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Article

Globalization Without a Safety Net: The Challenge of Protecting Cross-Border Funding of NGOs

Lloyd Hitoshi Mayer[†]

INTRODUCTION

In 2017, Compassion International announced that it would be closing its operations in India after forty-eight years and ending its services to 145,000 Indian children.¹ The reason for this drastic action was that the Indian government was adding Compassion to the over 11,000 nongovernmental organizations (“NGOs”) that, since 2014, had lost their required licenses to accept foreign funds.² Similarly, in 2015, the MacArthur Foundation announced it was closing its Moscow office after having made more than \$173 million in grants over nearly twenty-five years to promote higher education and human rights and to limit proliferation of weapons in Russia.³ The Foundation did not want to end its activities in Russia, but it stated that a series of laws enacted by Russian lawmakers that targeted foreign-funded NGOs, culminating in those lawmakers recommending that the Foundation be formally designated as “undesirable,”

[†] Professor of Law, Notre Dame Law School. I am very grateful for helpful comments on earlier drafts from participants in the International Society of Third Sector Research 12th International Conference, the Nonprofit Forum, and the Notre Dame Faculty Colloquium, and from Andrea Bjorklund, Jimmy Gurulé, and Mark Sidel. I am also very grateful for research assistance from Erik Adams, Jennifer Bandeen, and Dehmeh Smith. Copyright © 2018 by Lloyd Hitoshi Mayer.

1. Ellen Barry & Suhasini Raj, *Major Christian Charity Forced To Halt Work in India*, N.Y. TIMES, Mar. 8, 2017, at A4.

2. *Id.*; see also Noreen Ohlrich, *Nonprofits Shut Down as India Cuts Off Funding*, NONPROFIT Q. (Jan. 30, 2017), <https://nonprofitquarterly.org/2017/01/30/nonprofits-shut-india-cuts-off-funding>.

3. Henry Meyer, *MacArthur Foundation Leaves Russia amid NGO “Witch Hunt,”* BLOOMBERG, (2015); see also *The MacArthur Foundation in Russia: 1991–2015*, MACARTHUR FOUND., <https://www.macfound.org/tags/russia> (last visited Dec. 5, 2017).

had forced its hand.⁴ These stories would be troubling enough in isolation, but they have been repeated not only in India and Russia but also in China, Hungary, Kenya, and many other countries.⁵ Indeed, recent studies indicate that more than fifty countries are placing increasing restrictions on (1) domestic NGOs that receive funding from outside their countries' borders; and (2) foreign NGOs that provide such funding, sharply restricting the ability of both types of entities to pursue their legitimate charitable endeavors.⁶

Cross-border funding is a critical resource for NGOs in many countries for a variety of reasons, including limited domestic resources and the lack of a domestic philanthropic culture.⁷ At the same time, such funding is often viewed with suspicion by the governments of these countries ("host countries") because they are concerned about potential challenges to government authority, foreign influence, and possible cultural conflicts.⁸ While such concerns are generally not sufficient to justify limiting or regulating such support under international law, they provide motivations for governments to do so while publicly relying on other, more defensible justifications, such as national security and accountability. Cross-border funders seeking to challenge such legal restrictions under international law face great difficulty doing so in most countries, however, because of the limited reach

4. Press Release, MacArthur Found., Statement of MacArthur President Julia Stasch on the Foundation's Russian Office (July 21, 2015), <https://www.macfound.org/press/press-releases/statement-macarthur-president-julia-stasch-foundations-russia-office>; Meyer, *supra* note 3.

5. See, e.g., Helene Bienvenu & Palko Karasz, *In Anti-Soros Feud, Hungary Adopts Rules on Foreign-Financed Groups*, N.Y. TIMES, June 14, 2017, at A4; Jennifer Brass, *Kenya's Clampdown on Civil Society Is Against Its Self-Interest*, CONVERSATION (July 11, 2016), <http://theconversation.com/kenyas-clampdown-on-civil-society-is-against-its-self-interest-62019>; Josh Chin, *New Chinese Law Puts Foreign Nonprofits in Limbo; Many NGOs Could be Made Illegal on Jan. 1 amid Campaign Against Unwanted Foreign Influences*, WALL ST. J. (Dec. 14, 2016), <https://www.wsj.com/articles/foreign-nonprofits-brace-for-new-regulations-in-china-1481735054>.

6. See *infra* note 24.

7. This appears to be particularly true for advocacy NGOs that are often in conflict with host-country governmental authorities. See, e.g., Thomas Parks, *The Rise and Fall of Donor Funding for Advocacy NGOs: Understanding the Impact*, 18 DEV. PRAC. 213, 219 (Apr. 2008) (discussing developing countries in Asia); Kenneth Roth, *The Great Civil Society Choke-Out*, FOREIGN POL'Y (Jan. 27, 2016), <http://www.foreignpolicy.com/2016/01/27/the-great-civil-society-choke-out-human-rights-democracy-india-russia-china-kenya>.

8. Parks, *supra* note 7, at 218.

of the applicable international human rights treaties and inadequate enforcement regimes under the most directly applicable international agreements.⁹

One potentially promising avenue for closing this gap between international law and actual practice are the investment treaties to which many host countries and the home countries of cross-border funders are party.¹⁰ This growing web of treaties often define both investor and investment broadly enough to reach at least some cross-border funding of NGOs, and also generally provide a relatively effective enforcement mechanism for resolving disputes between investors and host countries.¹¹ But a closer examination of both the jurisdictional and other hurdles for invoking these treaties and the costs of trying to overcome those hurdles reveals significant barriers for cross-border funders. These barriers are difficult for NGOs to overcome because of their limited financial resources and the likely modest amount of any possible damages they could recover, particularly in light of recent data about the substantial financial costs incurred by for-profit investors that seek investment treaty protection. As a result, the promise of these treaties to protect cross-border funding of NGOs is unlikely to be fulfilled, unless ways are found to cover or significantly reduce those costs. Furthermore, most affected NGOs presumably are not interested primarily in recovering monetary damages but are instead primarily interested in being free to pursue their activities in the host countries, a goal not well-suited to the usual investment treaty dispute resolution procedures.

Absent ways to resolve these shortcomings, another alternative is to consider what lessons the successful development of the

9. A possible exception is the pending court challenge under the European Convention on Human Rights to some of Russia's actions in this regard. See *infra* note 274 and accompanying text.

10. See Timothy C. Evered, *Foreign Investment Issues for International Non-Governmental Organizations: International Health Projects in China and the Former Soviet Union*, 3 BUFF. J. INT'L L. 153, 171–78 (1996); Nick Gallus & Luke Eric Peterson, *International Investment Treaty Protection of NGOs*, 22 ARB. INT'L 527, 532–34 (2006); Sabine Konrad, *Protection for Non-Profit Organizations*, in INTERNATIONAL INVESTMENT LAW 555, 557–58 (Marc Bungenberg et al. eds., 2015); see also Gregory W. MacKenzie, Note, *ICSID Arbitration as a Strategy for Levelling the Playing Field Between International Non-Governmental Organizations and Host States*, 19 SYRACUSE J. INT'L L. & COM. 197, 223–33 (1993) (suggesting using international arbitration, which is increasingly used to resolve trade and cross-border investment disputes, to protect cross-border funding of NGOs).

11. See, e.g., MacKenzie, *supra* note 10, at 215–16.

investment treaty regime provides regarding the conditions that would be needed for the development of a separate treaty framework to more robustly protect cross-border funding of NGOs. Unfortunately, it appears that such conditions do not exist currently and may not exist for many years. In their absence and the absence of any other viable international law solution in the foreseeable future, the remaining alternative for NGOs is to continue pursuing ad hoc, country-specific efforts to resist the increasing legal restrictions on such funding.

This Article begins by summarizing the growth of burdensome legal restrictions on cross-border funding of NGOs. It then analyzes in Part II the promise of investment treaties to counter such restrictions, including the jurisdictional and other significant legal hurdles to including such funding within the reach of those treaties that may undermine that promise. Part III then explores the financial and possible other costs of invoking investment treaty protections and explains why those substantial costs further undermine that promise. Part IV considers two options for salvaging the promise of international treaties to address these restrictions. One option would be to reduce the financial costs to NGOs of invoking existing investment treaties either through third-party financing or by encouraging pro bono assistance, with the hope that it would then be feasible for many affected NGOs to obtain favorable arbitration decisions with respect to the jurisdictional and other legal hurdles. The other option is to learn what factors are needed to develop momentum for new treaties that could protect cross-border funding of NGOs from the history of investment treaties, and to examine whether those factors currently exist or could be developed in the foreseeable future. Unfortunately, the prospects for these options are not bright, and therefore Part V discusses a menu of ad hoc, country-specific methods for resisting restrictions on such funding that have proven successful in some instances.

I. THE “CLOSING SPACE” FOR NGOS

A. THRESHOLD ISSUES

One threshold issue when considering cross-border funding of NGOs is how to define nongovernmental organization, especially for purposes of international law.¹² Domestic legal definitions vary, but scholars who have considered the issue typically

12. See Gregor Zymek, *Too Invested in Politics? - Advocacy and State Funding as Limits of NGO Claimants in Investor-State Arbitration* 10–12 (Aug. 15,

define nongovernmental organization or related terms such as nonprofit by the characteristics that tend to be shared across countries and serve to distinguish such entities from businesses, governments, and families, including not distributing profits to owners and voluntary participation.¹³ For purposes of this Article, it is sufficient to identify NGOs as legal entities under the applicable domestic law that (1) do not have profit-seeking as their primary motivation (as distinct from businesses); (2) are not governmental entities (although they may receive significant government funding); and (3) for which involvement by individuals is generally voluntary.¹⁴

Another threshold issue is the significance of cross-border funding of NGOs, in terms of both its amount and impact. Turning first to amount, it is difficult to do more than roughly estimate the extent of cross-border funding of NGOs annually, because there are no official compilations of such funding. Overall development aid (defined broadly) from both governmental and private sources appears to be slightly more than \$200 billion annually.¹⁵ Of this amount, incomplete data based on information from thirty-nine countries indicates that private giving (including from individuals and businesses, as well as NGOs, and to governments as well as to host country NGOs) was slightly more

2016) (unpublished LL.M. research project, McGill University) (on file with author) (discussing the lack of legal definition under international law).

13. See, e.g., LESTER M. SALAMON & HELMUT K. ANHEIER, *DEFINING THE NONPROFIT SECTOR: A CROSS-NATIONAL ANALYSIS* 33–34 (1997) (identifying five common characteristics of nonprofits: organized, private, non-profit-distributing, self-governing, and voluntary); Lloyd Hitoshi Mayer, *The “Independent” Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 *VAND. L. REV.* 51, 55–56 (2012) (describing common characteristics of nonprofits); Lester M. Salamon & S. Wojciech Sokolowski, *Beyond Nonprofits: Re-conceptualizing the Third Sector*, 27 *VOLUNTAS* 1515, 1517–18 (2016) (describing common characteristics of nonprofits); Michael Bernhard et al., *The Varieties of Democracy Core Civil Society Index* 7–8 (The Varieties of Democracy Inst., Working Paper Series 2015:13, 2015), https://www.v-dem.net/media/filer_public/47/2e/472eec11-830f-4578-9a09-d9f8d43cee3a/v-dem_working_paper_2015_13_edited.pdf (identifying civil society organizations as “groups of self-organized interested citizens” acting in pursuit of those citizens’ interests broadly conceived and distinct from groups engaged in purely spiritual or economic activity).

14. This broad definition avoids the potential trap of limiting NGOs only to organizations that promote certain (generally Global North) values. See Thomas Kelley, *Wait! That’s Not What We Meant by Civil Society!: Questioning the NGO Orthodoxy in West Africa*, 36 *BROOK. J. INT’L L.* 993, 1000–02 (2011).

15. HUDSON INST., *THE INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES* 2016, at 6 (2016); Anup Shah, *Foreign Aid for Development Assistance*, *GLOBAL ISSUES* (last updated Sept. 28, 2014), <http://www.globalissues.org/article/35/foreign-aid-development-assistance#Sidenoteonprivatecontributions>.

than \$60 billion in 2014.¹⁶ Of course not all cross-border funding of NGOs necessarily falls within the term development aid, even defined broadly, so these are very rough figures. They nevertheless indicate that such funding totals annually at least tens of billions of dollars and possibly significantly more.

The impact of such funding is even more difficult to determine. Most commentators assume that such funding has positive effects on the recipient NGOs and the populations of their host countries, both with respect to meeting basic human needs and with respect to promoting human rights and democracy.¹⁷ But while there are numerous studies that focus on the impact of NGOs in a specific area (education, health care) or in a specific country, more comprehensive evaluations are generally lacking. Some funders, particularly larger ones, commission evaluations of their own efforts, but outsiders often criticize such evaluations as biased and incomplete.¹⁸ The area where it appears there have been the most robust attempts to measure the overall impact of efforts that often receive cross-border funding is with respect to specific methods of international development, but even in this context such comprehensive studies are still very much in their infancy and face significant obstacles.¹⁹ As a result, some commentators question the extent to which such funding has positive effects on the recipient domestic NGOs, and through them their host countries.²⁰ The strength of any positive effects

16. HUDSON INST., *supra* note 15, at 6.

17. For a thoughtful consideration of this assumption with respect to promoting democracy, see generally FUNDING VIRTUE: CIVIL SOCIETY AID AND DEMOCRACY PROMOTION (Marina Ottaway & Thomas Carothers eds., 2000).

18. *Compare, e.g.*, Robert Klara, *Infographic: A Look at the Millions of Lives Saved and Improved by the Gates Foundation*, ADWEEK (June 1, 2016), <http://www.adweek.com/brand-marketing/infographic-look-millions-lives-saved-and-improved-gates-foundation-171643> (depicting the foundation's positive contribution to global health and development), *with, e.g.*, Julia Belluz, *The Media Loves the Gates Foundation. These Experts Are More Skeptical*, VOX (June 10, 2015), <http://www.vox.com/2015/6/10/8760199/gates-foundation-criticism> (challenging the foundation's "lack of transparency, its veto power over other global health institutions, and its spending priorities").

19. See Henrik Hansen & Neda Trifković, *Means to an End: The Importance of the Research Question for Systematic Reviews in International Development*, 27 EUR. J. DEV. RES. 707, 717–20 (2015); Richard Mallett et al., *The Benefits and Challenges of Using Systematic Reviews in International Development Research*, 4 J. DEV. EFFECTIVENESS 445, 453 (2012).

20. See, e.g., Nicola Banks et al., *NGOs, States, and Donors Revisited: Still Too Close for Comfort?*, 66 WORLD DEV. 707, 710–13 (2014); Peter Nunnenkamp & Hannes Öhler, *Funding, Competition and the Efficiency of NGOs: An Empirical Analysis of Non-charitable Expenditure of US NGOs Engaged in Foreign Aid*, 65 KYKLOS 81, 81–82 (2012); Michael Hobbes, *Stop Trying To Save the*

may also be dependent on conditions beyond the control of NGOs, such as the extent of other freedoms in a given country.²¹ And of course trying to separate the flows of funding of particular interest in this Article—from foreign NGOs to domestic NGOs—is also difficult.

Even given these limitations, and while undoubtedly some of the funding has little positive impact or may even have a negative impact on the recipient NGOs and their host countries, even critical observers tend to conclude that a substantial amount of cross-border funding for NGOs is positively affecting education, health, and other metrics that the funders, the recipients, and host-country governments generally agree are desirable.²² In addition and as detailed below, permitting such funding is an aspect of the generally recognized right to freedom of association.²³ Unnecessary restrictions on such funding are therefore likely both to have a negative impact on host country populations in the aggregate and to violate recognized international human rights; if the restrictions are severe enough to sharply curtail or even end such funding, both that impact and that violation will almost certainly be significant.

B. INCREASING LEGAL RESTRICTIONS ON CROSS-BORDER FUNDING OF NGOS

Numerous articles, reports, and studies have documented the increasing use over the past decade of legal restrictions to create significant administrative and reputational burdens for domestic NGOs that receive cross-border funding and for the foreign NGOs that provide such funding. More specifically, Maina

World: Big Ideas Are Destroying International Development, NEW REPUBLIC (Nov. 17, 2014), <https://newrepublic.com/article/120178/problem-international-development-and-plan-fix-it>.

21. See, e.g., Nuno S. Themudo, *Reassessing the Impact of Civil Society: Nonprofit Sector, Press Freedom, and Corruption*, 26 GOVERNANCE 63, 66–70 (2013); Anna Lührmann et al., *Constraining Governments: New Indices of Vertical, Horizontal and Diagonal Accountability* 19, 25, 28 (Varieties of Democracy Inst., Working Paper Series 2017:46, 2017), https://www.v-dem.net/media/filer_public/9f/ff/9fffb5f8-9399-4e3d-ba60-f8341c177343/v-dem_working_paper_2017_46.pdf.

22. See, e.g., Banks et al., *supra* note 20, at 712–13; see also Michael Bernhard et al., *Institutional Subsystems and the Survival of Democracy: Do Political and Civil Society Matter?* 24 (Varieties of Democracy Inst., Working Paper Series 2015:4, 2015), https://www.v-dem.net/media/filer_public/b2/08/b208c64e-53e1-4203-bb34-5f3adc8674c0/v-dem_working_paper_2015_4.pdf (explaining empirical work indicating the positive effect of civil society on the survival of democratic forms of governance).

23. *Infra* notes 72–78 and accompanying text.

Kiai, the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association from 2011 to 2017; Thomas Carothers of the Carnegie Endowment for International Peace; and David Moore and Douglas Rutzen of the International Center for Not-for-Profit Law, among others, have documented this development.²⁴ The issue has become high profile enough to attract not only significant media coverage but also the attention of the U.S. Congress and a prominent Washington, D.C. think tank.²⁵

Russia is often cited as one of the first countries to take this approach, with its enactment of burdensome registration requirements and expanded government supervisory powers for noncommercial organizations in 2006 in the wake of the color revolutions in Georgia and Ukraine.²⁶ It then enhanced these requirements in 2012 with a law requiring Russian organizations to register as foreign agents if they receive foreign assistance and intend to attempt to change government policy.²⁷ On its face,

24. Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Report on the Rights to Freedom of Peaceful Assembly and of Association*, ¶¶ 8–42, U.N. Doc. A/HRC/23/39 (Apr. 24, 2013); THOMAS CAROTHERS, THE CLOSING SPACE CHALLENGE: HOW ARE FUNDERS RESPONDING? 4–8 (2015); THOMAS CAROTHERS & SASKIA BRECHENMACHER, CLOSING SPACE: DEMOCRACY AND HUMAN RIGHTS SUPPORT UNDER FIRE 7–14 (2014); Int'l Ctr. for Not-for-Profit Law (ICNL) & World Movement for Democracy Secretariat at the Nat'l Endowment for Democracy (NED), *Defending Civil Society*, 14 INT'L J. NOT-FOR-PROFIT L. 5, 27–30 (2012); David Moore & Douglas Rutzen, *Legal Framework for Global Philanthropy: Barriers and Opportunities*, 13 INT'L J. NOT-FOR-PROFIT L. 5, 17–25 (2011); see also BARBARA UNMÜBIG, CIVIL SOCIETY UNDER PRESSURE – SHRINKING – CLOSING – NO SPACE 4–8 (2016), https://www.boell.de/sites/default/files/uploads/2015/12/20160601_civil_society_under_pressure_shrinking_spaces_englisch.pdf.

