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Tax Reform and Promoting a Culture of Philanthropy: Guatemala's "Third Sector" in an Era of Peace

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Abstract

Three major sections comprise this Article. Part I offers a historical overview of recent Guatemalan tax reform efforts and goals for civil society, based on the 1996 Peace Accords. Part II maps and analyzes the current provisions regarding philanthropy and regulation of the NGO sector in Guatemala, including discussion of the limitations imposed by constitutional doctrine. Part III explores recommendations for Guatemalan reform in the areas of philanthropy and civil society, based in part on the negotiations of the 2006-2007 Pacto Fiscal Commission as well as recent recommendations for Latin America in general. While there has been a burgeoning conversation amongst scholars of Latin America and other parts of the developing world on the topic of law and philanthropy, there has been little (to date) on Guatemala and its legal frameworks for civil society, particularly in the realm of taxation. This Article intends to fill this gap through a study that addresses the Guatemalan context while providing a theoretical discussion that promises to be useful to other postwar, transitioning democracies throughout the global south.

TAX REFORM AND PROMOTING A CULTURE OF PHILANTHROPY: GUATEMALA'S "THIRD SECTOR" IN AN ERA OF PEACE

*Archana Sridhar**

INTRODUCTION – A CRISIS OF CONFIDENCE IN A CLIMATE OF CYNICISM

The 1996 signing of The Agreement on a Firm and Lasting Peace¹ ended Guatemala's thirty-six year civil war, Central America's longest and bloodiest. Ever since, this fledgling democracy has struggled to initiate the types of social welfare programs that are necessary for its sustainable development. According to the U.S. State Department, approximately 80% of the population of Guatemala lives in poverty, and two-thirds of that number lives in "extreme" poverty.² In large part, this is a result of Guatemala's lack of state resources, since the country has consistently had one of the lowest tax revenues (as percentage of GDP) in all of Latin America, contributing to some of the lowest social indicators in the region as well.³ Projects undertaken by a growing civil society sector—often funded by private philan-

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1. Agreement on a Firm and Lasting Peace, Guat.-Unidad Revolucionaria Nacional Guatemalteca [URNG], Dec. 29, 1996, U.N. Doc. A/51/796-S/1997/114, Annex II, 36 ILM 258 (1997) [hereinafter 1996 Peace Accords].

2. U.S. Dep't of State, Background Note: Guatemala, August 2007, <http://www.state.gov/r/pa/ei/bgn/2045.htm> [hereinafter Background Note]. "Extreme poverty" is generally defined as "the inability of an individual to feed him or herself properly." Cynthia Sanborn, *Philanthropy in Latin America: Historical Traditions and Current Trends*, in PHILANTHROPY AND SOCIAL CHANGE IN LATIN AMERICA 3, 14 (Cynthia Sanborn & Felipe Portocarrero eds., 2005).

3. See Int'l Monetary Fund, *IMF Executive Board Concludes 2005 Article IV Consultation with Guatemala*, Pub. Info. Notice No. 05/95 (July 27, 2005), available at <http://www.imf.org/external/np/sec/pn/2005/pn0595.htm>.

thropy—strive to fill the gap left by the State.⁴

Tax reform is and has been the subject of great debate in Guatemala. The 1996 Peace Accords (the “Accords”) enshrine specific goals about tax reform and the promotion of a healthy civil society. They state, for example: “Tax policy should be designed to enable the collection of the resources needed for the performance of the State’s functions, including the funds required for the consolidation of peace.”⁵ Guatemalan President Oscar Berger and the Bank of Guatemala project that the country will experience economic growth this year and next due to the Central American Free Trade Agreement (“DR-CAFTA”).⁶ With the hope of capturing some of Guatemala’s expected economic growth in the form of tax revenue, national leaders have re-established a government-affiliated commission charged with making comprehensive recommendations about tax legislation for a new administration after the 2007 presidential elections.⁷

