Donors without Borders

A Comparative Study of Tax Law Frameworks for Individual Cross-Border Philanthropy

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Abstract

Under current United States tax law, individual gifts to foreign charities generally are not deductible from federal income tax as charitable contributions. A comparative study of analogous tax laws in Switzerland and the United Kingdom demonstrates that the Swiss approach generally reflects the same prohibition against tax deductions for individual gifts to foreign charities, while British law permits such deductibility for gifts to qualified charities in other EU member states, Norway, and Iceland.

All three countries' legal frameworks demonstrate that their respective notions of the 'public interest' significantly affect their approaches to deductibility for gifts to foreign charities. The British conception of public interest, enlarged by participation in the European Union and the nondiscrimination requirements of the EU treaties, is embodied in its more expansive deductibility rules. Swiss non-participation in the EU, by contrast, reflects a more isolationist notion of public interest and may inform its prohibition on deductions for gifts to foreign charities. The narrower Swiss approach parallels the United States' approach, and it suggests that an American expansion of deductibility for foreign charitable gifts could be encouraged by American participation in the proposed TPP, TTIP, or other multilateral trade agreements or economic unions.

Keywords: comparative, philanthropy, tax, deduction, international.

A. Introduction

United States citizens have been hailed as world leaders in philanthropic giving and activity. By many measures, the data seem to corroborate such a view: in 2012, Americans increased their charitable giving by 3.5% year over year, to over $316 billion.[1] American generosity also appears to translate to the international

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1 Giving USA Foundation, citing M. Vorwerck, 'Charitable Giving Has Slow, Steady Growth in 2012', *USA Today*, 17 June 2013, <www.givingusareports.org/news-and-events/news.aspx?NewsTypeId=3&NewsId=176>.

context, as statistics suggest that over 10% of private philanthropy is directed to the developing world.[2]

Much of this giving is initiated by private foundations and corporations as well as by individuals, and much of it undoubtedly makes its way abroad through 'intermediary' United States organisations that engage in or support international charitable activity. Direct international philanthropy by American citizens, by contrast, is far less common, in part because under current United States tax law, individual and corporate gifts to foreign charities are generally not deductible from income tax as charitable contributions.[3]

I have previously called for a liberalisation of the general prohibition on deductibility for gifts by individuals to foreign charities.[4] While much of the discussion in my previous work has focused on the history, policy and development of United States law, it is also useful to examine approaches taken in other countries. Put directly, do the tax law systems of other countries permit deductibility for international philanthropy to the same degree as for domestic philanthropy? And what are the unique legal and non-legal factors that account for their respective approaches? By exploring other countries' frameworks in this regard, it may be possible to develop suggested improvements in, or methods for implementing changed approaches to, the 'American way'. Alternatively, such a comparative study may underscore the relative utility of the United States' current approach, even though it does little to encourage direct international giving by individuals.

Of course, a comprehensive, worldwide study of legal frameworks, even on a topic as narrow as deductibility for direct cross-border philanthropy, could be challenging to fit into a single book volume, let alone an article of the present scope. Moreover, important features of many countries render their legal frameworks inapposite for our purposes. For example, the relative prominence of the state in China's economy renders its tax law system much less interesting for the United States on matters discussed herein. Meanwhile, other countries may take market-driven views of political economy, but if those countries have not reached advanced stages of economic development, then international giving by their citizens may not constitute a priority for purposes of tax law policy and structure.

With these limitations in mind, I have selected two countries, the United Kingdom and Switzerland, which bear significant legal, political and economic similarities to the United States. All three countries, for instance, have achieved

2 *Index of Global Philanthropy and Remittances 2011*, Hudson Institute, Washington, DC, 2011, p. 12 (indicating that individuals, foundations, corporations and other private sector actors gave $37.5 billion to the developing world in 2009), <www.hudson.org/files/documents/2011%20Index%20of%20Global%20Philanthropy%20and%20Remittances%20downloadable%20version.pdf>.

3 Section 170(c)(2)(A) of the Internal Revenue Code of 1986, as amended (the 'Code', codified at Title 26 of the United States Code), provides for such deductibility only in the case of gifts and contributions to an entity "created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States".

4 *See, generally*, J.E. Miller, Jr., *Changing Our Approach to Changing the World: Encouraging and Enhancing American Engagement in International Philanthropy Through Tax Law Reform*, Council on International Law and Politics, Chicago, 2013.

advanced stages of economic development, as reflected (*inter alia*) in their mature industrial and technological sectors, their highly developed banking and financial systems and their levels of public health. Both the United Kingdom and Switzerland, however, also reflect sufficiently unique characteristics that make them meaningfully different from the United States – and from each other – to render them interesting and potentially instructive for purposes of a comparative study of tax law incentives for international philanthropy by private citizens.

The United Kingdom, of course, is widely acknowledged as the progenitor of the *common law* family of legal systems. Its influence on the legal system of the United States is arguably unparalleled. Moreover, like the United States, although its roots lie in a case law–focused approach to legal problem solving, the United Kingdom has developed an impressive array of statutory and regulatory frameworks to address specific issues – including in the area of tax law. On the other hand, the United Kingdom differs from the United States in that it belongs (for the time being, at least) to the European Union (EU), a highly integrated economic union reflecting a common market and free movement of persons, goods, services and capital – the last of which is particularly important for purposes of the present discussion.

Switzerland, by contrast, belongs to the *civil law* family of legal systems, which reflects a more comprehensive code-driven legal regime as embodied by the Swiss Civil Code. Like the United States, though, Switzerland's overarching legal framework is federal in nature, featuring multiple levels of legal authority, *i.e.*, federal, cantonal, and communal levels. Unlike the United Kingdom, Switzerland does not belong to the EU, so it is not bound by the EU's prohibition of restrictions against the free movement of capital, persons, goods and services among EU member states.

In exploring the frameworks of the United Kingdom and Switzerland, I labour under certain limitations, some more obvious than others. As a United States lawyer, my knowledge of legal systems is, practically speaking, limited to that of my own country. As a US national, I inherently lack a native's appreciation for British and Swiss factors of culture, politics, history and other matters that inevitably affect and condition the legal systems in those two countries. Additionally, in the case of Switzerland, I do not speak fluently any of the three official languages of the country (German, French or Italian).[5] Such linguistic shortcomings also increase the difficulty of locating and digesting official versions of primary Swiss legal materials.