25. See *Global Philanthropy and Remittances and International Development: Hearing Before the Subcomm. on Multilateral, Int'l Dev., Multilateral Inst., and Int'l Econ., Energy, and Envtl. Policy of the S. Comm. on Foreign Relations*, 115th Cong. (2017), <https://www.foreign.senate.gov/hearings/global-philanthropy-and-remittances-and-international-development-050317> (including testimony relating to restrictions on cross-border funding); *Threats to Civil Society Around the World: Hearing Before the Tom Lantos Human Rights Commission*, 115th Cong. (2017), <https://humanrightscommission.house.gov/events/hearings/threats-civil-society-around-world>; *Celebrating Global Philanthropy*, HUDSON INST., <http://www.hudson.org/events/1397-celebrating-global-philanthropy32017> (last visited Dec. 5, 2017) (focusing in part on “government crackdowns on non-profits and cross-border financial flows”).

26. Natalia Bourjaily, *Some Issues Related to Russia's New NGO Law*, 8 INT'L J. NOT-FOR-PROFIT L. 4, 5–6 (2006).

27. CAROTHERS & BRECHENMACHER, *supra* note 24, at 1–2, 12; Oonagh B. Breen, *Allies or Adversaries? Foundation Responses to Government Policing of Cross-Border Charity*, 17 INT'L J. NOT-FOR-PROFIT L. 45, 63 n.85 (2015); Kiai, *supra* note 24, at 9.

a registration requirement for entities may not seem onerous, and Russian officials even defended the requirement by stating it was based on a long-standing United States registration law.²⁸ In practice, however, the requirement has led many entities with foreign connections, including the Russian arm of the MacArthur Foundation, to cease their activities in Russia completely.²⁹ The term foreign agent also has a strong stigmatizing effect in Russia, as it is commonly understood to mean foreign spy, which has tended to deter domestic support for registered NGOs, even as domestic requests for assistance from the same NGOs continue unabated.³⁰ Failure to accept that label can trigger the application of substantial fines.³¹

As another example, China has recently shifted oversight of foreign NGOs to the Ministry of Public Security, China's internal security agency, as well as imposing a burdensome registration process on such NGOs and limiting the areas—both subject matter and geographic—in which they can operate.³² These new legal rules require any foreign NGO seeking to operate in China to partner with an approved domestic NGO, a requirement that can be difficult to satisfy.³³ And the Chinese government has been slow to provide guidance to foreign NGOs on how to comply with the new law, leading some legal experts and nonprofit staff to speculate that it is doing so intentionally to render such

28. Ingrid Burke, "Foreign Agents" Under Russia's NGO Law and Its US Doppelganger, RUSSIAN LEGAL INFO. AGENCY (July 27, 2012), http://www.rapsinews.com/legislation_publication/20120727/263954264.html.

29. See AMNESTY INT'L, AGENTS OF THE PEOPLE: FOUR YEARS OF "FOREIGN AGENTS" LAW IN RUSSIA: CONSEQUENCES FOR THE SOCIETY 1–6 (2016) (providing case studies illustrating the effect of Russia's 2012 law on Russian NGOs); Meyer, *supra* note 3.

30. See AMNESTY INT'L, *supra* note 29, at 6; Françoise Daucé, *The Duality of Coercion in Russia: Cracking Down on "Foreign Agents"*, 23 DEMOKRATI-ZATSIYA 57, 58 (2015); Françoise Daucé, *The Government and Human Rights Groups in Russia: Civilized Oppression?*, 10 J. CIV. SOC'Y 239, 242–43 (2014); Galina Goncharenko, *Essays on Financial Accountability of Human Rights Organizations* 138–41 (June 2016) (unpublished Ph.D. dissertation, Norwegian School of Economics), http://sro.sussex.ac.uk/64693/1/Goncharenko_IRRR_Essays%20on%20financial%20accountability_PhD%20dissertation_14.09.pdf.

31. See AMNESTY INT'L, *supra* note 29, at 4, 31.

32. See *The China NGO Project: About the China NGO Project*, CHINAFILE, <http://www.chinafile.com/ngo/about> (last visited Dec. 5, 2017); *Civic Freedom Monitor: China*, INT'L CTR. FOR NOT-FOR-PROFIT LAW (ICNL), [hereinafter ICNL China], <http://www.icnl.org/research/monitor/china.html> (last updated June 9, 2017).

33. Chin, *supra* note 5.

groups technically illegal and therefore easier to control or expel.³⁴ It also has been slow to register foreign NGOs since the law went into effect at the beginning of 2017, with only ninety registered during the first five months.³⁵

But these two countries are far from alone in this regard, as more than fifty countries have imposed such measures in recent years.³⁶ The emergence of these restrictions is particularly disheartening given the previous optimism regarding the growing, positive influence of NGOs in many countries with the end of the Cold War, the spread of technology, and other recent developments.³⁷ In many countries these measures are particularly harmful to the domestic NGOs that relied on this support because they lack significant domestic support, usually because of a combination of potential donors' fears of retaliation for supporting the human rights or democratization efforts of the NGOs and the lack of a domestic philanthropic culture.³⁸

Only a handful of fully authoritarian governments have taken more extreme steps, such as dissolving or taking over many domestic NGOs.³⁹ For example, in 2017 Egypt enacted a new law governing all NGOs that imposes stringent registration requirements enforced by heavy criminal penalties, which is widely viewed as an attack on the very existence of such organizations.⁴⁰ But subtler and, therefore, easier to justify restrictions

34. Chris Buckley, *Uncertainty over New Chinese Law Rattles Foreign Non-profits*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/world/asia/china-foreign-ngo.html>; Chin, *supra* note 5.

35. ICNL China, *supra* note 32.

36. CAROTHERS & BRECHENMACHER, *supra* note 24, at 7, 61; Darin Christensen & Jeremy M. Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 J. DEMOCRACY 77, 80 (2013); Kendra Dupuy et al., *Hands Off My Regime! Governments' Restrictions on Foreign Aid to Non-Governmental Organizations in Poor and Middle-Income Countries*, 84 WORLD DEV. 299, 302 (2016).

37. See CAROTHERS & BRECHENMACHER, *supra* note 24, at 2; Banks et al., *supra* note 20, at 707; Gerard Clarke, *Non-Governmental Organizations (NGOs) and Politics in the Developing World*, 46 POL. STUD. 36, 36 (1998); Jessica T. Matthews, *Power Shift: The Rise of Global Civil Society*, 76 FOREIGN AFFS. 50, 50–67 (1997); Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, 17 INT'L J. NOT-FOR-PROFIT L. 3, 5–6 (2015).

38. See, e.g., AMNESTY INT'L, *supra* note 29, at 5–6; JOHN CASEY, *THE NON-PROFIT WORLD: CIVIL SOCIETY AND THE RISE OF THE NONPROFIT SECTOR* 200 (2015).

39. CAROTHERS & BRECHENMACHER, *supra* note 24, at 6–7.

40. Declan Walsh, *Egypt's President Enacts Law Placing Severe Restrictions on Aid Groups*, N.Y. TIMES, May 30, 2017, at A4; see also Aswat Masriya, *Egypt: Political Parties, Rights Groups Reject NGO Law*, ALLAFRICA (Nov. 15, 2016), <http://allafrica.com/stories/201611151106.html> (citing a joint

are more widespread, including in countries with governments usually characterized as semiauthoritarian or even relatively democratic.⁴¹ For example, India in 2010 passed a law imposing additional administrative requirements on domestic NGOs receiving foreign assistance and prohibiting foreign funding for any organizations of a “political nature,”⁴² and Hungary in 2017 passed legislation to require domestic NGOs that receive foreign funding to publicly identify themselves and their donors, a step that many critics saw as part of a larger government effort to stigmatize and discredit such NGOs.⁴³

The specific legal restrictions on domestic NGOs receiving cross-border funding include: (1) significant additional registration and reporting obligations, sometimes including having to register in a manner that stigmatizes the NGO (Hungary, Indonesia, Russia); (2) requiring advance government approval before accepting or seeking such funding (Belarus, India, Jordan); (3) significant taxes or the imposition of highly unfavorable exchange rates on such funding (Russia, Zimbabwe); (4) requiring such funding to be routed through government channels or to only be used for certain activities (Bolivia, Eritrea); (5) limiting the amount of such funding to a certain percentage of a domestic NGO’s budget (Ethiopia); and (6) prohibiting receipt of such funding for NGOs engaged in certain activities, which are often defined vaguely (India, Venezuela).⁴⁴ The legal restrictions on

statement from numerous political parties and civil society organizations stating the law, prior to approval, would set “a dangerous precedent” and treats “civil society as an enemy to be defeated through secret plots and laws”).

41. CAROTHERS & BRECHENMACHER, *supra* note 24, at 6–7 (stating semiauthoritarian regimes constitute the “majority” of governments engaged in pushback against NGOs, but that even “relatively democratic governments” have “recently taken or seriously considered measures” to restrict NGOs); *see also* Helmet K. Anheier, Discussion Paper, *Civil Society Challenged: Towards an Enabling Policy Environment*, *ECONOMICS* 1, 10–11 (2017), <http://www.economics-ejournal.org/economics/discussionpapers/2017-45/file> (proposing a G20-initiated independent commission to address state-civil society relations, including with respect to the shrinking space for civil society in some countries both within and outside of the G20).

42. CAROTHERS & BRECHENMACHER, *supra* note 24, at 9; *see also* Moore & Rutzen, *supra* note 24, at 20, 23 (discussing the restrictions India already imposed on domestic NGOs prior to the 2010 law).

43. Bienvu & Karasz, *supra* note 5 (noting that, in addition to the law that critics state is meant to “stigmatize, discredit, and intimidate” NGOs, the Hungarian Government has also circulated biased questionnaires claiming certain NGOs are dangerous “to [Hungary’s] independence”).

44. *See* CAROTHERS & BRECHENMACHER, *supra* note 24, at 8–11; UNMÜBIG, *supra* note 24, at 6–9, 12; Dupuy et al., *supra* note 36, at 311; Moore & Rutzen, *supra* note 24, at 7, 18–25; Rutzen, *supra* note 37, at 9–20.

foreign NGOs providing such funding include: (1) repeated and burdensome investigation of such funders (Kazakhstan, Russia); (2) refusing to register such NGOs and then accusing the NGOs of violating host country registration requirements (Jordan); (3) criminal prosecution of foreign NGO representatives (Egypt); and (4) expulsion from the host country (Azerbaijani, Ethiopia).⁴⁵ Such legal rules are in addition to the creation of a hostile political environment for such funders and the domestic NGOs they support through critical public comments by senior government officials and government-controlled communication outlets,⁴⁶ and the imposition of more general legal barriers on the creation and operation of domestic NGOs.⁴⁷

In some countries, the restrictions vary based on the type of activity funded, with NGOs engaged in advocacy or human rights related activities more likely to be targeted, as opposed to NGOs engaged in less controversial activities, such as the provision of social services.⁴⁸ Not all restrictions are so finely tuned, however. For example, the Russian laws discussed above have hit not only NGOs engaged primarily in the former types of activities but also a charity involved in combating drug addiction and the spread of HIV (although the government also accuses of it of engaging in political activities).⁴⁹ Similarly, the Turkish

45. See CAROTHERS & BRECHENMACHER, *supra* note 24, at 12–15.

46. *Id.* at 11–12.

47. *Survey of Trends Affecting Civic Space: 2015–16*, GLOBAL TRENDS IN NGO LAW, Sept. 2016, at 2; see also BEN HAYES ET AL., TRANSNATIONAL INSTITUTE, ON “SHRINKING SPACE”: A FRAMING PAPER 3 (Apr. 2017), https://www.tni.org/files/publication-downloads/on_shrinking_space_2.pdf (noting NGOs have recently been galvanized to understand and counter “shrinking space”); ICNL & NED, *supra* note 24, at 13 (listing a host of legal barriers facing NGOs); Moore & Rutzen, *supra* note 24, at 25–27 (discussing “legal barriers that impede the development” of domestic NGOs that receive cross border funding).

48. See KATERINA HADZI-MICEVA EVANS, CONFERENCE OF INGOS OF THE COUNCIL OF EUROPE, EXPERT COUNCIL ON NGO LAW, REGULATING POLITICAL ACTIVITIES OF NON-GOVERNMENTAL ORGANIZATIONS, OING Conf/Exp ¶¶ 1–5, 46 (2015), <https://rm.coe.int/1680640fc2> (noting that in some countries any advocacy or human rights work done by an NGO would fall under broad restrictions against “political activity”); Zymek, *supra* note 12, at 9 (stating one of the main arguments made against cross-border funded NGOs is that they advocate for a destabilization of government); *Foreign Funding of NGOs: Donors: Keep Out*, ECONOMIST (Sept. 12, 2014), <https://www.economist.com/news/international/21616969-more-and-more-autocrats-are-stifling-criticism-barring-non-governmental-organisations> (stating that “NGOs focused on democracy-building or human rights are the most affected” by laws that limit cross-border funding).

49. See Ivan Watson et al., *On the Front Lines of Russia’s “Staggering” HIV Epidemic*, CNN (June 8, 2017), <http://www.cnn.com/2017/06/06/health/russia>

government recently revoked the registration of Mercy Corps, forcing the U.S. charity, which is heavily involved in helping Syrian civilians, to end its operations in Turkey.⁵⁰

The apparent advantage that most of these legal restrictions have over more draconian measures, such as wholesale closure of NGOs and seizure of their assets and records, is that such restrictions are easier to justify, thereby reducing exposure to negative international consequences that are likely to be triggered by blunter approaches. The countries that impose these restrictions often publicly argue for them based on a variety of concerns, including promoting transparency and accountability, ensuring cultural sensitivity and limiting cultural conflicts, controlling development priority setting, and combatting terrorism.⁵¹ Such concerns are certainly legitimate; for example, the risks of NGOs serving as conduits for financing terrorism has been well documented,⁵² although NGOs are not necessarily at greater risk in this regard than other types of entities.⁵³ In part for this reason, in many instances government officials appear

-hiv-epidemic/index.html (noting the Russian government's decision to label the Rylkov Foundation a Foreign Agent, due to cross-border funding, has put its operation at risk).

50. Karen DeYoung & Dan Lamothe, *Turkey Shuts Down a U.S. Aid Group That Helped Syrians*, WASH. POST (Mar. 7, 2017), https://www.washingtonpost.com/world/turkey-shuts-down-a-us-aid-group-that-helped-syrians/2017/03/07/e510d272-0374-11e7-9d14-9724d48f5666_story.html; Rick Gladstone, *Turkey Halts U.S. Charity That Aids Over 500,000 Syrians a Month*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/middleeast/turkey-syria-mercy-corps.html>.

51. ICNL & NED, *supra* note 24, at 31–32; Kiai, *supra* note 24, at 8–13; Douglas Rutzen, *Civil Society Under Assault*, 26 J. DEMOCRACY 28, 31–33 (2015).

52. See, e.g., GEOFFREY CORN ET AL., NATIONAL SECURITY LAW 402–19 (2015) (discussing economic sanctions and terrorist financing, and noting that the U.S. government designated over forty “purported charities” suspected of “providing financial support to terrorists or terrorist organizations”); JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 117–47 (2008) (discussing “corrupt Islamic charities” noting that they have been “one of the most important sources of funds” for many terrorist organizations); Matthew Levitt, *Charitable Organizations and Terrorist Financing: A War on Terror Status-Check*, WASH. INST. (Mar. 19, 2004), <http://www.washingtoninstitute.org/policy-analysis/view/charitable-organizations-and-terrorist-financing-a-war-on-terror-status-che> (discussing charitable organizations that act as fronts for international terror groups).

53. See Rebecca Cooney, *Charities Are “Not Inherently at Risk of Terrorist Abuse,” Financial Action Task Force Says*, THIRD SECTOR (June 30, 2016), <http://www.thirdsector.co.uk/charities-not-inherently-risk-terrorist-abuse-financial-action-task-force-says/finance/article/1400767> (noting a global body that “sets counter-terrorism financing standards” stated “charities are not inherently at risk of terrorist abuse”).

sincerely to believe that the new rules are necessary to address these concerns.⁵⁴

The reasons why these restrictions have attracted such sharp criticism, however, is that they often go well beyond what is required to address these concerns, including because of broad grants of discretionary power to government officials that effectively cut off foreign support of domestic NGOs without sufficient justification. For example, failure to register under the pejorative label “foreign agent[]” in Russia has led not only to warnings and court actions, but also substantial fines.⁵⁵ In China, even before the most recent round of legal changes there was a system of “graduated controls” under which government authorities could arbitrarily penalize or even shut down NGOs that engaged in disapproved activities.⁵⁶ As a result, these new restrictions have often proven to be quite effective in dissuading domestic NGOs from seeking such funding or using it for disfavored activities, and foreign NGOs from providing it, causing shifts in the activities of NGOs and, in some instances, their closure.⁵⁷ In contrast, less controversial laws in other countries, such as the U.S. Foreign Agents Registration Act that requires the registration of persons who act in the interests of a foreign principal and at the direction of that foreign principal (including receiving a major part of the person’s financing from that foreign principal), tend to be more limited in scope, not designed to stigmatize or delegitimize the affected entities, and weakly enforced.⁵⁸

Even laws that on their face may appear reasonable and so consistent with international law often are more troubling when considered in context, including government statements and other actions demonstrating hostility toward some or all NGOs. For example, the recent Hungarian legislation noted earlier requiring NGOs receiving cross-border funding to identify themselves and their donors has drawn criticism in part because of

54. See, e.g., CAROTHERS, *supra* note 24, at 21 (noting in some cases governments are sincerely attempting to address terrorist financing concerns “but fail to strike a balance with other priorities”).

55. CAROTHERS & BRECHENMACHER, *supra* note 24, at 20.

56. Shawn Shieh, *Mapping the Dynamics of Civil Society in China*, in NGO GOVERNANCE AND MANAGEMENT IN CHINA 45, 53 (Reza Hasmath & Jennifer Y.J. Hsu eds., 2016).

57. ICNL & NED, *supra* note 24, at 19–20; Kiai, *supra* note 24, at 5.

58. See Foreign Agents Registration Act, 22 U.S.C. §§ 611–621 (2012); Jihad Atieh, Comment, *Foreign Agents: Updating FARA To Protect American Democracy*, 31 U. PA. J. INT’L L. 1051, 1061–63, 1067 (2010) (discussing FARA’s effect and scope while noting enforcement by the Department of Justice has been “abysmal”).

long-standing concerns regarding the current government's apparent hostility to human rights.⁵⁹ For this reason, commentators have concluded that many of these restrictions on cross-border funding are actually motivated by the desire to silence critics and maintain power.⁶⁰

It is important to note, however, that these restrictions usually do not reach domestic NGOs that avoid foreign support or other foreign connections, although some countries have also targeted NGOs more generally.⁶¹ In fact, many of the countries imposing restrictions relating to cross-border funding of NGOs are at the same time encouraging the growth of purely domestic NGOs that engage in activities the government deems to be beneficial for society.⁶² For example, China has actively supported a sharp increase in the number of NGOs that provide domestic social services and promote social enterprise.⁶³ It has also seen an increase in registered NGOs generally, from no more than a couple thousand in the late 1980s to more than 600,000 in 2014,⁶⁴

59. See, e.g., EUR. PARL. DOC. (RSP 2656) (2017) (detailing human rights concerns in Hungary).

60. See THOMAS CAROTHERS, CLOSING SPACE AND FRAGILITY, FRAGILITY STUDY GROUP 2–3 (Oct. 2015), <https://www.usip.org/sites/default/files/Fragility-Report-Policy-Brief-Closing-Space-and-Fragility.pdf> (discussing the rise of civil society organizations and “power holders” attempts to “put the civil society genie back in the bottle”).

61. For examples of the latter, see Benjamin Novak, *Daggers Are Out for Civil Society in Hungary*, BUDAPEST BEACON (Jan. 12, 2017), <https://www.budapestbeacon.com/daggers-civil-society-hungary> (noting the push by the Orbán government to denigrate and oust civil society organizations); Noreen Ohlrich, *NGOs Fear the Forcible Shrinking of Civil Society in Poland*, NONPROFIT Q. (Dec. 7, 2016), <https://nonprofitquarterly.org/2016/12/07/ngos-fear-forcible-shrinking-civil-society-poland> (discussing the potential effects of a bill designed to create a “Civil Society Department” to “oversee and centralize the public funding of charities”); see also ICNL & NED, *supra* note 24, at 14–21 (listing examples of countries imposing legal restrictions that either create barriers to forming new NGOs or restrict legitimate activities of NGOs).

62. See CASEY, *supra* note 38, at 292 (stating that some authoritarian regimes “denounce [NGOs] as instruments of extremist special interests” yet many of those same regimes have benefited by “organizing through [NGOs]”).

63. Shieh, *supra* note 56, at 52–53; Mark Sidel, *Regulation of Nonprofit and Philanthropic Organizations: An International Perspective*, NONPROFIT Q. (July 25, 2016), <https://nonprofitquarterly.org/2016/07/25/regulation-nonprofit-philanthropy-international-non-profit-organizations>.

64. Zhang Yuanfeng, Presentation at CCSS, JHU, *Opening or Closing the Space for Civil Society in China? Two Tales of a Reality*, at 4 (Feb. 11, 2016), http://ccss.jhu.edu/wp-content/uploads/downloads/2016/02/Zhang_Seminar_2.11.2016.pdf; see also CASEY, *supra* note 38, at 295 (reporting similar figures).

and there may be millions of additional, unregistered NGOs.⁶⁵ Similarly, India has seen an increase in registered NGOs from 144,000 in 1970 to more than a million after 2000.⁶⁶ In Russia the government has taken steps to support NGOs that provide social services, even while imposing the restrictions noted previously on NGOs that receive cross-border funding.⁶⁷ While difficult to measure for a variety of reasons, including varying compliance with registration rules and changes in such rules over time, there are relatively strong data indicating that the number of NGOs is increasing in many, if not most, countries.⁶⁸ This may be why the most comprehensive current measure of the strength of civil society (defined in a manner consistent with the definition of NGO used in this article, except not including political parties or religious organizations primarily focused on spiritual practices), the Varieties of Democracies (V-Dem) Core Civil Society Index, does not indicate a sharp decline in such strength in any world region in recent years (through 2012).⁶⁹ At the same time, however, it does show a recent, sharp decline in at least one country (Russia) that has been increasingly restrictive with respect to cross-border funding of NGOs.⁷⁰

The “closing space” narrative is therefore not simply a story of governments seeking to shut down NGOs for reasons that clearly violate international law. It is rather a story of governments picking and choosing which types of NGOs to favor and disfavor, often based in large part on connections to foreign funders, and then ratcheting up otherwise legitimate registration, reporting, and other requirements to a point where the disfavored NGOs are forced to abandon their disliked activities and

65. See Wang Xinsong et al., *Giving in China: An Emerging Nonprofit Sector Embedded Within a Strong State*, in THE PALGRAVE HANDBOOK OF GLOBAL PHILANTHROPY 354, 355 (Pamela Wiepking & Femida Handy eds., 2015) (estimating the total number of registered and unregistered NGOs in China “range between two and four million”).

66. CASEY, *supra* note 38, at 22.

67. See Irina Mersianova et al., *Giving in Russia: The Difficult Shaping of the New Nonprofit Regime*, in THE PALGRAVE HANDBOOK OF GLOBAL PHILANTHROPY, *supra* note 65, at 249, 252.

68. See CASEY, *supra* note 38, at 21–22 (noting that while definitive figures are unavailable and “growth may not be constant . . . the upward trend [in NGOs] is the norm around the world”).

69. See Bernhard et al., *supra* note 13, at 7–8, 14–16 fig.4 (explaining how the Index is calculated and showing civil society strength by region based on V-Dem’s calculation).

70. *Id.* at 19–20 fig.7 (noting the sharp decline since 2000 corresponds to Putin’s rule, which subjected civil society organizations to the “heavy hand of the state”).

disfavored funding sources, or even to cease their operations entirely.⁷¹ It is also complicated by the difficulty of demonstrating that such restrictions are unduly burdensome when purportedly based on legitimate government interests. The next Section explains why such burdensome legal requirements are contrary to international law and yet are difficult to challenge under existing international human rights treaties.

C. THE GAP BETWEEN LAW AND PRACTICE

Numerous agreements, resolutions, and court decisions involving internationally recognized human rights have implications for the ability of NGOs to receive funding and other resources, including across borders.⁷² More specifically, Article 20 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of peaceful assembly and association.”⁷³ Building on this right, Article 22 of the International Covenant on Civil and Political Rights (the “Covenant”) limits the restrictions that may be placed on the exercise of free-

71. See, e.g., Deyong Yin, *China's Attitude Toward Foreign NGOs*, 8 WASH. U. GLOBAL STUD. L. REV. 521, 536 (2009) (“[T]he state seeks to foster certain types of foreign NGOs and to quell those with politically sensitive agendas.”); Jamie Dettmer, *Aid Groups Fear Mass Expulsion of Western NGOs from Turkey*, VOICE OF AM. (Mar. 10, 2017), <https://www.voanews.com/a/aid-gropus-fear-mass-expulsion-of-western-ngos-from-turkey/3760749.html> (quoting a U.N. Office for the Coordination of Humanitarian Affairs read-out stating that the Turkish government was likely to use a planned requirement that all international NGOs resubmit registration requests as a “way to choose which organizations they want to keep in the country”).

72. See CAROTHERS & BRECHENMACHER, *supra* note 24, at 41–42 (discussing the right to freedom of association “guaranteed by multiple international human rights agreements” and its effect on NGOs); ICNL & NED, *supra* note 24, at 36–56 (discussing international principles designed to “protect civil society from repressive intrusions of government”); Kiai, *supra* note 24, at 7–13 (noting that constraining NGOs from receiving foreign funding does not comply with Article 22 of the International Covenant on Civil and Political Rights); Rutzen, *supra* note 37, at 33–42 (discussing the international legal framework effecting NGOs cross-border funding); Josel Nivera Mostajo, *Access to Justice and the Right to an Effective Remedy in International Human Rights Law and International Investment Arbitration: The Case of International Non-Governmental and Non-Profit Organizations 20–26* (May 10, 2013) (unpublished LL.M. thesis, University of Notre Dame) (on file with author) (discussing a variety of internationally recognized rights NGOs may claim and potential ways to enforce said rights).

73. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 20, (Dec. 10, 1948).

dom of association to those “prescribed by law and which are necessary in a democratic society,”⁷⁴ and this protection likely extends to restrictions relating to accessing financial and other resources from both domestic and foreign sources.⁷⁵ Similarly, United Nations General Assembly Resolution 53/144, commonly known as the United Nations Declaration on Human Rights Defenders, provides in its Article 13 that everyone has the right, both individually and in association with others, to seek and receive resources for the purpose of protecting human rights and fundamental freedoms through peaceful means.⁷⁶ Other resolutions by both the United Nations General Assembly and the United Nations Human Rights Council elaborate further on the right to seek and receive needed resources to vindicate freedom of association.⁷⁷ Finally, a number of regional bodies have also recognized this right under international law, including within the regional human rights systems established in the Americas and Europe.⁷⁸

74. International Covenant on Civil and Political Rights, art. 22, ¶ 2, Dec. 19, 1966, 999 U.N.T.S. 171.

75. See CAROTHERS & BRECHENMACHER, *supra* note 24, at 41 (stating measures that “limit independent civil society usually fail” to meet Article 22 requirements); ICNL & NED, *supra* note 24, at 52 (“Funding restrictions that stifle the ability of [NGOs] to pursue their goals may well constitute unjustifiable interference with freedom of association.”); Kiai, *supra* note 24, at 6 (“[F]undraising activities are protected under article 22 of the Covenant, and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with article 22.”); Rutzen, *supra* note 37, at 33 (noting that restrictions on NGOs’ ability to fundraise likely violates Article 22).

76. G.A. Res. 53/144, annex, U.N. Doc. A/RES/53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 13 (Mar. 8, 1999).

77. *E.g.*, Human Rights Council Res. 32/31, U.N. Doc. A/HRC/32/L.29 (July 1, 2016); see also U.N. High Commissioner for Human Rights, *Practical Recommendations for the Creation and Maintenance of a Safe and Enabling Environment for Civil Society, Based on Good Practices and Lessons Learned*, ¶¶ 72, 75, U.N. Doc. A/HRC/32/20 (Apr. 11, 2016) (stating “predictability of core funding” is essential for NGOs to “work effectively and independently” and that “[w]here no restrictions on the receipt of foreign funds apply to State institutions or businesses, the same should apply to civil society organizations”); Breen, *supra* note 27, at 52–54 (discussing various U.N. Resolutions dealing with the right to seek resources); Kiai, *supra* note 24, at 6 (discussing the same); Rutzen, *supra* note 37, at 33–35 (discussing the same).

78. *E.g.*, Council of Europe, Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the Legal Status of Non-Governmental Organizations in Europe ¶ 50 (Oct. 10, 2007) (stating “NGOs should be free to solicit and receive funding” limited only to the laws “applicable to customs, for-

There is a gap, however, between the aspirations of international law and the actual practices of many countries for several reasons. One reason is the limited legal reach of the relevant international law authorities—they simply are not binding on all countries. Only 169 countries have ratified the Covenant, with China being the most prominent country not included in that number (although China signed the Covenant in 1998).⁷⁹ Even critics of these new restrictions acknowledge that the various United Nations declarations are not legally binding, although they arguably reflect an emerging soft-law consensus.⁸⁰ And while statements by regional bodies may reflect correct statements of laws within their region, their reach is limited to those regions and the efficacy of the treaties upon which they are based.⁸¹

Another reason for this gap between international law and actual practices are barriers that limit the parties that may invoke the protections provided and when they may do so. Under the original text of the Covenant, only states that are party to the Covenant and have recognized the competence of the Human Rights Committee that monitors compliance with the Covenant may invoke the Committee's authority to investigate and attempt to resolve alleged failures by another state to fulfill its ob-

eign exchange, money laundering and those on the funding of elections and political parties"); INTER-AM. COMM'N ON HUMAN RIGHTS, SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS 73, 235 (2011) (stating the right to receive cross-border funding to promote human rights is protected by freedom of association and states should allow human rights organizations to seek cross border funding); see CAROTHERS & BRECHENMACHER, *supra* note 24, at 42–43 box 4 (listing regional organizations that have weighed in on the matter); Evered, *supra* note 10, at 171 (stating “the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations . . . obligates ratifying states to recognize” and protect international NGOs); Gallus & Peterson, *supra* note 10, at 530–31 (discussing the European and American Convention on Human Rights and noting these conventions may protect the right of association); ICNL & NED, *supra* note 24, at 54 (listing various regional bodies and their recognition of the right to freedom of association); Rutzen, *supra* note 37, at 35 (listing examples of cross-border funding protections provided by regional bodies).

79. International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-4.en.pdf> (last visited Dec. 5, 2017).

80. CAROTHERS & BRECHENMACHER, *supra* note 24, at 41–42; Kiai, *supra* note 24, at 6–7.

81. Gallus & Peterson, *supra* note 10, at 530–32.

ligations under the Covenant—and then only if all domestic remedies have been invoked and exhausted.⁸² Under an optional protocol ratified by 115 countries, individuals may also submit complaints of alleged failures by those countries to the Committee, but again they are subject to exhaustion of domestic remedies.⁸³ NGOs and others may also submit shadow or alternative reports when a country that has ratified the Covenant submits its required reports to the Committee, but the Committee is not required to even consider such alternative reports (although it appears to usually do so), much less to act on them.⁸⁴ As for regional human rights bodies, while natural persons in covered states and sometimes even legal entities from those states, including NGOs, may invoke the dispute resolution procedures available with respect to those bodies in Africa, the Americas, and Europe, they generally may only do so after exhausting domestic remedies.⁸⁵ Some still existing Friendship, Commerce and Navigation treaties entered into on a bilateral basis between the United States and several countries also provide protection for foreign involvement in NGOs, but only countries may assert claims under such treaties.⁸⁶

A third reason is the lack of effective enforcement mechanisms, even if a state, natural person, or NGO successfully invokes the protections of binding international law with respect to cross-border funding of NGOs. The Human Rights Committee may seek resolution of an inter-state dispute under the Covenant and may communicate its views regarding a failure alleged

82. See International Covenant on Civil and Political Rights, *supra* note 74, art. 41, ¶ 1.

83. G.A. Res. 2200 (XXI), Annex, U.N. Doc. A/RES/2200(XXI), Optional Protocol to the International Covenant on Civil and Political Rights, (Dec. 16, 1966); Won-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 J. INT'L ECON. L. 725, 730–31 (2007).

84. See Human Rights Comm., *The Relationship of the Human Rights Committee with Non-Governmental Organizations*, U.N. DOC. CCPR/C/104/3 (June 4, 2012) (noting that shadow reports play an important role in “enhancing” the Covenant).

85. Choi, *supra* note 83, at 730–31; Gallus & Peterson, *supra* note 10, at 531; Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT'L L. 911, 915–22 (2011).

86. *International Investment Treaty Protection of Not-for-Profit Organizations* 2–3 (Int'l Ctr. for Not-for-Profit Law (ICNL), Working Paper, May 2008), <http://www.icnl.org/research/resources/dcs/BITNPOProtection2.pdf> [hereinafter ICNL Treaty Protection]; see also John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 343–44 (2013) (arguing that FCN treaties have become increasingly irrelevant over time, only successfully invoked recently in a few, narrow areas).

by an individual under the optional protocol, but the Committee has no authority to penalize a state for not agreeing to a resolution or for not correcting a found failure beyond publicizing the state's action or inaction.⁸⁷ Instead, the Committee only has conciliatory powers and so does not have the authority to make a judicial determination, but may only communicate its views on a matter in dispute.⁸⁸ While the Covenant arguably obligates states to create domestic means of addressing failures, the Committee faces the same limitations when seeking to enforce this obligation.⁸⁹ The African, Americas, and European regional human rights bodies have more significant enforcement tools, but even for those bodies the record of state compliance with ordered remedies is mixed at best.⁹⁰

The existence of this gap and the reasons for it should not obscure the country-specific options for challenging legal rules that impose undue burdens on cross-border funding of NGOs. These options include pushing back against overly burdensome application of such rules, including in domestic courts;⁹¹ opposing the enactment of such legal rules by domestic lawmaking bodies in the first place (or advocating their repeal if previously

87. Alan Brudner, *The Domestic Enforcement of International Covenants of Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 219–20 (1995); see also Choi, *supra* note 83, at 740 (“[R]ecommendations issued by human rights bodies such as the Human Rights Committee lack binding effects and enforcement power.”); *Human Rights Treaty Bodies—Individual Communications*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whathappens> (last visited Dec. 5, 2017) [hereinafter *Treaty Bodies*] (see the “What happens once a Committee decides a case?” entry, which includes what happens when the Human Rights Committee decides a case).

88. Brudner, *supra* note 87, at 220; *Treaty Bodies*, *supra* note 87.

89. See Anja Seibert-Fohr, *Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 Para. 2*, 5 MAX PLANCK Y.B. OF U.N. L. 399, 435 (2001) (noting that states that have not created domestic means to address failures have “attracted criticism” from the Committee).

90. Fekadeselassie F. Kidanemariam, *Enforcement of Human Rights Under Regional Mechanisms: A Comparative Analysis*, 53–54, 57–59, 62–63 (Jan. 1, 2006) (unpublished L.L.M. thesis, University of Georgia), http://digitalcommons.law.uga.edu/stu_llm/80.

91. See, e.g., Shashank Bengali, *Court Orders Indian Government To Release Greenpeace Funds*, L.A. TIMES (Jan. 20, 2015), <http://www.latimes.com/world/asia/la-fg-india-greenpeace-funds-20150120-story.html> (describing how the Delhi High Court ordered the Indian government to release more than \$310,000 in funds provided by Greenpeace International for its India office after finding that preventing that office from receiving foreign funding was unconstitutional).

enacted);⁹² and urging other states, international organizations, and other international actors to highlight these legal rules and their inconsistency with international law.⁹³ Host country NGOs can also use cross-border funding and other assistance for capacity building and developing domestic support, so that in the long run they are no longer reliant on foreign support.⁹⁴ But identifying and implementing the particular method or methods that are most likely to be successful in a given country can be difficult and time consuming, so it is desirable to consider whether any more comprehensive and effective international legal protections exist or realistically could be created to combat the increasing legal restrictions on cross-border funding of NGOs. This consideration brings us to the promise of investment treaties.

II. THE PROMISE OF INVESTMENT TREATIES

Bilateral investment treaties (BITs) and multilateral investment treaties (collectively “investment treaties”) provide several significant advantages over the international agreements discussed previously and therefore have the potential to close the gap between law and practice. First, and as detailed further below, many countries that are not party to the Convention or regional human rights agreements are parties to investment treaties.⁹⁵ Second, in general, investment treaties explicitly provide that aggrieved private parties covered by a given treaty may bring a claim against the states that are parties to

92. See, e.g., INT’L CTR. FOR NOT-FOR-PROFIT LAW, ANNUAL REPORT 2015–16, at 4 [hereinafter ICNL ANNUAL REPORT] (discussing a successful opposition in Kyrgyzstan to a proposed foreign agent registration law for NGOs that receive foreign donations and engage in “political activity”).

93. See CAROTHERS, *supra* note 24, at 19–22 (discussing campaigns to block closing-space legislation and noting the best campaigns “combine a coordinated international effort” and are led by “a diverse domestic coalition of civil society actors”); CAROTHERS & BRECHENMACHER, *supra* note 24, at 62 (noting one way to push back is by “bolstering international normative and legal frameworks that undergird civil society access to foreign resources and assistance”); ICNL & NED, *supra* note 24, at 57–59 (discussing various ways of “protecting and enhancing civil society space”); Moore & Rutzen, *supra* note 24, at 37–38 (stating that “[s]trategic outreach” to the international community can be “instrumental in influencing law and policy at the national level in various countries” and listing examples of such outreach).