The country’s visionary ideals are also undercut by a pervasive public cynicism in Guatemala regarding the subject of both taxes and the non-governmental (“NGO”) sector. With regard to taxes, the resistance is largely due to a general distrust of the government that has deep historical roots. Scholars agree that Guatemalan citizens are loath to pay their taxes and/or to approve of increased tax rates due to fatigue from political corruption scandals, a suspicion of inequality in terms of enforcement between low-income and wealthy taxpayers, and a belief that they will not see the benefits of their tax dollars in improved public services.⁸ Large-scale protests by Guatemalan citizens—

4. See Cynthia Sanborn, *Giving and Volunteering in the Americas: From Charity to Solidarity*, REV. – HARV. REV. LATIN AM., Spring 2002, at 3-5, available at http://drclas.fas.harvard.edu/revista/?article_id=2; John Ruthrauff, *The Guatemalan Peace Process and the Role of the World Bank and Inter-American Development Bank*, CTR. DEMOCRATIC EDUC. 1.2, 4.0 (1997), available at <http://dkc.mse.jhu.edu/~scholz/lprints/ruthrauff.htm>.

5. Agreement on Social and Economic Aspects and Agrarian Situation, Guat.-Unidad Revolucionaria Nacional Guatemalteca [URNG], §47, May 6, 1996, U.N. Doc. A/50/1996, 36 I.L.M. 292 (entered into force Dec. 29, 1996) [hereinafter Socio-Economic Accord].

6. See Celeste Alvarado, *Berger pide a empresarios aportar más en impuestos*, EL PERIÓDICO (Guat.), Aug. 24, 2006, at 12; see also Hernán Guerra B., *Economía crecerá más de 5% en 2007, estima Banguat*, PRENSA LIBRE (Guat.), Dec. 15, 2006, at 2.

7. See Jennyffer Paredes, *Pacto Fiscal se reactiva y define ocho prioridades*, PRENSA LIBRE (Guat.), Aug. 17, 2006, at 3. This commission hereinafter is referred to as “the 2006-07 Pacto Fiscal Commission.”

8. Interview with José Alejandro Arévalo, Vicerrector, Universidad Rafael Landívar,

rich and poor, urban and rural—have been the fast result of many proposed tax increases in the past.⁹ The Guatemalan high court has also been struggling over the past five years with tax law, balancing reforms against the individual rights of Guatemala's newly democratic citizenry, including specific cases about charitable giving.¹⁰ A mounting crisis of confidence with regard to the nonprofit sector has also been growing due to allegations of abuse and corruption, sparking a renewed interest in oversight of the charitable sector.¹¹ Perceptions of the NGO sector are also plagued by the same sense of cynicism as with taxes. Newspapers periodically feature scandals regarding the abuse of private funds, magnifying the general sense that the proliferation of NGOs includes illegitimate fronts for tax-free personal wealth.¹²

and member, 2006-07 Pacto Fiscal Commission, in Guat. City, Guat. (Sept. 18, 2006). See ROLANDO ESCOBAR MENALDO & ANA MARITZA MORALES, *RELACIÓN ESTADO-CONTRIBUYENTE* 25-29 (2000). Two other, less substantiated hypotheses about taxpayer fatigue include: 1) the role of tax collection by Spain as a substitute for slavery of the Mayan populations during the colonial period, and 2) a lack of a sense of Guatemalan identity or sense of citizenship due to the extended civil war, particularly among the rural indigenous populations that were victims of the war's violence. See EDMUNDO URRUTIA, *ENSAYO SOBRE LA VIABILIDAD POLÍTICA DEL PACTO FISCAL* 14, 53, 68-69 (2000). Enforcement against tax evasion is extremely poor, leading to a culture of impunity. According to statistics from Guatemala's Attorney General's office, for example, there were only an average of ten convictions per year for tax crimes between 1995 and 1999, and only one conviction for tax fraud during that entire period. See Rolando Escobar Menaldo et al., *Fortalecimiento de las Sanciones Penales relacionadas con la Defraudación Fiscal y la capacidad de investigación y sanción del Ministerio Público y del Organismo Judicial*, in *LA POLÍTICA FISCAL EN GUATEMALA* (VOL. II) 1, 23, 26 (1999).

9. See, e.g., URRUTIA, *supra* note 8, at 53; *Guatemala Tax Protests Turn Violent, 83 Arrested*, REUTERS, Aug. 2, 2001, available at <http://www.imadr.org/old/project/guatemala/news2.html> (regarding the specific example of proposed increases in the property taxes).

10. See, e.g., *Jurisprudential Review of the Constitutional Court [CC] files 1226-2001, 1492-2001, 401-2002* (2004) (Guat.) [hereinafter *CC files 1226-2001, 1492-2001, 401-2002*]; see also Mark Gallagher, *Guatemala Tax and Investment Policy Reform Program, Fiscal Reform in Support of Trade Liberalization*, USAID Cont. No. PCE-I-00-00-00015-00, at 1-2, available at http://pdf.usaid.gov/pdf_docs/PDACH953.pdf (summarizing recent tax law cases by the Guatemalan high court with Constitutional implications).

11. See, e.g., Beatrice Lix, *Presupuesto incluye más controles a ONGs*, SIGLO XXI (Guat.), Aug. 31, 2006, at 12-13, available at <http://www.sigloxxi.com/index.php?link=Noticias¬iciaid=4438>.

12. See, e.g., Jennyffer Paredes, *Q67.33 millones cobra OIM en comisiones*, PRENSA LIBRE (Guat.), Sept. 11, 2006, at 3, available at <http://www.prensalibre.com/pl/2006/septiembre/11/151409.html>; Interview with Dr. Edgar Balsells, Director, Development and Applied Sociology, Universidad del Valle de Guatemala, in Guat. City, Guat. (Oct. 3, 2006).

Within this historical, economic, and political context, this Article demonstrates that increased tax revenue, tailored tax incentives, and regulatory nonprofit legislation are all tools capable of enhancing the viability of NGOs and larger civil society in Guatemala.¹³ Many agree with the premise that a healthy nonprofit sector is important for Guatemala's future, including this country's aspirational documents—such as *La Constitución Política de la República de Guatemala* ("Constitution"), the 1996 Peace Accords, and the preambles to major tax reform legislation. As demonstrated below, each of these aspirational documents agrees that a harmonious and productive civil society needs to work with a well-funded State to alleviate poverty and build infrastructure.

This Article hypothesizes that encouraging both private philanthropy and legal compliance with tax laws in an environment of transparency and accountability will: (1) manage the fear of corruption Guatemalan citizens have about the State; (2) appeal to the libertarian or anti-taxation mentality that has been politically attractive in Guatemala over the past decade; and, (3) encourage citizens to advocate for a 'clean-up' of the NGO sector so as to attract local and international donors.¹⁴ Moreover, legal reform in the area of philanthropy offers the potential of achieving the visionary goals set out in Guatemala's foundational documents, helping the State to implement the benchmarks of peace and democracy with the aid of a healthy civil society and enthusiastic private philanthropists.

Three major sections comprise this Article. Part I offers a historical overview of recent Guatemalan tax reform efforts and goals for civil society, based on the 1996 Peace Accords. Part II maps and analyzes the current provisions regarding philanthropy and regulation of the NGO sector in Guatemala, includ-

13. This article uses the terms "nongovernmental organization" or "NGO" and "nonprofit organization" or "nonprofit" to reflect a broad range of Guatemalan nonprofit and civil society associations; basically, the terms are used here interchangeably, unless otherwise indicated, to imply any legal organization or association operated as a not-for-profit and working on charitable issues, broadly defined to include the major categories familiar in the U.S. context, such as human rights, arts and culture, education, health, etc. However, as will be discussed in Part II below, there are many ways to establish a nonprofit association in Guatemala, and not always as a so-called "NGO."

14. See generally Adele Simmons & Dan Nielsen, *Promoting Global Giving*, ALLIANCE (U.K.), Dec. 2004, available at <http://www.allavida.org/alliance/dec04f.html> (regarding international donors and strategic global philanthropy).

ing discussion of the limitations imposed by constitutional doctrine. Part III explores recommendations for Guatemalan reform in the areas of philanthropy and civil society, based in part on the negotiations of the 2006-07 *Pacto Fiscal* Commission as well as recent recommendations for Latin America in general. While there has been a burgeoning conversation amongst scholars of Latin America and other parts of the developing world on the topic of law and philanthropy,¹⁵ there has been little (to date) on Guatemala and its legal frameworks for civil society, particularly in the realm of taxation. This Article intends to fill this gap through a study that addresses the Guatemalan context while providing a theoretical discussion that promises to be useful to other postwar, transitioning democracies throughout the global south.

I. HISTORICAL CONTEXT – PEACE ACCORDS AND FISCAL PACTS

Guatemala has historically struggled with tax reform before, during, and after its lengthy civil war and peace process, particularly over the past two decades.¹⁶ As in any nation, the different sectors of society—primarily represented by the State, corporations, and civil society associations—all have different policy goals in regards to the tax system.¹⁷ A historical look shows us that there are, however, a few key areas of convergence in Guatemala, namely, a belief in having a fundamentally progressive tax system,¹⁸ a desire to help the majority of citizens out of poverty, and, a libertarian mood that favors free trade and low tax rates. Part I(a) of this section offers a review of the 1996 Peace Accords process. The Accords themselves as well as other preparatory documents contain tax revenue goals that are the basis of all post-war tax legislation and proposed reforms. Part I(b) examines tax reform efforts through a look at the 2000 and 2006-07

15. See generally, PHILANTHROPY AND SOCIAL CHANGE IN LATIN AMERICA (Cynthia Sanborn & Felipe Portocarrero eds., 2005).

16. See generally ROY BAHL ET AL., THE GUATEMALAN TAX REFORM (1996) (regarding the 1992 tax reform effort); see also PABLO RODAS MARTINI, ANTE LA TITUBEANTE POLÍTICA TRIBUTARIA: EL RETO ES TRAZAR LINEAMIENTOS DE LARGO PLAZO 11-20 (2000).

17. See generally JOSÉ FERNANDO VALDEZ, LA VIABILIDAD DE UN PACTO FISCAL EN GUATEMALA: PARA LOS EMPRESARIOS Y LA SOCIEDAD CIVIL (2000) (regarding the goals of corporations and civil society organizations during tax reform negotiations).

18. See MARTINI, *supra* note 16, at 62-63.

Pacto Fiscal Commissions, with a special eye on reforms affecting philanthropy. These historical facts lend texture to the current climate of tax reform, hinting at what types of changes are and are not possible politically. They also stand as guideposts regarding the long-range goals of Guatemala's democracy. Finally, Part I(c) briefly addresses the recent ratification of DR-CAFTA and cross-border connections with the United States through philanthropy and remittances, providing additional context for later recommendations.

A. *The 1996 Peace Accords*

Guatemala's citizens celebrated the historic signing of the 1996 Peace Accords on December 29, 1996, ending more than thirty years of civil war between an authoritarian State and rebel groups.¹⁹ At the height of the conflict, in the early 1980s, many indigenous Guatemalans were caught in the crossfire, with an estimated 200,000 killed in what amounted to state-sponsored genocide, leaving many refugees and rural citizens in poverty.²⁰ The Agreement on Social and Economic Aspects and Agrarian Situation, signed on May 6, 1996,²¹ ("Socio-Economic Accord") is central to an examination of tax reform and philanthropy, as the accord addresses the dire situation of Guatemala's post-war economy and poor populations. All of the accords were carefully negotiated documents with input from: the various political parties; the rebel forces, represented by the Guatemalan National Revolutionary Union ("URNG"); the business sector, through the Coordinating Committee on Farming, Commercial, Industrial and Financial Associations ("CACIF"); and, the civil society sector as represented by the federation known as the Assembly of Civil Society ("ASC").²² ASC was created formally by the Accord for the Resumption of the Negotiations Process be-

19. See Gus Van Harten, *Guatemala's Peace Accords in a Free Trade Area of the Americas*, 3 YALE HUM. RTS. & DEV. L.J. 113, 113-14 (2000).

20. See COMMISSION FOR HISTORICAL CLARIFICATION [CEH], GUATEMALA: MEMORY OF SILENCE (1999), at Conclusions I(2), available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> [hereinafter CEH Conclusions]; see also Kevin O'Neill, *Writing Guatemala's Genocide: Christianity and Truth and Reconciliation Commissions*, 7 J. GENOCIDE RES. 3, 331-349 (2005) (regarding the aftermath of the genocide).

21. Socio-Economic Accord (U.K.), *supra* note 5.

22. See generally Enrique Alvarez & Tania Palencia Prado, *Guatemala's Peace Process: Context, Analysis and Evaluation*, ACCORD (U.K.), 2002, available at <http://www.c-r.org/our-work/accord/public-participation/guatemalas-peace-process.php>.

tween the Government of Guatemala and the URNG ("1994 Accord"), signed January 10, 1994, as a precursor to the 1996 Peace Accords. Ten sectors of society participated in ASC: the political, religious, unions/populists, so-called "Atlixco" (made up of universities, small businesses, cooperatives), indigenous, women, NGOs, research institutes, human rights groups, and the press.²³ The 1994 accord demanded that these sectors play a larger role in the negotiations process through the newly-formed ASC,²⁴ and that the government recognize civil society as separate from the rebel groups.²⁵

Over the course of the peace talks, ASC submitted formal Proposals of Consensus regarding the various themes of the 1996 Peace Accords, including tax reform. ASC's Proposal of Consensus on Socio-Economic Aspects and the Agrarian Situation foreshadowed many of the themes in the final version of the Socio-Economic Accord. For example, ASC stated its belief that only a small group of Guatemalans have benefited from economic progress, while the rest have suffered; as a result, structural changes are needed in the tax system to rectify this gap.²⁶ Section 3 of the proposal advocates a progressive tax system: "The majority of tax revenue should be collected from the people with the most income."²⁷ The list of recommendations is quite general, suggesting: improvement of tax administration, a reduction in the value-added tax (generally assumed to be regressive), and an increase in the application of the income tax and withholding.²⁸ ASC also affirmed the need for encouraging exports²⁹ and finalizing a free trade agreement with the United States after a healthy national debate.³⁰ Finally, again foreshadowing the 1996 Peace Accords, ASC reiterated the importance of including social organizations as participants in finding eco-

23. See FUNDACIÓN PARA LA PAZ, LA DEMOCRACÍA, Y EL DESARROLLO [FUNDAPAZD], DOCUMENTOS DE LA ASAMBLEA DE LA SOCIEDAD CIVIL [ASC], May-Oct. 1994, at 8 (1994).

24. See *id.* at 1-2.

25. See *id.* at 1, 4. Historically, Guatemala's authoritarian and anti-Communist regimes had suppressed the assembly of many NGOs, weakening the entire civil society sector. See URRUTIA, *supra* note 8, at 15-16.

26. See ASAMBLEA DE LA SOCIEDAD CIVIL [ASC], ASPECTOS SOCIOECONÓMICOS Y SITUACIÓN AGRARIA, reprinted in FUNDAPAZD, *supra* note 23, at 33.

27. *Id.* §3 at 39.

28. See *id.*

29. See *id.* §4.1.1 at 40.

30. See *id.* §4.1.5 at 40.

nomic solutions for Guatemala in an era of globalization.³¹ ASC's role is crucial to understanding the present-day predicament of civil society and tax reform in Guatemala, since its concerns mirror current debates and represent the negotiated consensus of the nonprofit sector.

The final version of the Socio-Economic Accord discusses in various places the role of civil society and the need for tax reform. For example, with regard to civil society, section 5 recommends legislation to ease the process of legal recognition (*persona jurídica*) for social organizations or NGOs.³² As discussed more in the next section, such legislation was eventually passed, possibly leading to the present-day proliferation of NGOs. Section 5 also encourages the role of private social organizations as representatives of the poor in government negotiations and policy-making.³³ Section 16 discusses the State as only having a partial role in the nation's development, which really involves "society as a whole."³⁴ This type of language illustrates the signatories' desire to move from the authoritarian regimes of the civil war to one of consensus-building and private non-state actors. As discussed below, these lofty visions require translation into regulation and oversight mechanisms to ensure a sustainable nonprofit sector and preserve public confidence.

In perhaps the most important statement on tax reform contained within the 1996 Peace Accords, section 49 of the Socio-Economic Accord mandates that by the year 2000, Guatemala will increase its tax ratio (tax revenue as a percentage of GDP) by at least 50% of the 1995 percentage.³⁵ This has been commonly understood to mean a target goal of 12 percent.³⁶ The increase in tax revenue is fundamental to the success of all

31. See *id.* §4.1.4 at 40.

32. Socio-Economic Accord, *supra* note 5, §5. The 2005 law establishing the National Registry of Persons was one step in this direction, although the law focuses more on civil registry of individuals than juridical persons like nonprofit organizations. See Ley del Registro Nacional de las Personas ("RENAP"), Decreto No. 90-2005 (2005) (Guat.). The categories of civil society associations are not yet entirely clear. See *infra*, at II.a.

33. Socio-Economic Accord, *supra* note 5, §5.

34. See *id.* §16.

35. See *id.* §49.

36. See, e.g., Daniel Wisecarver, *Impuestos en Guatemala: Mayor Recaudación y Progresividad Global*, in LA POLÍTICA FISCAL EN GUATEMALA (VOL. I) 15 (1999); COS & CIIDH, *Propuesta para una Reforma Tributaria Integral*, Presentation (Oct. 7, 2006); Interview with José Alejandro Arévalo, *supra* note 8.

the other initiatives laid out in the 1996 Peace Accords, as this sustainable income was meant to finance the increases in spending on development projects in education, health, and other areas.³⁷ In addition, the words “on the whole, progressive” are used throughout the Socio-Economic Accord to describe the general nature of the tax system and the system’s relationship to the constitutional principles of “equity” and “the ability to pay,” which are described further in Part II below.³⁸ Despite the optimism surrounding the 1996 Peace Accords and the goals for tax reform, it was apparent by 1998 that the 12% tax ratio goal was unattainable. In October of that year, the government and the Commission Accompanying the Peace Accords rescheduled the goal from a target date of 2000 to 2002.³⁹ The goal of 12% has still not yet been reached, and the resulting tax reform commission is discussed in the next subsection.

Civil society groups have publicly decried the State’s inability to fully implement the various provisions of the 1996 Peace Accords. For example, in October 1999, ASC held a national summit to discuss the fact that the peace process had “reached an impasse,” resulting in an agreement signed by more than 100 nonprofit organizations.⁴⁰ With regard to the stagnating process of tax reform, the agreement states:

There exists a contradiction between [first] the suggested economic and financial policies and procedures of the Peace Accords and/or the taxes paid to the State by business groups and national and international financial organizations, and [second] the type of State socially required to complete and give sustainability to the construction of peace.

Posturing about tax reform has generated greater poverty and an expansion of society’s gap [between rich and poor], and is producing a financial crisis that results in the weak implementation of the Peace agreements.⁴¹

37. See, e.g., Socio-Economic Accord, *supra* note 5, §§22(a), 23(c).

38. See, e.g., *id.* §§47(a), 50; see also LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [Constitution] art. 243, 1985, con Reformas 1993.

39. See COMISIÓN TÉCNICA DEL PACTO FISCAL, PACTO FISCAL PARA UN FUTURO CON PAZ Y DESARROLLO (May 25, 2000), *reprinted by* COMISIÓN DE SEGUIMIENTO DEL PACTO FISCAL (July 2003), at Anexo 2 [hereinafter 2000 PACTO FISCAL].

40. ASAMBLEA DE LA SOCIEDAD CIVIL, PRIMERA CUMBRE NACIONAL DE LA SOCIEDAD CIVIL POR LA PAZ 3 (1999) [hereinafter ASC CUMBRE].

41. *Id.* at 4.

ASC also recognized the growing trend of government “outsourcing” of public services to NGO actors, a trend that continues at the present time, precipitating a need for more government regulation of the nonprofit sector.⁴² Part IV of the agreement states that a true democracy requires “putting a limit on privatizing state institutions and services, and putting in place a system of oversight for these private-public partnerships that includes [the participation of] civil society.”⁴³ The acknowledgment of such private-public partnerships involving civil society and NGOs can be read as a major development. As will be seen below, a debate continues as to whether this phenomenon is beneficial for Guatemala, and if so, how it should be regulated. The agreement was eventually signed by URNG and representatives of the major political parties (including current President Oscar Berger and previous presidents Alfonso Portillo and Efraín Ríos Montt), as well as some 200 participants from major Guatemalan civil society organizations like the University of San Carlos, The Guillermo Toriello Foundation, and the Rigoberta Menchú Foundation.

As described more in the next subsection, another major federation, the Collective of Social Organizations (“COS”) has risen to ascendance as a representative of Guatemala’s civil society sector, eclipsing ASC, particularly with regard to fiscal reform initiatives.⁴⁴ In April 2003 and August 2005, COS released two public declarations demanding accountability from the government regarding the State’s failure to fully implement the 1996 Peace Accords. In the 2005 statement, COS recommended setting in motion another commission to prioritize the action items of the 1996 Peace Accords, particularly a new *Pacto Fiscal Com-*

42. See Interview with Dr. Edgar Balsells, *supra* note 12 (using the word “outsourcing” to describe the growing phenomenon of government contracts with NGOs to carry out public services); see also Sanborn, *supra* note 2, at 23-24 (describing the concerns about philanthropy taking over previously State-run activities. Examples of such concerns include: a lack of transparency on the part of private philanthropists and NGOs; tax evasion using charitable tax incentives; and, the philanthropic sector setting different priorities than the public policy agenda set by democratically elected officials).

43. ASC CUMBRE, *supra* note 40, at 11.

44. See, e.g., Miguel González Moraga & Pavel Arellano, *Se prevé análisis negativo: Diversos sectores creen que evaluación no será positiva, pero apoyo internacional continuará*, PRENSA LIBRE (Guat.), May 8, 2003, available at <http://www.prensalibre.com/pl/2003/mayo/08/55545.html>; Martín Rodríguez P., *Compromiso en políticas para 15 años: Todos los partidos firman acuerdo*, PRENSA LIBRE (Guat.), Oct. 11, 2006, available at <http://www.prensalibre.com/pl/2006/octubre/11/153692.html>.

mission to address the Accords' specific statements about tax reform.⁴⁵ In the 2003 statement, COS echoed ASC's concern about the privatization of government services, stating that the NGO outsourcing model runs counter to the vision held by the 1996 Peace Accords regarding a healthy State, instead placing public services in the hands of nonprofits that lack transparency and accountability.⁴⁶ As discussed in Part III, this critique of Guatemala's NGO sector deserves further examination as well as major reform in terms of oversight. COS also renewed the push for reaching the 12% tax ratio goal and criticized the "regressive and unjust" nature of Guatemala's present tax system, which relies heavily on a value-added tax.⁴⁷ Yet, in a 2006 interview, COS director Carlos Barreda felt more optimistic, stating that progress is finally being made, especially with the creation of the 2006-07 *Pacto Fiscal* Commission.⁴⁸

The 1996 Peace Accords illustrate the important roles played by both tax reform and the nonprofit sector in the careful vision of Guatemala's peace-makers after decades of armed conflict. However, as demonstrated by the facts and the subsequent reactions from civil society actors like COS and ASC, the goals of the Accords have not yet been achieved. In fact, with the growing influence and number of NGOs in Guatemala, and their role in providing social services of all kinds, a new need for nonprofit regulation has been generated, alongside the continuing need for major tax reform envisaged by the 1996 Peace Accords. As discussed further below, both types of legal changes could potentially foster a growing culture of legitimate, private philanthropy alongside a stronger, more efficient State.

B. