also created donor country

incentives. For example, after the earthquakes in Haiti and Chile in 2010, the U.S. Congress passed legislation enabling taxpayers to claim certain donations made in 2010 on their 2009 tax returns.

The foregoing is only a brief survey of issues relating to disaster response. For a more complete discussion of this topic, please see the Council on Foundation's *Legal Guidelines for Corporate Grantmakers Providing Disaster Relief*, which is accessible at: <http://www.cof.org/files/Bamboo/programsandservices/legalinfo/documents/Corporate-Grantmakers-Disaster-Relief-2010.pdf>

## (2) Millennium Development Goals (MDGs)

Progress toward achieving the MDGs is frustrated by donor country impediments, recipient country impediments, and constraints affecting domestic nonprofit organizations.

Donor country impediments to philanthropic giving in support of the MDGs could, potentially, include all of the constraints listed above. For example, an NGO in **Egypt** must secure advance governmental approval in order to send funds abroad, even where those funds are intended to further progress toward the MDGs. Charitable organizations in **Malaysia** and social organizations in **Indonesia** are similarly restricted from sending funds abroad, without governmental approval, to address issues such as poverty alleviation, primary education and environmental sustainability.

Donors making direct cross-border contributions to CSOs working toward the MDGs receive, in many countries, no tax relief for those donations. The lack of tax incentives in many countries may deter more substantial grantmaking by corporate foundations, in particular.

As in the case of disaster relief, counter-terrorism measures often impede international grantmaking, even where funding is intended for causes supported by the MDGs.<sup>101</sup> Specifically, in **Kenya**, the Kibera Community Self Help Programme was unable to receive an anticipated grant from the U.S.-based Islamic American Relief Agency (IARA) to help fund a home for children, including orphans living with HIV/AIDS, due to the U.S. Treasury seizing IARA's assets. The regulatory procedures of the Treasury's Office of Foreign Assets Control (OFAC) and the Department of Commerce create delays of six to nine months for groups wanting to become licensed to provide psychosocial training to public school teachers in **Gaza**; during that time teachers are unable to identify, counsel, or direct children devastated by the violence to the necessary medical or psychosocial services that they may require. According to a 2008 survey, nearly three-fifths of U.S. grantmakers agreed that "the more demanding post-9/11 regulatory environment discourages giving to non-U.S.-based organizations."<sup>102</sup>

Recipient country impediments relating to advance governmental approval to receive foreign funding, mandatory routing of foreign funding through government channels, and post-receipt procedural burdens may all serve to deter foreign funding to address MDG-related issues in relevant countries.

Notably, restrictions on the types of activities that can be supported with foreign funding make progress toward certain MDGs particularly challenging in **Ethiopia**, in light of the 2009 *Ethiopian Proclamation to Provide for the Registration and Regulation of Charities and Societies*. The Proclamation effectively prevents foreign funding from flowing to an Ethiopian charity promoting gender equality or seeking to reduce child mortality (i.e., local charity pursuing these causes can receive no more than 10% of its income from foreign sources). Moreover, the Ethiopian Government has shown itself willing to terminate NGOs. In 2009, 42 community-based organizations (CBOs) were shut down and banks instructed to freeze their assets; among other reasons provided for the closure, the NGOs were alleged to have been engaged in promoting harmful traditional practices and in mobilizing communities against the use of fertilizers<sup>103</sup> – that is, seeking to ensure environmental sustainability.

Restrictions affecting the pool of nonprofit beneficiaries also undermine philanthropic giving to address the MDGs. For example, in a move that undermines efforts to eradicate extreme poverty and hunger, the Government of **Zimbabwe**, in February 2010, banned all food handouts by NGOs, despite forecasts that more than 2 million people require food aid.<sup>104</sup> In addition, in March 2010, the Ministry of Health and Child Welfare in Zimbabwe reportedly announced the Government’s intention to promulgate a legal instrument to regulate all organizations that are involved in combating HIV/AIDs in order to effectively coordinate the national response to the epidemic through a legally binding obligation on all such CSOs to report to the National Aids Council (a state entity).<sup>105</sup>

In summary, the three types of barriers presented above – donor country constraints, recipient country constraints, and impediments to the development of domestic CSOs – affect the ability of the international grantmaking community to effectively address the MDGs.

### III. Next Steps

This section will present and consider a range of options or “next steps” for reducing legal barriers to global philanthropy. The ideas outlined below are potential options to advance the Task Force’s deliberations and are not intended to be recommendations. The focus of this section is on collective action by Task Force members versus individual actions by members in their home countries. We are cognizant that important work relating to some of these “next steps” is already underway; the Ease of Global Giving Project, led by the Mercator Fund is but one example. An illustrative list of related initiatives follows each proposed initiative.

#### A. *Initiatives Focused on Existing Law*

*First we consider initiatives addressing the existing state of law affecting global philanthropy. Listed below are four illustrative initiatives. They include a survey of philanthropists; an indexing of existing barriers to cross-border philanthropy; expanding tools to help*

*philanthropists navigate the existing legal environment for cross-border philanthropy; and monitoring legal developments affecting cross-border philanthropy.*

### (1) Survey of Philanthropists

*An initial option is to survey foundations and other philanthropists on legal barriers to cross-border philanthropy.*

*Description of Concept:* This initiative would collect data on the problems global philanthropists confront while engaged in cross-border giving and would assess priorities for response.

There are a number of existing reports and publications that examine general legal barriers to philanthropy and civil society. USAID annually publishes the NGO Sustainability Index, which examines a range of factors including the legal framework and financial viability of nongovernmental organizations. Another annual publication is Freedom House's Freedom in the World, which examines restrictions on fundamental freedoms, including the freedom of association. ICNL makes country reports available through its NGO Law Monitor project, with a focus on barriers to civil society. And of course, this paper categorizes barriers to the outflow and inflow of global philanthropy.

To supplement these legal analyses, it would seem useful to survey international grantmakers to collect data on the actual problems they confront. This sort of survey would provide valuable information not only on existing legal barriers, but also on the geographic and thematic priorities of the global philanthropic community.

*Potential Challenges:* Careful thought would need to be given target audience and the disaggregation of data. For example, a small family foundation with only occasional foreign grants would likely face different challenges than a large foundation with in-house legal counsel skilled at international grantmaking. Similarly, U.S. foundations face procedural requirements that do not exist in many other countries. Accordingly, the survey would have to be carefully designed to enable appropriate collection and disaggregation of data, but this challenge could likely be overcome.

In addition, ensuring an adequate response rate is often a challenge. To help address this issue, it would seem useful to have the Council on Foundations, EFC, and WINGS directly associated with the administration of the survey in order to promote responses from their members.

### (2) Indexing of Existing Barriers to Cross-Border Philanthropy

*A related option is an index of existing legal barriers to cross-border philanthropy.*

*Description of Concept:* This option seeks to build upon the initial work of the Mercator Fund in advancing the "Ease of Global Giving Index." As part of its commitment to the GPLI, Mercator has handed over this index through the EFC for use in GPLI work. We are



encouraging the Task Force to consider building upon this index of existing legal barriers to cross-border philanthropy. The index would be made available online, updated on a regular basis, serving as an informational resource for the philanthropic community, government policy makers, civil society practitioners, lawyers, and academics.