94. See, e.g., Kingsley Ighobor, *Africa’s Civil Society Faces Up to Hostile Governments*, EURASIA REV. (Aug. 13, 2016), <http://www.eurasiareview.com/13082016-africas-civil-society-faces-up-to-hostile-governments> (describing in part efforts by civil society organizations in African countries with restrictive rules to develop domestic financial and other support).

95. See *infra* note 107.

the treaty, without the need to involve or obtain the consent of their home state and usually without the need to first exhaust domestic remedies (although preliminary procedures designed to encourage settlement are often required),⁹⁶ and even when there is an exhaustion requirement, it may be possible to avoid its application.⁹⁷ Third, almost all such treaties provide for international arbitration to resolve any disputes, with the arbitration decision generally enforceable in domestic courts in most countries.⁹⁸ These provisions are particularly important because they represent consent by the states that are parties to the treaties, which is necessary to subject them both to such arbitration and to national court enforcement of arbitration decisions.⁹⁹ This is not to say that such treaties have been uniformly viewed as successful in resolving investment-related disputes, but they have shifted the focus of such disputes away from host country courts (with their risk of host country bias) to more neutral international arbitration bodies.¹⁰⁰ There are, however, several legal hurdles that an NGO would have to clear in order to successfully invoke the protection of an investment treaty, including whether the states involved are party to such an agreement, jurisdic-

96. Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 735 (Stephen W. Schill ed., 2010); Choi, *supra* note 83, at 732; David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 10, 15 (Org. for Econ. Co-operation & Dev. Working Papers on Int'l Inv., No. 2012/03, 2012), http://www.oecd-ilibrary.org/finance-and-investment/investor-state-dispute-settlement_5k46b1r85j6f-en.

97. See Stephen R. Halpin III, Note, *Stayin' Alive?: BG Group, PLC v. Republic of Argentina and the Vitality of Host-Country Litigation Requirements in Investment Treaty Arbitration*, 71 WASH. & LEE L. REV. 1979, 2012–16 (2014) (discussing the effects of the United States Supreme Court upholding an international arbitration agreement procured after bypassing a host country's legal system).

98. Choi, *supra* note 83, at 741; Gaukrodger & Gordon, *supra* note 96, at 64.

99. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 44 (2009); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 828–29, 836–37 (2012).

100. See, e.g., William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199 (2008) (discussing the flawed and inconsistent outcomes in certain investment-related disputes submitted to an international arbitration tribunal); Choi, *supra* note 83 (discussing the pros and cons of investor-state dispute settlements and the lessons to be learned moving forward).

tional limitations, and being able to state a covered cause of action that can be addressed through an available remedy.¹⁰¹ In addition, and as will be discussed below, the limitation of available remedies to monetary damages under most, if not all, investment treaties is a significant disadvantage when it comes to challenging restrictions on cross-border funding of NGOs.

A. STATE PARTIES

In common with the international agreements that specifically protect freedom of association, investment treaties are only binding on the states that are party to them.¹⁰² The number of such agreements continues to grow: in 2006, there were approximately 2500 BITs and three multilateral investment treaties that were the equivalent of another 2000 BITs;¹⁰³ in 2015, there were over 2900 BITs, plus an additional 358 other types of international investment agreements, some of which contain BIT-equivalent provisions. The pace of growth for investment treaties and other types of international investment agreements, however, has slowed since 2007.¹⁰⁴ While these figures can be parsed further given differences among BITs, it is generally agreed that even limiting the count to relatively strong BITs (that is, ones that reflect the dominant current approach to such treaties by including a comprehensive, effective advance commitment by the state parties to investor-initiated arbitration) reveals a similarly fast rate of growth.¹⁰⁵ In addition, countries that are not parties to the Covenant or any regional human rights agreements may be parties to numerous investment treaties.¹⁰⁶ For example, China has not ratified the Covenant and is

101. See discussion *infra* Parts II.A, II.B, II.C.

102. See *supra*, notes 79–81 and accompanying text.

103. Gallus & Peterson, *supra* note 10, at 532.

104. U.N. Conference on Trade and Development (UNCTAD), *World Investment Report 2016: Investor Nationality: Policy Challenges*, 101, UNCTAD/WIR/2016 [hereinafter UNCTAD 2016]. The existing multilateral treaties that provide foreign direct investment protection include the ASEAN Comprehensive Investment Agreement, the Energy Charter Treaty, and the North American Free Trade Agreement (NAFTA) (Chapter 11). See NEWCOMBE & PARADELL, *supra* note 99, at 53–54; Born, *supra* note 99, at 834; Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 434 (2008); UNCTAD 2016, *supra*, at 105–06.

105. Yackee, *supra* note 104, at 423–25, 427–29.

106. For the three major regional human rights treaties, fifty-three countries have ratified the African Charter on Human and Peoples' Rights, twenty-five countries have ratified or acceded to the American Convention on Human Rights (plus the United States has signed but not ratified that agreement), and

not party to any regional human rights treaty, but it is party to 110 BITs and another nineteen treaties with investment provisions currently in force.¹⁰⁷ Of the twenty-eight other countries that are eligible to ratify the Covenant but have not done so, seven are not party to a regional human rights treaty but have a significant number of BITs and a number of other treaties with investment provisions currently in force (Cuba, Malaysia, Oman, Qatar, Saudi Arabia, Singapore, and the United Arab Emirates).¹⁰⁸

It is also necessary for an NGO providing cross-border funding to be from a country with an applicable investment treaty with the host country in order to invoke the protections provided by that treaty.¹⁰⁹ To the extent that is not the case, however, it often will be possible to create an entity in a different state that does have such an agreement and use that entity to provide the funding in order to overcome this hurdle. For-profit investors have in fact used this strategy with significant success.¹¹⁰ Some

forty-seven countries have ratified or acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32): Signatories and Ratifications*, ORG. OF AM. STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Dec. 5, 2017); *Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=3oT2oPOE (last updated May 10, 2017); *Ratification Table: African Charter on Human and Peoples' Rights*, AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/instruments/achpr/ratification> (last visited Dec. 5, 2017).

107. *See* U.N. Conference on Trade and Development: Investment Policy Hub, *International Investment Agreements Navigator*, <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> (last visited Dec. 5, 2017); *Status of Ratification Interactive Dashboard*, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, <http://indicators.ohchr.org> (last visited Dec. 5, 2017); *see also* NEWCOMBE & PARADELL, *supra* note 99, at 56–57.

108. *See supra* notes 106–07.

109. *See supra* notes 79–81 and accompanying text.

110. *See* SUZY H. NIKIEMA, INT'L INST. FOR SUSTAINABLE DEV., BEST PRACTICES DEFINITION OF INVESTOR 3 (2012), http://www.iisd.org/pdf/2012/best_practices_definition_of_investor.pdf; Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1278–80 (2009); Gaukrodger & Gordon, *supra* note 96, at 55–57 (discussing treaty shopping by investors); Christoph Schreuer, *Investments, International Protection* ¶¶ 33–34, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1533?rskey=qbHuB9&result=1&prd=EPIL> (last updated June 2013). *See generally* UNCTAD 2016, *supra* note 104, at 171–81 (discussing the effect ownership structures of multinational entities has on the coverage and reach of international investment agreements).

investment treaties deny their protections for entities formed in a particular country solely to gain access to that treaty, however, and this may be a growing trend.¹¹¹ For example, such a “denial of benefits” provision is included in the U.S. Model Bilateral Investment Treaty.¹¹² In addition, while the recent European Union-Canada Comprehensive and Economic Trade Agreement only has a relatively limited denial of benefits provision, it also includes a general good faith provision that could bar some attempts to obtain treaty protection in this manner.¹¹³ So the requirement that both the cross-border funder and the recipient of the cross-border funding be located in countries who are party to the same investment treaty could prove an obstacle to some potential claims against restrictions on such funding.

B. JURISDICTIONAL ISSUES

If a particular foreign-NGO/domestic-NGO relationship is potentially covered by an investment treaty because the two NGOs are in countries that are both parties to such an agreement, there are still several jurisdictional issues that the foreign NGO would have to overcome. These issues include temporal jurisdiction, personal jurisdiction, and subject-matter jurisdiction.¹¹⁴

Temporal jurisdiction is relatively straightforward: was the legal restriction imposed on the cross-border funding during the

111. See RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 55 (Oxford Univ. Press 2008); Bjorklund, *supra* note 110, at 1278 & n.44; UNCTAD 2016, *supra* note 104, at 174.

112. U.S. STATE DEP’T: BUREAU OF ECON. AFFAIRS, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY art. 17 (2012), <https://www.state.gov/e/eb/ifa/bit> [hereinafter 2012 U.S. MODEL BIT].

113. See Comprehensive and Economic Trade Agreement (CETA), Can.-European Union, arts. 8.16, 8.18(3), Sept. 14, 2016, 2017 O.J. (L11) 23, <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>; see also Philip Morris Asia Ltd. v. Austl., Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶¶ 539–54, 588 (Perm. Ct. Arb. 2012), https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf (discussing when the restructuring of an investment in order to fall within the scope of protection of a given treaty is an abuse of rights and so should fail, and concluding that such an abuse of rights occurred in the case).

114. Gallus & Peterson, *supra* note 10, at 534–35; MacKenzie, *supra* note 10, at 222–33 (discussing the various jurisdictional requirements in arbitrations); ICNL Treaty Protection, *supra* note 86, at 7–10 (discussing how a treaty’s definition of terms like investment may affect jurisdiction); see also Bjorklund, *supra* note 110, at 1274 (discussing temporal requirements for jurisdiction). It could be argued that the temporal aspect is better viewed as a procedural issue, but the exact terminology is not critical here.

time period when the investment treaty was in effect?¹¹⁵ Even if a country enacted the restriction prior to the applicable treaty's enactment, temporal jurisdiction generally will be satisfied if the application of that restriction at issue occurred during the same period when the treaty was in effect.¹¹⁶ In addition, the aging of existing investment agreements and the fact that most of the restrictions unduly burdening cross-border funding of NGOs are of relatively recent vintage means that in many, probably most, situations temporal jurisdiction will exist.¹¹⁷

Personal jurisdiction is trickier because the parties protected by investment agreements depend on the exact language of the agreement at issue, which can vary significantly. In some agreements, nonprofit or noncommercial entities are either explicitly covered or the definition of the covered entities is very broad, and so likely includes NGOs.¹¹⁸ For example, the current U.S. Model Bilateral Investment Treaty provides standing to bring claims to any "enterprise" of a (state) party to the agreement, with enterprise defined so as to include entities constituted or organized under applicable law "whether or not for profit."¹¹⁹

Such a broad definition appears to be the prevailing trend in investment treaties.¹²⁰ Some treaties may clearly not include nonprofit or noncommercial entities, however, or may fail to provide any guidance on this point, leaving personal jurisdiction over NGOs uncertain.¹²¹ For example, a draft of the recent India Model Bilateral Investment Treaty only covered an "enterprise" with "real and substantial business operations" in the host state, which it further defined as having "made a substantial and long term commitment of capital . . . ; engaged a substantial number of employees . . . ; made a substantial contribution to the development of the Host State . . . ; and carried out all of its operations

115. See Bjorklund, *supra* note 110, at 1282; Gallus & Peterson, *supra* note 10, at 535.

116. See, e.g., *Gami Invs. v. Mexico*, 44 I.L.M. 545, 560–61 (2005); ICNL Treaty Protection, *supra* note 86, at 20.

117. See Bjorklund, *supra* note 110, at 1282; Gaukrodger & Gordon, *supra* note 96, at 65.

118. Gallus & Peterson, *supra* note 10, at 535–36.

119. 2012 U.S. MODEL BIT, *supra* note 112, at art. 1.

120. See Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, in INTERNATIONAL INVESTMENT PERSPECTIVES 143, 145 (2006).

121. Gallus & Peterson, *supra* note 10, at 535–36.

in accordance with the Law of the Host State.”¹²² This relatively narrow definition, as compared to an earlier India Model Bilateral Investment Treaty, was an intentional decision by the Indian government to develop a more host-country-friendly model.¹²³ The final version of the new Model Treaty slightly loosened this specific definition, but remained narrower than the old version it replaced.¹²⁴

Many, if not most, investment treaties also give standing to the state parties to bring claims, but to date it appears states only very rarely choose to exercise this right.¹²⁵ And even if a state chooses to bring a suit, it is usually limited to bringing suits under the treaty relating to the interpretation of the treaty, as opposed to a suit pursuing a claim for a particular investor.¹²⁶ It may, however, be able to bring a claim on behalf of a particular investor as a matter of diplomatic protection more generally, as long as the investor has not already filed a claim under the treaty.¹²⁷ An interesting possible ramification of this limitation is that a host country facing a claim from an NGO that receives a significant amount of home-country government funding, or has close ties to that government, might argue that the NGO is effectively an arm of its home-country government and therefore subject to any treaty-specific limitations on the ability of a state

122. Draft, Model Text for the Indian Bilateral Investment Treaty, art. 1.2 (2015), https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

123. See Nikesh Patel, Note, *An Emerging Trend in International Trade: A Shift To Safeguard Against ISDS Abuses and Protect Host-State Sovereignty*, 26 MINN. J. INT'L L. 273, 283–88 (2017) (discussing the difference between India's old and new model BITs, and the motivations driving those changes).

124. GOV'T OF INDIA: DEP'T OF ECON. AFFAIRS, MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY art. 1 (2015), http://finmin.nic.in/sites/default/files/ModelTextIndia_BIT%20%281%29.pdf?download=1 [hereinafter 2015 INDIA MODEL BIT].

125. *E.g.*, Ecuador v. United States, Case No. 2012-5, Award, (Perm. Ct. Arb. 2012), <https://www.italaw.com/sites/default/files/case-documents/italaw7940.pdf> (analyzing standing arguments from both parties and determining there was no standing due to the lack of a dispute as defined under the applicable BIT); see Nick Gallus, *Protection of Non-Governmental Organizations in Egypt Under the Egypt-U.S. Bilateral Investment Treaty*, 14 INT'L J. NOT-FOR-PROFIT L. 62, 69 (2012); UNCTAD 2016, *supra* note 104, at 172–75 (discussing the various factors that convey standing).

126. See KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 499 (2010).

127. See Enrico Milano, *The Investment Arbitration Between Italy and Cuba: The Application of Customary International Law Under Scrutiny*, 11 LAW & PRAC. INT'L CTS. & TRIBUNALS 499, 507–08 (2012).

party to bring a claim.¹²⁸ It should also be noted that at least the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”) precludes a parallel diplomatic convention case while a claim brought by an investor against a host country is in arbitration; so an NGO pursuing a claim under that convention could not also have its home country pursue such a case at the same time.¹²⁹

The most difficult jurisdictional issue for an NGO engaged in cross-border funding likely would be subject matter jurisdiction, given that temporal and personal jurisdiction usually will exist.¹³⁰ This is because investment treaties generally only apply to “investments,” although the definition of investment tends to be broadly worded.¹³¹ For example, the current U.S. Model Bilateral Investment Treaty defines an investment as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk” and then provides a nonexclusive list of forms that an investment may take, including equity interests, debt interests, various contracts, various other rights, and other property and related property rights.¹³² The use of the term “or” between “expectation of gain or profit” and “assumption of risk” indicates that only one of the commitment of capital or other resources *or* the expectation of gain or profit *or* the assumption of risk is required for there to be an investment for purposes of the treaty. Since cross-border funding of a domestic NGO necessarily involves a commitment of capital or other resources, and arguably also involves an assumption of risk (if only that the funds may not be used for their designated purpose), such funding would appear to fall within

128. See Zymek, *supra* note 12, at 34–35.

129. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 27, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

130. Although the definition of investment, which can be characterized as a subject matter jurisdiction issue, is also relevant to who qualifies as an investor, which can be characterized as a personal jurisdiction issue. See Gallus & Peterson, *supra* note 10, at 535–36.

131. NEWCOMBE & PARADELL, *supra* note 99, at 65–66; Bjorklund, *supra* note 110, at 1280.

132. 2012 U.S. MODEL BIT, *supra* note 112, at art. 1. This relatively broad definition was also in the previous U.S. MODEL BIT. Mark Kantor, *Little Has Changed in the New US Model Bilateral Investment Treaty*, 27 ICSID REV. 335, 345–46 (2012).

the terms of the model treaty and so any investment treaties using the same definition.¹³³ Along the same lines, some investment treaties define investment negatively, with only a very limited number of items excluded from the term (and with items that might encompass cross-border funding of a domestic NGO generally not in that exclusion list).¹³⁴

Such a broad definition appears to the prevailing trend in investment treaties.¹³⁵ There are, however, at least two other, somewhat common definitions.¹³⁶ One of those other definitions provides that a covered investment is limited to one with an enterprise basis, by requiring a party seeking treaty benefits to have established an “enterprise” in the host state, with the definition of enterprise potentially excluding noncommercial entities.¹³⁷ The other common definition limits covered investments to an inclusive list of covered assets, which may not be broad enough to reach cross-border funding of a domestic NGO.¹³⁸ Furthermore, some arbitrators have held that an investment generally must be commercially oriented or intended to generate a profit to fall within the protections of an investment treaty, even in the face of a broad definition for investment in the applicable treaty.¹³⁹

There is also a second, related subject-matter jurisdictional issue that is relevant to claims relating to cross-border funding of NGOs. If the home country and host country are both parties to the ICSID Convention and the applicable investment treaty permits use of International Centre for the Settlement of Investment Disputes (ICSID) facilities for the arbitration, then a

133. See Mostajo, *supra* note 72, at 42–46 (discussing the low jurisdictional barrier set by such broad definitions of investment).

134. See, e.g., 2015 INDIA MODEL BIT, *supra* note 124, art. 1.4 (listing the types of assets *not* included within the definition of investment); Houde, *supra* note 120, at 149 (discussing article 1 of the 2002 Mexico/Korea BIT).

135. Houde, *supra* note 120, at 145.

136. See SOUTH AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BIT WITH COMMENTARY art. 2, <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> [hereinafter 2012 SADC MODEL BIT] (“The definition of investment is very critical and still very controversial. Three options are included here in full . . .”).

137. See, e.g., 2012 SADC MODEL BIT, *supra* note 136, art. 2.

138. See, e.g., Agreement Between Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 1(1), Sept. 9, 2012, 2014 Can. T.S. No. 2014-26; 2012 SADC MODEL BIT, *supra* note 136, art. 2.

139. See *Sedelmayer v. Russ. Fed’n*, Award, 65 (1998), <https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>; Gallus & Peterson, *supra* note 10, at 537–38.

claimant who uses those facilities can invoke the enforcement provisions of that convention with respect to any award they receive.¹⁴⁰ But in the view of some ICSID tribunals, those provisions are only available if the transaction at issue is an investment in an objective sense that has commerciality as a necessary feature,¹⁴¹ or in the sense that it contributes to the economic development of the host state.¹⁴² This is not a universally expressed view, and there is an argument that the term investment is broad enough under the ICSID Convention to encompass some or essentially all cross-border funding by NGOs.¹⁴³ A similar issue may arise if instead a claimant relies on the enforcement provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),¹⁴⁴ which has sometimes been interpreted as having a similar limitation.¹⁴⁵ While many, perhaps most, investment treaties specify that any awards are commercial, in an effort to overcome this second hurdle regardless of the applicable convention, it is unclear if such specifications are sufficient in all instances.

Of course, if these issues relating to the definition of investment were the only potential hurdle for claims relating to cross-border funding of NGOs, funders and recipient domestic NGOs might be able to restructure their arrangements so as to make it easier to overcome them. For example, they might be able to do

140. See ICSID Convention, *supra* note 129, arts. 25(1), 54; Katharina Diel-Gligor, Note and Comment, *Competing Regimes in International Investment Arbitration: Choice Between the ICSID and Alternative Arbitral Systems*, 22 AM. REV. INT’L ARBITRATION 677, 685–86 (2011).

141. See Bjorklund, *supra* note 110, at 1280–82 (discussing jurisdictional criteria requiring certain commercial aspects); Gallus & Peterson, *supra* note 10, at 538–43 (discussing ICSID criteria for investments and tribunals’ interpretations of those criteria).

142. See *Salini Construttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 I.L.M. 609 (2003). But see Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. J. INT’L L. 257, 272–74 (2010) (criticizing the outcome from *Salini Construttori*).

143. See Evered, *supra* note 10, at 174–78 (suggesting ways in which an NGO can fall under ICSID convention protection); Mostajo, *supra* note 72, at 35–39 (discussing ways in which NGOs meet certain jurisdictional requirements). See generally Mortenson, *supra* note 142 (urging investment tribunals to recognize ICSID jurisdiction over a broad range of claims).

144. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2577, 330 U.N.T.S. 38 (entered into force June 7, 1959).

145. Evered, *supra* note 10, at 176–77; ICNL Treaty Protection, *supra* note 86, at 28.

so by making the transaction a loan, or otherwise structuring it in a way that matched a more traditional investment.

Finally, some investment treaties may exclude certain host-country actions from the reach of the treaty. For example, the North American Free Trade Agreement (NAFTA) includes an exception for most tax provisions.¹⁴⁶ The India Model Bilateral Investment Treaty provides that the treaty does not apply to local government measures, tax laws, and certain other types of laws,¹⁴⁷ although it is not clear whether this provision will make its way into many of the actual treaties entered into by India.¹⁴⁸ Such exclusions may both block investment treaty claims relating to restrictions on cross-border funding of NGOs and provide a roadmap for creating restrictions that are not vulnerable to such claims.

C. CAUSES OF ACTION AND REMEDIES

Assuming an NGO providing cross-border funding to a domestic NGO is able to navigate the state parties and jurisdictional issues and so successfully invoke the protection of an investment treaty, and it appears this may be possible in at least some situations, it would of course still have to bring a cause of action available under the relevant investment treaty and seek an available remedy. Investment treaties typically provide causes of action for (1) failure to provide fair and equitable treatment; (2) failure to provide full protection and security; (3) imposition of arbitrary or discriminatory measures; (4) treatment of the foreign investor and its investment less favorably than a national of the host state or (assuming a most-favored-nation treatment clause) a third party; (5) impeding free transfers; and (6) uncompensated expropriation.¹⁴⁹ They also generally require national treatment—that is, in this context, no worse treatment for the foreign funder and the recipient domestic NGO than if the funder was a domestic one¹⁵⁰—although that cause of action would not be available if the host country imposes its restrictions

146. North American Free Trade Agreement, Can.-Mex.-U.S., art. 2103, Dec. 17, 1992, 32 I.L.M. 289 (1993).

147. 2015 INDIA MODEL BIT, *supra* note 124, art. 2.4.

148. See Priti Patnaik, *Deconstructing India's Model Bilateral Investment Treaty*, WIRE (Sept. 16, 2016), <https://thewire.in/66558/deconstructing-indias-model-bilateral-investment-treaty>.

149. See Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 172 (2007); Schreuer, *supra* note 110, ¶¶ 48, 84.

150. Schreuer, *supra* note 110, ¶ 67.

equally on all funders and recipient NGOs (such as has recently occurred in Egypt).¹⁵¹

These causes of action almost certainly apply to the types of restrictions on cross-border funding that have arisen in recent years. For example, almost all of the restrictions triggered by the receipt of cross-border funding—whether additional registration and reporting obligations, advance government approval, additional taxes or unfavorable exchange rates, required channeling through government channels, budget limitations, and barring funding for certain activities—violate the less favorably requirement, and may also violate both the fair and equitable treatment requirement and the arbitrary or discriminatory measures prohibition, depending on their exact provisions and effect.¹⁵² The common legal restrictions placed on the foreign NGOs that provide such funding—including repeated and burdensome investigation, refusal to process registration applications, criminal prosecution, and expulsion—raise similar issues.¹⁵³ For a foreign NGO with a legitimate concern about the treatment of cross-border funding, establishing a cause of action should therefore be relatively straightforward, unless there is a treaty-specific exception that might apply.¹⁵⁴

With respect to remedies, it should be noted that when an arbitration tribunal finds a state has violated an investment treaty, it is unclear whether it can order a remedy other than monetary damages, especially as arbitration tribunals have tended to limit final remedies to monetary damages.¹⁵⁵ The availability of other remedies, such as declaring a host country domestic law or administrative decision illegal or issuing an injunction, may depend on the language of the investment treaty at issue.¹⁵⁶ For example, the U.S. Model Bilateral Investment Treaty only permits the award of monetary damages (including any applicable interest) or restitution of property, with the host

151. See *supra* note 40 and accompanying text.

152. See *supra* note 44 and accompanying text.

153. See *supra* note 45 and accompanying text.

154. See Mostajo, *supra* note 72, at 47–74 (discussing the substantive protections provided under most BITs and providing examples of how NGOs can take advantage of those protections); ICNL Treaty Protection, *supra* note 86, at 10–11, 20–25 (discussing substantive protections provided by BITs and actions of states that may violate those protections).

155. See *e.g.*, van Aaken, *supra* note 96, at 734; Gallus, *supra* note 125, at 90; Gaukrodger & Gordon, *supra* note 96, at 25; ICNL Treaty Protection, *supra* note 86 at 25–27.

156. See Gaukrodger & Gordon, *supra* note 96, at 25.

country having the option to substitute monetary damages for such property.¹⁵⁷ That model treaty's only mention of injunctive relief is to permit a claimant to seek interim injunctive relief in a host country forum for "the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."¹⁵⁸ Similarly, the India Model Bilateral Investment Treaty bars tribunals from awarding injunctive relief, and also from awarding punitive or moral damages.¹⁵⁹ Such explicit limitations on available remedies may reflect a trend toward more host-country-protective investment treaties, even on the part of developed countries such as the United States. Finally, as a practical matter it is difficult to imagine that a court enforcing an arbitration award would be likely to order specific performance in another country.

Consistent with what appears to be the dominant language in investment treaties, tribunals appear to have almost always provided injunctive relief only as a provisional remedy while a dispute resolution is ongoing, as opposed to including injunctive relief in the final remedy resolving a dispute.¹⁶⁰ (Although this may in part reflect the fact that investors have historically usually only sought monetary damages.¹⁶¹) While an NGO attempting to provide cross-border funding to a domestic NGO may in fact suffer damages that can be readily monetized—for example, if a tax is imposed on such funding or such funding is seized by the state—often the NGO will be more interested in obtaining relief that would permit it to proceed with the funding free from the imposition of unduly burdensome restrictions. It is far from clear that arbitration tribunals would be able or, even if able, particularly open to providing such relief, or that host countries would be willing to comply with tribunal decisions ordering such relief as opposed to monetary damages, especially since such relief may be less easily enforceable against host countries in national courts.¹⁶² Finally, even if a tribunal would be willing to declare that a particular law should not apply to a given NGO—and the host country agreed to follow that declaration—the case-

157. 2012 U.S. MODEL BIT, *supra* note 112, art. 34(1).

158. *Id.* art. 26(3).

159. 2015 INDIA MODEL BIT, *supra* note 124, arts. 26.3–4.

160. See Farshad Rahimi Dizgovin, *Foundations of Specific Performance in Investor-State Dispute Settlements: Is It Possible and Desirable?*, 28 FLA. J. INT'L L. 1, 12–21 (2016) (discussing the use of specific performance in enforcing investment treaties); Gaukrodger & Gordon, *supra* note 96, at 28–29.

161. Gaukrodger & Gordon, *supra* note 96, at 11.

162. See *id.* at 98–100.

by-case nature of investment treaty arbitrations argues against any other NGO being able to rely on that decision, as opposed to having to bring its own challenge if the host country tried to apply to relevant law to it.¹⁶³ While a latter claimant might be able to nevertheless make an estoppel argument against the host country, factual differences between cases may make it difficult to win such an argument. In other words, the best result an NGO likely could obtain, even if the treaty language permitted injunctive relief and an arbitration tribunal was willing to provide such relief, would be to win what would effectively be an as-applied challenge to a host country law, not a facial challenge.

* * * * *

The above discussion reveals that international commercial law in the form of bilateral and multilateral investment treaties may provide a legally viable avenue in some situations for challenging undue burdens on cross-border funding of NGOs, but there are several significant legal hurdles an NGO bringing such a claim would have to overcome. At a minimum, those hurdles—particularly state parties and subject matter jurisdiction concerns—may foreclose a substantial proportion of potential claims relating to cross-border funding of NGOs. To determine how large that proportion likely is would require not only an empirical analysis of the agreements¹⁶⁴ but also a mapping of that analysis against the countries imposing overly burdensome restrictions on the recipients or providers of such funding, a major task that is beyond the scope of this Article. The limitation on remedies may also make a significant number of otherwise viable claims unattractive to the NGOs involved if provable monetary damages are limited. Yet if these obstacles were the only ones preventing the bringing of such claims, it would be surprising that not a single such claim has been brought, given that these obstacles almost certainly do not block all such claims.¹⁶⁵

163. See *infra* note 187 and accompanying text.

164. For an approach to such analysis that could possibly be used in this context, see Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of Investment Agreements*, 19 J. INT'L ECON. L. 561 (2016).

165. The closest situation appears to have been when an NGO pursued a commercial investor claim for which it had received the rights. See Victor Pey Casado and Foundation “President Allende” v. The Republic of Chile, ICSID Case No. ARB/98/2, Award (Sept. 13, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7630.pdf>; ICNL Treaty Protection, *supra* note 86, at 30 (possibly discussing this case); Zymek, *supra* note 12, at 14 (discussing this case).

This is particularly true given almost 700 investment treaty claims were brought by commercial investors through 2015.¹⁶⁶ While it is possible that most NGOs involved in cross-border funding are simply not aware of this option, the experience of commercial investors suggests another reason why such NGOs would be unlikely to pursue such a claim even if it were legally viable: cost.

III. THE COSTS OF INVOKING INVESTMENT TREATIES

It has been known for many years that invoking the protections of investment treaties can be expensive.¹⁶⁷ Because of the relatively small number of claims and the limited public information regarding these costs, it is only recently that the true magnitude of those financial costs has started to become apparent, however. In addition, a claim relating to cross-border funding of NGOs might also result in reputational costs to the NGO bringing the claim (both with respect to the challenged host country and with respect to other countries where the NGO may work or may want to work in the future) and principle costs (to the extent that invoking the protections of an investment treaty may undermine the principles or ideals of the NGO).

A. FINANCIAL COSTS

The costs of invoking either (1) the ICSID facilities and rules; or (2) conciliation and arbitration facilities that use the United Nations Commission on International Trade Law (UNCITRAL) rules—the two paths that are usually available and chosen by claimants invoking the protections of investment treaties—have become clearer over time.¹⁶⁸ First, a nonrefundable fee of \$25,000 is required to begin conciliation or arbitration proceedings under the ICSID rules.¹⁶⁹ Organizations that apply the

166. UNCTAD 2016, *supra* note 104, at 104.

167. Lee M. Caplan, *Making Investor-State Arbitration More Accessible to Small and Medium-Sized Enterprises*, in *THE FUTURE OF INVESTMENT ARBITRATION* 297, 304–07 (Catherine A. Rogers & Roger P. Alford eds., 2009); Gallus, *supra* note 125, at 91; Gallus & Peterson, *supra* note 10, at 547–48; ICNL Treaty Protection, *supra* note 86, at 27; MacKenzie, *supra* note 10, at 219, 234.

168. See NEWCOMBE & PARADELL, *supra* note 99, at 59; Gaukrodger & Gordon, *supra* note 96, at 64, 68 (summarizing dispute resolution systems); UNCTAD 2016, *supra* note 104, at 103–04 (discussing transparency rules for investor-state arbitrations).

169. *Schedule of Fees*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (ICSID) (2017) <https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx>.

UNCITRAL rules appear to have similar or even higher initial fees.¹⁷⁰ But this is only the tip of the iceberg. Conciliators, arbitrators, commissioners, and ad hoc committee members who oversee and decide the dispute have a right not only to reimbursement of direct expenses reasonably incurred but also to a fee of \$3000 per day of meetings or other work performed under the ICSID rules.¹⁷¹ The UNCITRAL rules do not provide a set figure for such fees to be paid by the parties, but only require that they be reasonable and clearly stated in the final award.¹⁷² This obligation on the parties to pay these costs is in contrast to most state-state international dispute mechanisms and human rights decisionmaking bodies, under which a state-funded institution usually compensates the decision makers.¹⁷³ In addition, in most disputes these costs pale in comparison to the legal counsel and expert costs.

More specifically, a recent Organization for Economic Co-operation and Development (OECD) study by David Gaukrodger and Kathryn Gordon, based on the limited publicly available data (many international arbitration decisions do not include cost information), found that on average the cost of arbitration between investors and states (whether under the ICSID rules, the UNCITRAL rules, or another system) is eight million dollars per dispute, with costs in some disputes exceeding thirty million dollars and with on average eighty-two percent of these costs being for legal counsel and experts (as opposed to for the arbitrators or the institutional body involved).¹⁷⁴ While the prevailing party may be able to shift some or all of its costs to the losing party, in many cases this shift does not occur, and whether it will occur in a given dispute is highly uncertain, although the trend may be toward a presumptive loser-pays model.¹⁷⁵ And of course

170. See, e.g., *Schedule of Fees and Costs*, PERMANENT COURT ARBITRATION, <https://www.pca-cpa.org/fees-and-costs> (last visited Dec. 5, 2017) (listing fees and costs for the services of the Permanent Court of Arbitration); *SIAC Schedule of Fees*, SING. INT'L ARBITRATION CTR., <http://siac.org.sg/estimate-your-fees/siac-schedule-of-fees> (last visited Dec. 5, 2017) (listing fees and costs for the services of the Singapore International Arbitration Centre).

171. ICSID, *supra* note 169.

172. U.N. Comm'n on Int'l Trade Law (UNCITRAL), UNCITRAL Arbitration Rules arts. 40–41 (2011).

173. Gaukrodger & Gordon, *supra* note 96, at 11.

174. *Id.* at 19.

175. Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 843–44 (2011); Gaukrodger & Gordon, *supra* note 96, at 22; David Smith, Note, *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*, 51 VA. J. INT'L L. 749, 750 (2011).

the claimant could be the losing party and so face the prospect of not only having to bear its own costs but also some or all of the defending host country's costs.¹⁷⁶

Not surprisingly given these high costs, the publicly available information on the damages sought by investors indicates those damages range from a low of eight million dollars to a high of \$2.5 billion.¹⁷⁷ Claims worth less than at least several million dollars are likely not economically feasible.¹⁷⁸ This is particularly true given that amounts awarded as damages are usually significantly less than the damages claimed.¹⁷⁹ Furthermore, the existence of numerous claims by for-profit investors in the amounts of many millions of dollars is possible given there is now over \$1.5 trillion in foreign direct investment annually.¹⁸⁰ Yet, from 1987 through 2015, only slightly fewer than 700 such claims (under any set of international arbitration rules) are known to have been brought, with the bulk of such claims brought in the past fifteen or so years.¹⁸¹ The existence of an international arbitration option almost certainly makes it easier for international investors to successfully resolve claims through host country domestic channels, which may often be less expensive, as well as less likely to antagonize the host country, although there does not appear to be any data on this effect and so it is impossible to determine its magnitude.

As previously noted, the level of cross-border funding of NGOs is difficult to determine but appears to be a much more modest amount of tens of billions of dollars annually.¹⁸² The largest NGO involved in cross-border funding is probably the Bill and Melinda Gates Foundation (the "Gates Foundation"). In 2015, the Gates Foundation made approximately four billion dollars in grants, spread across dozens of countries and over a thousand recipients (including many in the United States, where the

176. Franck, *supra* note 175, at 785–86.

177. U.N. Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance*, 115, UNCTAD/WIR/2015 [hereinafter UNCTAD 2015].

178. Gaukrodger & Gordon, *supra* note 96, at 23.

179. UNCTAD 2015, *supra* note 177, at 146; Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 57–62 (2007).

180. UNCTAD 2016, *supra* note 104, at 2; OECD, FDI IN FIGURES 1 (2017), <http://oecd.org/daf/inv/investment-policy/FDI-in-Figures-April-2017.pdf>.

181. UNCTAD 2016, *supra* note 104, at 104.

182. See *supra* notes 15–16 and accompanying text.

Gates Foundation is based).¹⁸³ Slightly fewer than eighty of these grants were for ten million dollars or more, with most of the recipients of those grants going either to NGOs based in the United States, international organizations (such as the International Bank for Reconstruction and Development and the World Health Organization), or foreign government agencies (such as the United Arab Emirates Minister of State Office).¹⁸⁴ Therefore the potential claims by even the Gates Foundation that could justify the cost of pursuing an international arbitration proceeding are relatively few, assuming the various legal hurdles identified above to invoking the protection of an applicable investment treaty could be overcome. That said, even as large a funder as the Gates Foundation is not immune from the impact of restrictions on cross-border funding, as the Indian government recently revoked the license of a Gates Foundation grantee to accept such funding.¹⁸⁵

Those jurisdictional and other legal hurdles also add to the likely cost of bringing a claim pursuant to an investment treaty, especially since host countries presumably will generally raise any viable jurisdictional concerns. Among for-profit investors through 2015, about a third of the approximately 440 concluded cases were decided in favor of the host country, about a quarter in favor of the investor, with the remainder either settled (usually with the terms kept confidential) or discontinued.¹⁸⁶ In light of the jurisdictional uncertainties mentioned above, a lower success rate for providers of cross-border funding to NGOs is likely. This is especially true given that even if an NGO providing cross-border funding successfully overcomes those jurisdictional concerns in a particular dispute, arbitration tribunal decisions are not precedential for any subsequent tribunal, even those applying the same investment treaty (although they often are cited by

183. *Grantmaking: Awarded Grants (2015)*, BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/How-We-Work/Quick-Links/Grants-Database#q/year=2015&sort=amount> (last visited Dec. 5, 2017) [hereinafter Gates Foundation, *Grantmaking*]; BILL & MELINDA GATES FOUND., INTERNAL REVENUE SERVICE FORM 990-PF: RETURN OF PRIVATE FOUNDATION (2015), at 11, https://www.gatesfoundation.org/~media/GFO/Who-We-Are/Financials/F_535940_15_GatesFoundation_FS.PDF?la=en.

184. Gates Foundation, *Grantmaking*, *supra* note 183.

185. See Nida Najar, *India's Ban on Foreign Money for Health Group Hits Gates Foundation*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/world/asia/india-health-nonprofit-gates-foundation.html?mcubz=3>.

186. UNCTAD 2016, *supra* note 104, at 107.

later tribunals as persuasive authority).¹⁸⁷ This lack of formal precedential status also lessens the attractiveness of a test case approach by which a group of well-resourced cross-border funders pays for the costs of a particular case with favorable facts in order to hopefully establish positive legal authority for later cases, particularly on jurisdictional issues. So even if an NGO providing cross-border funding has a large enough potential claim to justify the cost of pursuing arbitration under an investment treaty, and the resources to cover that cost, there is a substantial chance it would not be successful (and the NGO might even be required to cover the costs of the challenged host country). Given the lack of previous claims by NGOs and the novel legal issues discussed previously that such claims likely would raise, the magnitude of legal counsel and expert costs for such claims is highly uncertain and so it cannot be assumed that those costs would necessarily be significantly less as compared to the legal counsel and expert costs related to pursuing for-profit investor claims.

The costs already discussed also do not include the costs associated with enforcing an arbitration tribunal's monetary damages award. States that are required to pay monetary damages under international arbitration decisions sometimes refuse to do so.¹⁸⁸ Seeking enforcement of such damages in national courts may also sometimes be particularly difficult for NGOs, in that the New York Convention and other applicable domestic laws may impose additional jurisdictional hurdles that could frustrate such attempts, especially if the host country involved is one of the approximately twenty-five (including China and the United States) that have chosen to limit the reach of the New York Convention to disputes arising out of commercial relationships.¹⁸⁹ And of course having to enforce a damage award only

187. MARIEL DIMSEY, *THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS* 40–41 (2008); NEWCOMBE & PARADELL, *supra* note 99, at 59–60; Bjorklund, *supra* note 110, at 1294; W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1908 (2010).

188. Gallus, *supra* note 125, at 92; MacKenzie, *supra* note 10, at 219; Mostajo, *supra* note 72, at 80–82; ICNL Treaty Protection, *supra* note 86, at 28; *see also* Gaukrodger & Gordon, *supra* note 96, at 30–31.

189. Evered, *supra* note 10, at 176–77; Gallus & Peterson, *supra* note 10, at 530; ICNL Treaty Protection, *supra* note 86 at 28. In contrast, for arbitration awards enforceable under the ICSID Convention, domestic courts are generally required to treat the award as a final decision of a domestic court, and so are barred from refusing to enforce the award on public policy or other grounds not

further lengthens the time period for the dispute,¹⁹⁰ which may have already spanned several years,¹⁹¹ and so further delays any recoupment of the costs incurred. Finally, other barriers to enforcement may exist, such as the application of sovereign immunity to protect certain state-owned assets from seizure to satisfy an arbitration award.¹⁹²

In sum, the considerable financial costs involved with pursuing international arbitration as currently provided for in investment treaties likely renders all but a few potential claims by NGOs providing cross-border funding uneconomical, especially once the uncertainty of prevailing and the possibility of having to pay the defendant state's costs are taken into account. And these are not the only costs that an NGO claimant may face.

B. REPUTATIONAL COSTS

Bringing a claim against a given host country might poison a given cross-border funder's relationship with that country, rendering it difficult or even impossible to continue to work in that country even if the claim results in monetary damages for the funder.¹⁹³ Such a result would undermine the funder's goals of helping the domestic NGOs and people of the host country and so might not be acceptable to that funder. In addition, if a cross-border funder is known to have brought such a claim against one country, other host countries might be less inclined to work with the funder. Particularly for NGOs that engage in activities where a good working relationship with host-country governments is seen as important or necessary, such reluctance could

based on the ICSID Convention's terms. See ICSID Convention, *supra* note 129, arts. 53, 54; Diel-Gligor, *supra* note 140, at 683–86.

190. Gaukrodger & Gordon, *supra* note 96, at 11.

191. *Id.* at 21; ICNL Treaty Protection, *supra* note 86 at 27.

192. See Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 302, 303 (Christina Binder et al. eds., 2009); Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 211 (2010). The likely relatively smaller amounts for damage awards from cross-border funding of NGO claims, even if successful, may make this application of sovereign immunity less of a concern, however. See Jacob A. Kuipers, Note, *Too Big To Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards*, 39 B.C. INT'L & COMP. L. REV. 417, 417 (2016).

193. Gallus & Peterson, *supra* note 10, at 547.

be a significant additional cost.¹⁹⁴ Bringing such a claim might also have negative effects on the previously supported host country domestic NGOs, including loss of domestic support and persecution of staff.

The extent of such reputational costs is speculative at this point, however. There do not appear to be any studies considering whether and to what extent for-profit investors pursuing claims under investment treaties have suffered reputational damage that prevented them from pursuing future investment opportunities, either in the defendant host country or in host countries generally. The studies of reputational effects of such claims tend to focus instead on the reputation of the host-country governments with respect to meeting their treaty obligations.¹⁹⁵ And of course such information may not be indicative of the potential reputational damage to NGOs, given the different nature of their investments in the host countries. It is therefore highly uncertain what effect, if any, bringing such claims might have on the ability of an NGO to operate in the defendant host country in the future, or in other countries. Of course, that very uncertainty is another reason why providers of cross-border funding to NGOs may be reluctant to try to invoke the protections of international investment treaties to counter restrictions on such funding.

C. PRINCIPLES COSTS

Some NGOs that engage in significant amounts of cross-border activity are also critical of current international commercial law and particularly the growing web of investment treaties.¹⁹⁶ For example, the Transnational Institute is highly critical of investment treaties, viewing them as favoring the financial interests of large corporations over host country sovereignty and resulting in negative social and ecological impacts.¹⁹⁷ While less

194. Evered, *supra* note 10, at 160–62 (discussing the importance of reaching agreement between the NGOs and host countries).

195. See, e.g., Shahryar Minhas & Karen Remmer, *Contingent Institutions: The Reputational Impact of Investor-State Disputes* (Mar. 5, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576568 (exploring the extent to which alleged violations of international commitments damage state reputations).

196. Gallus & Peterson, *supra* note 10, at 547; Mostajo, *supra* note 72, at 77–78.

197. NICK BUXTON ET AL., TRANSNATIONAL INSTITUTE (TNI) & CORPORATE EUROPE OBSERVATORY (CEO), LEGALISED PROFITEERING? HOW CORPORATE LAWYERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (2011), <https://www.tni.org/en/briefing/legalised-profiteering>.

overtly critical, the Ford Foundation has also supported efforts to reform international commercial law through its Reforming Global Financial Governance initiative.¹⁹⁸ NGOs with this perspective may be reluctant to invoke the protections provided by the very system they criticize, as doing so might undermine their other efforts and alienate some of their staff and supporters. It is not clear, however, how many NGOs engaged in cross-border funding have such concerns.

* * * * *

Based on the experience of for-profit investors that have brought claims under investment treaties, it is likely that the financial costs faced by an NGO seeking to challenge a host country's treatment of its cross-border funding activities or recipients would render all or almost all such claims economically unwise. This conclusion is reinforced by the significant, although not necessarily insurmountable, jurisdictional hurdles such an NGO would need to clear, which could both doom the NGO's claim and possibly expose it to liability for the costs incurred by the defendant host-country government. The likely lack of both injunctive relief and definite lack of precedential value for any arbitration decision further reduce the attractiveness to an NGO of bringing such a claim. While the potential reputational costs of pursuing such a claim are much less certain, they also weigh against bringing such a claim, as do the principles costs for those NGOs that are critical of the international investment treaty structure.

Two commentators have argued that even the threat of an investment treaty claim may be sufficient to alter host country behavior and so blunt some of growing legal restrictions on cross-border funding without the need to incur the costs of actually bringing such a claim.¹⁹⁹ It may be that the availability of investment treaty claim mechanisms for for-profit investors has influenced investor-state relations generally and encouraged resolution of many disputes before the filing of a formal claim for arbitration, even though a relatively small proportion of foreign direct investments have been the subject of actual claims.²⁰⁰ But

198. *Institutional and Regulatory Reforms in the European Union. Re-Mapping Economic and Financial Governance After the Crisis*, ECONOMIA CIVILE, <http://www.aitomo.it/ford> (last visited Dec. 5, 2017) (discussing a project funded by the Ford Foundation to contribute to regulating the financial sector).

199. ICNL Treaty Protection, *supra* note 86, at 29–30.

200. W. Michael Reisman, *International Investment Arbitration and ADR; Married but Best Living Apart*, in U.N. CONFERENCE ON TRADE AND DEV.

it likely was necessary for some successful claims to be made before most host countries took their investment treaty obligations seriously. Absent any claims by NGOs relating to cross-border funding—much less successful claims—host countries could, and likely would, accurately judge that a threat to bring such a claim is a hollow one. Furthermore, even if it could be demonstrated that such claims can be viable, the relatively small amounts of damages available would also limit the effect of potential exposure to such claims on host country behavior. Finally, and as will be discussed further in the next Part, at least at this time, it appears that host countries perceive a much lower national need for such funding (as opposed to foreign direct investment) and so are likely to be less concerned about developing a reputation for being hostile to such funding or otherwise discouraging such funding.

Does this mean NGOs facing the growing legal restrictions on cross-border funding have no viable international law remedy to challenge such restrictions? The answer is currently yes, but there may be ways to modify the existing international-investment protection legal regime to better accommodate claims by such NGOs. It may also be possible to develop a separate international treaty framework to better protect such funding, consistent with the international law. The next Part addresses these possibilities.

IV. REVISITING THE PROMISE OF INTERNATIONAL TREATIES

There are at least two ways the existing legal regime could be modified to increase the ability of NGOs providing cross-border funding to successfully access a formal international law regime to challenge unduly burdensome legal restrictions on such funding. One way would be either to fund, or to significantly reduce the financial costs associated with, invoking the protections of existing investment treaties. This way is relatively feasible, in that it would not require the creation of new treaties and could be incorporated into already existing efforts to address the costs of international arbitration generally. The other way would be to try to create a distinct protection regime for such funding by identifying the reasons for the relatively recent surge in investment treaties and trying to generate similar momentum for new

(UNCTAD), INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II 22, 22–23 (2011); Gaukrodger & Gordon, *supra* note 96, at 13.

agreements addressing cross-border funding of NGOs. This second way would be much more difficult to pursue and would almost certainly require a much longer time frame to implement, but potentially could provide more certain and comprehensive protection for such funding.

A. REDUCING THE FINANCIAL COSTS OF INVOKING INVESTMENT TREATIES

Since the magnitude of reputational costs is uncertain and may be minimal in some, if not many, instances, and since principles costs only probably apply to a relatively small portion of the NGOs providing cross-border funding, it makes sense to focus primarily on reducing the financial costs that most clearly pose a barrier to NGOs seeking to invoke the protections of investment treaties. There are a number of existing proposals for addressing the costs of arbitration under investment treaties generally that could help achieve this goal, including making resolution of disputes more cost effective, facilitating third-party financing of claims, and increasing the amount and certainty of cost-shifting to the losing party,²⁰¹ although the openness of host countries to these changes is uncertain (at least to the extent they may make it easier to bring claims against them). There also are several possible ways to reduce these costs specifically for NGOs seeking to challenge restrictions on their cross-border funding activities, including permitting or requiring fee waivers and encouraging pro bono legal and expert assistance.

1. Addressing the Costs of International Arbitration Generally

Turning first to the more general proposals, ICSID has already taken a number of steps to streamline its procedures and so hopefully lower the financial costs of the parties invoking those procedures, although it is not yet clear whether those steps have actually reduced those costs.²⁰² Of course, cost reduction in the form of a more efficient process risks reducing the quality of the dispute resolution, although it is also not clear whether this has occurred.²⁰³ In addition, various commentators have suggested further ways to prevent disputes or manage them more effectively, which could not only reduce financial costs but also

201. Gaukrodger & Gordon, *supra* note 96, at 21, 23, 37 (discussing each of these proposals in turn).

202. *Id.* at 21.

203. *Id.* at 24 (discussing the United States' and Canada's formation of specialized legal departments to litigate investment disputes).

might reduce reputational costs by putting less strain on investor-state relations.²⁰⁴ These further ways tend to involve either (1) host countries setting up institutions or procedures to better identify and resolve potential disputes before they rise to the level of formal claim and to better educate relevant government officials; or (2) host countries and aggrieved investors pursuing nonbinding alternate dispute resolution processes to more quickly and cheaply resolve disputes that do arise.²⁰⁵ But, as Michael Reisman has suggested with respect to why a significant number of disputes are probably already resolved before a notice of arbitration is submitted, these options likely will only be effective if backstopped by the credible threat of compulsory arbitration.²⁰⁶ It is therefore necessary to not simply reduce the cost of resolving disputes more generally as most of these suggestions seek to do, but to also significantly reduce the cost of actual arbitration for NGOs so as make the threat of such arbitration credible for NGOs engaged in cross-border funding.

A potentially more promising way of helping NGOs cover the costs of arbitration would be for them to tap into the growing availability of third-party financing for commercial litigation, including in the international investment context.²⁰⁷ Interestingly, in at least two cases NGOs have served as third-party funders for international investment claims that were of interest to those NGOs.²⁰⁸ One case involved a 2010 claim by Philip Morris against Uruguay, where the U.S.-based Campaign for Tobacco-Free Kids provided funding for Uruguay's successful defense.²⁰⁹

204. See generally, U.N. CONFERENCE ON TRADE & DEV. (UNCTAD), INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II (2011) (compiling and synthesizing ideas concerning alternative dispute resolutions in the international investment law context).

205. *Id.* at 1–2 (discussing various proposals related to alternative dispute resolution).

206. Reisman, *supra* note 200, at 23.

207. Gaukrodger & Gordon, *supra* note 96, at 37; Mostajo, *supra* note 72, at 88–89; see, e.g., FULBROOK CAPITAL MGMT., LLC, <http://www.fulbrookmanagement.com> (last visited Dec. 5, 2017) (displaying the website of a company involved in dispute finance); *Third-Party Funding*, INT'L COUNCIL FOR COMMERCIAL ARBITRATION, http://www.arbitration-icca.org/projects/Third_Party_Funding.html (Dec. 5, 2017) (displaying the website of a group studying third-party financing in international arbitration).

208. Luke Eric Peterson, *Uruguay Hires Law Firm and Secures Outside Funding To Defend Against Philip Morris Claim; Not the First Time an NGO Offers Financial Support for Arbitration Costs*, INV. ARB. REP., Oct. 20, 2010.

209. See Philip Morris Brands Sàrl et al. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 1–2, 7, 15, 590 (July 8, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>; Peterson, *supra*

The other case involved a successful 2003 set of claims pursued by a group of dispossessed Zimbabwean farmers, which was partially funded by the U.K.-based AgricAfrica.²¹⁰ While this role indicates that pursuing a claim in international arbitration is not beyond the financial reach of all NGOs, it is notable that these NGOs enjoyed financial support from Bloomberg Philanthropies and the Open Society Initiative of South Africa, respectively, which in turn are supported by the deep pockets of billionaires Michael Bloomberg and George Soros.²¹¹

Third-party financing in this context raises a variety of concerns, including possible conflicts between the provider of financing and the NGO regarding the appropriate resolution of the dispute, whether such financing should be disclosed to the arbitrators, and whether such financiers can be subject to cost shifting.²¹² In the context of an NGO claim, perhaps the most pressing concerns are that the involvement of such a financier would tilt the scales toward seeking pecuniary damages as opposed to nonpecuniary remedies that otherwise the NGO would prefer (if they are available) and, relatedly, whether the same calculus that makes pursuing such claims uneconomical for most NGOs because of the modest level of any monetary damages available would also make such claims unattractive to most financiers. Because of these concerns, an NGO likely would have to identify a financier motivated at least in part by political or ideological reasons in order to obtain such financing (as was the

note 208; Mac Margolis, *Big Tobacco Gets Crushed by Tiny Uruguay*, BLOOMBERG VIEW (July 18, 2016), <https://www.bloomberg.com/view/articles/2016-07-18/big-tobacco-gets-crushed-by-tiny-uruguay>.

210. See Funnekotter et al. v. Republic of Zim., ICSID Case No. ARB/05/6, Award, ¶¶ 1, 148 (Apr. 22, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0349.pdf>; Alan Beattie & Luke Peterson, *Farmers Use Tribunal To Tackle Harare*, FIN. TIMES, June 27, 2007, at 10; Augustine Mukaro, *Dutch Farmers Put Zim Land Reform on Trial*, ZIMBABWE INDEP. (July 1, 2005), <https://www.theindependent.co.zw/2005/07/01/dutch-farmers-put-zim-land-reform-on-trial>; Peterson, *supra* note 208; Damon Vis-Dunbar, *Tribunal Orders Compensation in Dutch Farmers' Claims Against Zimbabwe*, INV. TREATY NEWS (Apr. 28, 2009), <https://www.iisd.org/itn/2009/04/28/tribunal-orders-compensation-in-dutch-farmers-claims-against-zimbabwe>.

211. See Wyre Davies, *Michael Bloomberg Fights Big Tobacco in Uruguay*, BBC NEWS (Apr. 7, 2015), <http://www.bbc.com/news/world-latin-america-32199250>; Peterson, *supra* note 208; Statement by Michael R. Bloomberg on Philip Morris International v. Uruguay Decision (July 8, 2016), <https://www.mikebloomberg.com/news/statement-by-michael-r-bloomberg-on-philip-morris-international-v-uruguay-decision>.

212. Gaukrodger & Gordon, *supra* note 96, at 39–42.

case in the two known instances where an NGO served as a third-party financier).²¹³

A variation on this approach would be for a group of similarly situated NGOs operating in the same country to pool their resources to fund a single claim by one of their members. Such an approach has the advantage of possibly avoiding disagreements over the remedies to pursue, although conflicts on this point and other aspects of the claim might still arise between the NGOs provided the funding. There are, however, significant barriers to this test case approach as noted previously, including that the claim would not create a binding precedent, even if successful, and the fact that the financial resources needed to pursue a given claim may be beyond the reach of even a relatively large group of NGOs.²¹⁴ (For similar reasons establishing some type of captive insurance arrangement to fund such claims would also be difficult.)

Lastly, clarifying the rules regarding cost-shifting based on the final resolution of a dispute would reduce some of the uncertainty regarding both whether a prevailing claimant will have to bear its own costs and whether a losing claimant faces a significant risk of bearing the costs of the defendant host country.²¹⁵ However, there is still substantial uncertainty regarding the likelihood of prevailing, especially in the NGO context, particularly given the jurisdictional issues discussed previously, as well as the burden of bearing the financial costs while the dispute is being resolved even if there is a strong prospect of recovering those costs if the NGO prevails. So such clarification likely would not significantly reduce the possible financial costs to an NGO as long as the jurisdictional uncertainties are still significant. Furthermore, any clarification in the direction of increased fee-shifting could increase the possible costs, given the uncertain success of any cross-border funding of NGOs claim. Finally, if much of the costs are waived or eliminated through pro bono assistance, there would be limited costs available for shifting even in the event of a successful claim.

213. See *supra* notes 208–11 and accompanying text.

214. See *supra* note 187 and accompanying text.

215. Franck, *supra* note 175, at 844; Smith, *supra* note 175, at 750.

2. Addressing the Costs of International Arbitration for NGOs

There may be, however, ways to reduce the costs of international arbitration specifically for NGOs that could be more effective.²¹⁶ One way would be for the ICSID to waive its initial \$25,000 fee and to encourage arbitrators and others paid pursuant to ICSID's fee schedules to either waive their fees or to accept significantly reduced fees because of the nature of the claimant. Such a change would not require amendment of the numerous existing investment treaties, but could be made instead by ICSID and thus applicable to all arbitrations under its rules. More specifically, the current fee structure exists under ICSID Administrative and Financial Regulations 14 and 16, which grant the ICSID Secretary-General the authority to set the fees.²¹⁷ With respect to the fee rate for arbitrators and other members of decision-making bodies, the approval of the President of the World Bank, in their role as the Chairman of the ICSID Administrative Council, would also be needed.²¹⁸ It is not clear, however, whether this authority extends to setting different fee rates based on the nature of the claimant or whether instead the ICSID Administrative Council would need to modify the applicable Administrative and Financial Regulations (pursuant to ICSID Convention Article 6(1)(a)).²¹⁹ There is also the related issue of whether the fees should also be adjusted for the defendant host countries when a claim is brought by an NGO, particularly since their fees could be shifted to the NGO if the defendant host country prevails.

Because the UNCITRAL Rules and other commonly used arbitration rules do not specify a fee structure (beyond limiting fees to those that are reasonable) and are administered by a number of organizations, it would be more difficult to seek such financial accommodations for arbitrations brought by NGOs under those other sets of rules.²²⁰ This is a concern in part because of the possible additional jurisdictional hurdle under the ICSID rules

216. These proposals mirror in part suggestions by others concerned with access to international arbitration in this context for parties with limited financial resources. See, e.g., Caplan, *supra* note 167, at 307–10 (discussing small and medium-sized enterprises).

217. Int'l Ctr. for Settlement of Inv. Disputes (ICSID), *Administrative and Financial Regulations*, in ICSID CONVENTION, REGULATIONS AND RULES 60–62, regs. 14(1), 16 (2006), https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

218. See *id.* at 60, reg. 14(1); ICSID Convention, *supra* note 129, art. 5.

219. See ICSID Convention, *supra* note 129, art. 6(1)(a).

220. See *supra* note 172 and accompanying text.

mentioned previously that does not appear to be present under other sets of rules, and so NGOs might prefer these other sets of rules, when available.²²¹ Such accommodation could nevertheless be sought by approaching the various private bodies that offer (for a fee) to appoint arbitrators and provide administrative services in order to resolve international investor disputes pursuant to these rules.

Finally, ICSID and other arbitration facilities may be unwilling to grant such waivers even if it would be possible to do so, both because it could make them appear biased toward one party and because it would open the door for waiver requests from other financially strapped parties, such as small and medium-sized enterprises and less developed countries.

As noted previously, on average the bulk of costs for arbitration of for-profit investor disputes do not stem from the fees charged by the bodies that facilitate arbitration and the costs of the arbitrators themselves; rather the vast majority of such costs represent the legal and expert fees charged by the individuals and firms that assist the parties to such arbitrations.²²² Any attempt to significantly reduce those costs must therefore also take these legal and expert fees into account. One NGO-specific option for doing so would be to encourage law firms and experts engaged in these disputes to grant their services on a pro bono basis to the NGO, which may be particularly attractive if they support the NGO's goals or are troubled by the legal restrictions on cross-border funding that the NGO is challenging. Given the relative size and expertise of the legal and expert community for international commercial arbitrations—dozens of major law firms now have international arbitration practices—it should be possible to match at least some potential NGO claimants with favorably inclined lawyers and experts.²²³ Such pro bono service may be particularly attractive as a counter to accusations that these lawyers and experts are enriching themselves to the detriment of host countries.²²⁴ Such service also is in step with the

221. See *supra* notes 141–43 and accompanying text.

222. See *supra* note 174 and accompanying text.

223. See *Best Law Firms for International Arbitration - Commercial*, U.S. NEWS & WORLD REP., http://bestlawfirms.usnews.com/search.aspx?practice_area_id=48 (last visited Dec. 5, 2017).

224. See generally BUXTON ET AL., *supra* note 197 (describing the reasoning behind such accusations).

growing calls for all lawyers to provide pro bono services, particularly by the courts in New York where many of these practices are based.²²⁵

There likely would, however, be some significant obstacles to this pro bono approach. First, taking on one or more such claims could create potential conflicts of interest that could prevent the lawyers and experts involved from taking on other, paying clients (including any host countries involved). Second, even if no technical conflicts of interest arose, lawyers and experts might be hesitant to get involved in NGO disputes on a pro bono basis because by doing so they may risk both alienating the potential host country or for-profit investor clients and opening the door to requests from some of those clients for reduced or waived fees. Third, given the many complex legal issues relating to such disputes, there likely would be many hours of work required. Finally, the increasing financial demands placed on law firms, as well as the likely sensitivity of willingness to provide pro bono assistance to the changing economic fortunes of such firms, may more than outweigh the pressure from the increasing calls for lawyers to provide additional pro bono services.

Even with these caveats, the NGO-specific proposals appear to have more promise, as compared to the more general cost strategies, to significantly reduce the cost barrier for an NGO to pursue a challenge to burdensome legal restrictions on cross-border funding under an investment treaty. Pursuing these proposals would still require significant effort, however, both to generate a cadre of pro bono lawyers and experts in a legal space where such a group has not existed before and to persuade IC-SID and other arbitration facilities to waive or reduce their fees in this context. An NGO pursuing such a claim would also likely have to cover some costs, even if it received most services on a pro bono basis, such as travel expenses for the arbitrators, lawyers, and any experts involved, and so would need to have or secure the financial resources to do so. And, of course, this approach assumes that the jurisdictional hurdles discussed previously are surmountable, at least under many, if not most, investment treaties, and the potential monetary damages are significant enough to make the effort worthwhile even with reduced costs. Finally, using investment treaties in this fashion

225. *The Legal Profession - Pro Bono: Overview*, N.Y. STATE UNIFIED COURT SYSTEM, <https://www.nycourts.gov/attorneys/probono/index.shtml> (last updated Dec. 31, 2015).

could lead to host country responses that could limit or neutralize any protections obtained for cross-border funding of NGOs, including pursuit of other means of restricting such funding (or domestic NGOs more generally) that are less likely to fall under such treaties and even renegotiation of those treaties to explicitly exclude such funding from protection.

It is therefore far from clear that existing investment treaties would be sufficient to counter the increasing restrictions on cross-border funding for NGOs, even if the cost concerns identified here could be overcome. It is therefore necessary to consider a more ambitious option in case using existing investment treaties to protect cross-border funding of NGOs proves not to be feasible.

B. PROSPECTS FOR CREATING A DISTINCT PROTECTION REGIME FOR CROSS-BORDER FUNDING OF NGOS

It was far from a given that the growing web of investment treaties would come into existence, and indeed the magnitude of its growth has been characterized as both “radical”²²⁶ and “remarkable.”²²⁷ This is in part because, unlike previous international commercial treaties and early bilateral investment treaties, more recent investment treaties generally give investors—not just the state parties to the treaties—the right to bring claims against a state party pursuant to compulsory arbitration without the involvement of the investor’s home-country government and without the necessity of exhausting domestic remedies.²²⁸ This was a significant change, because by providing an effective way for investors to directly resolve disputes through international arbitration with host countries, these treaties removed the need for investors to either have their claims placed on the diplomatic agendas of the countries involved or to exhaust

226. Choi, *supra* note 83, at 731.

227. Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POLY 157, 157 (2005); Yackee, *supra* note 104, at 405; Diel-Gligor, *supra* note 140, at 677.

228. O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011, at 649, 679 (Karl P. Savant ed., 2011); Choi, *supra* note 83, at 737; Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1537–38 (2005); Vandavelde, *supra* note 227, at 175.

host country domestic court remedies.²²⁹ The ability to avoid going to domestic courts is particularly attractive to investors, because they tended to view such courts as not being impartial, as being bound by domestic laws that disfavored foreign investors, and as often lacking the technical expertise required to resolve complex investment disputes.²³⁰ This change was particularly striking because it was only possible with the consent of the states involved, usually obtained on a bilateral basis, although some multilateral investment treaties now exist.²³¹

Could the factors that led to many states entering into such agreements, despite initial hostility because of the loss of sovereignty they represented, have parallels in the context of cross-border funding of NGOs, such that similar momentum could be created for a distinct and accessible set of legal protections for such funding under bilateral and multilateral treaties? To consider such a possibility first requires a general understanding of how the existing web of investment treaties came into existence.

1. Key Factors Supporting Creation of Investment Treaties

While many factors played into the positive shift in attitude of most, although not all, countries toward investment treaties, consideration of the history of international law relating to foreign direct investment reveals two critical examples that came together in the late twentieth century to begin, and then maintain, the surge in modern investment treaties. Those critical factors are host country demand and investor demand, with the latter stemming in large part from the perceived inadequacy of other approaches for protecting foreign direct investment and the viability of the international arbitration approach to dispute resolution that is now incorporated in almost all investment treaties.²³²

Host Country Demand: A combination of the collapse of communism as an ideological force, the economic successes of Asian developing countries that embraced a capitalist model, and a growing view in developing countries that strong economic de-

229. NEWCOMBE & PARADELL, *supra* note 99, at 1–2; Johnson Jr. & Gimblett, *supra* note 228, at 650; Vandeveld, *supra* note 227, at 175.

230. Choi, *supra* note 83, at 735.

231. For examples of the existing multilateral treaties that provide foreign direct investment protection, see *supra* note 104.

232. See Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 436–44 (2010).

velopment requires foreign direct investment led many developing-country governments to pursue investment treaties in the last quarter of the twentieth century, albeit with some reservations.²³³ For example, beginning in the 1980s even Latin American states that had been the most steadfast in their opposition to developing country views relating to protecting foreign investments, began entering into BITs and acceding to the ICSID Convention, although more recently they have been expressing some reservations regarding international arbitration.²³⁴ This shift in views was also driven in part during the 1980s by the international debt crisis and the reduced availability of financial aid from developed country governments, thereby increasing competition for the remaining significant source of foreign capital: foreign direct investment.²³⁵ While not all commentators agree with this explanation, there is general agreement that individual host countries felt pressure to compete with each other in agreeing to protections for foreign direct investments, even though collectively they resisted efforts to impose such protections on a multilateral basis.²³⁶ This pressure may have arisen in part by an impression that home countries would treat host countries and their economic interests, including exports, more favorably if an investment treaty was in place.²³⁷ The groundwork for this demand was also arguably laid by the wholesale unwinding of many previous foreign investments, made under colonial and pre-communist governments, through mass expropriations in the post-World War II era (especially relating to control of natural resources) and the subsequent diplomatic resolution of claims arising out of those expropriations.²³⁸

Investor Demand: At the same time, the increasing globalization of business activities and interests in the second half of the twentieth century led to increasing demands by investors

233. UNCTAD 2016, *supra* note 104, at ch. 4; NEWCOMBE & PARADELL, *supra* note 99, at 48; Franck, *supra* note 228, at 1527; Johnson Jr. & Gimblett, *supra* note 228, at 687–88; Vandeveld, *supra* note 227, at 171, 177–79, 183, 193; Diel-Gligor, *supra* note 140, at 677.

234. NEWCOMBE & PARADELL, *supra* note 99, at 50–51.

235. *Id.* at 48; Choi, *supra* note 83, at 733; Salacuse, *supra* note 232, at 441; Vandeveld, *supra* note 227, at 177–78.

236. Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 73, 83 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

237. Salacuse, *supra* note 232, at 442.

238. NEWCOMBE & PARADELL, *supra* note 99, at 18–19, 34; Choi, *supra* note 83, at 733; Johnson Jr. & Gimblett, *supra* note 228, at 661–67, 686, 690.

that their home countries enter into investment treaties that protect their foreign investments, especially in the wake of mass expropriations earlier in the twentieth century.²³⁹ For example, in the 1970s lobbying by the business community in the United States led to the launch by the U.S. government of its BIT program in 1977.²⁴⁰ More recently, investors in developing countries have begun to make significant foreign investments, leading to an increasing number of BITs between developing countries, as opposed to BITs that follow the previously dominant pattern of being between developed and developing countries.²⁴¹ These pressures may have not only made home countries agreeable to entering into investment treaties, but also may have led to those countries conditioning other benefits to host countries, such as government aid or loans from multilateral development institutions, on having an acceptable investment treaty in place.²⁴²

This investor demand was driven by the fact that in the years prior to the growth in modern investment treaties existing international law was generally seen as inadequate to protect foreign direct investments.²⁴³ This perception arose in large part because of sharply divergent views between developed and developing countries regarding the appropriate level of protection for such investments under customary international law, as exemplified by the U.N. Declaration of the New International Economic Order and the U.N. Charter of Economic Rights and Duties of States in the 1970s, as well as earlier disputes between these two types of countries.²⁴⁴ Attempts to develop a broad multilateral agreement to protect such investments also foundered on these differences despite repeated attempts.²⁴⁵ At the same time, the nineteenth century's diplomatic-protection approach, which relied on the use of not only diplomatic pressure but also

239. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 659 (1990); Vandeveld, *supra* note 227, at 171; Diel-Gligor, *supra* note 140, at 677.

240. NEWCOMBE & PARADELL, *supra* note 99, at 47.

241. *Id.* at 63; Vandeveld, *supra* note 227, at 182–83.

242. Yackee, *supra* note 104, at 462.

243. See Salacuse, *supra* note 232, at 437–40.

244. UNCTAD 2016, *supra* note 104, at 121–23; Salacuse, *supra* note 232, at 437; Vandeveld, *supra* note 227, at 166–70.

245. UNCTAD 2016, *supra* note 104, at 123; NEWCOMBE & PARADELL, *supra* note 99, at 19–22, 41, 55–56; Born, *supra* note 99, at 833; Salacuse, *supra* note 239, at 660; Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT'L L. & POL'Y 483, 485–86 (2011); Vandeveld, *supra* note 227, at 191–92.

military force to protect the property of investors in foreign countries, became less useful—both because of the necessity of home country involvement that was tempered by other national concerns and the growing rejection of using military force for such purposes.²⁴⁶ Finally, other means of protecting foreign direct investment, including host country domestic laws and investment contracts, were not seen as sufficient by investors.²⁴⁷

At the same time, international arbitration began to gain a reputation as a successful way to resolve investor-state disputes, particularly through the oil concession agreement cases and the Iran-U.S. Claims Tribunal's decisions; international arbitration's development was further aided by treaties, such as the 1958 New York Convention and the 1965 ICSID Convention, that facilitated such arbitration and ensured the ability of prevailing investors to enforce arbitration results in national courts.²⁴⁸ The fact that these treaties established procedural rules and gave binding effect to arbitration results without having to resolve the long-standing dispute over the appropriate level of protection for foreign direct investments as against host-country governments made this approach more feasible than a broad multilateral agreement incorporating such substantive standards.

It is important to note that this history is measured in decades and so reflects much broader political and economic developments across that time period, including the emergence of many countries from colonial rule and the end of the Cold War, with the collapse of communism.²⁴⁹ It is also important to note that the current investment-treaties web is not without its critics, not only with respect to some of the details of those treaties

246. Johnson Jr. & Gimblett, *supra* note 228, at 664–65.

247. Salacuse, *supra* note 232, at 438–39; Yackee, *supra* note 104, at 456.

248. UNCTAD 2016, *supra* note 104, at 122; NEWCOMBE & PARADELL, *supra* note 99, at 24–29, 39; Born, *supra* note 99, at 858–59; Johnson Jr. & Gimblett, *supra* note 228, at 682–85; Vandavelde, *supra* note 227, at 174–75.

249. NEWCOMBE & PARADELL, *supra* note 99, at ch. 1; Johnson Jr. & Gimblett, *supra* note 228; Vandavelde, *supra* note 227, at 193–94. Some commentators emphasize some of these factors over others. *See, e.g.*, NEWCOMBE & PARADELL, *supra* note 99, at 48–49 (attributing the growth of international investment agreements primarily to the triumph of economic liberalism because of the Asian countries' success and the inadequacy of other sources of capital for developing countries); Vandavelde, *supra* note 227, at 177–78 (attributing the growth of BITs primarily to the victory of market ideology and the loss of alternatives to foreign direct investment as a source of capital).

but also with respect to whether those treaties in fact have increased the level of foreign direct investment,²⁵⁰ or unduly favor developed-world business interests over the interests of host country populations.²⁵¹ For this reason, many countries and international organizations are actively considering how the existing global international-investment-agreement regime should be reformed, and a small number of countries have chosen to terminate existing investment treaties.²⁵² Not coincidentally and as noted previously, the growth in such treaties has slowed.²⁵³ Nevertheless, the large and still growing number of such treaties demonstrates their now established and important role in international commercial law.²⁵⁴

2. Key Factors Supporting Creation of Cross-Border Funding Protection

Do similar factors potentially exist in the context of cross-border funding of NGOs? If so, could they generate sufficient momentum to create viable formal legal dispute mechanisms to protect such funding? And what form should such mechanisms take? For example, should they be incorporated into existing and new investment treaties, other existing agreements such as regional human rights treaties, or new bilateral and multilateral agreements? At the risk of over-generalizing, given the enormous variety of host countries and NGOs, it is possible to give some initial thought to these questions.

Host Country Demand: The spread of burdensome legal restrictions on cross-border funding of NGOs indicates that many host-country governments see little domestic demand or national need to agree to a formal legal regime that would allow for challenges to such restrictions. As Oonagh Breen has detailed, such governments tend to base such restrictions on the concept of “host country ownership” of both development and political

250. NEWCOMBE & PARADELL, *supra* note 99, at 62–63; LUKE ERIC PETERSON, INT’L INST. FOR SUSTAINABLE DEV., BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING 9–10 (2004); Vandeveld, *supra* note 227, at 184–87; Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. & SOC’Y REV. 805 (2008).

251. NEWCOMBE & PARADELL, *supra* note 99, at 63–64; Born, *supra* note 99, at 842.

252. UNCTAD 2015, *supra* note 177, at 120, 124; UNCTAD 2016, *supra* note 104, at 101–02; Born, *supra* note 99, at 844.

253. See *supra* note 104 and accompanying text.

254. See *supra* notes 103–05 and accompanying text.

agendas, an assertion of sovereignty that has much in common with historical developing country objections, based on the supremacy of host country domestic law, to developed country views of required foreign investment protections.²⁵⁵ While economic realities, shifting views regarding the benefits of markets, and competition among host countries for foreign direct investment eventually overcame those objections in most host countries with respect to foreign investments, there do not appear to be similar forces emerging that would overcome these views in the context of cross-border funding of NGOs. As Moore and Rutzen have acknowledged, securing political will for a treaty to help promote global philanthropy, including protections for cross-border funding, would “be a formidable challenge.”²⁵⁶ This is almost certainly an understatement, even though some host countries have joined voluntary, nonbinding international efforts that include a commitment to protecting the ability of NGOs to operate in ways consistent with freedom of association, such as the Open Government Partnership, which currently has seventy-five participating countries, and the Community of Democracies.²⁵⁷ Furthermore, the current skepticism in some circles regarding the positive effects of BITs and other treaties, as evidenced not only by the reconsideration of existing investment treaties in some countries but also the decision by the United States to abandon the Trans-Pacific Partnership, does not bode well for the prospects of creating a new international treaty regime relating to NGOs.²⁵⁸

One possible way to address this lack of host country demand would be to gather data regarding the positive effects of such funding on initiatives that tend to be important to host countries, such as disaster relief and development assistance.

255. Breen, *supra* note 27, at 64.

256. Moore & Rutzen, *supra* note 24, at 39.

257. See *Mission Statement*, CMTY. OF DEMOCRACIES, <http://www.community-democracies.org/values/mission-statement> (last visited Dec. 5, 2017) (“Supporting and defending civil society in all countries.”); *Open Government Declaration*, OPEN GOV’T P’SHIP (Sept. 2011), <https://www.opengovpartnership.org/open-government-declaration> (“We commit to protecting the ability of not-for-profit and civil society organizations to operate in ways consistent with our commitment to freedom of expression, association, and opinion.”).

258. See, e.g., KARL P. SAUVANT & FEDERICO ORTINO, IMPROVING THE INTERNATIONAL INVESTMENT LAW AND POLICY REGIME: OPTIONS FOR THE FUTURE 38–40 (2013), <http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf>; *supra* note 252 and accompanying text.

This effort could take advantage of both the growing systematic consideration of development aid and the increasing profile of such aid given the U.N. Millennium Development Goals and other similar international efforts.²⁵⁹ Some such efforts are already underway, but gathering these data will be costly and time consuming, with no guarantee that the results would make a strong enough case to convince many host countries to surrender some of their control over the legal rules governing cross-border funding of domestic NGOs (especially at a time when some of those countries are questioning the wisdom of their investment treaty commitments).²⁶⁰ There also do not appear to be any obvious parallels to the “Asian tigers” that so strongly made the case for economic liberalism.²⁶¹

Cross-Border Funder Demand: On the surface, there appears to be significant interest among cross-border funders in such protections (if they are affordable), given the relatively high profile that the lack of such protections has recently attained in media reports and elsewhere. In 2015, however, Carothers observed that many such funders have only begun to consider how to address the increasing legal restrictions on such funding and collectively their overall response “is still not very strong.”²⁶² Perhaps not surprisingly, many funders were at that point only focused on working out their specific problems with particular governments and not broader policy responses.²⁶³ He also noted that divisions within the funding community have weakened its ability to respond and to coalesce around any given approach.²⁶⁴ This appears to still be the case, even though there have been some attempts at creating a unified voice, such as The Civic Space Initiative sponsored by four international NGOs concerned about this issue and, beginning in 2017, the Funders’ Initiative for Civil Society.²⁶⁵ Absent a relatively strong and unified voice on this issue, it seems unlikely that the home countries

259. Breen, *supra* note 27, at 49–50; see also James McGann & Mary Johnstone, *The Power Shift and the NGO Credibility Crisis*, 11 BROWN J. WORLD AFF. 159 (2005) (highlighting the positive effects of international NGOs, but criticizing their lack of transparency and accountability).

260. See *supra* notes 17–20 and accompanying text.

261. See Kimutai Gilbert, *Who Are the Four Asian Tigers?*, WORLDATLAS, <http://www.worldatlas.com/articles/who-are-the-four-asian-tigers.html> (last updated June 5, 2017).

262. CAROTHERS, *supra* note 24, at 24.

263. *Id.* at 24–25.

264. *Id.* at 25–27.

265. See *Funders’ Initiative for Civil Society*, GLOB. DIALOGUE FOR HUMAN RIGHTS & SOC. CHANGE, <http://global-dialogue.eu/funders-initiative-for-civil>

for cross-border funders will be particularly inclined to make negotiating such protections with host countries a high or even significant diplomatic priority. One necessary step for pursuing this approach will therefore be to continue to increase the communication with and among funders regarding these increasing restrictions and possible responses, in order to develop that voice. Whether such communication would be sufficient to overcome the tendency of funders to focus on their particular situations and the collective action difficulties in developing such a voice remains to be seen, however.²⁶⁶

If cross-border funders can speak with a sufficiently unified voice, as investors did when pushing for investment treaties, they may also be able to successfully argue that the desired protections are in the long-run self-interest of their home countries. In this context, that self-interest is not primarily economic, but instead is about ensuring stability in host countries and thus reducing risks of creating unstable or failed states, and the potential dangers to other countries that can result from such states.²⁶⁷ Convincing home countries that restrictions on cross-border funding of NGOs (and other restrictions on host-country NGOs) is not only a human rights and democracy issue but also a national security issue will not necessarily be an easy or quick task, however, especially given antiterrorism concerns that host countries often use to justify such restrictions.²⁶⁸

It also has not yet been demonstrated that the time and effort required to lay the groundwork for new international agreements is necessary to sufficiently protect cross-border funding of NGOs. For the reasons already discussed, it appears existing international law does not provide a sufficiently robust legal regime for successfully challenging legal restrictions on such funding.²⁶⁹ What is less clear is if the workarounds that many funders have pursued to address such restrictions are inadequate to protect most such funding and whether domestic and international campaigns to influence the lawmakers in host countries will be inadequate as well.²⁷⁰ While in some countries

-society (last visited Dec. 5, 2017) (describing a collaborative program funded by eleven international donors to respond to the closing of civic space launched in 2017); *The Civic Space Initiative*, INT'L CTR. FOR NOT-FOR-PROFIT L., <http://www.icnl.org/csi> (last visited Dec. 5, 2017).

266. CAROTHERS, *supra* note 24, at 24–27.

267. *See, e.g.*, CAROTHERS, *supra* note 60, at 3–5.

268. *See supra* notes 51–52 and accompanying text.

269. *See supra* Part I.B.

270. *See* CAROTHERS, *supra* note 24, at 11–23.

that have been the most aggressive in their efforts, such as Egypt, these alternative measures appear to have been insufficient, it is uncertain how widespread that lack of effectiveness is.²⁷¹ The fact that most of these workaround efforts are of recent vintage (and public information regarding them is limited) hinders any such evaluation. It does appear to be too early, however, to write off these alternative approaches in favor of what would almost certainly be a complex and therefore costly and time-consuming pursuit of new international agreements that could very well not succeed. As noted previously, it took several decades for it to become clear that other means of protecting investments, including negotiating a broad multilateral agreement, were not viable.²⁷²

Finally, consideration has to be given to whether creating agreements that parallel the existing investment treaty structure, including using international arbitration as the formal legal dispute mechanism, is a viable one in the cross-border funding of NGOs context. For the cost reasons previously discussed, international arbitration may not be a practical option in this context, especially if the strategies discussed above to address these costs are found to not be feasible.²⁷³ A mechanism that instead relies on member state, not party, funding may then be a better option. This consideration would also need to include what is the best vehicle for such agreements—for example, existing investment treaties, existing regional human rights agreements (with their existing dispute resolution mechanisms), or new, stand-alone bilateral or multilateral treaties. With respect to the second option, there is currently pending a case brought by eleven Russian NGOs challenging restrictions on cross-border funding of NGOs under the European Convention on Human Rights (*Ecodefense, Golos, and Other NGOs v. Russia*).²⁷⁴ That

271. See *supra* note 40 and accompanying text.

272. See *supra* note 245 and accompanying text.

273. See *supra* Part IV.A.2.

274. See NORWEGIAN HELSINKI COMM., RUSSIA'S FOREIGN AGENT LAW: VIOLATING HUMAN RIGHTS AND ATTACKING CIVIL SOCIETY 6, 8 n.5 (2014), http://www.nhc.no/filestore/Publikasjoner/Policy_Paper/NHC_PolicyPaper_6_2014_Russiasforeignagentlaw.pdf; Antoine Buyse, *Two High Profile Russian Cases Coming to Strasbourg*, ECHR BLOG (Feb. 8, 2013, 10:57 AM), <http://echrblog.blogspot.com/2013/02/two-high-profile-russian-cases-coming.html> (describing this case). In another example of a regional body being the vehicle for challenging such restrictions, the European Commission has begun the process for determining whether Hungary's new law restricting NGOs is inconsistent with that country's European Union commitments. See European Commission Press

case may provide a good test regarding whether the existing provisions of this regional human rights agreement are sufficient to successfully challenge such restrictions and therefore whether they are a viable protection with respect to the countries that are part of this agreements; if they prove to be, expanding the reach of such treaties may be the best way to protect cross-border funding of NGOs.

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The relative success of international commercial law, particularly investment treaties, when it comes to protecting foreign investments may be difficult to translate to the cross-border funding of NGOs context. Even given that many existing investment treaties may apply to such funding, that application is not without doubt; the current financial costs of invoking that protection are too high for all but the wealthiest NGOs; and reputational and principles costs may further limit or even effectively eliminate NGO access to those protections. There may, however, be ways to address those costs for NGOs by urging arbitration institutions, lawyers, and experts to waive or sharply reduce their fees for claims brought by such entities, or by seeking third party financing. Whether the successful pursuit of some such claims would lead to improved behavior on the part of host countries or instead a backlash that would generate new restrictions or narrowed treaty provisions is unclear, however.

As for instead pursuing new agreements to protect cross-border funding by NGOs, the history of investment treaties indicates that a confluence of factors is needed to make doing so possible by generating sufficient host country demand (or at least grudging acceptance of the need for such protections) and sufficient cross-border funder demand driven by a lack of adequate other options. While it has been at least a decade since observers began highlighting these restrictions, the momentum for the current investment treaties took several decades to grow, and it seems likely that would be the case in the cross-border funding of NGOs context as well. This time is necessary because of the need to develop a case for protecting such funding that would be persuasive to host countries, the lack of a current consensus among funders regarding how to proceed, the need to determine whether less costly and time-consuming alternatives exist, and

the need to determine what approach holds the most promise for resolving funder-state disputes in conformity with international law. It may also be necessary to wait for the current rise in nationalist sentiments and related general hostility to international agreements to wane. In other words, much work remains to be done and a significant amount of time may need to pass before the best approach for combatting these restrictions can be determined and sufficient support for that approach generated if using existing investment treaties is not feasible.

In the meantime, and particularly if invoking the protections of international investment treaties proves impractical because of the obstacles to doing so, both the recipients and providers of cross-border funding for NGOs will need to consider alternate approaches to countering the growing restrictions on such funding. The final part of this Article addresses those alternate approaches.

V. COUNTRY-SPECIFIC STRATEGIES FOR RESISTING LEGAL RESTRICTIONS ON CROSS-BORDER FUNDING

It is possible that given enough time and resources, NGOs facing undue restrictions on their ability to provide and receive cross-border funding will be able to successfully challenge those restrictions either under existing investment treaties or under new agreements specifically designed to protect such funding and perhaps NGOs more generally. But that is little comfort to NGOs that currently face such restrictions and the prospect that those restrictions may cause decades of work to be squandered or thousands of people to be denied needed assistance. Such NGOs therefore need to instead consider a variety of ad hoc approaches and to carefully choose the ones that best fit the specific country and type of restriction they face, some of which were mentioned previously.²⁷⁵ In the interests of brevity a full consideration of such approaches has to be deferred to a later day, but some initial consideration can be given here.

One approach is to try to stop such restrictions before they even become law, or to fight for their repeal if they are already in place. For example, the International Center for Not-for-Profit Law (ICNL) and other NGOs successfully worked together in Kyrgyzstan to convince the parliament there in 2016 to reject a

²⁷⁵. See *supra* notes 91–94 and accompanying text. See generally CIVIL SOC'Y & MEDIA DIV., USAID, STAND WITH CIVIL SOCIETY: BEST PRACTICES (2014), http://pdf.usaid.gov/pdf_docs/PBAAE863.pdf (discussing strategies to promote civil society).

foreign agents law targeting NGOs that mirrored the existing Russian law discussed previously.²⁷⁶ ICNL and other international NGOs are usually critical to such efforts, both for identifying legislation of concern in a timely fashion and for providing resources and needed coordination for opposition efforts.²⁷⁷

If attempts to stop such restrictions are unsuccessful or the restrictions of concern are already in place, another possible approach is to challenge the application of such restrictions under host country domestic law instead of under international law. For example, Greenpeace in 2015 successfully challenged the application of India's restrictions on cross-border funding in the Indian courts.²⁷⁸ The success of such an approach will of course depend on the strength of the host country legal system and the rights it provides, as well as likely requiring perseverance in the face of possibly multiple attempts by a host country to impose such restrictions; Greenpeace has so far obtained six court judgments in its favor in India.²⁷⁹

Another option is to try to enlist other countries to bring diplomatic pressure on the host country to reverse or weaken the restrictions at issue. For example, when Hungary passed legislation in 2017 that appeared designed to shut down Central European University because of its funding and other connections to George Soros, several top U.S. officials pressured the government to allow the university to continue to operate in its current form.²⁸⁰ The pressure appears to have the desired effect, as Hungary's Minister for State Education then suggested that there might be a legal loophole that could lead to this result.²⁸¹ But diplomatic pressure is of course not always so successful; for example, both Compassion International in India and Mercy Corps in Turkey were able to gather some diplomatic support from the United States in the face of cross-border funding restrictions, but

276. See *supra* note 92; *supra* note 27 and accompanying text (discussing Russian law).

277. See, e.g., ICNL ANNUAL REPORT, *supra* note 92, at 2–9.

278. See *supra* note 91.

279. See CIVICUS, STATE OF CIVIL SOCIETY REPORT 2016, at 58 (2016), <http://www.civicus.org/documents/reports-and-publications/SOCS/2016/summaries/SoCS-full-review.pdf>.

280. See Helene Bienvenu & Balint Bardi, *A Loophole Could Keep Open Soros's University in Hungary*, N.Y. TIMES, Apr. 13, 2017, at A6.

281. *Id.*

at this point it appears both NGOs have still been forced to abandon their operations in these countries.²⁸² And, of course, other countries may sometimes send messages that suggest such restrictions are acceptable, even inadvertently, as may have happened when President Donald Trump's praise of Egyptian President Abdel Fattah el-Sisi appeared to undermine previous criticism from other U.S. officials' of a law pending before President el-Sisi that imposes severe new restrictions on NGOs and so may have encouraged him to sign that law.²⁸³

If lobbying, domestic legal challenges, and diplomacy are either not viable options or prove unsuccessful, it may be possible for funders and recipients to develop workarounds that successfully avoid the restrictions.²⁸⁴ As already noted, it appears that such a workaround may exist for the Central European University in Hungary (as helpfully pointed out by a Hungarian minister in the face of diplomatic pressure).²⁸⁵ Before enactment of the most recent set of laws relating to NGOs, a variety of such workarounds were available in China, including registering as a foreign enterprise, opening a domestic project office, or identifying a domestic NGO to receive program funding from a foreign NGO as opposed to the foreign NGO itself operating in the country.²⁸⁶ But as the situation in China demonstrates, such workarounds are vulnerable to changes in domestic law.²⁸⁷

A longer-term solution is to develop the capacity of host country NGOs to attract domestic support so that if and when restrictions on cross-border funding arise the previously supported host country NGOs can leave such funding (and the restrictions that come with it) behind without unduly compromising their ability to pursue their missions.²⁸⁸ Such an approach may also have the benefit of increasing the connections between

282. See Ellen Barry & Suhasini Raj, *U.S. To Question India About Ban on Christian Charity*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/world/asia/compassion-international-india.html>; DeYoung & Lamothe, *supra* note 50.

283. See Walsh, *supra* note 40.

284. See Anna Berry, *Human Rights Nonprofits Under Fire in Civil Society Crackdowns*, NONPROFIT Q. (June 22, 2017), <https://nonprofitquarterly.org/2017/06/22/human-rights-nonprofits-fire-civil-society-crackdowns>.

285. See *supra* notes 280–81 and accompanying text.

286. See Yin, *supra* note 71, at 539–41.

287. See *supra* notes 32–34 and accompanying text.

288. See Kendra Dupuy et al., *Foreign Disentanglement*, STAN. SOC. INNOVATION REV., Fall 2015, at 61, 61 (urging such an approach); Ighobor, *supra* note 94 (describing such efforts in Africa).

such NGOs and their country's populations, thereby improving legitimacy and relevance.²⁸⁹

The piecemeal nature of these approaches is a major drawback to them, but unless invoking investment treaty protections is more promising than appears to be the case or until a more comprehensive, international effort to secure binding and effective protections for such funding is feasible, these approaches are the only viable way to counter the increasing restrictions on cross-border funding of NGOs. Gathering information about such approaches and refining them may in fact be a useful role for leading cross-border funders to work collaboratively. If such efforts prove to be sufficiently successful, then the issues identified in this Article have been addressed; if not, collaboration on this more manageable task could lay the groundwork for a more ambitious effort to address these restrictions.

CONCLUSION

The promise of investment treaties to counter burdensome legal restrictions on cross-border funding of NGOs is currently a hollow one for most, if not all, providers and recipients of such funding, because of the significant hurdles to successfully invoking those treaties and the prohibitively high financial costs and possible other high costs of doing so. That promise may be salvageable if the arbitration facilities, arbitrators, lawyers, and experts whose fees drive those high costs could be convinced to donate their services when the claimant is an NGO challenging such restrictions or if third-party financing sources could be identified for such claims. Absent such efforts and subsequent success in invoking these protections, however, the prospects for developing new international agreements to create a viable legal mechanism for challenging such restrictions are not currently very bright, given the lack of a consensus among cross-border funders for doing so, the lack of host country recognition of the importance of such funding for development and other issues of national importance, the limited track record for other approaches for dealing with such restrictions, and the uncertainty

289. See SARAH E. MENDELSON, CTR. FOR STRATEGIC & INT'L STUDIES, WHY GOVERNMENTS TARGET CIVIL SOCIETY AND WHAT CAN BE DONE IN RESPONSE: A NEW AGENDA 5–6 (2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150422_Mendelson_GovTargetCivilSociety_Web.pdf; Kendra Dupuy et al., *Across the Globe, Governments Are Cracking Down on Civic Organizations. This Is Why.*, WASH. POST: MONKEY CAGE (July 5, 2017), http://www.washingtonpost.com/news/monkey-cage/wp/2017/07/05/_trashed-4.

regarding the best model for such agreements. At a minimum, and if the history of investment treaties is any guide, it will take many years to change these facts so that such new agreements have a realistic possibility of being accepted by both home countries and host countries. In the meantime, less ambitious strategies such as pursuing domestic law remedies and other means of relaxing or avoiding these new restrictions likely hold more promise for NGOs directly affected by these new restrictions than pursuing the uncertain hope that investment treaties can protect such funding.