I also approach this study with the perspective of a practicing attorney who has represented tax-exempt organisations in the United States for nearly 20 years. While that experience has afforded me the opportunity to build broad and deep legal knowledge in my field of practice, it has also facilitated the accumulation of assumptions, preferred strategies and linguistic conventions – often held subconsciously – that affect my analysis of legal problems. While these conditions can serve as productive tools in my American law practice, they can also

5 Sadly, I am also unfamiliar with Romansh, the fourth language of Switzerland, which is spoken in one southeastern canton.

create blinders in the international context, where such assumptions can be poisonous to effective comparative study.[6]

Finally, as revealed in my prior work, I bring a normative point of view to this study. This perspective has been shaped by my involvement as a volunteer in HIV/AIDS work in sub-Saharan Africa and with First Nations people in Canada; by my extensive readings in the disciplines of politics, economics, history and development; and by my personal views on social justice and cross-cultural engagement.

In short, I believe that Americans should give more, and more effectively, to foreign charities, particularly in the developing world. Consequently, I am interested in encouraging tax law reforms, such as expanded deductibility for charitable contributions, which will facilitate these outcomes.[7]

With these acknowledgements and limitations in mind, I will now turn to brief overviews of the tax law frameworks for international philanthropy by individuals in the United States, the United Kingdom and Switzerland. Each of these overviews will contain three components: a basic outline of the country's requirements for tax exemption as a charity, a discussion of the general deductibility of contributions by individuals to such charities and an outline of the special rules for deductibility (or non-deductibility) of such contributions to foreign charities.

Following the three country overviews, I will compare their frameworks and the significant non-legal factors that influence them and then extrapolate lessons from the studies of British and Swiss law that could help shape reforms of United States tax law to encourage international philanthropy among individuals. Specifically, I will posit that a more robust level of American participation in multilateral trade agreements, customs unions or common markets may facilitate expanded deductibility for gifts and contributions made by American individuals directly to foreign charities.

B. Three Approaches to Cross-Border Giving in Tax Law: the United States, the United Kingdom and Switzerland

I. *United States*

1. *Tax Exemption Requirements*

In the United States, charities constitute only one part of a complex web of tax-exempt organisations, including social welfare organisations, trade associations, social clubs, and many others. Charities are generally exempt from federal corpo-

6 In this particular study, for example, I occasionally found myself locating an unfamiliar term under British or Swiss law, searching for familiar terminology in my home jurisdiction that could be analogous to the foreign system's term, and tempted to conclude too hastily that the American term and the foreign system's term have equivalent meanings.

7 I am aware of the practical and fiscal limitations of a more expansive approach to deductibility, and I have addressed those concerns in *Changing our Approach*, Miller, 2013.

rate income tax[8] under Code Section 501(c)(3), which contains four general requirements. The burden on exemption applicants to demonstrate their satisfaction of these criteria demonstrates the well-settled view in American jurisprudence, embodied in the words of a former judge of the United States Tax Court, that "[t]ax exemption is a privilege derived from legislative grace, not a constitutional right."[9]

First, an organisation is prohibited from using its assets and earnings in a manner that constitutes 'private inurement'. Code Section 501(c)(3) provides that "no part of the net earnings of [such an organisation may inure] to the benefit of any private shareholder or individual." While this prohibition does not preclude an organisation from paying reasonable compensation and fees to carry out its charitable purpose,[10] a charity may not maintain 'stakeholders' in the sense of individuals or organisations owning equity or other financial interests in the charity. In keeping with this 'no ownership' rule, upon its dissolution a charity may distribute its remaining assets only for charitable purposes or to a governmental entity.[11]

Second, United States tax law requires a charity to be *organised* and *operated* exclusively for 'charitable' purposes, which encompasses religious, charitable, scientific, educational, and several other enumerated purposes.[12] Pursuant to this twofold mandate, a would-be charity must meet thresholds that relate to its structure and its activities. The structural test will generally be met if a charity's organisational document (*e.g.*, articles of incorporation for a non-profit corporation) limits its purposes to one or more of the aforementioned charitable purposes that are enumerated in Code Section 501(c)(3).[13] The activity-based test will be satisfied if "[no] more than an insubstantial amount of its activities is [...] in furtherance of an exempt [*e.g.*, charitable] purpose".[14] No methodology for measuring insubstantiality is prescribed in statute or regulation. Rather, the administrative agency charged with enforcement of the tax laws – the Internal Revenue Service (IRS) – constitutes the arbiter of this issue through its power to audit organisations and issue rulings.

Third, a charity may not engage in lobbying activity, *i.e.* attempts to influence legislation, as a "substantial part of [its] activities".[15] This restriction constitutes one of the primary distinctions between charities and other exempt organizations, such as trade associations, that have greater freedom to advocate for the

8 For purposes of this piece, I am concentrating on charities organised in corporate form, rather than as trusts or unincorporated associations.

9 *See* Tax Analysts, *As Certain as Death – Quotations About Taxes*, 2010, at 165 (quoting Hon. L.W. Hamblen, Jr.), <www.taxanalysts.com/www/freefiles.nsf/Files/Yablon2010_6_Exemption.pdf/$file/Yablon2010_6_Exemption.pdf>.

10 *E.g.*, *Broadway Theatre League of Lynchburg, Va., Inc. v. United States*, 293 F. Supp. 346, 354 (W.D. Va. 1968) ("[t]hese things [required goods and services] must be paid for").

11 Section 1.501(c)(3)-1(b)(4) of the United States Treasury Regulations (Treas. Reg.).

12 Code Section 501(c)(3).

13 Treas. Reg. Section 1.501(c)(3)-1(b)(1).

14 Treas. Reg. Section 1.501(c)(3)-1(c)(1).

15 Code Section 501(c)(3). A particular subset of charitable organisations – private foundations – is effectively prohibited from engaging in any amount of lobbying. *See* Code Section 4945(d)(1).

passage or defeat of legislation. The Treasury Regulations contain voluminous rules defining lobbying activity, clarifying that certain activities such as non-partisan analysis do not constitute lobbying, and providing an elective test for charities that wish to be governed by mathematical limits on lobbying[16] rather than by the IRS's interpretation of insubstantiality through audits and rulings.