*Potential Challenges:* A key issue is that the ease of giving often depends on the nature of the grantmaker and the activities it seeks to support. For example, a foundation seeking to support human rights work would face nearly insurmountable barriers in Ethiopia, while a donor seeking to work with the government on food aid would likely encounter more manageable challenges. Similarly, in China, a large foreign foundation with offices in Beijing and close relations with the Chinese government would likely face fewer challenges than a small grantmaker without connections to the Chinese Government and seeking to support grassroots advocacy organizations in the countryside. As another example, US grantmakers seeking to fund organizations in Venezuela confront challenges that do not arise for grantmakers located in, for example, Brazil. While not insurmountable, careful thought is required on if/how these sorts of variations would be reflected in an Index. We note that ICNL has been involved in discussions about the creation of a civil society index akin to the World Bank's "Doing Business" Index, and the disaggregation issue remains a perplexing challenge.

Finally, one must consider the likely impact that such an indexing system would have. As an informational resource for those predominantly engaged in cross-border giving, it could be tremendously valuable. As a reform tool, however, the impact would likely be substantially more uncertain, particularly among the countries least friendly to philanthropic inflows. Transparency International's Corruptions Perceptions Index<sup>106</sup> has a "name and shame" value, as no country relishes being labeled corrupt. The low-ranking countries in an "ease of giving" index, by contrast, would likely not be disturbed by a low ranking. As stated recently by the Minister for Regional Integration and International Cooperation in Zimbabwe, donors must coordinate with the host government and follow their national development plans and cannot be allowed to "run around and do their own thing."<sup>107</sup> Even more developed democratic countries may not find great shame in receiving a low ranking on an index measuring the ease of giving "aid" to their country.

*Related Initiatives:*

- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)
- CIVICUS Civil Society Index: <http://www.civicus.org/csi>
- USAID NGO Sustainability Index: [http://www.usaid.gov/locations/europe\\_eurasia/dem\\_gov/ngoindex/](http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/)
- Freedom House: Freedom in the World: <http://www.freedomhouse.org/template.cfm?page=15>
- ICNL NGO Law Monitor (funded by the MacArthur Foundation): <http://www.icnl.org/knowledge/ngolawmonitor/index.htm>
- Salzburg Global Seminar: <http://www.salzburgglobal.org/2009/phil.cfm>

- John D. Gerhart Center for Philanthropy and Civic Engagement, American University in Cairo: <http://www.aucegypt.edu/research/gerhart/Pages/default.aspx>

### (3) Expanding Tools to Help Foundations Navigate the Legal Environment for Cross-Border Philanthropy

*A third option is to help foundations navigate existing legal requirements relating to global philanthropy.*

*Description of Concept:* The purpose of this initiative would be to help philanthropists better understand the legal rules affecting global philanthropy. With the appropriate navigational tool in hand, global philanthropists would be better able to determine whether, where, and how to pursue cross-border giving.

Some information on the requirements of cross-border philanthropy is already available. For example, the Council of Foundations has established the United States International Grantmaking Project ([www.usig.org](http://www.usig.org)). Resources on the website help U.S. private foundations better understand IRS rules and procedures governing foreign grantmaking. Similarly, the King Baudouin Foundation (KBF) maintains a web-based resource called “Giving in Europe,”<sup>108</sup> a cross-border giving database that provides information, best practices and solutions concerning cross-border giving, with focus on EU member states. In addition, the King Baudouin Foundation has a special section on its website dedicated to transatlantic giving.

While these are significant initiatives, they have limited scope. It might be interesting, for example, to expand the “Giving in Europe” model to other regions, such as Asia, Africa, Latin America, or elsewhere. A complementary approach would be to facilitate learning networks that focus on recipient countries. For example, donors to activities in places such as China, India, or Russia could form *ad hoc* information sharing networks. Through such learning networks, donors could share information about navigating through the legal landscape of recipient countries. It is conceivable that a centralized Outreach Coordinator (discussed below) could serve as the focal point for such information sharing.

In addition, corporations are sometimes unfamiliar with legal requirements for international grantmaking. The Task Force might consider developing tools and training opportunities to help corporations navigate the legal framework for global philanthropy.

*Potential Challenges:* As we know from the USIG project and other initiatives, it is labor-intensive to keep this sort of information accurate and up-to-date. Also, for legal reasons, it would be important that this initiative be presented as providing general background information and not legal advice. Finally, some groups may be reluctant to share information on how they navigate through complex legal environments in various countries.

*Related Initiatives:*

- United States International Grantmaking: <http://www.usig.org/>
- Giving in Europe: <http://www.givingineurope.org/site/index.cfm?tid=1&mid=1&homep=1&bid=1&sid=1&lg=2>
- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)

(4) Monitoring Legal Developments Affecting Cross-Border Philanthropy

*While monitoring may be implicit in some of the prior activities, we make it an explicit activity here to emphasize its potential as a stand-alone activity or as a natural complement to other initiatives.*

*Description of Concept:* This initiative would seek to monitor legal challenges to cross-border philanthropy on a routine basis through a global network of organizations, philanthropists, and lawyers. When newly emerging challenges are identified, alerts can be issued to the task force (or some other pre-defined list of philanthropic organizations, donor organizations, and governments). Initially, the reach of the initiative could be limited to a select group of countries and subsequently expanded to embrace other countries, depending on interest and resources.

*Potential Challenges:* It is challenging to keep this information timely and accurate. It can also be burdensome to identify appropriate contacts and to maintain up-to-date contact lists.

*Related Initiatives:*

- ICNL NGO Law Monitor: <http://www.icnl.org/knowledge/ngolawmonitor/index.htm>.
- Civil Society Law Alert System (in development; by ICNL)
- CIVICUS Civil Society Watch: <http://www.civicus.org/csw>
- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)

*B. Initiatives Intended to Advance Law Reform*

*While some of the prior initiatives could, arguably, influence reform – for example, the index has potential “name and shame” value – the primary goal of each is instead to map out, understand, and provide information about the existing legal frameworks and their impact on global philanthropy. A complementary option is to undertake activities that will lead to reform of the restrictive legal provisions, such as those presented in the “barriers” section of this paper.*

*Listed below are four illustrative initiatives. They include efforts to engage in research to strengthen the chances for long-term reform; to reform law and policy affecting global*

*philanthropy; to develop good principles to support global philanthropy; and to seek a treaty or other international agreement on cross-border philanthropy.*

#### (5) Expanding the Analytic Base for Reform

*An important prerequisite to reform is developing the intellectual base necessary to support reform and persuade skeptics of its importance.*

*Description of Concept:* This initiative would seek to expand, through research, the intellectual basis for the reform of laws affecting cross-border philanthropy.

For example, one particularly complex issue impeding cross-border giving is the desire of many governments to control the flow of all foreign funding into their respective countries – and to ensure that the foreign funding is used solely to finance governmental priorities. Philanthropy is welcome, the argument goes, provided that donors follow the government’s rules and finance activities that are consistent with the government’s development plan. In some countries, such as Bolivia, Nicaragua, and Sierra Leone, governments have justified mandatory coordination of foreign financial flows and civil society activity through reliance on the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action.<sup>109</sup>

In light of this, the challenge is to make the case for pluralistic philanthropy. Are there persuasive reasons for governments to allow private donors to fund initiatives and organizations within a country but outside of the governmental development plan? The question is controversial not only among governmental leaders, but also among some civil society leaders. A clear articulation of how pluralism in cross-border giving can actually strengthen the recipient country would be an important contribution to the field.

Similarly, it would be useful to present compelling reasons relating to why donor governments should welcome the export of global philanthropy. While many support the importance of giving beyond one’s borders, others may tend toward isolationist thinking and the argument that “charity begins at home,” especially in times of economic downturn. Research supporting global philanthropy could help challenge such positions.

*Potential Challenges:* It will likely prove complex to present a cogent “case for global philanthropy,” so serious thought would have to go into the design and implementation of this initiative. In addition, in some countries the goal is the preservation of power, so even well reasoned positions may go unheeded.

#### (6) Good Principles/Protocol for Cross-Border Philanthropy

*Another option is to support the development of principles relating to cross-border philanthropy.*

*Description of Concept:* This option would seek to develop and promulgate principles for a country’s treatment of philanthropic organizations and cross-border philanthropy. Properly drafted, the principles could serve as an important guide or measuring stick for

law drafters and policy makers seeking to improve the legal environment for global philanthropy. We understand that the Mercator Fund is considering a similar initiative, although we are not privy to current details.

*Potential Challenges:* The two most significant challenges in relation to developing principles on global philanthropy relate to substance and impact. First, developing a consensus on the substance of the principles themselves is likely to be a significant obstacle. This arises in part because the legal impediments to global philanthropy do not spring from one law, but rather are rooted in multiple sources, including laws governing civil society organizations, tax laws, counter-terrorism measures, etc. While it is conceivable that donors could agree on some principles, it would seem quite complex to move beyond rhetoric and reach consensus on meaningful, actionable principles on counter-terrorism, for example.

Second, even if grantmakers could reach consensus on the content of good principles for cross-border philanthropy, it may prove quite challenging to get a broad range of governments to support these principles.

*Related Initiatives:*

- Council of Europe, Recommendation CM/Rec(2007)14 of the Committee of Ministers on the legal status of non-governmental organizations in Europe: [http://www.coe.int/t/ngo/Legal\\_standards\\_en.asp](http://www.coe.int/t/ngo/Legal_standards_en.asp).
- European Foundation Centre, Fundamental Legal and Fiscal Principles for Public Benefit Foundations: [http://www.efc.be/Legal/Pages/principles\\_model\\_law.aspx](http://www.efc.be/Legal/Pages/principles_model_law.aspx).
- European Foundation Statute: <http://www.efc.be/EuropeanFoundationStatute/Pages/LatestnewsabouttheEuropeanFoundationStatute.aspx>
- Mercator Fund: [http://www.mercatorfund.net/modules/innovative\\_philanthropy](http://www.mercatorfund.net/modules/innovative_philanthropy)
- Salzburg Global Seminar: <http://www.salzburgglobal.org/2009/phil.cfm>
- Defending Civil Society (which contains principles relating to the legal framework for civil society *writ large*, including foreign funding issues): <http://www.icnl.org/knowledge/news/2008/3-21.htm>

(7) Reform of Laws and Policies Affecting Cross-Border Philanthropy

*To address the barriers impeding philanthropy, efforts to reform the laws and policies of the donor country and/or recipient country may be necessary. Recognizing, however, that some foundations may be reluctant to pursue reform directly, consideration might be given to working through umbrella groups or connecting with other initiatives already engaged in ancillary initiatives.*

*Description of Concept:* This option would seek to determine if there is a role for the Task Force, or a subset of Task Force members, to address some of the barriers identified in the first part of this paper. Depending on Task Force interest, a stand-alone initiative might be

possible, but at a minimum, it might make sense to appoint an Outreach Coordinator to make contact with other groups that are already working on related issues.<sup>110</sup>

For example, the OECD/DAC<sup>111</sup> is active in facilitating an ongoing discussion around aid effectiveness and coordination; this discussion has clear and direct relevance to the legal and policy framework for foreign funding (and therefore philanthropic giving). As another example, the International Committee of the Red Cross<sup>112</sup> has launched an initiative to develop a model law for disaster relief, which is of major concern to a number of international donors. Active outreach to such initiatives could be critical to help monitor developments and to ensure that concerns of international grantmakers are addressed appropriately. In addition, ICNL is currently working on civil society legal reform in every region.

Furthermore, the Working Group on Enabling and Protecting Civil Society was established under the auspices of the Community of Democracies. Chaired by the Canadian Government, a number of other governments, including from the US and Europe, are members of this group – as are ICNL, CIVICUS, the World Movement for Democracy, UNDP, and others. There may be benefits in liaising with the Working Group in order to ensure that issues of concern specific to global philanthropy are not lost in the broader discussion on civil society and law. Furthermore, the UN Special Rapporteur (SR) on Human Rights Defenders<sup>113</sup> addresses issues of foreign funding in the context of human rights work. Outreach to the SR could provide an important opportunity to communicate the concerns of the global philanthropic community and could help ensure greater attention to these issues by the SR.

Strategic outreach to other pivotal players could be instrumental in influencing law and policy at the national level in various countries. For example:

- *Trade officials.* A recent study indicated that bilateral investment treaties often apply to the cross-border flow of capital not only within the for-profit sector, but also within the not-for-profit sector.<sup>114</sup> It could be useful, therefore, to reach out to trade officials and support their continuing attention to this issue in order to protect global philanthropy within the realm of trade agreements.
- *The UN Development Programme (UNDP).* UNDP has recognized the importance of civil society and, in many countries, has supported law reform initiatives. Moreover, UNDP is able to play more of a neutral, convening role than many private organizations. Recognizing UNDP's particular position, the Outreach Coordinator could seek to leverage UNDP's influence and encourage UNDP to include information on cross-border philanthropy into development materials.
- *International financial institutions.* Similarly, outreach to the International Monetary Fund (IMF) and/or the World Bank could be useful in supporting initiatives to promote global philanthropy.

*Potential Challenges:* Key issues include the willingness of countries to undertake reform to promote global philanthropy. In addition, we recognize that some foundations are

reluctant to support advocacy efforts for a variety of legal and mission-related reasons. Nonetheless, some foundations have played a leadership role in this field, as have groups such as the Council on Foundations and the European Foundation Centre. As with all initiatives, there is also a question of resources, but linking with existing initiatives (versus creating a new stand-alone initiative) could help ameliorate this issue.

*Related Initiatives:*

- ICNL: [www.icnl.org](http://www.icnl.org)
- European Foundation Centre: [www.efc.be](http://www.efc.be)
- The World Movement for Democracy: [www.wmd.org](http://www.wmd.org)
- Council on Foundations (on US laws and policies): [www.cof.org](http://www.cof.org)
- ICRC: <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JR62>
- The Arab Foundations Forum:  
<http://www.arabfoundationsforum.org/en/node/158>

(8) Treaty on Cross-Border Philanthropy

*Another option is the preparation of a treaty – be it global, regional or sub-regional – to help promote global philanthropy.*

*Description of Concept:* This initiative would seek to prepare a global treaty on cross-border philanthropy. Possibilities include a “status treaty” to facilitate the international operations of the foundation community or a tax treaty to extend tax incentives to foreign philanthropy.

A status treaty might follow the model of the European Convention on the Recognition of the Legal Personality of International NGOs<sup>115</sup> or the Model Law for Public Benefit Foundations in Europe.<sup>116</sup> The goal would be to facilitate the ability of foundations to work internationally. The goal of the tax treaty would be to extend tax benefits for contributions to entities resident in another country.

Recognizing the obvious challenge of securing political will for such a treaty, it may be prudent to aim for a regional treaty as an initial step. For example, in the European Union, we are seeing a wave of reform in the wake of the ECJ’s *Persche* judgment. Similarly, it may be possible to generate interest in promoting cross-border philanthropy in other regions or sub-regions, such as within the Caribbean Community (CARICOM) or other regional bodies. A less ambitious but potentially viable approach would be to promote the adoption of bilateral treaties to ease cross-border giving between two countries (perhaps two donor countries to reduce concerns about revenue loss).

*Potential Challenges:* Securing political will for such an initiative would be a formidable challenge. Among other reasons, a “status treaty” would be difficult because of the different legal regimes governing foundations across countries (consider, for example, the different systems governing foundations in the United States and Mexico, or the United

States and France). In terms of a tax treaty, officials will likely be concerned about losses to the tax base, particularly considering the current economic climate. In addition, concerns about counter-terrorism, national security, and foreign interference may limit political will for such a treaty.

Numerous studies have focused on the issue of non-discrimination in the tax treatment of philanthropic contributions to foreign recipients.<sup>117</sup> And several initiatives have emerged seeking to break the “landlock” or discriminatory approach in providing tax relief. Notably, however:

During nearly 60 years of history, several attempts have been made for progress in this area. Although an important number of international institutions have supported these calls for solutions, all initiatives in this direction came to naught. One explanation for this lack of success has been the assertion that the initiatives were too ambitious and too idealistic.<sup>118</sup>

*Related Initiatives:* A brief review of some past and present initiatives relating to the issue of non-discrimination in tax benefits is instructive:

- The International Standing Conference on Philanthropy (INTERPHIL) was formed in 1969 and developed a Draft European Convention on the Tax Treatment in respect of certain Nonprofit Organizations (1971). The Draft Convention sought to allow states to extend tax relief to foreign organizations, to domestic organizations operating abroad, and to foreign residents contributing to domestic organizations. The Convention was ultimately not enforced, however, due in part to the fact that registration with the Council of Europe was envisioned to trigger the non-discrimination principles.<sup>119</sup>
- The European Foundation Centre issued the “Fundamental Legal and Fiscal Principles for Public Benefit Foundations” in 2003, and subsequently developed a Draft European Statute for Foundations, which remains an active initiative. Part of the rationale for the European Statute is to facilitate the giving and receiving of gifts across borders.<sup>120</sup>
- The OECD Model Tax Convention, in Article 24(1), establishes that for tax purposes, discrimination on the grounds of nationality is forbidden and that, subject to reciprocity, the nationals of one contracting state may not be less favorably treated in another contracting state than the nationals of the latter state in the same circumstances. That said, the OECD Commentary on Article 24(1) states that these provisions do not oblige a state that extends tax benefits to not-for-profit organizations for public benefit purposes to extend the same benefits to similar organizations whose activities are not for its benefit. In short, the presumption of the Tax Convention is that not-for-profits are designed for the public benefit of their state of origin.<sup>121</sup>



### *C. Special Initiatives*

*In this final section, we offer stand-alone “special initiatives” for the consideration of the Task Force, relating to disaster relief and the Millennium Development Goals.<sup>122</sup>*

#### (1) Enabling Global Philanthropy for Improved Disaster Relief

Interest in the legal framework for global philanthropy surges immediately following natural disasters, such as the 2004 tsunami and the 2010 earthquake in Haiti. The importance of an enabling legal framework to allow quick and effective flows of philanthropic giving in the wake of disaster is inarguable. In recognition of the interest in disaster relief and the crucial support that law provides to disaster relief, the Task Force could consider launching a comprehensive project in this field, examining both constraints and good practices relating to global philanthropy and disaster response; raising awareness of the need to anticipate disasters and confront legal barriers now; and support legal reform in willing countries.

#### (2) Enabling Global Philanthropy for the Millennium Development Goals (MDGs)

In September 2010, the U.N. reviewed progress on the MDGs. In the words of UN Secretary General Ban Ki-moon, “Time is short. We must seize this historic moment to act responsibly and decisively for the common good.”<sup>123</sup> In light of the interest and concern among public donors and the foundation community in addressing the MDGs, it may be strategically opportune to implement a comprehensive initiative built around the MDGs, with the goal of eliminating barriers to global philanthropy targeting the 8 MDGs (at a minimum). Concrete objectives might include examining the current constraints and good practices relating to global philanthropy and the MDGs; raising awareness of the connection between an enabling legal framework and achieving the MDGs; and supporting legal reform in willing countries. Using achievement of the MDGs as the leverage point, the Task Force would likely be able to collaborate more broadly with stakeholders from diverse fields and sectors. Consideration could be given to a private-public partnership involving the philanthropic community as well as a range of governments (including governments from the Global South, where the distance to achieving the MDGs is greatest).

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- <sup>1</sup> These figures are drawn from the article entitled *The New Face of Global Philanthropy*, which the Council on Foundations kindly provided to ICNL. We are unaware of the author, date or copyright for this article, but would be happy to provide a more complete citation based on guidance from the Council. For the data on Brazil, reference is made to the Institute for the Development of Social Investment (IDIS).
- <sup>2</sup> Arpan Sheth, *An Overview of Philanthropy in India*, (c) 2010 Bain & Company, Inc., page 2, available at [http://www.bain.com/bainweb/PDFs/cms/Public/India\\_Sheth\\_Speech.pdf](http://www.bain.com/bainweb/PDFs/cms/Public/India_Sheth_Speech.pdf).
- <sup>3</sup> Olga Alexeeva, *Russia: historic growth in private giving*, Philanthropy/UK: newsletter, Issue 34, September 2008, <http://www.philanthropyuk.org/Newsletter/Sep2008Issue34/Russia>.
- <sup>4</sup> *The New Face of Global Philanthropy*, with reference made to the China Foundation Center.
- <sup>5</sup> *The New Face of Global Philanthropy*, with reference made to the Global Philanthropic Capital Project.
- <sup>6</sup> *The New Face of Global Philanthropy*.
- <sup>7</sup> Id.
- <sup>8</sup> Sheth, *An Overview of Philanthropy in India*, page 4; *see also* *High net worth individuals in India up 51% in 2009*, The Financial Express, June 24, 2010, <http://www.financialexpress.com/news/high-net-worth-individuals-in-india-up-51-in-2009/637684/>.
- <sup>9</sup> *The New Face of Global Philanthropy*.
- <sup>10</sup> *Singapore gives more in philanthropy*, China Daily, August 16, 2010, available at [http://www.chinadaily.com.cn/world/2010-08/16/content\\_11157803.htm](http://www.chinadaily.com.cn/world/2010-08/16/content_11157803.htm).
- <sup>11</sup> “Charitable giving increasingly needs to be understood in an international context. With populations migrating and the growth in public awareness of international issues and needs, more people globally are interested in making cross-border charitable donations to charity.” CAF briefing paper, *International comparisons of charitable giving* (November 2006), available at [www.efc.be/ftp/public/cpi/Newsletter\\_Jan07/InternationalGivinghighlights.pdf](http://www.efc.be/ftp/public/cpi/Newsletter_Jan07/InternationalGivinghighlights.pdf).
- <sup>12</sup> The Foundation Center, *The Global Role of U.S. Foundations*, © 2010 by the Foundation Center, pg. 18.
- <sup>13</sup> The Hudson Institute, *Index of Global Philanthropy*, 2010, pg. 14, fig. 4.
- <sup>14</sup> “Philanthropy may be defined as voluntary and private initiative to support a public objective.” {Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007 Ineke A. Koele, page 3} For purposes of the remainder of this paper, “global philanthropy” refers to cross-border giving – that is the making of grant, donation or voluntary contribution from a private donor in one country to a recipient in another, in order to pursue a public objective. The report will use the terms “global philanthropy” and “cross-border giving” and “philanthropic giving” interchangeably.
- <sup>15</sup> Salzburg Global Seminar: <http://www.salzburgglobal.org/2009/phil.cfm>.
- <sup>16</sup> Council on Foundations, *We Were There: The Role of Foundations in National Disasters*, <http://classic.cof.org/files/Documents/Publications/WeWereThere.pdf>.
- <sup>17</sup> United Nations Development Programme, Division for Foundation Affairs, <http://www.undp.org/partners/foundations/Foundations-and-UNDP.pdf>.
- <sup>18</sup> The World Bank, *Foundations and the World Bank: Partners for Development Innovation*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/FOUNDATIONSEXT/0..menuPK:60000436~pagePK:60000431~piPK:60000435~theSitePK:267976.00.html>.
- <sup>19</sup> Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007 Ineke A. Koele, page 4.
- <sup>20</sup> Income Tax Act of 1961, § 11(1).
- <sup>21</sup> Australian Taxation Office, *Income tax guide for non-profit organisations*, <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/34269.htm&page=15&H15>.
- <sup>22</sup> Council on Foundations, United States International Grantmaking, Brazil country note, March 2010, <http://www.usig.org/countryinfo/brazil.asp>.
- <sup>23</sup> ICNL, NGO Law Monitor, Egypt country report, July 30, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/egypt.htm>.
- <sup>24</sup> Inland Revenue Board of Malaysia, *Guidelines for Application of Approval under subsection 44(6) of the Income Tax Act 1967*, articles 3.3 and 3.11, available at: [http://www.hasil.org.my/lhdnv3e/documents/GarisPanduanTeknikal/GuidelinesSection44\(6\).pdf](http://www.hasil.org.my/lhdnv3e/documents/GarisPanduanTeknikal/GuidelinesSection44(6).pdf).
- <sup>25</sup> Regulation of Minister of Home Affairs Number 38 of 2008 on *Receipt and Giving of Social Organization Aid from and to Foreign Parties*, Article 33. Regulation No. 38 springs from Government Regulation No. 18/1986

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on the Implementation of Social Organization Law. Thus, while Regulation No. 38 is of recent origin, the obligations described here and elsewhere in this paper (relating to Regulation No. 38), have existed since 1986.

<sup>26</sup> Note, however, that international CSOs are often precluded from receiving tax-deductible donations even if they have met the legal requirements to operate in a foreign jurisdiction. For example, a Singaporean taxpayer cannot receive a tax deduction for a contribution to an international organization that carries out publicly beneficial activities in Singapore if the organization is based outside the country. Consider also the situation where a multinational corporation and an international CSO have operations in the same country. In some cases, the corporation would have to route a donation through a third country (such as the country where the international CSO is based) in order to be eligible for a tax deduction. This requires considerable tax planning and is a further impediment to global philanthropy.

<sup>27</sup> Koele, *International Taxation of Philanthropy*, pg. 5.

<sup>28</sup> Australia Taxation Office, *Deductible Gift Recipients*,

<http://www.ato.gov.au/nonprofit/content.asp?doc=/content/34516.htm&page=2&H2>. See also information on “Overseas Aid Gift Deduction Scheme”, available at <http://www.ausaid.gov.au/ngos/tax.cfm>. In brief, the Overseas Aid Gift Deduction Scheme (OAGDS) enables donations collected by organizations for their overseas aid activities to be tax deductible so donors can claim their contributions to the organization as a tax deduction. Tax deductibility is only allowable for gifts to aid activities in those countries declared as ‘developing’ by the Minister for Foreign Affairs. There is a two-step process to achieve tax deductibility under the OAGDS. The first step is that an organization must be accepted as an “Approved Organisation” by the Minister for Foreign Affairs. To qualify, the organization must meet seven criteria, one of which is to be “clearly identifiable as Australian.” Second, the organization must put in place a developing country relief fund which is exclusively for the relief of persons in declared developing countries.

<sup>29</sup> Council on Foundations, United States International Grantmaking, India country note, May 2010,

<http://www.usig.org/countryinfo/india.asp>.

<sup>30</sup> European Foundation Centre, Legal and Fiscal Comparative Charts,

<http://www.efc.be/Legal/Documents/FoundationLawsEU.pdf>, section 24.

<sup>31</sup> In June 2010, the Revenue Commissioners introduced a procedure that allows certain foreign organizations to seek a Determination from the Revenue Commissioners that will allow them to receive tax relief in Ireland. To qualify, the body must be legally established in the EEA or EFTA state with its centre of control and some operations therein. A majority of its trustees/directors must be resident within the EEA/EFTA state and its objects must conform to the definition of charity under Irish tax law and its governing instrument must bind the charity regarding the application of its income and/or property. In effect, the Revenue Commissioners will require the entity to meet its normal tests for charitable exempt status that it would expect of a domestic applicant charity with the exception of the residency requirement. However, this determination is narrow and is not available to non-EEA/EFTA charities.

<sup>32</sup> ECJ case number C-318/07. Full text of the judgment is available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=allldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=allldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-318%2F07&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit>.

<sup>33</sup> Curia, Judgment of the Court of Justice in Case C-318/07, *Hein Persche v Finanzamt Ludenscheid*, Press Release No. 05/09, January 27, 2009,

<http://curia.europa.eu/en/actu/communiqués/cp09/aff/cp090005en.pdf>.

<sup>34</sup> European Foundation Centre, *ECJ rules in favour of cross-border giving*, EFC briefing, January 27, 2009,

<http://www.efc.be/EUAdvocacy/EU%20Communiqués%20%20Briefings/befc0908.pdf>

<sup>35</sup> These countries include Austria, Bulgaria, Belgium, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Slovenia and the U.K.

<sup>36</sup> Curia, Judgment of the Court of Justice in Case C-318/07, *Hein Persche v Finanzamt Ludenscheid*, Press Release No. 05/09, January 27, 2009,

<http://curia.europa.eu/en/actu/communiqués/cp09/aff/cp090005en.pdf>.

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<sup>37</sup> Qualification is normally accomplished by registration at the Tax office. According to ICNL's local partner, the European Commission in May 2010 objected to the registration requirement, and suggested that the only permissible requirement may be that the recipient would qualify as an ANBI; it is unclear how this determination will be made.

<sup>38</sup> Article 22 (2), US-Mexico Double Taxation Treaty.

<sup>39</sup> Council on Foundations, United States International Grantmaking, Mexico country note, May 2010, <http://www.usig.org/countryinfo/mexico.asp>

<sup>40</sup> For additional information on the legal issues relating to international grantmaking and donor-advised funds, please see the following article: *International Grantmaking from Donor-Advised Funds: New Requirements and Changing Practices after the Pension Protection Act of 2006*, available at <http://www.cof.org/files/Bamboo/programsandservices/legalinfo/images/International%20Grants%20from%20DAFs.pdf>.

<sup>41</sup> U.S. Internal Revenue Service, *Expenditure Responsibility*, <http://www.irs.gov/charities/foundations/article/0,,id=137613,00.html>.

<sup>42</sup> Techsoup Global, *What Is Equivalency Determination?*, <http://www.techsoupglobal.org/ngosource/ED>.

<sup>43</sup> Canada Revenue Agency, Guidance: Canadian Registered Charities Carrying Out Activities Outside Canada, July 8, 2010, section 1, [http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#\\_ftn1](http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#_ftn1).

Indeed, both charitable organizations and charitable foundations are required to expend at least 80% of the income for which donation tax receipts were issued in the previous year, and may meet this disbursement quota by distributing money to "qualified donees" or by carrying out activities themselves.

<sup>44</sup> The full list of qualified donees includes: a registered charity; a registered Canadian amateur athletic association; a housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged; a Canadian municipality; the United Nations and its agencies; a university that is outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada; a charitable organization outside Canada to which Her Majesty in right of Canada has made a gift during the fiscal period or in the 12 months immediately preceding the period and Her Majesty in right of Canada or a province. See <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-q01-eng.html>. In addition, Canadian tax law also allows Canadians who live "near the border" to make donations to U.S. 501(c)(3) organizations if they have business or employment income from the U.S.

<sup>45</sup> For more information, see [http://www.globalphilanthropy.ca/index.php/articles/new\\_guidance\\_for\\_canadian\\_registered\\_charities\\_carrying\\_out\\_foreign\\_activit/](http://www.globalphilanthropy.ca/index.php/articles/new_guidance_for_canadian_registered_charities_carrying_out_foreign_activit/).

<sup>46</sup> The sample contractor agreement is available at <http://ow.ly/29hM4>.

<sup>47</sup> Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007, page 373. Although beyond the scope of the research, there is evidence to suggest that international philanthropy "may be hampered by the threat of anti-terrorism measures." For example, in a 2004 survey of international funders, the majority agreed that it was now more difficult to fund internationally, and 70% maintained that the war on terrorism complicates overseas funding due to increased security risks abroad. See Koele, page 11-12.

<sup>48</sup> The Terrorism (United Nations Measures) Order 2006, [http://www.hm-treasury.gov.uk/d/si\\_2657\\_terrorism\\_un\\_measures\\_order\\_2006\\_121006.pdf](http://www.hm-treasury.gov.uk/d/si_2657_terrorism_un_measures_order_2006_121006.pdf).

<sup>49</sup> Canada Revenue Agency, Guidance: Canadian Registered Charities Carrying Out Activities Outside Canada, July 8, 2010, section 4.3, [http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#\\_Toc260732227](http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html#_Toc260732227).

<sup>50</sup> *Holder et al. v. Humanitarian Law Project et al.*, 561 U.S. \_\_\_ (2010).

<sup>51</sup> [http://www.icnl.org/knowledge/ijnl/vol10iss3/special\\_2.htm](http://www.icnl.org/knowledge/ijnl/vol10iss3/special_2.htm)

<sup>52</sup> U.S. Department of Treasury, Office of Foreign Assets Control, <http://www.ustreas.gov/offices/enforcement/ofac/>.

<sup>53</sup> Foreign Affairs and International Trade Canada, Export Controls to Belarus, <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/148.aspx>.

<sup>54</sup> U.N. Security Council, SC/9948, Security Council Imposes Additional Sanctions on Iran, June 9, 2010, <http://www.un.org/News/Press/docs/2010/sc9948.doc.htm>.

<sup>55</sup> European Commission, Sanctions or restrictive measures, [http://ec.europa.eu/external\\_relations/cfsp/sanctions/index\\_en.htm](http://ec.europa.eu/external_relations/cfsp/sanctions/index_en.htm).

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<sup>56</sup> Clyde & Co., *EU sanctions against Iran*, July 28, 2010, <http://www.ifw-net.com/freightpubs/ifw/features/eu-sanctions-against-iran/20017796472.htm>.

<sup>57</sup> It should be noted, however, that an Egyptian administrative court found in a prior case involving another association that dissolution of an organization based on receipt of foreign funds without prior approval is unconstitutional. Cairo Institute for Human Rights Studies, *Human Rights in the Arab Region* (Annual Report 2008). (The Association of Human Rights Legal Aid (AHLRA), a similar organization, was dissolved in September 2007 for alleged acceptance of foreign funding without the approval of the Administrative authorities. On 26 October 2008 a judicial ruling was issued to halt the dissolution of the NGO).

<sup>58</sup> In addition to the examples listed here, recent legal initiatives in the Middle East have sought to increase the degree of government engagement in controlling the inflow of foreign funding generally, including philanthropic funding. For example, in March 2009 the **Iraqi** Government sent to the legislature a draft federal law that requires NGOs receiving donations, grants or bequests “from within the Republic of Iraq or from abroad” to obtain prior approval from the Department of NGOs in the Secretariat of the Council of Ministers, and also requires individuals who wish to donate to NGOs to notify this Department ahead of time. (Article 17 of draft law). The law does not specify how permission is obtained or on what grounds permission will be granted or denied. This would have placed a potentially severe burden in the way of NGO sustainability. Fortunately, the version of the federal law enacted in January 2010 did not include this restriction. In July 2009, the Republic of **Yemen’s** Ministry of Labor and Social Affairs proposed a package of twenty amendments to the *Law on Associations and Foundations* (Law 1 of 2001), which, among other proposed changes, would have required domestic associations and foundations to obtain permission from the Minister of Labor and Social Affairs before obtaining any “material or financial support from a foreign person or from foreign actors, either abroad or within the Republic.” (Revised Article 23, proposed Article 30). The Ministry would have had significant discretion to deny funding to organizations, and certain types of organizations that may rely heavily on foreign funding could potentially be starved of resources, essentially extinguishing their rights to associate.

<sup>59</sup> ICNL, NGO Law Monitor, Algeria country report, April 26, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/algeria.htm>

<sup>60</sup> ICNL, NGO Law Monitor, Jordan country report, July 30, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/jordan.htm>

<sup>61</sup> Presidential Decree No. 8 of March 12, 2001, para. 1(2).

<sup>62</sup> ICNL, NGO Law Monitor, Uzbekistan country report, July 28, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/uzbekistan.htm>

<sup>63</sup> Decree # 27, Rules on registration of contracts (decisions) on receiving (giving) grants, of February 12, 2004.

<sup>64</sup> ICNL, *Memorandum on grant registration problem in Azerbaijan*, January 19, 2010.

<sup>65</sup> According to a local expert, the regulations should only apply to social organizations and not foundations and associations, although the Ministry of Internal Affairs continues to insist that all organizations are “social organizations” subject to this set of regulations. See Council on Foundations, United States International Grantmaking, Indonesia country note, April 2010, <http://www.usig.org/countryinfo/indonesia.asp>.

<sup>66</sup> 2008 Regulation on the *Receipt and Giving of Social Organization Aids From and To Foreign Parties* (Article 40(1)); see also John Aglionby, “Indonesian Funding Rule “Draconian,” *Financial Express*, (20 December 2008), <http://www.thefinancialexpress-bd.com/2008/12/20/53598.html>.

<sup>67</sup> Regulation of Minister of Home Affairs Number 38 of 2008 on *Receipt and Giving of Social Organization Aid from and to Foreign Parties*, Article 10.

<sup>68</sup> *Id.*, Article 11.

<sup>69</sup> *Id.*, Article 12.

<sup>70</sup> *Id.*, Article 13.

<sup>71</sup> At the time of writing, a new Foreign Contributions Regulation Bill was pending in India.

<sup>72</sup> Council on Foundations, United States International Grantmaking, India country note, May 2010, <http://www.usig.org/countryinfo/india.asp>.

<sup>73</sup> Zimbabwe Electoral Commission Act, § 16.

<sup>74</sup> Article 2(15) of the Proclamation to Provide for the Registration and Regulation of Charities and Societies, 2009.

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- <sup>75</sup> Debebe Hailegebriel, *Ethiopia: Restrictions on Foreign Funding of Civil Society*, The International Journal for Not-for-Profit Law, Vol. 12, Issue 3, May 2010, [http://www.icnl.org/knowledge/ijnl/vol12iss3/special\\_3.htm](http://www.icnl.org/knowledge/ijnl/vol12iss3/special_3.htm).
- <sup>76</sup> <http://www.theglobeandmail.com:80/news/world/new-law-cripples-ngos/article1367330/>
- <sup>77</sup> 2008 *Receipt and Giving of Social Organization Aids From and To Foreign Parties* (Article 6(2)(e)).
- <sup>78</sup> *Proclamation No. 145/2005, A Proclamation to Determine the Administration of Non-governmental Organizations* [Eritrea], No. 145/2005, 11 May 2005, Article 9(1), available at: <http://www.unhcr.org/refworld/docid/493507c92.html>
- <sup>79</sup> Sunil Jayasiri, "All foreign aid should go through Govt.: Minister Keheliya Rambukwella" (9 March 2009), <http://www.lankamission.org/content/view/1723/9/>; see also "Sri Lanka government expects transparency from NGOs" *ColomboPage* (6 March 2009) [http://www.colombopage.com/archive\\_09/March6160421RA.html](http://www.colombopage.com/archive_09/March6160421RA.html); although the Sri Lankan government has not taken any legislative action as of this writing, government spokespeople have been promising imminent action.
- <sup>80</sup> Sandun A. Jayasekera, "Ministry accuses NGOs of fraud" *Daily Mirror* (27 March 2009), <http://www.dailymirror.lk/DM BLOG/Sections/frmNewsDetailView.aspx?ARTID=44613>.
- <sup>81</sup> Asamblea Nacional anunció agenda legislativa de 2009 (10 March 2009), [http://www.asambleanacional.gob.ve/index.php?option=com\\_content&task=view&id=21299&Itemid=27](http://www.asambleanacional.gob.ve/index.php?option=com_content&task=view&id=21299&Itemid=27).
- <sup>82</sup> ICNL, NGO Law Monitor, Turkey country report, July 12, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/turkey.htm>
- <sup>83</sup> ICNL, NGO Law Monitor, Uzbekistan country report, July 28, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/uzbekistan.htm>
- <sup>84</sup> Council on Foundations, United States International Grantmaking, India country note, May 2010, <http://www.usig.org/countryinfo/india.asp>.
- <sup>85</sup> Regulation of Minister of Home Affairs Number 38 of 2008 on *Receipt and Giving of Social Organization Aid from and to Foreign Parties*, Article 17(2).
- <sup>86</sup> Regulation No. 38, Article 40(1-2).
- <sup>87</sup> While not relating directly to foreign grantmaking per se, local partners in India have raised concerns with the tax treatment of anonymous donations to charitable organizations. According to §115BBC of the Finance Act, 2006, anonymous donations to charitable organizations are subject to the maximum marginal rate of 30%. Subsequently, Finance (No. 2) Act, 2009, provided some relief, in that anonymous donations aggregating up to five years of the total income of an organization or a sum of Rs 100,000, whichever is higher, will not be taxed. Still, charitable organizations in India – and especially those organizations, like the Salvation Army India, which raise funds through donation collection boxes – find that §115BBC is a deterrent to mobilize funds for welfare and developmental work from the general public. Indeed, several such organizations have been compelled to remove these collection boxes.
- <sup>88</sup> It is important to recognize that a "grant" and a "donation" are distinct concepts under Russian law. Foreign donors need not be on a government-approved list in order to make tax-exempt donations.
- <sup>89</sup> Since the introduction of the multiple currency system, however, grant recipients are no longer affected by exchange rate problems.
- <sup>90</sup> More recently, the Rockefeller Brothers Fund (RBF) launched a long-term project in six countries of the West Balkans to promote a legal-fiscal environment that encourages the creation and sustainability of indigenous private foundations so that they remain as funders of local NGOs after the withdrawal of international foundations.
- <sup>91</sup> Defending Civil Society, A Report of the World Movement for Democracy, co-authored by ICNL and the World Movement for Democracy Secretariat at the National Endowment for Democracy, © World Movement for Democracy / ICNL 2008.
- <sup>92</sup> For additional examples, please see Defending Civil Society.
- <sup>93</sup> Indeed, from September 13-16, 2010, prosecutor's offices in Moscow and in a number of other cities carried out a series of coordinated inspections of about 40 Russian NGOs working in the areas of human rights, public interest and social and economic issues. Several Russian NGOs issued a joint statement, demanding an end to what they describe as a "campaign of intimidation." See <http://www.rightsinrussia.info/home/hro-org-in-english-1/ngos/statement>.
- <sup>94</sup> Hadeel Qazzaz, *Palestine: West Bank and Gaza Strip*, in Barbara Ibrahim et. al., *From Charity to Social Change: Trends in Arab Philanthropy* (American University in Cairo: 2008), p. 96.

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- <sup>95</sup> ICNL, NGO Law Monitor, Rwanda country report, July 30, 2010, <http://www.icnl.org/knowledge/ngolawmonitor/rwanda.htm>.
- <sup>96</sup> The Central Repository project championed by The Council on Foundations will expedite the process for some grantees, but challenges will remain for grantees that are not included in the Central Repository.
- <sup>97</sup> U.S. Internal Revenue Service, *Disaster Relief: Assistance by Employer-Sponsored Private Foundation*, <http://www.irs.gov/charities/charitable/article/0,,id=149929,00.html>.
- <sup>98</sup> Association for India's Development, FCRA waiver for Tsunami relief, <http://survivors.aidindia.org/site/content/view/132/146/>.
- <sup>99</sup> See, e.g., *Cyclone Relief - Distrust of Junta Deters Donors*, <http://ipsnews.net/news.asp?idnews=44410>.
- <sup>100</sup> CBC News, *Ottawa matching Canadians' Haiti donations*, <http://www.cbc.ca/canada/story/2010/01/14/haiti-canada-aid.html>.
- <sup>101</sup> Examples in this paragraph are drawn from the following source: [http://www.charityandsecurity.org/background/The\\_Impact\\_of\\_Counterterrorism\\_Measures\\_on\\_Charities\\_and\\_Donors\\_After\\_9/11#\\_edn19](http://www.charityandsecurity.org/background/The_Impact_of_Counterterrorism_Measures_on_Charities_and_Donors_After_9/11#_edn19).
- <sup>102</sup> *International Grantmaking IV Highlights*, (Foundation Center: 2008). Available at [http://foundationcenter.org/gainknowledge/research/pdf/intlgmiv\\_highlights.pdf](http://foundationcenter.org/gainknowledge/research/pdf/intlgmiv_highlights.pdf)
- <sup>103</sup> Debebe Hailegebriel, *Ethiopia: Restrictions on Foreign Funding of Civil Society*, *The International Journal for Not-for-Profit Law*, Vol. 12, Issue 3, May 2010, [http://www.icnl.org/knowledge/ijnl/vol12iss3/special\\_3.htm](http://www.icnl.org/knowledge/ijnl/vol12iss3/special_3.htm).
- <sup>104</sup> *Zimbabwe govt. bans food aid*, Feb. 14, 2010, <http://greatindaba.com/issue/february-2010-vol-34/article/zim-govt-bans-food-aid>.
- <sup>105</sup> *The Herald, Government to Regulate HIV/Aids Organisations*, March 23, 2010, <http://allafrica.com/stories/201003230065.html>.
- <sup>106</sup> See [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009](http://www.transparency.org/policy_research/surveys_indices/cpi/2009).
- <sup>107</sup> Faith Zaba, *Decision on NGOs threatens Western aid*, *Zimbabwe Independent*, July 29, 2010, <http://www.theindependent.co.zw/local/27501-decision-on-ngos-threatens-western-aid.html>.
- <sup>108</sup> See <http://www.givingineurope.org/site/index.cfm?tid=1&mid=1&homep=1&bid=1&sid=1&lg=2>.
- <sup>109</sup> For more information, see [http://www.oecd.org/document/18/0,3343,en\\_2649\\_3236398\\_35401554\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_1_1_1_1,00.html).
- <sup>110</sup> We recognize that the Council on Foundations and other Task Force members are already engaged in reform efforts in their home countries. We defer to these groups on whether there is a role for other Task Force members to support these ongoing domestic initiatives.
- <sup>111</sup> OECD/DAC stands for the Development Assistance Committee of the Organisation for Economic Cooperation and Development. See [www.oecd.org/dac/](http://www.oecd.org/dac/).
- <sup>112</sup> The ICRC stands for the International Conference of the Red Cross and Red Crescent.
- <sup>113</sup> See <http://www2.ohchr.org/english/issues/defenders/index.htm>.
- <sup>114</sup> ICNL, *International Investment Treaty Protection of Not-for-Profit Organizations*, May 2008, available at: [http://www.pdfdownload.org/pdf2html/view\\_online.php?url=http%3A%2F%2Fwww.icnl.org%2Fknowledge%2Fpubs%2FBITNPOProtection2.pdf](http://www.pdfdownload.org/pdf2html/view_online.php?url=http%3A%2F%2Fwww.icnl.org%2Fknowledge%2Fpubs%2FBITNPOProtection2.pdf).
- <sup>115</sup> See <http://conventions.coe.int/treaty/en/Treaties/Html/124.htm>.
- <sup>116</sup> See [http://www.efc.be/Legal/Pages/principles\\_model\\_law.aspx](http://www.efc.be/Legal/Pages/principles_model_law.aspx).
- <sup>117</sup> Research into the question of discrimination includes (1) the Nebolsine Report (1963) ("New efforts in the direction of fiscal assistance to donors and the extension of fiscal privileges to international charitable organizations are urgently needed."); and (2) the 1969 International Fiscal Associations (IFA) Report ("... a critical examination of the criteria and arguments used for a restrictive application of tax concessions seems to provide a sufficient reason to state that there is hardly an objection to a removal of such obstacles. It is necessary, however, to establish several rules to make a removal of the obstacles possible in practice."). Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007, pages 12-14.
- <sup>118</sup> Ineke A. Koele, *International Taxation of Philanthropy*, IBFD © 2007, page 9.
- <sup>119</sup> Id., page 15. See also <http://www.non-gov.org/profile/interphil>.
- <sup>120</sup> Id., pages 17-18. See also <http://www.efc.be/EuropeanFoundationStatute/Pages/EuropeanFoundationStatute.aspx>.
- <sup>121</sup> Id., pages 6-8. The Model Tax Convention was first issued in 1958 and remains in use today; see <http://www.oecdobserver.org/news/fullstory.php/aid/2742/>.

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<sup>122</sup> In the interest of brainstorming, we offer an additional idea for an initiative that would focus on creating “carrots” to encourage reform. Often the focus of international attention is on “naming and shaming.” This initiative, by contrast, would adopt a “naming and faming” approach and seek to reward those who are opening their borders to the outflow and/or inflow of philanthropic giving. More specifically, the initiative would seek to encourage the removal of legal barriers and the introduction of incentives to the legal environment by creating a contest or sense of competition among countries in a designated region or sub-region. Following the announcement of the contest, each country would be given a year (or more) to demonstrate progress in improved legislation and/or improved implementation. At the conclusion of the contest period, candidates would be nominated for consideration, and then measured based on objective, pre-determined criteria. The winner (or winners) of the competition would then receive a large philanthropic award, which could be a one-time award or the commitment of increased philanthropic giving during the upcoming year(s). While we recognize issues relating to this approach, the key point is that we think it would useful to consider the development of new “carrots” to encourage countries to reform their legal framework for global philanthropy.

<sup>123</sup> <http://www.un.org/millenniumgoals/sept 2010 more.shtml>