

Article

**A DIFFERENCE IN APPROACH:
COMPARING THE US FOREIGN AGENTS REGISTRATION ACT
WITH OTHER LAWS TARGETING
INTERNATIONALLY FUNDED CIVIL SOCIETY**

SAMANTHA LAUFER¹

I. Introduction

Over the last decade, several countries have drafted legislation that targets civil society organizations that receive international funding. Governments have justified the enactment of these laws by claiming that they are based on the United States Foreign Agents Registration Act (FARA).²

This article will address the ways in which FARA differs from legislation drafted in other countries. The article is not intended to be a comprehensive analysis or defense of FARA. Rather, governments targeting internationally funded civil society organizations (CSOs) often claim they have modeled their legislation on FARA, and this paper discusses critically important differences in approach.

II. Background

The Foreign Agents Registration Act (FARA)³ was enacted in 1938 in response to the proliferation of German propaganda prior to World War II.⁴ The stated purpose of the Act was to ensure that government officials and citizens would be aware of the identity of those “engaging in political activities for or on behalf of foreign governments, foreign political parties, or other foreign principals, so that their statements and activities could be appraised in the light of their

¹ Samantha Laufer is a 2018 J.D. candidate at Georgetown University Law Center and an intern at the International Center for Not-For-Profit Law (ICNL). The author thanks Douglas Rutzen and the staff of ICNL for their guidance and support.

² In 2012, in response to criticism over Russia’s foreign agents law, President Vladimir Putin said, “I believe that in Russia we can have a law similar to that adopted in the United States . . . why can we not do the same in Russia?” In 2014, while defending the Kyrgyz foreign agents law, President Almazbek Atambayev argued that “the terminology [foreign agent] was first introduced in America. . . the first of such laws was adopted in the cradle of democracy – the USA.” Most recently, in 2016 Israel’s Minister of Justice Ayelet Shaked wrote an Op-Ed in which she likened the Israeli NGO transparency law to the “similar” U.S. FARA. (See *NGO law protects Russia from foreign influence – Putin*, RT, July 31, 2012, <https://www.rt.com/politics/putin-seliger-forum-power-496/>; International Center for Not-for Profit Law, *Analysis of the draft law of the Kyrgyz Republic on Making Additions and Amendments to Certain Legislative Acts in of the Kyrgyz Republic*, http://peremena.kg/wp-content/uploads/2015/06/Analysis-of-ICNL-on-KG-draft-law-on-foreign-agents-eng_30-May.pdf; Ayelet Shaked, *Opinion, Ayelet Shaked Defends Her NGO Bill*, JEWISH TELEGRAPHIC AGENCY, Jan. 4, 2016, <http://www.jta.org/2016/01/04/news-opinion/opinion/ayelet-shaked-ngo-law-protects-israel-from-existential-threats>).

³ Foreign Agents Registration Act of 1938 (“FARA”), 22 U.S.C.A. §611 - §621.

⁴ *FARA Frequently Asked Questions*, U.S. DEP’T OF JUSTICE, NAT. SEC. DIV., <https://www.fara.gov/fara-faq.html> (last visited Oct. 16, 2016).

associations.”⁵ FARA requires persons in the United States acting as agents of foreign principals and engaging in political activities to register with the Department of Justice and disclose information in connection with those activities.

In recent years, countries have proposed or enacted laws targeting internationally funded CSOs, asserting that the legislation is similar to FARA.⁶ Examples of these laws include the following:

- **Russia:** In July 2012, the Russian government amended its Law on Noncommercial Organizations (NCOs)⁷ to require that any NCO that receives international funding and also engages in broadly defined “political activities” be labeled a “foreign agent” and submit to stringent reporting and disclosure requirements. As of August 1, 2016, 137 groups were labeled “foreign agents” and at least 22 NCOs had shut down as a result of the law.⁸
- **Ukraine:** In 2014, the Yanukovich regime passed the Law on Organizations Receiving Funding from Abroad,⁹ though the law was never enacted or implemented. Similar to the Russian NCO law, the bill required nonprofit groups that receive international funding and engage in political activities to register as foreign agents and be subject to burdensome reporting requirements. The law also targeted the mass media and internet providers.
- **Kyrgyzstan:** In 2014, a draft law was introduced in the Kyrgyz Parliament that would have amended the Law on Noncommercial Organizations by placing restrictions on organizations that received funding from abroad and labeling such organizations as “foreign agents.”¹⁰ The original draft of the law was identical to the Russian NCO law. In May 2016, the Kyrgyz Parliament voted down the draft law.
- **Israel:** On July 11, 2016, the Israeli Knesset passed the Transparency Requirements for Parties Supported by Foreign State Entities Bill,¹¹ which imposes enhanced disclosure burdens on CSOs that receive over 50 percent of their funding from certain foreign sources. The law applies exclusively to nonprofit groups that receive funding from public—as opposed to both public and private—foreign sources. Of the 27 groups affected by this legislation, 25 are Palestinian human rights groups.¹²

⁵ U.S. DEP’T OF JUSTICE, REPORT OF THE ATTY GEN. TO THE CONGRESS OF THE U.S. ON THE ADMIN. OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE SIX MONTHS ENDING JUNE 30, 2006 I - 2 (2007), <https://www.fara.gov/reports/June30-2006.pdf>.

⁶ See footnote 2.

⁷ Government of Russia, *Amended Law on Noncommercial Organizations*, 2016.

⁸ See Russian Ministry of Justice Registry of Foreign Agents, <http://unro.minjust.ru/NKOForeignAgent.aspx>.

⁹ Government of Ukraine, *Law on Organizations Receiving Funding from Abroad*, 2014.

¹⁰ Government of Kyrgyzstan, *Draft Law Amending the Law on Noncommercial Organizations*, 2013.

¹¹ Government of Israel, *Transparency Requirements for Parties Supported by Foreign State Entities Bill*, 2016.

¹² Zena Tahhan, *Israel passes controversial NGO bill amid criticism*, Al Jazeera, July 12, 2016, <http://www.aljazeera.com/news/2016/07/israel-passes-controversial-ngo-bill-criticism-160712071408073.html>.

- **Slovakia:** At the time of writing, a “foreign agents” bill is pending in the Slovak Parliament, requiring organizations covered by the bill to state on their educational and informational materials “Warning! Foreign Agent.”¹³

III. Distinguishing Features of FARA

Three important features of FARA differentiate it from other laws targeting internationally funded CSOs: (1) FARA requires an agent-principal relationship; (2) FARA contains numerous exemptions to its application; and (3) FARA does not specifically target CSOs.

1. FARA requires a principal-agent relationship

FARA requires the registration of any person or entity engaged in political activities and acting as an agent of a foreign principal. The Act defines “agent of a foreign principal” as “any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal.”¹⁴ A foreign principal includes any foreign government, foreign political party, non-U.S. person or organization, or entities organized under the laws of other countries or having their primary place of business outside the U.S.¹⁵

The meaning of “agent of a foreign principal” under FARA has been interpreted with reference to the common law definition of agency.¹⁶ Under this definition, a principal-agent relationship is created when an agent “acts as a representative of or otherwise on behalf of another person” and where “[t]he person represented has a right to control the actions of the agent.”¹⁷ This element of control is fundamental to the principal-agent relationship under FARA, and the principal must “ha[ve] the right throughout the duration of the relationship to control the agent’s acts.”¹⁸

In the Restatement (Third) of Agency, the American Law Institute provides examples of relationships and circumstances that fall under this definition:

The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner. People often retain agents to perform specific services. Common real-estate transactions, for example, involve the use of agents by buyers, sellers, lessors, and

¹³ See National Council on the Slovak Republic, Proposal to Amend Law No. 213/1997, available at <http://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=6083>. See also <https://dennikn.sk/470467/fico-poskytol-rozhovor-tasr-bojovali-mimovladnym-sektorom-ktory-bol-casto-dotovany-financovany-zo-zahranicia/?ref=tit?ref=in>

¹⁴ Foreign Agents Registration Act of 1938 (“FARA”), 22 U.S.C.A. §611(c)(1).

¹⁵ 22 U.S.C.A. §611(b)(1)-(3).

¹⁶ See *United States v. German-American Vocational League*, 153 F.2d 860, 864 (3d Cir. 1946).

¹⁷ Restatement (Third) Of Agency § 1.01 (c) (2006).

¹⁸ *Id.* It is not enough to argue that dominance or influence over one party in itself create a principal-agent relationship. Rather, a principal-agent relationship is created only when the principal “has a right of control, not simply an ability to bring influence to bear.” Restatement (Third) Of Agency § 1.01 (c) (2006).

lessees. Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties.¹⁹

As demonstrated by these examples, a principal-agent relationship requires one party to act as a representative of or on behalf of another party, as we find with a lawyer and client or a real estate agent and home buyer. In addition, the principal has the right to control the actions of the agent throughout the duration of the relationship.

A principal-agent relationship is not created simply because one party agrees to provide funding to a second party. This is true even if “the agreement between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make.”²⁰

Under FARA, the fact that a CSO receives international funding does not automatically mean that it must register, even if the organization engages in “political activities.” Rather, FARA requires that the entity act “at the order, request, or under the direction or control, of a foreign principal.”²¹ Congress clarified this point 50 years ago when it amended the law’s definition of “agent of a foreign principal” in order to “make clear that the mere receipt of a bona fide subsidy not subjecting the recipient to the direction or control of the donor does not require the recipient of the subsidy to register as an agent of the donor.”²² In sum, FARA’s registration requirements are not triggered simply because a politically active organization also receives international funding.

By contrast, other laws disregard FARA’s requirement that the entity act “at the order, request, or under the direction or control, of a foreign principal.” For example, the Russian “foreign agents” law applies if a CSO receives international funding (in any amount) and engages in broadly defined “political activities,” even if there is no connection between the international funding and the political activities. For example, if a Russian nonprofit helping orphans received US\$1,000 from an international source to buy cribs and baby food, and also received funding from Russian citizens to advocate for a change in Russia’s child protection laws, the nonprofit would have to register as a “foreign agent” even though there was no connection between the international funding and the organization’s advocacy activities.

The same is true in other legislation. Neither the law adopted by the Yanukovich regime in Ukraine nor the bill proposed in Kyrgyzstan required a connection between the international funder and the CSO’s “political activities.” Similarly, the new Israeli NGO transparency law applies to any CSO that receives 50 percent or more of its funding from foreign governments or

¹⁹ Restatement (Third) Of Agency § 1.01 (Comment c) (2006).

²⁰ Restatement (Third) Of Agency § 1.01 (f)(1) (2006).

²¹ When seeking out potential registrants, the DOJ FARA Registration Unit “looks for direction, control, and tasking from a foreign government.” DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT OF THE NAT’L SEC. DIV’S ENFORCEMENT AND ADMIN. OF THE FOREIGN AGENTS REGISTRATION ACT iii (2016) [hereinafter FARA AUDIT 2016], <https://oig.justice.gov/reports/2016/a1624.pdf>.

²² H.R. Rep. No. 89-1470, at 2401 (1966). In September 2016 the Department of Justice’s Office of the Inspector General (OIG) again clarified this point when it released a review of the FARA Unit’s enforcement of FARA. The report stated that activities carried out by certain CSOs that receive international funding—for example, think tanks, non-governmental organizations, and universities—have not been required by the FARA Unit to register, despite the receipt of international funds, because they “generally claim that they act independently of foreign control or are not serving a foreign interest.” FARA AUDIT 2016, *supra* note 21.

political parties.²³ In sum, these laws claim to be modeled after FARA, but they do not require a principal-agent relationship or even any connection between the international funder and the CSO's advocacy activities.

2. *FARA Contains Exemptions for Various Activities and Actors*

FARA contains exemptions relevant to the nonprofit sector. First, FARA does not apply to entities engaged in purely religious, scholastic, academic, or scientific pursuits, or the fine arts.²⁴ It also includes an exemption for entities engaged in the solicitation or collection of funds for medical aid or "for food and clothing to relieve human suffering."²⁵

FARA also contains an exemption for lawyers representing foreign principals in litigation or agency proceedings, so long as "representation does not include attempts to influence or persuade agency personnel or officials other than in the course of [legal] proceedings..."²⁶ Such an exemption does not exist in the foreign agents laws drafted in other countries. In fact, Russia has labeled numerous legal service providers as "foreign agents," including organizations providing legal aid to migrant populations and victims of discrimination and homophobia.²⁷

Some of the foreign laws contain no exemptions. The Israeli NGO transparency law, for example, applies to all CSOs that receive public international funding. Other laws, such as the Russian foreign agents law, do contain statutory exemptions,²⁸ though it is unclear how these exemptions are applied in practice. For example, despite excluding the "protection of flora and fauna" from its definition of "political activities," numerous environmental groups in Russia have been targeted as foreign agents.²⁹ Or, despite exempting groups that provide "social support and protection of citizens," the Russian government has labeled the Committee Against Torture and the Anti-Discrimination Center as foreign agents.

3. *FARA does not specifically target CSOs*

FARA does not specifically target CSOs, but is geared much more broadly toward regulating those "acting for or in the interest of foreign principals where their activities are political in nature" so that government officials and the public "can appraise their statements and

²³ Government of Israel, *Transparency Requirements for Parties Supported by Foreign State Entities Bill, 2016*.

²⁴ 22 U.S.C.A. §613(e).

²⁵ 22 U.S.C.A. §613(d).

²⁶ 22 U.S.C.A. §613(g).

²⁷ *Russia: Government vs. Human Rights Groups*, Human Rights Watch, (Oct. 12, 2016), <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle>.

²⁸ The Russian law exempts from the definition of "political activities" anything "in the sphere of science, culture, art, healthcare, prevention and protection of public health, social maintenance, social support and protection of citizens, protection of motherhood and childhood, social support of persons with disabilities, propaganda of healthy lifestyle, physical culture and sports, protection of flora and fauna, charitable activities." Government of Russia, *Amended Law on Noncommercial Organizations, 2016*.

²⁹ Government of Russia, *Amended Law on Noncommercial Organizations, 2016*; *Russia: Government vs. Human Rights Groups*, Human Rights Watch (Oct. 12, 2016), <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle>; *Russia: Harsh toll of "Foreign Agents" Law*, Human Rights Watch (June 25, 2014), <https://www.hrw.org/news/2013/06/25/russia-harsh-toll-foreign-agents-law>.

actions accordingly.”³⁰ The vast majority of those registered under FARA are law firms, lobbying firms, public relations firms, and tourism agencies.³¹ Though there may be particular instances where a CSO must register as an agent of a foreign principal (if, for example, that organization is lobbying for a foreign interest and is under the direct control of a foreign government), FARA is not specifically aimed at CSOs. In essence, FARA is intended to regulate a specific type of activity rather than a specific group of actors. Moreover, “the Department’s administration of the Act is not designed or intended to inhibit or discourage the expression of political views in any way,”³² and FARA is almost never applied to CSOs.³³

By contrast, the laws that have been drafted in other countries apply exclusively to CSOs and not to other entities that might engage in lobbying activities. These initiatives are typically justified as necessary for promoting transparency and accountability in the political sphere,³⁴ though the laws do not attempt to broadly regulate the political activities of business or other actors. Further, many of these laws target a subset of civil society, particularly those CSOs that undertake activities disfavored by the government. The Israeli law, for example, requires registration of organizations that receive funding from foreign public sources but not those funded by private sources. In a list released by the Israeli government of CSOs impacted by the law, as noted above, 25 of the 27 are human rights groups that support Palestinian causes.³⁵

The Russian law also specifically targets civil society. It applies to groups that receive any amount of public or private international funding, no matter how small a percentage of the group’s overall budget. As of August 2016, 137 NCOs had been forced to register as foreign agents and 22 NGOs had shut down as a result of the law.³⁶

Russia’s unique historical and political context has also amplified the negative impact of these laws: in Russia the term “foreign agent” is synonymous with “foreign spy.” Some groups have voluntarily dissolved to avoid the stigma that comes with such a designation.³⁷

³⁰ 1966 U.S.C.C.A.N. 2397, 2401; Letter from Peter J. Kadzik, Assistant Attorney General, to Charles E. Grassley, Chairman of the Committee on the Judiciary (May 21, 2015) [hereinafter Kadzik Letter], [http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-05-22%20DOJ%20to%20CEG%20\(Blumenthal%20and%20Kornblum%20FARA\).pdf](http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-05-22%20DOJ%20to%20CEG%20(Blumenthal%20and%20Kornblum%20FARA).pdf).

³¹ See U.S. DEP’T OF JUSTICE, REPORT OF THE ATTY GEN. TO THE CONGRESS OF THE U.S. ON THE ADMIN. OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED, FOR THE SIX MONTHS ENDING JUNE 30, 2015 (2016) [hereinafter REPORT ON FARA ADMINISTRATION 2015], https://www.fara.gov/reports/FARA_JUN_2015.pdf.

³² Kadzik Letter, *supra* note 30.

³³ See REPORT ON FARA ADMINISTRATION 2015, *supra* note 31.

³⁴ *Opinion on Federal Law N. 121-FZ On Non-Commercial Organisations (“Law on Foreign Agents”), On Federal Laws N. 18-FZ and N. 147-FZ*, Venice Commission, Ninth Plenary Session, June 13-14, 2014.

³⁵ See Zena Tahhan, *Israel passes controversial NGO bill amid criticism*, Al Jazeera, July 12, 2016, <http://www.aljazeera.com/news/2016/07/israel-passes-controversial-ngo-bill-criticism-160712071408073.html>.

³⁶ See Russian Ministry of Justice Registry of Foreign Agents, <http://unro.minjust.ru/NKOForeignAgent.aspx>.

³⁷ Charles Diggs, *Foreign Agents Law Has Put 33% of Russia’s NGOs Out of Business*, Bellona (October 20, 2015), <http://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2015-10-foreign-agent-law-has-put-33-percent-of-russias-ngos-out-of-business>; Luhn, Alec, *Russian Green Group Labeled “Foreign Agent” in Crackdown on NGOs*, Guardian (January 14, 2016), <https://www.theguardian.com/environment/2016/jan/14/russian-green-group-labelled-foreign-agent-in-crackdown-on-ngos>.

In sum, by contrast to FARA, the laws of other countries specifically target civil society.

IV. Key Issues to Address When Analyzing Claims that Legislation Is Based on FARA

Considering the features of FARA addressed above, the following questions may be useful for determining whether a foreign law is in fact similar to FARA:

- **Direction and control:** Is the law triggered by a principal-agent relationship, or is registration required merely for the receipt of international funding?
- **Exemptions:** Does the law provide exemptions for certain activities typically undertaken by CSOs? If so, is the definition of “political activities” so broad that it makes such exemptions meaningless?
- **Who is being targeted:** Does the law apply only to CSOs? Does it target specific sources of international funding, with disparate impact on groups advocating against government policies?
- **Context:** Does the phrase “foreign agent” carry historical or linguistic stigma? In some countries, the phrase “foreign agent” is synonymous with “foreign spy,” which has the effect of stigmatizing the work of civil society groups that are forced to register.