

Tax Incentives for Cross-Border Giving in an Era of Philanthropic Globalization: A Comparative Perspective

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The 21st century has ushered in an era of philanthropic globalization marked by a significant rise in international charitable giving. At the same time, cross-border philanthropy has raised legitimate fiscal and regulatory concerns for government. To understand how donor countries have responded to this changed global philanthropic landscape, we use comparative tax methodology to develop a spectrum of approaches to the tax treatment of cross-border giving and apply tax policy criteria to critically evaluate the divergent approaches of Australia and the Netherlands, located at opposing ends of the spectrum. Findings from the comparative analysis reveal that in the current global environment for philanthropy there is a strong case to be made for allowing tax deductible donations to cross borders.

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I. Introduction

Almost every member of the Organisation for Economic Co-operation and Development (“OECD”) Development Assistance Committee (“DAC”)¹ has tax incentives to encourage domestic philanthropy. These tax incentives, typically in the form of a tax deduction or tax credit, have

1. The DAC of the OECD is an international forum of the major countries that provide aid, online: *OECD* <www.oecd.org/dac/>.

the potential to lower the price of giving, increasing both the amount donated to nonprofit organizations² and the number of donors.³ Until quite recently, these tax incentives generally did not extend to cross-border philanthropy⁴ notwithstanding their significance for nonprofits engaged in international charitable activities. The transformation of the global philanthropic landscape in the 21st century, marked by a rise in both the amount of international giving and the form that giving takes,⁵ has forced donor countries to consider the provision of tax incentives for cross-border donations. As national boundaries around philanthropy have started to blur, governments are struggling to maintain an appropriate balance between protecting the interests of the fiscal state (including the

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2. The term ‘nonprofit organization’ (“NPO”) will be used throughout this paper to refer to ‘not-for-profit organization’, ‘non-governmental organization’ (“NGO”) and ‘charities’ (a subset of NPOs that have been acknowledged by the state as meeting either the common law or statutory definition of charity depending on the jurisdiction).
 3. See *e.g.* John Simon, Harvey Dale & Laura Chisolm, “The Federal Tax Treatment of Charitable Organisations” in Walter Powell & Richard Steinberg, eds, *The Non Profit Sector: A Research Handbook*, 2d (New Haven: Yale University Press, 2006) 267 at 272; Joseph Cordes, “Re-Thinking the Deduction for Charitable Contributions: Evaluating the Effects of Deficit-Reduction Proposals” (2011) 64:4 National Tax Journal 1001 at 1003; Charles Clotfelter, *Federal Tax Policy and Charitable Giving* (Chicago: University of Chicago Press, 1985) at 281; Roger Colinvaux, Brian Galle & Eugene Steuerle, *Evaluating the Charitable Deduction and Proposed Reforms* (Washington: The Urban Institute, 2012) at 9.
 4. Defined as a charitable gift from a donor in one jurisdiction to a recipient in another. This term will be used throughout this article interchangeably with ‘international philanthropy’ and ‘international giving’.
 5. In the two decades from 1997 to 2017, private philanthropic flows for development grew from approximately USD \$7.1 billion to USD \$40.9 billion. See “Grants by Private Agencies and NGOs” (2019), online: [OECD <data.oecd.org/drf/grants-by-private-agencies-and-ngos.htm>](https://data.oecd.org/drf/grants-by-private-agencies-and-ngos.htm) DOI: <10.1787/a42ccf0e-en>. The Hudson Institute estimates that in 2014 private philanthropy from DAC donors to developing countries was as high as USD \$63.7 billion. See Center for Global Prosperity, *The Index of Global Philanthropy and Remittances 2016* (Washington: Hudson Institute, 2016) at 6.

potential for international giving like other cross-border transactions to be misused for the purposes of terrorism and money laundering),⁶ while enabling their citizens to effectively contribute to philanthropy's globalization.

The situation in the European Union is illustrative. For Member States, the fundamental freedoms of the Treaty on the Functioning of the EU ("TFEU") have caused a changed regional philanthropic environment by mandating non-discrimination of charities and their donors.⁷ The European Court of Justice ("ECJ") has interpreted this principle of non-discrimination to require that Member States provide the same tax concessions to equivalent charities resident in other Member States that they provide to qualifying domestic charities.⁸ In practice however, implementation by Member States differs due to domestic fiscal policy, with the result that "the fiscal environment for cross-border philanthropy, even within the EU, is still rather complex".⁹ Despite

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6. See Victoria Bjorkland, Jenni Reynoso & Abbey Hazlett, "Terrorism and Money Laundering: Illegal Purposes and Activities" (2004-2005) 25:2 Pace Law Review 233 at 233; Christopher Groves & Alana Lowe-Petraske, "The Practice of International Philanthropy" in Clive Cutbill, Alison Paines & Murray Hallam, eds, *International Charitable Giving* (Oxford: Oxford University Press, 2012) at 3, 4, 13-4; Douglas Rutzen, "Aid Barriers and the Rise of Philanthropic Protectionism" (2015) 17:1 International Journal of Not-for-Profit Law 5 at 18-19; Rebecca Vernon, "Closing the Door on Aid" (2009) 11:4 International Journal of Not-for-Profit Law 5 at 17-19.
 7. "Consolidated Versions of the Treaty on the Functioning of the European Union" (1 March 2020), *EUR-Lex*, online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02016E/TXT-20200301>> [TFEU].
 8. See *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften*, C-386/04, [2006] ECR I-8203 at I-8234 [*Centro di Musicologia*]; *Hein Persche v Finanzamt Lüdenscheid*, C-318/07, [2009] ECR at I-359 [*Hein Persche*]; *Missionswerk Werner Heukelbach eV v Belgium*, C-25/10, [2011] ECR at I-497 [*Missionswerk*]; *European Commission v Republic of Austria*, C-10/10, [2011] ECR at I-05389 [*Republic of Austria*].
 9. Hanna Surmatz & Ludwig Forrest, "Boosting Cross-Border Philanthropy in Europe: Towards a Tax-Effective Environment" (Brussels: European Foundation Centre, 2017) at 4.

the current complexity of cross-border giving, the issue remains topical within the EU. It is expected that under the Romanian presidency of the EU, resolving the barriers to cross-border giving will be included on the political agenda.¹⁰ As the philanthropic sector in Europe continues to strive for a tax-effective environment for ‘European’ cross-border donations,¹¹ changes in government policy affecting the tax treatment of international giving are taking place elsewhere.¹²

The transformation of the global philanthropic landscape has prompted tax scholars from around the world to examine this domestic tax issue from a comparative perspective to understand how countries have responded to the challenges and opportunities presented by

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10. See European Economic and Social Committee, “European Philanthropy: An Untapped Potential (Exploratory Opinion at the Request of the Romanian Presidency)” (2019), online: *European Economic and Social Committee* <www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/european-philanthropy-untapped-potential-exploratory-opinion-request-romanian-presidency>.
 11. See Surmatz & Forrest, *supra* note 9. See also European Foundation Centre and Donors and Foundations Networks in Europe, “European Philanthropy Manifesto” (Brussels: European Foundation Centre, 2019), online (pdf): *Philanthropy Advocacy* <philanthropyadvocacy.eu/wp-content/uploads/2019/03/20190321-Philanthropy-Manifesto_420x210_WEB.pdf>.
 12. See *e.g.* Australia where the Australian Taxation Office recently issued a new public ruling reflecting a more permissive approach to the tax treatment of cross-border donations. Australian Taxation Office, Taxation Ruling TR 2019/6, “Income Tax: The ‘in Australia’ Requirement for Certain Deductible Gift Recipients and Income Tax Exempt Entities” (2019) online: <www.ato.gov.au/law/view/document?docid=TXR/TR20196/NAT/ATO/00001> [TR 2019/6].

the globalization of philanthropy.¹³ This article builds on the existing scholarship by employing comparative tax methodology and utilizing a technique of actual comparison that can be used by policy-makers

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13. See e.g. Ineke Koele, *International Taxation of Philanthropy: Removing Tax Obstacles for International Charities* (Amsterdam: International Bureau of Fiscal Documentation, 2007); Sigrid Hemels, "Are We In Need of a European Charity? How to Remove Fiscal Barriers to Cross-Border Charitable Giving in Europe" (2009) 37:8 *Intertax* 424; Theodore Georgopoulos, "Can Tax Authorities Scrutinise the Ideas of Foreign Charities? The ECJ's Persche Judgment and Lessons from US Tax Law" (2010) 16:4 *European Law Journal* 458; Charles Ostertag, "We're Starting to Share Well With Others: Cross-Border Giving Lessons from the Court of Justice of the European Union" (2011) 20:1 *Tulane Journal of International and Comparative Law* 255; Sabine Heidenbauer, *Charity Crossing Borders: The Fundamental Freedoms' Impact on Charity and Donor Taxation in Europe* (Alphen aan den Rijn: Kluwer Law International, 2011); David Moore & Douglas Rutzen, "Legal Framework for Global Philanthropy: Barriers and Opportunities" (2011) 13:1-2 *International Journal of Not-for-Profit Law* 5; Heike Jochum, "Cross-Border Charitable and Other Pro Bono Contributions: The Situation in Europe and the US" (2012) 40:11 *Intertax* 593; Sabine Heidenbauer et al, "Cross-Border Charitable Giving and its Tax Limitations" (2013) 67:11 *Bulletin for International Taxation* 611; Clive Cutbill, Alison Paines & Murray Hallam, eds, *International Charitable Giving* (Oxford: Oxford University Press, 2013); Thomas von Hippel, *Taxation of Cross-Border Philanthropy in Europe After Persche and Stauffer: From Landlock to Free Movement?* (Brussels: European Foundation Center, 2014); Lilian Faulhaber, "Charitable Giving, Tax Expenditures, and Direct Spending in the United States and the European Union" (2014) 39:1 *Yale Journal of International Law* 87; Miranda Stewart, "The Boundaries of Charities and Tax" in Matthew Harding, Ann O'Connell & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) 232; Myles McGregor-Lowndes, Julie-Anne Tarr & Natalie Silver, "The Fisc and the Frontier: Approaches to Cross-Border Philanthropy in Australia and the UK" (2015) 26:4, online: *The Philanthropist* < thephilanthropist.ca/2015/05/the-fisc-and-the-frontier-approaches-to-cross-border-charity-in-australia-and-the-uk/>; Renate Buijze, "Tax Incentives Crossing Borders: Considering the Example of Tax Incentives for Charitable Giving" in Sigrid Hemels & Kazuko Goto, eds, *Tax Incentives for the Creative Industries* (Singapore: Springer, 2017).

seeking to reform their tax treatment of cross-border donations. Applying comparative tax methodology to this discrete tax issue enables national tax laws and policies affecting cross-border giving to be considered beyond domestic tax policy-making concerns, to take into account the international realities of philanthropic globalization.

Part II of the article discusses comparative tax methodology and its application to the tax incentives for international giving. Part III adopts a functionalist approach to jurisdictional selection by examining ‘comparable’ jurisdictions that are all members of the OECD group of DAC donor countries. The results of this comparison are then used to develop a spectrum of approaches to the tax treatment of cross-border donations. At one end of the spectrum are countries that have employed domestic tax policy to place geographic barriers around charitable tax relief for donors; at the other end are countries that have adopted a more permissive approach to the provision of tax incentives for international giving. Part IV evaluates the two countries located at opposing ends of the spectrum — Australia and the Netherlands — using traditional tax policy considerations of equity, efficiency, simplicity, policy consistency and sustainability. Comparing these two divergent approaches utilizing a clear tax policy assessment framework points to an optimal approach for addressing this discrete tax issue. Part V offers concluding thoughts on how the comparative analysis can inform governments seeking to reform their tax incentives for cross-border philanthropy.

II. Comparative Tax Methodology And Its Application To The Tax Treatment Of Cross-Border Donations

Comparative tax methodology, or comparative tax law, is the “application of ‘comparative law’ methodologies to the study of tax laws”.¹⁴ Comparative tax law takes a country comparison beyond parallel descriptions of domestic tax laws in multiple jurisdictions. It provides a critical evaluation of those rules within the legal systems in which they

operate in order to develop an appropriate policy framework for reform.¹⁵ In doing so, it provides new insights that can only be achieved by way of comparison, adding to the body of comparative tax knowledge.¹⁶

We employ a functional approach, which rests on the assumption that “the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results”.¹⁷ Because functionalists see the convergence of legal systems as desirable, their approach to jurisdictional selection is to examine ‘comparable’ jurisdictions, which are typically at a similar evolutionary stage and therefore likely to face similar problems.¹⁸ This provides a functional equivalence, a ‘similarity in difference’ that facilitates the comparative analysis.¹⁹ While other comparative approaches have been applied to tax law, the functional approach has been found to be particularly suited to comparative taxation because it is able to overcome the obstacles to comparing tax rules “posed by rapid legislative change, complexity of tax systems and the heterogeneity of local tax concepts [by looking] at the functions of tax rules in different domestic systems as they evolve over time”.²⁰ The normative goal of the tax functionalist is the harmonization of tax laws for similarly situated jurisdictions.²¹

For the practical application of this approach, we adopt a comparative technique that incorporates Walter Kamba’s three phases of comparative legal analysis.²² In the first ‘descriptive’ phase, the “norms, concepts and institutions of the systems concerned” are described in their local context.²³ In the second ‘identification’ phase, the systems are compared in an effort to identify “divergences and resemblances between the legal systems or

15. See Carlo Garbarino, “An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research” (2009) 57:3 *American Journal of Comparative Law* 677 at 685.

16. See Reuven Avi-Yonah, Nicola Sartori & Omri Marian, “Some Theoretical Aspects of ‘Comparative Taxation’” in Reuven Avi-Yonah, Nicola Sartori & Omri Marian, eds, *Global Perspectives on Income Tax Law* (Oxford: Oxford University Press, 2011) at 1.

22. See Walter Kamba, “Comparative Law: A Theoretical Framework” (1974) 23:3 *International & Comparative Law Quarterly* 485 at 511.

23. *Ibid.*

parts of the legal systems compared”.²⁴ In the third ‘explanatory’ phase, the results of the analysis are critically evaluated and the divergences and resemblances explained.²⁵ The results from the descriptive and identification phases are used to develop a spectrum of approaches to the tax treatment of cross-border donations in order to understand where each country is located globally on this issue. We then take these findings to critically evaluate the divergent approaches of the countries that appear at opposing ends of the cross-border giving spectrum to determine which approach is optimal. In doing so, we employ tax policy criteria used to reform national tax laws, providing a clear assessment framework that overcomes the evaluation shortcomings that have been associated with equivalence functionalism.²⁶

Comparative tax methodology was first used to address the tax treatment of cross-border donations by Anthony Infanti, an American tax and comparative law scholar, who used the rules governing the United States tax treatment of cross-border donations to test his own comparative tax framework of ‘spontaneous tax coordination’.²⁷ Infanti argued that this topic was particularly suited to comparative tax methodology because it contained distinct legal rules that cross borders, implicating other countries and their international tax regimes.²⁸ As a critical legal scholar, Infanti acknowledged that his primary reason for choosing this topic was because “it was *not* a topic about which academics studying international tax normally write”.²⁹ More than a decade later, the transformation of the global philanthropic landscape has prompted other tax scholars around

24. *Ibid.*

25. *Ibid* at 511-12.

26. See Michaels, *supra* note 17 at 373-76 for a discussion of these limitations.

27. See Anthony Infanti, “Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the US International Tax Regime” (2002) 35:4 *Vanderbilt Journal of Transnational Law* 1105 [Infanti, “Spontaneous Tax Coordination”].

28. *Ibid* at 1120.

29. See Anthony Infanti, “A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity” (2005) 26:2 *Whittier Law Review* 707 at 796.

the world to address the comparative tax treatment of cross-border donations.³⁰

Infanti's comparative tax framework involved "unilateral action on the part of [a country seeking to reform its tax system by] reviewing and evaluating the international tax rules adopted by other countries" in order to understand and accommodate legislative solutions and trends.³¹ He defined tax coordination broadly as "the adaptation of one country's tax system to that of another"³² in order to "imbue the framework with a great deal of flexibility and allow policy-makers to vary the desired level of coordination as necessary to accommodate domestic political, economic and social norms".³³ For the practical application of his framework Infanti followed Kamba's three phases of comparative legal analysis, emphasizing the descriptive phase where he compared a broad cross-section of countries representing "each of the eight families of income tax laws".³⁴ After identifying similarities and differences, Infanti briefly evaluated the findings "to determine the most 'appropriate' rule by balancing the benefits of the superior rule against all of the relevant theoretical and practical considerations that normally inform US international tax policy-making".³⁵

Our comparative technique differs from Infanti's in three significant ways. First, rather than looking at a broad range of countries, we adopt a functional approach to jurisdictional selection by comparing OECD DAC donor countries at similar stages of legal development. Second, we create a spectrum of approaches to identify where each country is located in terms of the extent to which tax incentives for international giving are permitted or restricted. Third, we undertake an in-depth analysis of the two countries at opposing ends of the spectrum using tax policy considerations that inform policy-making across jurisdictions. Narrowing the analysis to the two extremes on the spectrum, rather than

30. See *supra* note 13.

31. See Infanti, "Spontaneous Tax Coordination", *supra* note 27 at 1136.

32. *Ibid* at 1128.

33. *Ibid* at 1142.

34. *Ibid* at 1159.

35. *Ibid* at 1226.

drawing from all of the countries in the initial comparison, achieves a comparative clarity that assists in ascertaining the optimal approach to the tax treatment of cross-border donations. Employing traditional tax policy considerations provides a clear assessment framework for evaluating the two divergent approaches.

III. Developing A Spectrum Of Approaches To The Tax Treatment Of Cross-Border Donations

We have undertaken a functional comparison of 11 jurisdictions based on our earlier comparative research to assess how these jurisdictions have responded to philanthropic globalization through the provision of tax incentives for international giving.³⁶ This comparative research examined the tax laws and policies governing cross-border philanthropy in the ‘comparable’ jurisdictions of Australia, Belgium, Canada, France, Germany, Japan, Luxembourg, the Netherlands, Spain, the United Kingdom and the US. These countries are all present members of the OECD DAC and as such are all considered developed nations with high income and the most significant providers of cross-border development

36. See Natalie Silver, *Beyond the Water's Edge: Re-thinking the Tax Treatment of Australian Cross-Border Donations* (DPhil Thesis, Queensland University of Technology, 2016); Renate Buijze, *Philanthropy for the Arts in the Era of Globalisation: International Tax Barriers for Charitable Giving* (DPhil Thesis, Erasmus University Rotterdam, 2017). Materials concerning the mentioned countries have been included up to June 7, 2017. Since then, the position of France on the spectrum has changed and moved more towards the permissive side of the spectrum, see Isabel Heuzé, “Legaat van een Inwoner van Frankrijk aan een Nederlandse ‘ANBI’: Vrijstelling van Franse Erfbelasting” (“Legacy from an Inhabitant of France to a Dutch ‘ANBI’: Exemption from French Inheritance Tax”) (2018) 10 Fiscaal Tijdschrift Vermogen 6 (translation by the authors). As soon as the United Kingdom leaves the EU, it becomes a third country and it no longer has to comply with EU law. The UK then thus no longer has to grant the same tax benefits on donations to domestic Public Benefit Organizations (“PBOs”) as on donations to comparable PBOs located in other EU Member States, which might influence its position on the spectrum.

aid.³⁷ They also share similarities in their approach to civil society regulation and are at a similar level of evolutionary legal development. We compared the country approaches thematically to identify similarities and differences. This analysis revealed that while there is policy consistency across these jurisdictions in encouraging domestic giving through the tax laws, this is not the case with cross-border giving.

The countries examined evidence a broad range of approaches to the provision of tax incentives for international philanthropy. At one end of the spectrum are countries that have used domestic tax policy to place geographic barriers around charitable tax concessions, including Australia and Japan, whereby tax incentives for charitable giving generally stop at a country's borders. At the other end are countries that have adopted a more permissive approach to the provision of tax incentives for international philanthropy, including Luxembourg and the Netherlands, allowing tax deductible donations to cross borders. These research findings are illustrated on a spectrum from most restrictive to least restrictive tax treatment in Figure 1 below.

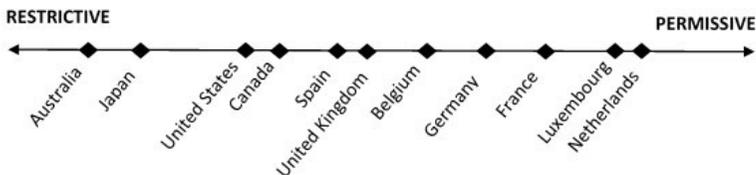


Figure 1: Spectrum of approaches to tax treatment of cross-border donations

It is notable that with the exception of Spain and the UK, all other EU Member States appear on the permissive end of the spectrum. This is a result of Member States amending their tax laws in response to a combination of infringement procedures by the European Commission and decisions by the ECJ. The European Commission aimed to achieve non-discrimination of charities and their donors within the EU, in compliance with the four fundamental freedoms stipulated in the TFEU.

37. "Development Assistance Committee (DAC)" (2019), online: *OECD* <www.oecd.org/dac/dacmembers.htm#members>. In addition to development aid, this article also includes other types of charitable giving for the public benefit.

In four landmark cases dealing with the tax treatment of charities, the ECJ developed a general non-discrimination principle according to which a Member State must grant the same beneficial tax treatment to an equivalent charity resident in another Member State as it provides to a domestic charity.³⁸ Both the ECJ case law and the infringement procedures by the European Commission reflect a permissive approach towards 'European' cross-border charity and philanthropy. While Member States retain the right to decide whether they want to provide tax incentives and under what conditions, a residency requirement is prohibited. The result is that once a Member State decides to provide favourable tax treatment to domestic charities and their donors it must also provide non-discriminatory tax treatment to comparable charities located in other Member States.³⁹

The majority of Member States have amended their tax laws in accordance with the non-discrimination principle established by the ECJ. Of the Member States examined, only Spain's tax legislation does not conform with this principle.⁴⁰ This explains Spain's location towards the restrictive end of the spectrum. The UK has amended its tax legislation in accordance with the non-discrimination principle, however its approach is moderately restrictive as a result of tax legislation containing jurisdiction, registration and management requirements, which serve to limit access to UK charitable status and tax relief for non-UK charities.⁴¹ It also provides that UK charities submit to a reasonableness determination by the UK tax authority, Her Majesty's Revenue and Customs, prior to sending charitable funds outside the UK. While other Member States have adopted more permissive approaches than Spain and the UK, the Netherlands is the only European jurisdiction examined that has extended the principle of non-discrimination to countries beyond the EU, which locates it at the most permissive end of the spectrum.

In contrast, Australia, Canada, Japan and the US all appear at the restrictive end of the spectrum because the tax legislation in these countries contain 'in country' residency requirements that requires a charity to be resident or established in the home country to access charitable tax concessions. The result is that in these jurisdictions there are no tax

incentives for donations made directly to foreign charities.⁴² Canada, Japan and the US permit a tax deduction for cross-border donations made indirectly through domestic charities for their own charitable work abroad or by serving as a charitable intermediary, provided that the domestic charity maintains discretion and control over the funds and is not serving as a mere conduit for channeling the funds abroad. Australia appears at the most restrictive end of the spectrum because unlike Canada, Japan and the US, it generally does not permit a tax deduction for cross-border donations made indirectly through domestic charities.⁴³

This analysis locates Australia and the Netherlands at opposing ends of the spectrum for the tax treatment of cross-border donations. The Australian Government responded to philanthropic globalization and domestic fiscal pressures by restricting tax incentives for cross-border giving, while the Netherlands adopted a permissive, internationalist approach by applying the same tax treatment to domestic and cross-border donations. Given their divergent approaches, these two countries provide an important basis for comparison.

IV. Evaluating The Divergent Approaches Using Tax Policy Considerations

This section provides a descriptive analysis of Australia and the Netherlands' legal regime governing the tax treatment of cross-border giving and identifies the similarities and differences between the two divergent approaches. These results are critically evaluated using tax policy considerations to determine the optimal approach for the provision of tax incentives for cross-border donations in a changed global philanthropic landscape.

42. Although the US has tax treaties with three countries and Canada has one that all contain 'mutual recognition' provisions enabling cross-border reciprocity for charitable donations.

43. Other than exceptions for foreign aid organizations and certain environmental organizations.

A. Descriptive Country Comparison

The descriptive country comparison considers each jurisdiction's laws and policies governing the tax treatment of cross-border donations, taking into account the broader historical and cultural context in which their charitable tax regimes operate. Each country will be described under two main headings (i) tax incentives for cross-border donations and (ii) regulatory measures governing cross-border charitable activities. This facilitates the comparative analysis by providing a thematic basis for comparison, augmenting the functional equivalence of the two jurisdictions.

1. Australia

Since colonial times, Australia has relied on the English common law model of charity, with churches and citizens being the primary drivers of voluntary sector activities and organizations.⁴⁴ This colonial model of welfare provision combined private charity focused on domestic causes through the delivery of social services, with significant government subsidies to provide the basis for the new welfare state.⁴⁵ Australia adopted the definition of charity enunciated in the seminal English case *Commissioners for Special Purposes of Income Tax v Pemsel*,⁴⁶ which defines charities as nonprofit organizations with charitable purposes that are for

44. See Wendy Scaife et al, "Giving in Australia: Philanthropic Potential Beginning to Be Realized" in Pamala Wiepking & Femida Handy, eds, *The Palgrave Handbook of Global Philanthropy* (London: Palgrave Macmillan, 2015) 488.

45. See e.g. John Murphy, "The Other Welfare State: Non-Government Agencies and the Mixed Economy of Welfare in Australia" (2006) 3:2 *History Australia* 44.1; Stephen Garton, *Out of Luck: Poor Australians and Social Welfare 1788-1988* (Crow's Nest, NSW: Allen and Unwin, 1990); Brian Dickey, *No Charity There: A Short History of Social Welfare in Australia*, 2d (Sydney: Allen and Unwin, 1987); Mark Lyons, *Third Sector: The Contribution of Nonprofit and Cooperative Enterprises in Australia* (Crow's Nest, NSW: Allen and Unwin, 2001).

46. [1891] AC 531 (HL (Eng)).

the public benefit.⁴⁷ These colonial origins resulted in Australia adopting the English tradition of providing favourable tax treatment for domestic charities. A tax deduction for charitable gifts was enacted with the first Commonwealth legislation introducing personal income tax in 1915 and remains an important tax concession in Australia's federal income tax system.

i. Tax Incentives for Cross-Border Donations

The Australian Tax Office ("ATO") is responsible for administering and enforcing tax law for nonprofits. Organizations must be endorsed by the ATO to access charitable tax concessions, including income tax exemption and deductible gift recipient ("DGR") status. Having DGR status enables the organization to receive tax deductible donations. Australian residents can deduct from their taxable income the value of donations of AUD \$2 or more made to a DGR.⁴⁸ Australia's tax legislation states that in order to obtain DGR status, the organization must be 'in Australia'.⁴⁹ The legislation does not provide a definition of 'in Australia'. Instead, the ATO has issued tax rulings and guidance on its meaning. For the past 50 years, the ATO adopted a strict interpretation of this 'in Australia' residency requirement, stipulating that a DGR must "be established, controlled, maintained and operated in Australia" and have "its benevolent purposes" in Australia.⁵⁰ In practical terms this meant that donations by Australian taxpayers made directly to a charity outside Australia were never tax deductible. Donations made to an Australian DGR to use the gift for its own programs outside Australia were also not tax deductible, unless such activities were relatively minor or incidental

47. *Charities Act 2013* (Cth), 2013/100 (Austl), s 5.

48. *Income Tax Assessment Act 1997* (Cth), 1997/38 (Austl), s 30-15 [*ITAA 1997*].

49. *Ibid*, s 30-125(1)(b)(iii).

50. Australian Taxation Office, Taxation Ruling TR 2003/5, "Income Tax and Fringe Benefits Tax: Public Benevolent Institutions" (4 June 2003) at para 129 [TR 2003/5]. For the origins of the ATO's 'in Australia' interpretation and a critique see Natalie Silver, Myles McGregor-Lowndes & Julie-Anne Tarr, "Delineating the Fiscal Borders of Australia's Non-Profit Tax Concessions" (2016) 14:3 *eJournal of Tax Research* 741.

to the organization's Australian operations,⁵¹ or unless the organization obtained its DGR status pursuant to one of the limited exceptions to the 'in Australia' residency requirement.⁵² While limited in number due to high entry barriers, organizations that have obtained DGR status pursuant to one of these exceptions have been used by Australian charities and their donors as giving intermediaries to channel tax deductible funds abroad.⁵³ These channelling arrangements, involving a servicing fee being paid to the intermediary DGR,⁵⁴ have provided a workaround for organizations and their donors, enabling them to circumvent the restrictive tax laws in order to engage in tax-effective cross-border charitable activities.⁵⁵

Two significant judicial decisions in the last ten years have challenged the legislative efficacy of the geographic restrictions placed around gift deductibility and income tax exemption. In *Federal Commissioner of*

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51. TR 2003/5, *ibid* at para 130.
 52. The exceptions are overseas aid funds, developed country disaster relief funds, public funds on the Register of Environmental Organisations and DGRs listed by name in the tax law. See *ITAA 1997*, *supra* note 48, ss 30-55, 30-80, 30-85. For a detailed discussion of these exceptions, see Natalie Silver, Myles McGregor-Lowndes & Julie-Anne Tarr, "Should Tax Incentives for Charitable Giving Stop at Australia's Borders?" (2016) 38:1 Sydney Law Review 85 at 96-103.
 53. The Australian Bureau of Statistics *Australian National Accounts: Non-Profit Institutions Satellite Account 2012–13* found that 'grants and other payments' made by Australian nonprofit organizations to 'non-resident organisations' (defined as any organization domiciled overseas, including foreign branches and subsidiaries of Australian organizations) amounted to more than AUD \$1 billion, highlighting the widespread use of domestic nonprofits for cross-border giving, a significant component of which is likely to be intermediary giving. See Australian Bureau of Statistics, *Australian National Accounts: Non-Profit Institutions Satellite Account, 2012–13* Catalogue No 5256.0 (Canberra: ABS, 28 August 2015), online: *Australian Bureau of Statistics* <www.abs.gov.au/AusStats/ABS@.nsf/MF/5256.0> [perma.cc/95RM-3TS2], table 10.1.
 54. This servicing fee is typically 7-10 per cent of the amount distributed. See Letter from Philanthropy Australia to Prime Minister Tony Abbott (21 April 2015) at 1.
 55. For further discussion on the use of such workarounds, see Silver, McGregor-Lowndes & Tarr, *supra* note 52 at 95, 103.

Taxation v Word Investments Ltd,⁵⁶ the High Court of Australia found that it was permissible for a tax exempt entity to send funds abroad through a suitably qualified organization. This was affirmed in *Federal Commissioner of Taxation v The Hunger Project Australia*,⁵⁷ where the Federal Court of Australia determined that Hunger Project Australia, which operated primarily as a fundraising arm for a global network of entities that provided hunger relief was eligible to apply for income tax exemption and DGR status. Following these decisions, the ATO's longstanding restrictive position has shifted towards a more permissive approach to the tax treatment of cross-border donations, culminating in 2017 when the ATO withdrew its public ruling containing its strict interpretation of the 'in Australia' residency requirement.⁵⁸ In doing so, the ATO cited a statement by the Commissioner of the Australian Charities and Not-for-profits Commission ("ACNC") that an organization "is not precluded from being registered as a [public benevolent institution] subtype of charity if it has a main purpose of providing benevolent relief to people residing overseas".⁵⁹ In March 2018, the ATO announced it was developing a new public ruling on the 'in Australia' residency requirement for deductible gift recipients and income tax exempt entities.⁶⁰ This ruling was issued in December 2019.⁶¹ As the nonprofit sector awaited this new ruling,

56. (2008) 236 CLR 204 (HCA) [*Word Investments*].

57. (2014) 221 FCR 302 (Austl) [*Hunger Project*].

58. Australian Taxation Office, Taxation Ruling TR 2003/5W, "Income Tax and Fringe Benefits Tax: Public Benevolent Institutions, Notice of Withdrawal" (17 May 2017) online: *Australian Taxation Office* <www.ato.gov.au/atoLaw/view.htm?DocID=TXR%2FTR20035%2FNAT%2FATO%2F00001> [perma.cc/J5VX-LJKS].

59. Australian Charities and Not-for-profits Commissions, *Commissioner's Interpretation Statement: Public Benevolent Institutions*, CIS 2016/03, (ACNC, 2016), s 5.8.

60. Australian Taxation Office, Advice Under Development – Income Tax Issues, [3911] "'In Australia' Requirement - Deductible Gift Recipients" (2018) online: *Australian Taxation Office* <www.ato.gov.au/General/ATO-advice-and-guidance/Advice-under-development-program/Advice-under-development---income-tax-issues/#BK_3911> [perma.cc/52YG-H4PV].

61. TR 2019/6, *supra* note 12.

Australian organizations and their donors took advantage of the legal vacuum created by establishing organizations with DGR status that were able to send funds and engage in charitable activities outside Australia.

ii. Regulatory Measures Governing Cross-Border Charitable Activities

The ACNC was established in 2012 as Australia's first national charity regulator.⁶² Registration of charities with the ACNC is voluntary, but is required for charities to access tax concessions, including obtaining DGR status, from the ATO.⁶³ In order to register with the ACNC, an organization must meet the legal definition of charity, be in compliance with ACNC governance standards and have not been listed as an organization engaging in or supporting terrorist or other criminal activities.⁶⁴ The registration process enables the ACNC to assess compliance risks against its governance standards. Once registered, the ACNC has a number of tools for the ongoing regulation of charities. All registered charities must keep certain financial and operational records for seven years explaining the charity's financial position and activities.⁶⁵ The charity legislation also contains reporting requirements for registered charities (unless they are subject to an exception) through the submission of an annual information statement and financial reports, which requires some information on cross-border charitable activities.⁶⁶ Failure to submit an annual information statement results in penalties⁶⁷ and may result in revocation of registration.

While the ACNC's governance standards do not contain specific requirements for charities operating abroad, the charity legislation provides for external conduct standards to regulate registered charities

62. The ACNC is governed by the Australian *Australian Charities and Not-for-profits Commission Act 2012* (Cth), 2012/16.

63. *Ibid*, s 10-5.

64. *Ibid*, s 25-5.

65. *Ibid*, s 55-5.

66. *Ibid*, s 60-5.

67. *Ibid*, s 175-35.

sending funds or engaging in activities outside Australia.⁶⁸ Until recently these external conduct standards had not been developed. Instead the ACNC issued guidance to assist charities working abroad to minimize the risk of being used for raising and distributing funds for terrorist financing.⁶⁹ As part of a DGR reform package announced in December 2017, the Australian Government stated its intention to issue the external conduct standards “[t]o strengthen oversight of overseas activities”.⁷⁰ The external conduct standards came into effect in July 2019.⁷¹

In addition to regulation by the ACNC, charities are also subject to audits from the ATO, which can revoke DGR and tax exempt status and impose penalties for non-compliance. International aid organizations are subject to further regulation through the Overseas Aid Gift Deduction Scheme administered by the Department of Foreign Affairs and Trade; and environmental organizations working abroad are also regulated through the Register for Environment Organisations, administered by the Department of the Environment.

2. The Netherlands

In the second half of the 19th century a differentiation of religious groups in the Netherlands took place, which led to Dutch society

68. *Ibid*, div 50.

69. “Protecting Your Charity Against the Risk of Terrorism Financing” (2015), online: ACNC <www.acnc.gov.au/ACNC/Manage/Protect/ProtectingTF/ACNC/Edu/ProtectTF.aspx>; “Checklist: Protecting your Charity Against the Risk of Terrorism Financing” (2014), online: ACNC <www.acnc.gov.au/for-charities/manage-your-charity/checklist-protecting-your-charity-against-risk-terrorism-financing>.

70. See Australian Treasury, Media Release, “Reforming Administration of Tax Deductible Gift Recipients”, (5 December 2017) online: *Treasury Portfolio Ministers* <ministers.treasury.gov.au/ministers/kelly-odwyer-2016/media-releases/reforming-administration-tax-deductible-gift-recipients>.

71. See *Australian Charities and Not-for-profits Commission Amendment 2018 (No 2)* (Cth), regs 2018, online: *Federal Register of Legislation* <www.legislation.gov.au/Details/F2018L01601> [perma.cc/L9S4-9GTP]; ACNC, “External Conduct Standards” (2019), online: ACNC <www.acnc.gov.au/tools/topic-guides/external-conduct-standards>.

being organized into social groups based on religious and political lines, known as ‘pillarization’.⁷² This fostered the growth and development of religiously and ideologically affiliated charitable organizations,⁷³ which had strong relationships with the national government.⁷⁴ In the second half of the 20th century, the pillarization weakened and Dutch citizens became involved with organizations that were not defined by religious or political affiliation.⁷⁵ The growth of the welfare state resulted in increased public funding for charitable activities, both domestic and international, which solidified the centrality of charitable organizations in Dutch social and economic life.⁷⁶ The concept of public benefit was first introduced in the Dutch tax legislation in 1917, when a tax exemption was introduced in the inheritance law.⁷⁷ In 1952 a tax deduction for charitable gifts was introduced in the Dutch personal income tax for gifts to organizations that contributed to the public good⁷⁸ and in 2012 specific categories of public benefit were enumerated in the tax laws, extending to charitable organizations located abroad.⁷⁹

i. Tax Incentives for Cross-Border Donations

A tax deduction is available to Dutch taxpayers who donate to an *Algemeen Nut Beogende Instelling* [Public Benefit Pursuing Entity (“PBPE”)], which has been registered as a charity under the *Wet Inkomstenbelasting* [*Income*

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72. See Gabi Spitz, Roeland Muskens & Edith van Ewijk, *The Dutch and Development Cooperation: Ahead of the Crowd or Trailing Behind?* (Amsterdam: National Committee For International Cooperation and Sustainable Development, 2013) at 10.
 73. See Ary Burger et al, “The Netherlands: Key Features of the Dutch Nonprofit Sector” in Lester M Salamon et al, eds, *Global Civil Society: Dimensions of the Nonprofit Sector* (Baltimore: Johns Hopkins Center for Civil Society Studies, 1999) 145 at 145-46.
 74. See Spitz, Muskens & Van Ewijk, *supra* note 72 at 8.
 75. *Ibid* at 10.
 76. See Burger et al, *supra* note 73 at 146, 152.
 77. Law of 20 January 1917, Dutch Official Gazette 189, concerning the *Successiewet 1859* [*Inheritance law 1859*] (translation by the authors).
 78. Law of 26 June 1952, Dutch Official Gazette 376.
 79. *Algemene Wet Inzake Rijksbelastingen* [*General State Taxes Act*] (The Netherlands) 1959, art 5b (translation by the authors) [*GSTA*].

Tax Act 2001 (“*ITA*”).⁸⁰ The *ITA* distinguishes between periodic and other gifts.⁸¹ For periodic gifts, the donor commits to pay the same amount annually to a single PBPE over a period comprising at least five years and ultimately ending at the death of the taxpayer. These periodic gifts are fully deductible, up to 100 per cent of taxable gross income.⁸² The remainder can be deducted in a subsequent year. Other gifts, defined as any gift that does not meet the requirements of a periodic gift, are tax deductible to the extent that the amount combined with other donations made during the taxable year exceeds a floor of EUR 60 and one per cent of taxable gross income. These gifts are capped at ten per cent of taxable gross income.⁸³

To qualify as a Dutch charity, the organization must register with the Dutch tax authority, *Belastingdienst*.⁸⁴ Following the establishment of the non-discrimination principle by the ECJ, the Netherlands amended its tax legislation. In doing so, rather than limiting its charitable tax relief to European cross-border donations as mandated by the ECJ, the Netherlands went one step further by extending its tax relief to charities beyond Europe. The result is that charities in EU Member States or States designated by the Dutch Ministry of Finance⁸⁵ can register as a

80. *Wet Inkomstenbelasting 2001 [Income Tax Act 2001]* (The Netherlands), arts 6.32-6.33 (translation by the authors).

81. *Ibid*, arts 6.34-6.35.

82. *Ibid*, arts 6.34, 6.38.

83. *Ibid*, art 6.39.

84. *GSTA*, *supra* note 79.

85. These include countries with which the Netherlands has an agreement to exchange information on income tax and gift and inheritance tax, which may be in the form of a bilateral tax treaty, an agreement on exchange of tax information, or the Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters. Even if a charity resides in a country that does not have an exchange of information agreement with the Netherlands, it can still register as a PBPE by agreeing to provide additional information to the Dutch tax authority. See *GSTA*, *supra* note 79; *Uitvoeringsregeling Algemene Wet Inzake Rijksbelastingen [Implementing Regulation General State Taxes Act]* (The Netherlands) 1994, art 1c (translation by the authors).

PBPE in the Netherlands. Upon receiving its Dutch charity status as a PBPE, the foreign charity is included in a list of charities that are eligible to receive tax deductible donations from Dutch taxpayers.⁸⁶ Once registered as a Dutch charity, there are no geographic restrictions on the charity's activities. Both resident and non-resident registered charities can undertake some or all of their activities outside the Netherlands. As of 1 January 2018, there were 236 foreign charities registered as PBPEs in the Netherlands.⁸⁷

Until recently, PBPEs could be used by Dutch donors as giving intermediaries to obtain a tax deduction for donations to charities that were not registered as a PBPE in the Netherlands, such as foreign charities or newly established domestic charities that had not yet obtained PBPE status. However, following a decree by the Ministry of Finance in 2014⁸⁸ and a decision by the Dutch Supreme Court in 2016,⁸⁹ the use of PBPEs serving as giving intermediaries has been significantly restricted. These restrictions were created in response to the perception that giving intermediaries were being used to maximise gift deductibility. Instead of making partially deductible other gifts to different charities over five consecutive years, Dutch donors were making a fully deductible periodic gift to a giving intermediary. Each year the giving intermediary would pass the gift to a different charity, as directed by the donor. To prevent donors

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86. See “Zoek een ANBI” [“Find an ANBI”], online: *Belastingdienst* <www.belastingdienst.nl/rekenhulpen/giften/anbi_zoeken/> (translation by the authors).
87. “Kabinetsreactie Evaluaties Giftenaftrek en ANBI/SBBI-Regeling” [“Government Response to the Assessment of the Gift Deduction and ANBI/SBBI Regulation”] (2018), online: *Rijksverheid* <www.rijksverheid.nl/documenten/kamerstukken/2018/04/26/kabinetsreactie-evaluaties-giftenaftrek-en-anbi-sbbi-regeling> [perma.cc/6JZZ-ACVP] (translation by the authors).
88. *Inkomstenbelating: Giften en Algemeen Nut Boegende Instellingen* [Income Tax: Donations and Public Benefit Pursuing Entities], Decree of 19 December 2014, nr BLKB2014/1415M, (2014) *Staatcourant* [Government Gazette], nr 36877 (translation by the authors) [Decree].
89. Supreme Court 14/06262 (22 April 2016) ECLI:NL:HR:2016:695 (The Netherlands) [Supreme Court 14/026262].

from converting their other gifts into periodic gifts, in 2014 the Ministry of Finance decreed that a PBPE that functions as a conduit organization will lose its charitable status.⁹⁰ Following this decree, the Dutch Supreme Court found that a facilitator of an online donation platform was not a PBPE on the basis that a PBPE should focus its activities on sufficiently defined aims that almost exclusively serve the public benefit.⁹¹ As a result, opportunities for Dutch donors to use a giving intermediary to obtain a tax deduction (whether directed domestically or abroad) are restricted.

ii. Regulatory Measures Governing Cross-Border Charitable Activities

The Dutch tax legislation includes a number of registration requirements for any entity, domestic or foreign, seeking Dutch charity status. The main requirement is that at least 90 per cent of its activities are dedicated to pursuing the public benefit.⁹² Since January 2014, PBPEs are required to publish information annually on their website and to report this website to the Dutch tax authority.⁹³ Foreign charities seeking Dutch charity status must submit an application form to the Dutch tax authority along with governing documents, tax status in the country of residence, financial statements and a list of board members.⁹⁴ The Dutch tax authority may revoke charitable status if it determines that an organization's activities are not being exercised in the public interest or

90. Decree, *supra* note 88.

91. Supreme Court 14/06262, *supra* note 89.

92. *GSTA*, *supra* note 79.

93. This includes a description of the organization's aims, policy plan, financial statements, reimbursement policy and annual report. See "Publishing ANBI Information on a Website", online: *Belastingdienst* <belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/business/other_subjects/public_benefit_organisations/publishing-anbi-information-on-a-website/> [perma.cc/4UXF-5RB2].

94. "Aanvraag ANBI-Beschikking – Buitenland" ["Application PBPE-status – Foreign Countries"], online: *Belastingdienst* <belastingdienst.nl/wps/wcm/connect/bldcontentnl/themaoverstijgend/programmas_en_formulieren/aanvraag_anbi_buitenland> [perma.cc/MNQ6-TAP2] (translation by the authors).

other requirements are not met.⁹⁵

Ongoing monitoring of a number of registered charities is also conducted by the Central Bureau for Fundraising (“CBF”), an independent accrediting and oversight agency, providing its member organizations with greater credibility.⁹⁶ Charities apply to the CBF for a ‘seal of approval’, which involves the CBF conducting an assessment of the organization’s records and information against a number of criteria and subsequent annual assessments to ensure ongoing compliance.⁹⁷ While the CBF’s seal of approval has no legal consequences, it nonetheless serves as an important charitable monitoring body given that the charities under its supervision account for approximately 85 per cent of all funds raised in the Netherlands including all international Non-Governmental Organizations (“NGOs”).⁹⁸ The Dutch tax authorities and the CBF have signed an agreement on the incorporation of the PBPE requirements in the CBF’s assessment.⁹⁹

B. Identification of Similarities and Differences

Australia and the Netherlands offer contrasting approaches to the tax treatment of cross-border donations as a result of the particular local context in which each country’s charitable tax regime operates. Australia’s approach is based on the English common law definition of charity, codified in its charity laws, with regulation occurring primarily through its national charity regulator. The Netherlands has codified its tax laws, with regulation mainly undertaken by the Dutch tax authority. The

95. *GSTA*, *supra* note 79, s 7.

96. *Financial Action Tax Force*, “Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism – The Netherlands” (25 February 2011) at 262.

97. *Ibid* at 264.

98. *Ibid*.

99. CBF Toezichthouder Goede Doelen, “Goededoelensector en Belastingdienst Ondertekenen Convenant” [CBF Supervisor Charitable Organisations, “Charities and Tax Authorities Sign Agreement”] (29 June 2018), online: *CBF Nieuwsoverzicht* <www.cbf.nl/nieuwsbericht/goededoelensector-en-belastingdienst-ondertekenen-convenant> [perma.cc/XCZ2-QDWM] (translation by the authors).

differences in approaches undertaken by the two countries are further illuminated through the thematic bases for comparison.

1. Tax Incentives for Cross-Border Donations

The comparative analysis revealed that there is policy consistency across the two jurisdictions in encouraging domestic giving through the tax laws. Each country, however, has responded differently to concerns relating to the fiscal consequences of extending tax concessions to cross-border donations and the supervision of philanthropy outside their jurisdiction.

In Australia, the residency requirement does not permit a deduction for donations made directly to foreign charities, consistent with Australia's colonial origins of welfare provision combined with private charity that focused on domestic causes. This restrictive approach to charity was incorporated into Australia's tax laws, resulting in a narrow concept of public benefit limited to organizations 'in Australia'. The ATO's longstanding interpretation of the 'in Australia' residency requirement has not permitted a tax deduction for donations to domestic charities that are spent abroad, unless such activities are relatively minor or incidental to their Australian operations or unless the organization obtained its DGR status pursuant to one of the exceptions to the 'in Australia' requirement. In contrast, since 2008 the Netherlands, in line with the EU treaties, has provided equal tax treatment of domestic and foreign charities that register with the Dutch tax authority. This allows Dutch donors to claim a deduction for donations made directly to foreign charities, provided they have registered as PBPEs. The Netherlands has incorporated this permissive approach into its tax laws, extending the concept of public benefit to charitable activities carried out abroad. As a result, domestic charities are able to use tax deductible donations for their international charitable activities.

The Australian tax laws applying to cross-border giving and (until recently) their restrictive interpretation by the ATO, have provided strong incentives for charities and donors wishing to obtain charitable tax relief to direct their charitable activities and funds domestically. This restrictive approach also revealed the limited options available to Australian donors who wished to engage in tax effective cross-border giving, as well as the

difficulties Australian charities reliant on these donations experienced in operating abroad. As a consequence, organizations and their donors have been making tax deductible donations indirectly, through domestic giving intermediaries as workarounds of the tax laws. In contrast, in the Netherlands both the Dutch Government and the courts have indicated they are limiting the use of domestic giving intermediaries. This does not affect the ability of Dutch donors to make tax effective donations abroad, as they can still obtain a tax deduction on a cross-border donation made directly to a foreign charity provided it is recognized as a PBPE, or to a domestic charity that operates internationally. However, it has implications for foreign charities that have not registered with the Dutch tax authority as a PBPE, as Dutch donors can no longer use a giving intermediary to make tax deductible donations to such charities.

2. Regulatory Measures Governing Cross-Border Charitable Activities

Both countries have tools to regulate international giving for donations made to foreign charities, responding to the need for government oversight of cross-border giving. Australia has registration and reporting requirements for charities generally, including compliance with the ACNC's governance standards and provision of annual information statements. To date these regulatory requirements have not been particularly focused on international charitable activities, although that is likely to change with the recent introduction of the ACNC's external conduct standards. In the Netherlands there are also registration and reporting requirements applying to both domestic and foreign charities. These processes enable the Dutch tax authority to have a measure of control over foreign charities and the funds entrusted to them. While this regulation may increase the administrative burdens and costs for foreign charities potentially creating disincentives for registration,¹⁰⁰ it appears to be a more targeted regulatory tool for government to monitor international charitable activities.

100. See Hemels, *supra* note 13 at 431.

C. Evaluation

To evaluate which of the two divergent approaches to the tax treatment of international giving is more optimal, we employ five tax policy criteria: efficiency, equity, simplicity, policy consistency and sustainability. Across jurisdictions there is general consensus that a country's "tax laws should be fair, economically efficient and simple to comply with and administer".¹⁰¹ Additional concerns of sustainability and policy consistency are often used to evaluate tax laws and systems.¹⁰² An optimal approach to the tax treatment of cross-border donations would seek to maintain a delicate balance between these oft-competing policy considerations.

1. Efficiency

Treasury, or economic, efficiency is concerned with whether the tax deduction is a cost effective way to subsidize charitable organizations by measuring the extent to which the deduction delivers social benefits (in the form of donations) that exceed the costs of the lost tax revenue.¹⁰³ On a granular level, treasury efficiency is concerned with whether a dollar of forgone taxes induces at least an extra dollar of donations. If each dollar of forgone revenue purchases less than one dollar of giving, arguably the subsidy should be removed and replaced with direct spending.¹⁰⁴ The extent to which the tax deduction succeeds in encouraging giving depends on how responsive donors are to price incentives, measured by

101. See Michael Graetz, "Paint-By-Numbers Tax Lawmaking" (1995) 95:3 Columbia Law Review 609 at 609.

102. See e.g. UK, HC Treasury Committee, *Principles of Tax Policy: Eighth Report of Session 2010-11*, vol 1 (15 March 2011) [Treasury Committee]; Austl, Commonwealth, Australia's Future Tax System Review Panel, *Australia's Future Tax System: Report to the Treasurer* (Canberra: Australian Government Treasury, 2009) [Australia's Future Tax System Review].

103. See Rob Reich, "Toward a Political Theory of Philanthropy" in Patricia Illingworth, Thomas Pogge & Leif Wenar, eds, *Giving Well: The Ethics of Philanthropy* (Oxford: Oxford University Press, 2011) 177 at 182-83.

104. See Colinvaux, Galle & Steuerle, *supra* note 3 at 8 (noting that transaction costs, such as fundraising and the costs of grants and direct expenditures would also have to be taken into account).

economists as the price elasticity of giving. For taxpayers for whom giving is price elastic, lowering the price of giving through tax incentives can potentially increase the amount donated and the number of individuals donating.¹⁰⁵ Conversely, low price elasticities suggest that tax incentives are an inefficient means of funding nonprofit organizations. Since the 1970s, the effects of tax incentives on charitable contributions have been studied extensively. A review of these studies in the US suggests that giving is price elastic, at least among individuals with high incomes.¹⁰⁶ These findings suggest that the gift deduction is an efficient way to subsidize charitable organizations. The higher top marginal tax rates in Australia and the Netherlands compared to the US implies that the gift deduction would have a larger impact on giving in these countries, particularly for wealthy taxpayers.¹⁰⁷

While there have been no studies estimating price elasticities of cross-border philanthropy, a comparative study of private charitable giving to developing countries conducted by the Center for Global Development concluded that “[c]itizens in countries with stronger targeted income

105. See Simon, Dale & Chisolm, *supra* note 3.

106. See John List, “The Market for Charitable Giving” (2011) 25:2 *Journal of Economic Perspectives* 157. See also John Peloza & Piers Steel, “The Price Elasticities of Charitable Contributions: A Meta-Analysis” (2005) 24:2 *Journal of Public Policy & Marketing* 260, which shows a price elasticity of giving between -1.11 and -1.44.

107. See Austl, Commonwealth, Productivity Commission, *Contribution of the Not-for-Profit Sector* (Canberra: Australian Government Productivity Commission, 2010) at 174; Myles McGregor-Lowndes & Marie Crittall, “An Examination of Tax Deductible Donations Made By Individual Australian Taxpayers in 2012–13” (2015) Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology Working Paper No 66 at 7, 61. In the 2019 Dutch Tax Plan it was announced that from 2020 the tax rate against which donations can be deducted in the Netherlands will reduce gradually, from the highest tax bracket to 37.05 per cent in 2023. See *Belastingplan 2019* [Dutch Tax Plan 2019] (Dutch Ministry of Finance, 18 September 2018).

tax incentives appear to give more private charity to poor countries”.¹⁰⁸ This finding indicates a high price elasticity for taxpayers who give to developing countries, suggesting that the gift deduction may also be a cost-effective way to subsidize international charitable activities. Whether or not this increases treasury efficiency, however, depends on the larger social aims of the deduction and the reach of the social benefits it delivers. In an era of philanthropic globalization, an optimal approach to the tax treatment of cross-border donations would take a broad perspective of treasury efficiency. If this view is adopted, the permissive approach of the Netherlands means that the social benefits the deduction delivers extends globally. As a result, the deduction for cross-border donations could be considered treasury efficient in its cost-effective delivery of support abroad. In contrast, in Australia where traditionally “the fiscal state generally does not recognise or facilitate [the] growth in global charity”,¹⁰⁹ the social benefits of the deduction have been largely confined to beneficiaries within Australia’s borders. While this may be treasury efficient in the narrower sense of limiting the consequences for national revenue, it is not cost effective for the increasing amount of Australian donations being directed abroad.¹¹⁰

2. Equity

Equity is concerned with the concepts of “similar treatment of people similarly situated” (horizontal equity) and “fairness of the distribution of taxes at different levels of income, consumption, or wealth” (vertical equity).¹¹¹ The gift deduction is particularly problematic with respect to

108. See David Roodman & Scott Standley, “Tax Policies to Promote Private Charitable Giving in DAC Countries” (2006) Center for Global Development Working Paper No 82 at 35.

109. See Stewart, *supra* note 13 at 244.

110. The most recent data shows that almost 20 per cent of total donations are directed internationally, representing AUD \$2.1 billion. See Myles McGregor-Lowndes et al, *Giving Australia 2016: Individual Giving and Volunteering* (The Australian Centre for Nonprofit Studies, Centre for Social Impact Swinburne and Centre for Corporate Public Affairs 2017) at 32.

111. Graetz, *supra* note 101 at 610.

vertical equity and is subject to ‘powerful criticisms’ that relate to the fair treatment of donors.¹¹² This is due to its ‘upside down effect’ in a system of progressive taxation, whereby the government’s contribution is tied to a donor’s marginal tax rate.¹¹³ The result of this system is that the wealthier the donor, the less a charitable gift costs. Given that wealthy taxpayers have the resources to make larger donations than lower income taxpayers, they are already able to allocate more of the tax subsidy. The upside-down effect of the deduction compounds this inequity.¹¹⁴ With evidence of a high price elasticity for wealthy taxpayers, when cross-border donations are introduced into the analysis the question becomes whether income has a significant effect on the likelihood of giving abroad. Empirical studies from around the world profiling donors who engage in cross-border philanthropy suggest that this is not the case.¹¹⁵ Instead the characteristics most strongly related to private international giving are

112. Reich, *supra* note 103 at 182.

113. See Richard Krever, “Tax Deductions for Charitable Donations: A Tax Expenditure Analysis” in Richard Krever and Gretchen Kewley, eds, *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes* (Wellington: Comparative Public Policy Research Unit, Monash University, 1991) at 19-20; Mark Gergen, “The Case for a Charitable Contributions Deduction” (1988) 74:8 *Virginia Law Review* 1391 at 1405.

114. Krever, *ibid* at 20. The Dutch Government’s recent announcement of a reduction in the tax rate against which gifts may be deducted will resolve the upside-down effect of the charitable tax deduction in the Netherlands. See Dutch Tax Plan 2019, *supra* note 107.

115. See *e.g.* Daniela Casale & Anna Baumann, “Who Gives to International Causes? A Sociodemographic Analysis of US Donors” (2015) 44:1 *Nonprofit and Voluntary Sector Quarterly* 98 at 117; John Micklewright & Sylke Schnepf, “Who Gives Charitable Donations for Overseas Development?” (2009) 38:2 *Journal of Social Policy* 317 at 335; Suja Rajan, George Pink & William Dow, “Sociodemographic and Personality Characteristics of Canadian Donors Contributing to International Charity” (2009) 38:3 *Nonprofit and Voluntary Sector Quarterly* 413 at 435-36; and Pamala Wiepking, “Democrats Support International Relief and the Upper Class Donates to Art? How Opportunity, Incentives and Confidence Affect Donations to Different Types of Charitable Organisations” (2010) 39:6 *Social Science Research* 1073 at 1081.

higher education, being religious and being foreign-born.¹¹⁶ As a result of these findings, permitting a deduction for cross-border charitable gifts would have a neutral effect on vertical inequity.

For domestic donations, the gift deduction has not been subject to criticism on horizontal equity grounds because taxpayers in the same tax bracket are treated similarly. When international giving is introduced into the analysis, at first glance it appears that horizontal equity is maintained because taxpayers in a particular tax bracket are subject to the same tax treatment whether they give domestically or internationally. However, it is arguable that the unequal tax treatment of domestic and cross-border donations does have an impact on taxpayers in the same tax brackets if the gift deduction is only available for donors in that bracket who choose to give domestically, but not for those who choose to give abroad. An optimal approach to the tax treatment of cross-border donations would ensure that horizontal equity is maintained by providing equal tax treatment for domestic and international gifts. The approach taken in the Netherlands conforms to this horizontal equity ideal. First, the Netherlands permits foreign charities to register with the Dutch tax authority, such that donations made by Dutch taxpayers in the same tax bracket to these foreign charities will be treated the same as donations made to domestic charities. That is, the Dutch tax authority does not distinguish between domestic and foreign PBPEs for tax purposes. Second, the Netherlands allows donations to domestic charities that operate abroad to be tax deductible for Dutch taxpayers in the same tax bracket whether or not the funds are directed to beneficiaries in the Netherlands. Third, the Netherlands limits the use of charitable giving intermediaries, for both domestically-targeted and internationally-targeted donations. In contrast, the 'in Australia' residency requirement for DGRs decreases horizontal equity domestically with respect to cross-border donations because taxpayers at the highest tax rate of 49 per cent who give to organizations engaged in domestic charitable activities each pay 51 cents after tax for each dollar donated, while those who donate

116. See Casale & Baumann, *ibid*; Micklewright & Schnepf, *ibid*; Rajan, Pink & Dow, *ibid*.

to organizations operating abroad that do not fall under an ‘in Australia’ exception each pay a dollar.

Equity considerations can also be considered from a broader, global perspective. When the global impact of permitting the deduction for cross-border donations is taken into account it may reduce inequities associated with the deduction, provided these donations flow from wealthier countries to poorer countries as ‘private’ foreign aid. The vast majority of private international giving is channeled to developing countries through relief and development NGOs.¹¹⁷ As charitable funds are redistributed from developed to developing countries they have the potential to influence the inequitable global allocation of resources.¹¹⁸ The Netherlands’ permissive approach to cross-border giving promotes this redistributive effect of the gift deduction. In contrast, the Australian approach, while acknowledging the redistributive effect of private giving to international relief and development organizations through the international aid exception to the ‘in Australia’ residency requirement, has placed significant barriers to entry for organizations seeking to qualify for DGR status under this exception. The result is that Australia has not been able to utilize the gift deduction as a tool for reducing global inequities to the same extent as the Netherlands.

3. Simplicity

Tax rules should aim to be simple in the sense that they are clear in their objectives, able to be understood by taxpayers and capable of efficient implementation by administrators.¹¹⁹ An optimal approach to the tax treatment of cross-border donations would reduce complexity by ensuring

117. See Roodman & Standley, *supra* note 108 at 5-6, (noting that 70 per cent of DAC private aid goes to ‘Part I’ countries, which includes most economies typically categorized as ‘developing countries’, nearly all of whom fall below the World Bank’s threshold for ‘high-income country’ and are generally considered to be the poorest recipients).

118. See David Pozen, “Remapping the Charitable Deduction” (2006) 39:2 Connecticut Law Review 531 at 583 [Pozen, “Remapping Charitable Deduction”].

119. See Treasury Committee, *supra* note 102 at 28.

that the laws and procedures applying to cross-border giving are clear and unambiguous.¹²⁰ Complexity is further reduced by providing certainty for foreign charities and their donors and by providing the government with a cost effective means of ensuring that the tax expenditure is being used for its intended purposes.

In Australia, the complex legislative architecture governing the tax treatment of cross-border donations is far from clear. The meaning of ‘in Australia’ was never stated in the tax legislation and required interpretation by the ATO. The ATO’s longstanding restrictive interpretation of the ‘in Australia’ residency requirement combined with the special exceptions contained in the legislation has produced considerable complexity for organizations and their donors seeking to engage in cross-border charitable activities. Ambiguities also exist as to whether donations to an Australian DGR that re-donates the funds to a charitable organization operating outside Australia are tax deductible.¹²¹ As a result, Australian charities and their donors have used workarounds to circumvent the tax laws to facilitate tax-effective cross-border giving. Ironically, this legal circumvention has made monitoring cross-border donations more difficult for the Australian authorities operating within a regulatory regime with overlapping supervisory functions. The result is a complicated and costly system for organizations operating abroad and their donors, who are faced with legal and regulatory requirements that on the one hand are quite restrictive, while on the other are able to be bypassed for a price.

In the Netherlands, the tax treatment of cross-border donations is less ambiguous and there is greater procedural clarity governing international philanthropy. This is reflected in the ability of foreign charities to register as a PBPE, after which they are subject to the same legal and regulatory requirements as Dutch charities. Centralized regulation for registered PBPEs with the Dutch tax authorities simplifies oversight and monitoring. Because registration as a PBPE means that there are

120. See Harvey Dale, “Foreign Charities” (1995) 48:3 *The Tax Lawyer* 655 at 696.

121. *Word Investments*, *supra* note 56; *Hunger Project*, *supra* note 57.

no geographic restrictions on the charity's activities, both domestic and foreign registered charities can undertake some or all of their activities outside the Netherlands. This legal and procedural clarity provides relative certainty for Dutch donors seeking a tax deduction for gifts directed abroad through these registered domestic and foreign charities. In doing so, it alleviates the need for workarounds when Dutch taxpayers donate to a registered Dutch charity which operates abroad or to a foreign charity that is registered as a PBPE. While there has previously been some uncertainty concerning the ability of a Dutch donor to make a tax deductible donation to a foreign charity that is not registered as a PBPE through a domestic charity serving as a giving intermediary, the recent government decree and Supreme Court of the Netherlands decision on this issue have clearly restricted the use of giving intermediaries to send tax deductible donations abroad.¹²²

4. Policy Consistency

Tax rules should be consistent with broader government policy objectives. This is “particularly relevant when assessing the role of tax expenditures, since the justification for many of them lies in other economic and social policy objectives”.¹²³ Determining whether the gift deduction is consistent with broader government policy objectives involves considering the policy reasons for the existing state of affairs.¹²⁴ The policy underlying the gift deduction is to encourage philanthropic giving to provide support for the production and delivery of public goods and services. By attracting philanthropic funding, nonprofits are able to produce and deliver more of these public goods and services, generating external benefits to the

122. Decree, *supra* note 88; Supreme Court 14/06262, *supra* note 89.

123. See Australia's Future Tax System Review, *supra* note 102 at 206, 728.

124. See Myles McGregor-Lowndes, Matthew Turnour & Elizabeth Turnour, “Not-for-Profit Income Tax Exemption: Is There a Hole in the Bucket, Dear Henry?” (2011) 26:4 Australian Tax Forum 601 at 626.

wider society in which they operate.¹²⁵

This raises the question of whether public goods should be for the benefit of the domestic population or extend to the wider international community. The concept of public benefit found in the common law is informative. In the UK and Australia, the courts have upheld trusts covering a wide range of charitable purposes to be carried out abroad, provided that they do not contravene policy in the home jurisdiction.¹²⁶ The Charity Commission of England and Wales has taken the position that “[a] purpose may be charitable even if all its potential beneficiaries are outside England and Wales”.¹²⁷ In Australia, the Inquiry into the Definition of Charities and Related Organisations found that “public benefit is a universal concept and cannot be contained within the boundaries of any country”.¹²⁸ The universal concept of public benefit developed in charity law suggests that the ‘public’ who should ‘benefit’

125. See Burton Weisbrod, “Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy” in Edmund Phelps, ed, *Altruism, Morality and Economic Theory* (New York: Russell Sage Foundation, 1975) at 171-95.

126. In the UK, see e.g. *Re Vagliano*, (1905) 75 LJ Ch 119 (Eng); *Re Redish*, (1909) 26 TLR 42 (Ch (Eng)); *Re Robinson*, [1931] 2 Ch 122 (Eng); *Re Jacobs*, (1970) 114 SJ 515 (Ch (Eng)); *Re Niyazi’s Will Trusts*, [1978] 1 WLR 910 (Ch (Eng)); *Human Dignity Trust v The Charity Commission for England and Wales*, [2014] UKFTT 2013_0013 (GRC). In Australia, see e.g. *Re Pieper*, [1951] VLR 42 (SC (Austl)); *Kytherian Association of Queensland v Sklavos*, (1958) 101 CLR 56 (HCA); *Re Lowin* [1967] 2 NSW 140 (CA (Austl)); *Re Stone* (1970) 91 WN (NSW) 704 (SC (Austl)); *McGrath v Cohen* [1978] 1 NSWLR 621 (SC (Austl)); *Lander v Whitbread*, [1982] 2 NSWLR 530 (SC (Austl)); *Goldwyn v Mazal*, [2003] NSWSC 427 (Austl).

127. UK, Charity Commission of England and Wales, *Analysis of the Law Relating to Public Benefit* (September 2013), online (pdf): *Gov.uk* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589796/Public_benefit_analysis_of_the_law.pdf> at para 74.

128. See Ian Sheppard, Robert Fitzgerald & David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Canberra: Commonwealth of Australia, 2001) 257.

from charity extends beyond national borders.¹²⁹ It follows that an optimal approach to the tax treatment of cross-border donations that is consistent with the policy objective of encouraging philanthropic giving to provide support for the production and delivery of public goods would be permissive. The Netherlands satisfies this public benefit policy objective by permitting indirect support of the charitable purposes enumerated in the tax legislation through the tax deduction regardless of where the purpose is fulfilled geographically. This approach is also consistent with broader supranational agreements between EU Member States concerning the free movement of goods, citizens, services and capital and the recent opinion of the European Economic and Social Committee.¹³⁰

Tax deductibility for cross-border donations also implicates support for foreign policy objectives, such as development aid and disaster relief. Because governments can influence the level of private philanthropy through domestic tax policy, a policy promoting private cross-border giving can be considered support for these foreign policy objectives.¹³¹ Studies have shown that private international giving to developing countries and official government aid are complements rather than substitutes.¹³² Indeed, one legal scholar has described the charitable deduction in the US as “the most significant foreign aid tax

129. See Pozen, “Remapping Charitable Deduction”, *supra* note 118 at 531, 568; Stewart, *supra* note 13 at 251; Jonathan Garton, *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013) 55-56; Gino Evan Dal Pont, *Law of Charity* (Chatswood, NSW: LexisNexis Butterworths, 2010) at 75-76.

130. See TFEU, *supra* note 7; “Consolidated Version of the Treaty on European Union” (1 March 2020), *EUR-Lex*, online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02016M/TXT-20200301>>; European Economic and Social Committee, *supra* note 10.

131. See Roodman & Standley, *supra* note 108 at 10, 35.

132. *Ibid* at 35 (noting that private international giving and government aid have a “strong positive relationship”); Rajan, Pink & Dow, *supra* note 115 at 415 (noting that empirical studies show that government aid does not crowd out private donations).

expenditure”.¹³³ Similarly, tax deductibility for cross-border donations can also serve as a complementary measure to direct government subsidies to tackle transnational policy objectives, such as environmental protection and the prevention of terrorism.¹³⁴

5. Sustainability

Tax rules should be considered in light of revenue sustainability, in the sense that they need to be affordable over the long term.¹³⁵ Governments are concerned with protecting the public purse from unintended consequences of the charitable tax concessions.¹³⁶ An optimal approach to the tax treatment of cross-border donations would ensure that countries minimize the costs to the public purse of taxpayer subsidized funds being sent abroad, while ensuring the tax expenditure is used for its intended purpose.

Australia and the Netherlands both have a charitable funding system in which donations by individuals will trigger a consequent government contribution indirectly to the donor in the form of a tax deduction. The fiscal consequences of the tax deduction are measured in each country's tax expenditure statement. Table 1 below shows the revenue impact of the charitable tax deduction in each jurisdiction. This data is obtained from the line item in each country's tax expenditure statement on tax concessions for charitable donations, with the caveat that international

133. See David Pozen, “Tax Expenditures as Foreign Aid” (2007) 116:5 Yale Law Journal 869 at 874.

134. See Pozen, “Remapping Charitable Deduction”, *supra* note 118 at 580.

135. See Australia's Future Tax System Review, *supra* note 102 at 727.

136. See Susan Phillips & Steven Rathgeb Smith, “Between Governance and Regulation: Evolving Government-Third Sector Relationships”, in Susan Phillips & Steven Rathgeb Smith, eds, *Governance and Regulation in the Third Sector: International Perspectives* (London: Routledge, 2011).

comparability of tax expenditure estimates has significant limitations.¹³⁷

Data Country	Country estimates (billion)	Country estimates (USD billion 2017) ⁵	Country estimates (USD 2017) per inhabitant ⁶
Netherlands ¹	EUR 0.36 ³	0.41	24
Australia ²	AUD 1.20 ⁴	0.94	38

Table 1: Revenue impact of charitable tax incentives

Table 1 Notes

1. *Persoonsgebonden Aftrek - Giftenaftrek Inkomstenbelasting* [Personal Allowances – Deduction of Charitable Donations] (translation by the authors).
2. Deduction for gifts to DGRs.
3. Estimation for the calendar year 2017. Source: Tweede Kamer der Staten-Generaal [House of Representatives of the Dutch Parliament], “*Fiscale Regelingen*” [“Fiscal Arrangements”], *Nota over de Toestand van’s Rijks Financien: Vergaderjaar 2017–18* [Notes on the Government’s Finances: Year 2017-18] 34 775, No 2 (19 September 2017) at table 6.3.1 (translation by the authors).
4. For the fiscal year 2016-17. Source: Australian Treasury, *Tax Expenditures Statement 2017* (January 2018) at 43, item A57.
5. USD comparison of the first column based on 2017 exchange rates.
6. USD comparison of the second column based on 2017 population. While Table 1 does not disaggregate tax expenditures for cross-border giving, it is notable that the responsiveness of the Netherlands towards international philanthropy —providing equal tax treatment for domestic and cross-border donations — appears to have had limited revenue impact. This is surprising given that the Netherlands currently has some of the highest marginal income tax rates in the world. This

137. See OECD, Tax Policy Studies, *Choosing a Broad Base – Low Rate Approach to Taxation*, No 19 (2010) at 115 (“Tax expenditure definitions differ across countries due to differences in the definition of their benchmark tax systems. Factors that have an impact on the choice between a broad base and use of tax expenditures include own country’s preferences regarding income redistribution, the strength of its tax administration and its revenue requirements. Most, if not all, of these factors differ across countries, making international comparison more difficult”).

finding indicates that there are factors other than tax incentives that also influence individual philanthropic behaviour, including the level of government support provided to nonprofits; the extent of regulation of the nonprofit sector; and culture, particularly religion and fundraising professionalism.¹³⁸ It also suggests that fears of fiscal consequences from allowing a deduction for cross-border gifts cannot be substantiated solely by tax incentives. To more accurately measure the impact of this permissive approach on the public purse, further empirical research on the taxes foregone as a result of tax incentives for cross-border donations would be necessary.

Any calculation of the cost to the public purse of the deduction for cross-border gifts also needs to consider the return in the form of benefits that the government receives for the public funds expended. If a global view of the impact of the deduction is taken “there is a plausible case to be made that net social welfare will be greater in a tax system with more generous international deductions”.¹³⁹ Consistent with a broad concept of public benefit, cross-border gifts that fund organizations involved in the production of global public goods such as scientific innovations, conflict resolution and artistic collaborations and in the development of solutions for global challenges such as climate change and infectious diseases, can provide benefits to citizens in the donor country. As a result, a permissive approach that further supports the provision of global public goods is likely to result in government savings that may not be immediately apparent, but that will have a significant impact on revenue sustainability in the long term.

V. Conclusion

The development of a spectrum of approaches to the tax treatment of cross-border donations reveals that the current legal and regulatory environment in which cross-border giving operates around the world emphasizes government regulation combined with a desire from donors to engage in tax-effective international philanthropy. Adopting a policy

138. See Pamala Wiepking & Famida Handy, “Explanations for Cross-National Differences in Philanthropy” in Pamala Wiepking & Famida Handy, eds, *The Palgrave Handbook for Global Philanthropy* (London: Palgrave Macmillan, 2015) at 9.

139. See Pozen, “Remapping Charitable Deduction”, *supra* note 118 at 580.

framework for reforming the tax and regulatory regime governing cross-border giving requires an approach that is responsive to this changed philanthropic landscape. An evaluation of the divergent approaches of Australia and the Netherlands reaches an unequivocal conclusion; the permissive approach of the Netherlands is optimal in an era of philanthropic globalization when measured against each of the tax policy considerations.

The Netherlands has responded to case law of the ECJ and a changed regional philanthropic landscape by delivering an ‘equivalency ideal’¹⁴⁰ whereby cross-border donations are subject to the same tax treatment as domestic donations, achieving horizontal equity. This approach also promotes economic efficiency in the broad sense as a cost-effective way to subsidize international charitable activities and ultimately contributes to a reduction in global inequities due to the redistributive effect on the global allocation of resources. The Netherlands’ approach also reduces complexity with legislative clarity and straightforward registration procedures. This permissive approach complements Dutch foreign policy objectives by enhancing the Netherlands’ delivery of international aid. It is also consistent with broader regional agreements. The Dutch tax expenditure statement when compared with Australia’s shows that the impact of this approach on revenue sustainability appears to be minimal, particularly when the benefits to Dutch citizens and the wider global community of investing in the production of global public goods are considered.

In contrast to the Dutch approach, the legislative architecture in Australia has created a particularly complex legal and regulatory regime for cross-border charity. The Australian Government’s longstanding approach has been to prioritize fiscal consequences over the need to balance other tax policy considerations, resulting in the reduced capacity of the traditional normative concerns of taxation to influence policy-making with respect to the tax treatment of cross-border donations. Ironically, instead of ensuring that the benefits of these charitable tax subsidies remain in Australia, the Government’s restrictive approach has

140. *Ibid* at 594.

enabled largely unregulated tax deductible cross-border giving to take place through giving intermediaries.

The Australian Government's recently announced reform proposals to simplify the regulatory regime governing international charity and the ATO's new tax ruling on the 'in Australia' residency requirement reflect a shift to a more permissive approach to tax incentives for cross-border philanthropy. This represents an acknowledgment by the Australian Government that its longstanding restrictive approach is not working in a changed environment for international giving, reinforcing the findings of the comparative analysis. The convergence of the Australian approach towards the Dutch position on the spectrum signifies that Australia is now moving towards a more optimal policy response to this issue. Policy-makers in other jurisdictions may also recognize that their current legal regime governing cross-border philanthropy is not adequately addressing the challenges posed by a changed global philanthropic landscape. The comparative analysis undertaken in this article illuminates the path forward for reform.