Finally, a charity may not engage in any amount of political campaign activity, defined as participation or intervention in "any political campaign on behalf of (or in opposition to) any candidate for public office".[17] This bar is absolute and precludes even insubstantial amounts of such 'politicking' by charities.

2. *General Deductibility Rules*

United States tax law provides that individuals may deduct from their taxable income certain "contribution[s] or gift[s] to or for the use of" governmental units and specified categories of organisations, including charities that meet the criteria for tax exemption under Code Section 501(c)(3).[18] Because the statutory language contemplates *gifts*, any contribution of money or property to a charity must, in fact, be gratuitous in order to be eligible for deductibility. Accordingly, payments to charities in exchange for consideration (*e.g.*, school tuition payments in exchange for educational instruction) are not deductible as charitable contributions.

In order to verify the gratuitous nature of a gift, an individual donor generally is required to obtain a contemporaneous written acknowledgement from a charity documenting a monetary gift of $250 or more, and such an acknowledgement must indicate whether the donor received any goods or services in return (in which case the donor's deduction will be reduced by the value of such goods or services).[19]

The Code and Treasury Regulations impose caps on the extent of an individual donor's tax deduction associated with charitable contributions made in any particular year. In general, an individual taxpayer may deduct the value of monetary contributions to public charities to the extent such contributions do not exceed 50% of the taxpayer's adjusted gross income, and a corresponding but lower 30% cap is imposed in connection with monetary gifts to private foundations.[20] Gifts to public charities of non-cash 'capital gain' property, *e.g.*, stocks, are deductible to the extent they do not exceed 30% of adjusted gross income (20% in the case of such gifts to private foundations).[21] Contributions that exceed the applicable deductibility cap generally may be carried forward and used in any of the succeeding five tax years.[22]

16 *See* Code Section 501(h) and the Treasury Regulations promulgated thereunder.
17 *See* Code Section 501(c)(3).
18 *See* Code Section 170(c).
19 *See, generally,* Code Section 170(f)(8) and the Treasury Regulations promulgated thereunder. These rules also contain highly technical provisions for documenting contributions of non-cash property.
20 Code Section 170(b)(1)(A)-(B).
21 Code Section 170(b)(1)(C)-(D).
22 Code Sections 170(d)(1), 170(b)(1)(B), 170(b)(1)(C)(ii) and 170(b)(1)(D)(ii).

3. *Special Deductibility Rules for International Philanthropy*

Notwithstanding the generally expansive scope of deductibility for charitable contributions under United States tax law, the scope of such deductibility is, in a very meaningful way, limited by geography. Code Section 170(c)(2)(A), which defines the group of charities contributions to which may be eligible for deductibility, describes charities "*created or organized in the United States* or in any possession thereof, *or under the law of the United States*, any State, the District of Columbia, or any possession of the United States" (emphases added).

Pursuant to this statutory limitation, American donors generally are prohibited from deducting charitable contributions made to or for the benefit of a charity that is formed neither in the United States nor under United States law. A very few treaties between the United States and other countries (currently Canada, Mexico, and Israel) provide limited exceptions to this rule of non-deductibility, but only to the extent that an American donor has a source of income in the foreign country.[23]

While American donors may not deduct gifts that they make directly to foreign charities, two alternative avenues exist. First, an individual may create a private foundation, make gifts to such a foundation, and then participate in a decision to have the foundation make grants to foreign charities. This approach contains several important legal limitations, including the lower caps on the deductibility of gifts to private foundations,[24] the general restrictions on the operation of private foundations (including the prohibition on self-dealing and the minimum payout requirement),[25] and the rules penalising as taxable expenditures any grants that a private foundation makes to a non-public charity without exercising expenditure responsibility.[26] With respect to the last of these limitations, a private foundation may make a grant to a foreign charity if it undertakes a procedure designed to determine that the foreign charity is the equivalent of a United States public charity,[27] or if it complies with the onerous 'expenditure responsibility' rules designed to confirm that a grantee will use a grant for the intended charitable purposes.[28]

Importantly, although private foundations may make grants to foreign charities subject to the restrictions summarised above, the creation and maintenance of a private foundation is beyond the reach of many Americans, due to the expense and complexity involved. Consequently, individual donors who wish to direct their charitable giving internationally more often will utilise a second alternative: giving to an American public charity that makes grants and/or conducts operations outside the United States.

23 *See U.S. Tax Treaties*, UncleFed's Tax Board, <http://unclefed.com/ForTaxProfs/Treaties/index.html>.

24 *See* text *supra* accompanying notes 20-22.

25 *See, generally*, Code Sections 4940-4946.

26 *See* Code Section 4945(d)(4).

27 *See* Revenue Procedure 92-94, 1992-1 C.B. 507.

28 *See* Code Section 4945(d)(4)(B) and the Treasury Regulations promulgated thereunder for an overview of the highly complex expenditure responsibility framework.

Such 'intermediary' organisations have proliferated in recent years, and many of them do excellent work while maintaining excellent organisational practices with respect to governance, financial transparency, operational efficiency and cross-cultural sensitivity. Nevertheless, such organizations cannot function as mere conduits for foreign charities, which would effectively allow donors to circumvent the prohibition on deductibility for gifts made directly to foreign charities. The domestic charity must have full control over the use of a donation, rather than "inevitably commit[ing it] to go to a foreign organization".[29]

Accordingly, a donor seeking deductibility for a gift to such an intermediary must allow for the possibility of the intermediary using the gift for purposes other than those preferred by the donor (including domestic purposes). Moreover, even the most efficient intermediary domestic charity incurs administrative costs in overseeing its international grant-making and programmatic activity. As a result, an individual donor utilising this alternative approach may gain the benefit of the intermediary's experience in overseeing such activities, but he or she must surrender elements of control and efficiency in the process.

II. United Kingdom

Tax laws in the United Kingdom historically developed in ways that reflected the notion that exemption from tax for charities "is not a privilege – it is a right".[30] This formulation departs sharply from the nearly inverse view in United States jurisprudence, as articulated by Judge Hamblen.[31] Not surprisingly, then, and notwithstanding the common legal genealogy between the United Kingdom and the United States, British laws reflect unique characteristics in their provision of a framework for tax exemptions for charities, tax deductions for donors supporting charities and the availability of such deductions in the case of contributions to foreign charities.

1. Tax Exemption Requirements

Charities in the United Kingdom may obtain exemption from corporation tax[32] pursuant to Sections 466 through 493 of the Corporation Tax Act 2010.[33] Such exemption generally requires the satisfaction of four core tests, which the national revenue and customs agency (Her Majesty's Revenue & Customs, or 'HMRC') describes as the 'qualifying conditions': exclusively charitable purpose,

29 *See* Revenue Ruling (Rev. Rul.) 63-252, 1963-2 C.B. 101.

30 Charity Tax Group, *Charity Tax Map*, Nuffield Foundation, London, 2011, at 6 (quoting B. Disraeli and citing Picarda, *The Law and Practice Relating to Charities*, 3rd edn, Butterworths, London, 1999, p. 733), <www.ctrg.org.uk/files/tax_map/CTG_charity_tax_map_03-02-11.pdf>.

31 *See* text *supra* accompanying note 9.

32 Trust-form charities, which are beyond the scope of this piece, are exempt from income tax under the Income Tax 2007. *See* 'Her Majesty's Revenue & Customs: Annex I – Tax Exemptions for Charities', Section I.2.1, <www.hmrc.gov.uk/charities/guidance-notes/annex1/annex_i.htm>.

33 *See id.*, at Section I.2.1.

the jurisdiction condition, the registration condition and the management condition.[34]

The first qualifying condition requires a corporation to have exclusively charitable purposes; it may not have any non-charitable purposes.[35] The Charities Act 2011 provides that such charitable purposes include thirteen enumerated categories, all of which must be for public benefit. These categories generally include the prevention or relief of poverty; advancement of education, religion, health, community development, the arts (including culture, heritage or science), amateur sports, human rights, environmental protection or animal welfare; the relief of those in need due to age, disability or other factors; and the promotion of the armed forces and police and fire protection.[36] The Charity Commission provides further clarification on these purposes through guidance and decisions.[37]

Under the second condition, the 'jurisdiction condition', an applicant for exemption as a charitable company must be 'based' (perhaps best explained as 'domiciled') in the United Kingdom, another EU country, Iceland or Norway.[38] The allowance of exemption for non-UK-based charities due to the UK's participation in the EU will be explored further below.

The 'registration condition' requires each eligible non-UK-based charity first to have registered (before seeking exemption in the United Kingdom) with the agency in its home country that serves a regulatory function analogous to that of the Charity Commission in the United Kingdom, provided that the home country requires such registration.[39]

Finally, each applicant for exemption as a charitable company, whether based in the United Kingdom or elsewhere, must meet the 'management condition', which requires the allocation of organisational responsibilities to 'authorized officials' (one individual per organisation, who is authorised to deal with HMRC on behalf of the organization) and 'responsible persons' (between two and four directors per corporation, one of whom may be the authorised official, who are responsible for the affairs of the charity).[40]

As part of the 'management condition', all authorised officials and responsible persons must be 'fit and proper persons' pursuant to the Finance Act 2010.

34 *See* HMRC, 'How to Complete Form ChA1 HMRC Charities Application Form', <www.hmrc.gov.uk/charities/complete-form-cha1.htm#1>.

35 *See* Charity Commission, 'Guidance on Charitable Purposes', <www.charitycommission.gov.uk/detailed-guidance/charitable-purposes-and-public-benefit/guidance-on-charitable-purposes/>.

36 *See id.*

37 *See* Charity Commission, 'The Prevention or Relief of Poverty', <www.charitycommission.gov.uk/detailed-guidance/charitable-purposes-and-public-benefit/guidance-on-charitable-purposes/the-prevention-or-relief-of-poverty/#3>. Notably, a charitable company may engage in a certain amount of non-charitable activity (subject to prescribed limits) without jeopardising its exemption, provided that the proceeds from such activity are applied to a charitable purpose. *See* Corporation Tax Act 2010 Sections 478-479. Further details are provided in HMRC, 'Charities – Trading and Business Activities', <www.hmrc.gov.uk/charities/guidance-notes/annex4/sectiona.htm>.

38 *See* HMRC, *supra* note 34, <www.hmrc.gov.uk/charities/complete-form-cha1.htm#1>.

39 *See id.*

40 *See id.*

This mandate seeks to "ensur[e] that charities are not managed or controlled by individuals who present a risk to the charity's tax position", including persons with histories of tax fraud, other fraudulent behaviour such as misrepresentation or identity theft, or abuse of tax repayment systems, as well as those who have been barred by a court or regulator from serving as a director.[41]

2. *General Deductibility Rules*

Under the laws of the United Kingdom, the most significant provisions affecting the deductibility of donations to charitable companies are those relating to the Gift Aid scheme, which dates to 1990 and offers charities the opportunity to 'reclaim' certain income taxes in connection with monetary gifts received from donors.[42] In practical terms, qualified charities can reclaim from HMRC an amount of tax equal to one-fourth of the value of a donation. Accordingly, for a donation of £100, a charity could reclaim an additional £25 in tax from HMRC, increasing the value of the gift to the charity.[43] Importantly, HMRC will only recognise Gift Aid claims from companies that are recognised as charities pursuant to the above-described conditions.[44]

From the donor's perspective, Gift Aid offers the possibility of tax relief in an amount equal to the difference in the donor's actual tax rate and the 'basic' 20% tax rate, multiplied by the amount of the 'grossed-up' donation to a qualified charity, *i.e.*, the donation augmented by the tax reclaimed from HMRC by the charity. In the above-described example, if the charity received the £100 donation from a donor who pays tax at a 40% rate, then the donor would be able to claim a total of £25 in tax relief (20% (the difference between the donor's tax rate and the basic rate) multiplied by £125 (the value of the donation, 'grossed up' by the tax reclaimed by the charity)).[45] Charities reclaiming tax under Gift Aid must maintain records of their donors' declarations to HMRC and other documentation prescribed by HMRC.[46]

A charity may provide some goods or services in return without disqualifying the eligibility of the charity and the donor to reclaim taxes under Gift Aid. In general, for gifts up to £100, such benefits may represent up to 25% of the donation's value, while an absolute cap of £25 applies to donations over £100 and up to £1,000. Where a gift exceeds £1,000, the return goods or services may not exceed the lesser of 5% of the donation's value or £2,500 (£500 if the gift was made before 6 April 2011).[47]

41 *See* HMRC, 'Detailed Guidance on the Fit and Proper Persons Test', <www.hmrc.gov.uk/charities/guidance-notes/chapter2/fp-persons-test.htm>. Individuals are presumed 'fit and proper' unless HRMC demonstrates otherwise. *Id.*

42 *See* Charity Tax Group, 2011, at 7 and 82.

43 *See* HMRC, 'Gift Aid: The Basics', <www.hmrc.gov.uk/charities/gift_aid/basics.htm>.

44 *See id.*

45 *Id.*

46 For more information on record-keeping requirements, *see* HMRC, 'Gift Aid Record Keeping and Audit Requirements', <www.hmrc.gov.uk/charities/gift_aid/record-keeping.htm#2>.

47 *See* HMRC, 'Gift Aid: the Basics', <www.hmrc.gov.uk/charities/gift_aid/basics.htm>.

3. Special Deductibility Rules for International Philanthropy

As mentioned above, under the 'jurisdiction condition' for tax exemption, a company that meets all other requirements described by HMRC may be treated as a charity even if it is not domiciled in the United Kingdom, but only if it is based in another one of the EU member states, in Norway, or in Iceland – and only to the extent the company has completed all registrations in its home country with agencies that carry regulatory authority analogous to that of the UK Charity Commission. Accordingly, United Kingdom citizens may engage in a limited scope of direct giving to foreign charities (*i.e.*, those that are registered as charities in the United Kingdom) and enjoy tax deductibility for that giving at a level equivalent to that which they would enjoy for gifts to domestic charities.

The ability of British donors to make deductible contributions directly to foreign charities in EU member states represents a recent phenomenon (since 2010), and it stands as a testament to the unique role of EU law and its direct impact on the law of the United Kingdom. The current state of British law in this regard reflects a sequence of developments involving the European Commission, the European Court of Justice (ECJ) and the British Parliament.

In 2006, the European Commission requested that the United Kingdom cease discriminating against charities based in other EU member states (consistent with the assurance of free movement of capital under Articles 26 and 56 of the Treaty on the Function of the European Union (TFEU)).[48] That same year, the ECJ held that where Germany refused to grant tax exemption to an Italian foundation in connection with its receipt of rental income on property in Germany, such a refusal constituted a breach of European law.[49] Two years later, the ECJ held that Germany's refusal to allow relief to a German donor on a gift made to a Portuguese charity to be a violation of European law.[50] In the wake of these decisions, the British Parliament in 2010 extended deductibility for charitable gifts made to charities in the EU, Norway and Iceland that meet the exemption criteria laid out above.[51]

Finally, in addition to making gifts directly to qualifying charities based in other EU member states (or in Norway or Iceland), individual donors in the United Kingdom may give to UK-registered charities that themselves make gifts to foreign charities (similar to the use of 'intermediary charities' in the United States, as described above). Such payments by UK charities, however, are closely regulated by HMRC. Voluminous rules govern the incurrence of 'non-charitable expenditures', which may jeopardise the exempt status of a charitable company, and certain payments to 'overseas bodies' will constitute such forbidden non-charitable expenditures.[52]

48 Charity Tax Group, 2011, at 101.

49 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften*, C-386/04 (14 September 2006).

50 *Hein Persche v Finanzamt Lüdenscheid*, C-318/07 (27 January 2009).

51 Charity Tax Group, 2011, at 101.

52 *See* HMRC, 'Tax and Charitable or Non-Charitable Expenditures: Annex II', Section 9, <www.hmrc.gov.uk/charities/guidance-notes/annex2/annex_ii.htm#9>.

In general, payments by charities to overseas bodies are permitted only where they are for goods or services to facilitate the direct conduct of the UK charity's own activities, or where reasonable steps are taken to ensure that the payments are used overseas for purposes deemed charitable under British law.[53] Consistent with this framework, therefore, British individual donors may not use domestic charities as mere conduits for obtaining Gift Aid relief for donations in support of unsupervised international purposes. Rather, such donations to domestic charities for international purposes must further the domestic charity's own purposes, and the domestic charity must comply with HMRC's detailed rules for oversight and supervision of payments made to overseas bodies. Otherwise, the domestic charity risks the loss of its exemption and the ability to attract tax-deductible gifts from donors under Gift Aid.

III. Switzerland

1. Tax Exemption Requirements

Most Swiss non-profit organisations are organised either as foundations, which carry minimum capitalization requirements, or as non-profit associations.[54] Such entities are generally subject to corporate income tax at all three levels of government (federal, cantonal and communal), but a special tax regime effectively cuts the normal tax rate by one-half for most of them.[55] Moreover, such organisations may seek total exemption from corporate income tax by demonstrating their satisfaction of a twofold test under Article 56(g) of the Federal Income Tax Act (FITA) and Article 23(1)(f) of the Federal Tax Harmonization Act (FTHA), applicable to cantonal- and communal-level corporate income tax and capital gains tax.[56] Entities seeking exemption as charities submit their applications for exemption to their respective canton-level tax authorities, and those applications serve as applications from federal and communal income tax as well.[57]

A charity's first of two requirements for exemption from income tax under Swiss law involves demonstrating that it pursues a charitable or public purpose.[58] Commentators have noted that this requirement implies that a charity must devote its activities solely "for the benefit of the public or the common good".[59]

53 *See id.* HMRC lays out extensive principles and examples in this guidance for determining whether a charity's oversight steps are reasonable in the international context.

54 Mandat International, 'Practical Guide for NGOs: How to Set Up a Nongovernmental Organization in Geneva or Switzerland', at Section 1, <www.mandint.org/en/guide-ngos>.

55 *See* M. Simonek, *Taxation of Charities in Switzerland*, Congress of the European Association of Tax Law Professors, June 2012, at 2, <http://eatlp.org/uploads/public/Reports%20Rotterdam/National%20report%20Switserland.pdf>.

56 *Id.*, at 2; *see also* O. Arter, 'Swiss Charitable Foundations', October 2008, at 2, <www.froriep.ch/download/FR_Newsletter_Swiss_Charitable_Foundations1.pdf>.

57 *See* Simonek, 2012, at 8.

58 *See* Arter, 2008, at 2. Religious purposes are also contemplated within exemptions provided in Art. 56(h) FITA and Art. 23(1)(g) FTHA. *See* Simonek, 2012, at 3, n. 11.

59 B. Merkt & M. Barmes, 'Swiss Philanthropy', *Step Journal: Wealth Structuring Analysis for Trust and Estate Practitioners*, October 2008, <www.stepjournal.org/journal_archive/2008/step_journal_october_2008/swiss_philanthropy.aspx>.

Others have termed this criterion a "public utility purpose" requirement reflecting an "unrestricted circle of beneficiaries".[60] Such "public utility purposes" include "activities in charitable, humanitarian, health-promoting, ecological, educational, scientific and cultural areas" and causes such as human rights and development assistance.[61] The charitable or public purpose requirement also requires that a charity's purpose(s) must be altruistic in nature; commentators have variously observed that this requirement reflects a prohibition on activity pursued for "self-interest,"[62] the "sacrifice [of members'] own interests"[63] and "financial sacrifices in the form of sponsors' donations [...] or personal sacrifices in the form of services rendered to the charitable organization without remuneration" rather than the conduct of business purposes.[64]

The second general exemption requirement for charities under Swiss law is reflected in the obligation to dedicate the organisation's profits exclusively and irrevocably to charitable or public purposes. This condition prohibits the distribution of a charity's profits to its members (and to the relatives of members) and generally forbids the payment of compensation to members of a charity's governance body (*e.g.*, its board of directors).[65] This 'exclusive and irrevocable' requirement extends to disallowing distributions of a charity's assets to members upon dissolution.[66]

Swiss law provides for partial tax exemption for certain charities that carry out profit-making activities.[67] Such entities must comply with specific financial accounting requirements to segregate their charitable and profit-making activities.[68]

2. *General Deductibility Rules*

Individuals generally may deduct from their taxable income any voluntary contributions made to charities that (i) qualify for tax exemption pursuant to the rules summarised above and (ii) are located in Switzerland.[69] Donations of cash and non-monetary property are equally eligible for tax relief, but both types are sub-

60 B. Merkt, *Swiss Foundations in an International Context*, presentation to International Finance Management Association, 4 June 2013, <www.ifma-net.ch/public_html/docs/2013/Swiss%20Foundations%20in%20an%20International%20Context_FINAL%20version.pdf>.

61 Simonek, 2012, at 3 (citing Federal Tax Administration circular letter No. 12, para. II(3)(a), 8 July 1994).

62 Merkt, 2013.

63 Arter, 2008, at 3.

64 Simonek, 2012, at 4.

65 *Id.*, at 7.

66 Merkt & Barnes, 2008.

67 Simonek, 2012, at 7 (citing Federal Tax Administration circular letter No. 12, 8 July 1994).

68 *See* Simonek, 2012, at 7.

69 Article 33(a) FITA; Art. 9(2)(l) FTHA (cited in Simonek, 2012, at 9). Simonek states that such deductibility is available in connection with contributions to exempt charities "having their seat in Switzerland". *Id.*

ject to an aggregate cap on deductibility equivalent to 20% of the donor's taxable income.[70]

As in the United States (and in the United Kingdom, subject to *de minimis* exceptions), only gifts without return consideration are eligible for deductibility, and the value of services donated to a charity by a donor is not deductible.[71] A gift to a charity that is partially exempt may be deductible only if the charity uses the gift exclusively in furtherance of its exempt purposes.[72]

3. *Special Deductibility Rules for International Philanthropy*

Much like the legal framework in the United States, and in contrast to the United Kingdom's rules that reflect the guaranteed free movement of capital under EU law, Swiss tax law does not provide any deductibility for individual contributions made to charities registered outside Switzerland.[73]

Notably, at least one Swiss practitioner has elaborated on the non-deductibility under Swiss law of gifts to foreign charities by contrasting that approach with the framework required for EU member states.[74] Because Switzerland has declined to join the EU, it is not subject to the guarantee of free movement of capital under Articles 26 and 56 TFEU. Accordingly, Switzerland remains free to chart its own course by denying deductions in connection with Swiss donors' contributions to foreign charities.

As in the United States (and the United Kingdom), however, donors may engage in tax-deductible giving with international impact by donating to Swiss charities that engage in international grant making or programmatic activity. The Swiss Philanthropy Foundation (SPF), for example, maintains membership in Transnational Giving Europe (TGE), a group of charities with 'national partners' in countries across Europe. SPF promises to accept donations from Swiss citizens who designate foreign charities, and if SPF's national partner in the foreign charity's country 'recognizes' the designated charity, SPF will facilitate the transfer of the Swiss donor's gift to the designated foreign charity.[75] Such gifts, of course,

70 *See id.*; *see also*, Merkt & Barmes, 2008, and Merkt, 2013 (noting that such gifts may also be deducted from cantonal-level taxes, subject to caps that vary in amounts up to 20% of the donor's taxable income).

71 *See* Simonek, 2012, at 9.

72 *See id.*, at 10.

73 *See* Merkt, 2013. *See also* Merkt & Barnes, 2008 ("the tax reductions and exemptions granted under legislation in Switzerland have clear geographical limits. If a Swiss [...] individual [...] wishes to make a gift in favor of a charitable entity registered abroad [...] there will be no deduction allowed in Switzerland"), and Simonek, 2012, at 10 ("only contributions made to exempted legal entities having their seats in Switzerland are deductible from the taxable income. Contributions made to charities with seats abroad cannot be deducted").

74 *See* Merkt, 2013 (citing *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, C-386/04 (14 September 2006) and *Hein Persche v. Finanzamt Lüdenscheid*, C-318/07 (27 January 2009), and noting that the member state in question still may condition exemption based on compliance with the state's own rules for permissible purposes).

75 *See* Swiss Philanthropy Foundation, *Your Donation*, <www.swissphilanthropy.ch/en/votre_donation.php>.

are subject to transactional costs, as TGE takes a 5% fee on gifts of up to 80,000 Swiss francs (€50,000) and 1% of the excess above that threshold.[76]

C. Comparing and Evaluating the Approaches

I. A Comparative View of Countries' Restrictiveness with Respect to Deductibility

The foregoing review of three national legal frameworks suggests that from the perspective of the United States, with respect to the facilitation of tax relief for individuals who wish to make gifts and contributions directly to foreign charities, the laws of the United Kingdom offer a relatively more liberal or permissive approach. Swiss law, by contrast, much more resembles the American approach in its general prohibition on income tax deductions for individual contributions made directly to foreign charities.[77]

With respect to the United Kingdom, gifts to foreign charities are not universally deductible. United Kingdom's membership in the EU, however, requires it to grant tax exemption to charities that (i) register for exemption under the laws of other EU member states and (ii) meet the other two requirements for exemption as a charity under British law (demonstrating an exclusively charitable purpose and satisfying the 'management condition' requiring that all authorised officials and responsible persons of the charity be 'fit and proper persons'). The United Kingdom has also elected to grant such reciprocal recognition to Norwegian and Icelandic charities meeting these conditions, despite the non-membership in the EU of these two countries. Under this framework, British citizens may seek deductions in connection with gifts made directly to foreign charities in 29 other countries (albeit all in Europe).

On the other hand, Switzerland does not allow tax deductibility for any gift to a charity not 'seated'[78] in Switzerland. In this regard, Switzerland's approach is quite similar to that of the United States. No exceptions exist to the Swiss prohibition. As a non-member of the EU, Switzerland is not bound by the TFEU's guarantee of the free movement of capital. Furthermore, Swiss legislators have not elected to grant reciprocal recognition to other countries' charities in the manner that British legislators have done vis-à-vis Norway and Iceland.

II. Evaluating the Effectiveness of the Approaches through the Lens of Public Interest

As in other areas of the law, non-legal factors such as culture, politics, economics, and other matters exert influence on the approaches reflected in the American, British and Swiss approaches to the tax treatments of individuals' gifts and contributions to foreign charities. As an initial matter, each country's exemption

76 *See* Transnational Giving Europe, *Fee*, <www.transnationalgiving.eu/tge/details.aspx?id=219956&LangType=1033>.

77 In this discussion, as has been the case throughout this piece, the term 'foreign' refers to charities that are neither located in nor established under the laws of an individual donor's home jurisdiction.

78 *See* Simonek, 2012, at 10.

framework requires an applicant for charitable status to demonstrate that it operates exclusively for public, rather than private, benefit.

In light of the consensus that exists among the countries as to the primacy of the 'public interest' requirement, it is therefore useful to compare the effectiveness of the American approach against that of the British and Swiss approaches, respectively, to determine how well each country's approach to the issue of tax deductibility for individual gifts to foreign charities aligns with the promotion of 'public interest'. Such an analysis, however, requires an understanding of what a country perceives to fall within the sphere of 'public benefit'. Specifically, this exemption requirement calls into question whether the pursuit of charitable purposes outside the borders of one's country is in pursuit of the 'public benefit' of that country.

In this sense, the term 'public benefit' carries overtones of a distinctly non-legal, but conceptually related concept: the 'national interest'. In the case of the United States, the prohibition on deductibility for gifts to foreign charities arguably descends directly from the narrow view of the 'national interest' held by legislators during the 1930s, when the foundations of the current United States tax law framework took shape. The legislative committee primarily responsible for drafting the deductibility provisions offered this telling commentary in 1938:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its *relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. The United States derives no such benefit from gifts to foreign institutions*, and the proposed limitation [on deductibility, ultimately adopted,] is consistent with the above theory.[79]

Put simply, the current legal framework of United States tax law, in its denial of deductibility for individual contributions to foreign charities, reflects a conception of national interest that predates World War II, *i.e.* before the United States' development and implementation of the Marshall Plan to aid in the reconstruction of Europe, before its decision to join (and indeed to host) the United Nations, before it took a leading role in the creation of the Bretton Woods institutions, and before its countless other initiatives reflecting a commitment to international development and global engagement, albeit often for self-interested motives designed to advance American concerns.

Elsewhere, I have critiqued this 'disconnect' between an arguably archaic portion of American tax policy and the otherwise prevailingly interconnected nature of American engagement in global affairs.[80] That analysis, however, was conducted in a vacuum in the sense that it did not undertake any comparative studies of the frameworks adopted by other countries. In the present study, we

79 H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19-20 (1938) (emphasis added).

80 *See, generally*, Miller, 2013.

may undertake two such comparisons in light of the overviews of British and Swiss law set forth in the preceding sections.

III. Evaluating the American Approach in Light of a Swiss Comparison

As noted above, the United States' general denial of deductibility for individual gifts to foreign charities parallels the approach taken by Switzerland. Curiously, however, in many matters other than tax law, it is fair to observe that the United States and Switzerland take very different approaches to global engagement.

As evidenced by the aforementioned (admittedly anecdotal) list of American efforts to reshape other parts of the world through military, diplomatic, financial and development strategies, the United States frequently takes an interventionist approach to international engagement. Switzerland, on the other hand, has for centuries (and even throughout the wars that wracked Europe in the twentieth century) maintained a deserved and well-recognised reputation for independence and geopolitical neutrality up to the present day – even at the expense of opportunities for greater global prominence.[81]

So why does the American framework so closely resemble that of the Swiss, whose approach to international engagement in other ways is so strikingly non-aligned and isolationist? Perhaps the answer is as simple as an American failure to bring its tax policy up to date in the sense of keeping step with its policies on so many other global fronts.

But perhaps that failure itself reflects a countervailing fear on the part of American legislators: the fear of excessive international entanglements that could lead to a reduction in the integrity of the tax deduction framework. Indeed, such a fear may account for the continued restrictiveness in the Swiss approach, even in the face of domestic criticism.[82] As to this potential concern, a final comparison with the British framework is instructive.

IV. The American Approach Viewed through a British Filter

Although the United Kingdom allows deductions for individual gifts to some foreign charities, that allowance is not unlimited. Indeed, with two exceptions for relatively small countries, the ability to deduct gifts to foreign charities is largely conditioned on whether the country of domicile for such a charity is a member of the EU. EU membership status, in turn, casts a completely different light on the definition of 'public interest' for member states, as EU membership requires a

81 *See, e.g.*, M. Mazower, *Governing the World: The History of an Idea*, Penguin Press, New York, 2012, at 218 (noting that during discussions regarding a permanent location for the headquarters of the United Nations, although many "Europeans wanted to keep the [League of Nations'] successor in Europe, [because] no longer being at the center of world affairs was almost unimaginable to them [...] the Swiss helped [to reach an agreement on the New York location] by hedging any future use of their country with so many preconditions that they effectively ruled themselves out").

82 *See* Simonek, 2012, at 10 ("Contributions made to charities with seats abroad cannot be deducted. This restriction has been subject to criticism among Swiss scholars") (citing T. Koller & N. Sennhauser, 'Das EuGH – Urteil Persche aus der Sicht von Drittstaaten, insbesondere der Schweiz', *in* M. Martinek, P. Rawert & B. Weitemeyer (Eds.), *Festschrift für Dieter Reuter zum 70. Geburtstag am 16. Oktober 2010*, de Gruyter, Berlin, 2010, p. 1061 *et seq.*, 1082).

country to take a much more liberal approach – indeed, to adopt a paradigm shift – in its treatment of workers, firms, goods, services and capital from other member states.

Even after the United Kingdom joined the EU, however, it maintained for some time its disallowance of deductions for gifts to foreign charities domiciled elsewhere in the EU. This practice was abandoned only after the European Commission threatened to challenge the United Kingdom's practice in the ECJ (presumably under Article 258 TFEU as a violation of the guarantee of free movement of capital)[83] and following the ECJ's decisions in *Centro di Musicologia* and *Hein Persche* in 2006 and 2009, respectively.[84]

Nevertheless, even following its expansion of deductibility for gifts to certain foreign charities in the Finance Act 2010, the United Kingdom continues to maintain a tight rein on such deductibility. First, it has not extended such deductibility to gifts made to charities seated in countries other than EU member states, Iceland or Norway. Additionally, overseas payments made by British charities may jeopardize the tax-exempt status of such domestic charities if they cannot demonstrate that the overseas payments were made for purposes recognised as charitable under British law[85] – suggesting that the alternative use of 'intermediary' domestic charities to effect international giving remains tightly regulated in the United Kingdom, as it is in the United States under the regime reflected in Rev. Rul. 63-252.[86]

What lessons can we draw from this analysis of British law? I would contend that the United Kingdom's framework for deductibility of individual gifts to foreign charities, while relatively permissive compared with the United States' approach, is determined almost entirely by the United Kingdom's prior determination to join the EU, which entails myriad commitments of non-discrimination among member states to create an 'ever closer union' pursuant to Article 1 of the Treaty on European Union.

The United States, by contrast, has made limited commitments to multinational free trade areas, let alone customs unions, common markets, internal markets, or full-blown fiscal unions.[87] Interestingly, the United States has committed to tax treaties with both of its partners in the North American Trade Agreement (NAFTA) that offer limited deductibility for American individuals' gifts to charities domiciled in Canada or Mexico.[88]

Such evidence, combined with the United Kingdom's history following its accession to the European Union, suggests that to the extent the United States steps up its participation in multilateral free trade agreements – or in even more integrated customs unions or common markets – it may be more politically palat-

83 Charity Tax Group, 2011, at 101.

84 *See* text *supra* accompanying notes 49-50.

85 *See* text *supra* accompanying notes 52-53.

86 *See* text *supra* accompanying note 29.

87 In this context, it should be noted that at the time of this writing, the United Kingdom's continued commitment to the EU is not guaranteed, thanks to the rise of 'Euroskepticism' among some British citizens, including members of the United Kingdom Independence Party.

88 *See* text *supra* accompanying note 23.

able to enlarge the tax deduction for charitable contributions made to charities domiciled in other states participating in such agreements, unions or markets. In this regard, it will be interesting to follow the progress of the United States' participation in ongoing negotiations regarding the proposed Trans-Pacific Partnership (TPP) involving Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam, as well as the nascent discussions of a proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States and the EU.

V. *Final Thoughts*

Of course, participation in multilateral trade agreements or other economic arrangements does not represent the only path to expanded deductibility for United States citizens wishing to provide direct support to foreign charities. Indeed, the agreements under consideration would not cover very much of the developing world where philanthropically minded individuals wish to engage. Moreover, the conclusion of any such trade agreement arguably could be far more politically problematic (in terms of domestic United States politics) than a simple expansion of the tax deduction for charitable contributions.

Nevertheless, the linkage of such expanded deductibility to participation in multilateral trade agreements represents one practical approach to the limitations of the current United States approach. By comparing the more permissive framework of the United Kingdom with the prohibitive approach adopted by Switzerland (the latter of which parallels the American approach), one develops the sense that a broader definition of the 'public interest' – shaped by deeper and broader commitments to multilateral trade agreements, customs unions, or common markets – could change the policy conversation in the United States in favour of expanded deductibility for individual gifts and contributions to foreign charities.

D. Conclusion

As always, comparative studies of other countries' legal frameworks offer a fresh perspective on current challenges faced in one's 'home' system. In the case of income tax deductibility for gifts and contributions made by individuals to foreign charities, the current approach taken by the United States mirrors that of Switzerland in its general prohibition of such deductibility. By contrast, the United Kingdom's framework is more liberal than that of the United States, offering deductibility for individual British citizens' gifts to charities registered in other EU member states, in Norway, and in Iceland, but only to the extent that such charities meet the standards imposed on British charities with respect to the pursuit of exclusively charitable purposes and the management of such charities by fit and responsible persons.

The more permissive approach of the United Kingdom developed following its accession to the EU. The United Kingdom arguably expanded such deductibility through legislation only after seeing the 'handwriting on the wall' in the form of a challenge brought by the European Commission and relevant decisions issued by the European Court of Justice on similarly restrictive practices adopted by Germany's tax authorities. Switzerland's more isolationist approach, meanwhile, continues to reflect its non-alignment with the EU. According to some Swiss scholars and practitioners, the EU membership issue constitutes the rationale for Switzerland's prohibitive approach to this issue.[89]

These analyses of British and Swiss law suggest that one possible path to expanding United States income tax deductibility for individuals' contributions to foreign charities lies in the potential of American participation in multilateral trade agreements, customs unions or common markets such as NAFTA and the proposed TPP and TTIP. While participation in any such agreement faces significant domestic political resistance in the United States, a decision to commit to any such agreement will inevitably redefine the notion of the 'public interest' in the United States in a more geographically and internationally expansive fashion, just as it has in the United Kingdom. Broader conceptions of the public interest, in turn, should justify more liberalised approaches to deductions for contributions to foreign charities made by individual American citizens.

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89 *See, e.g.*, Simonek, 2012, at 10, and Merkt, 2013.

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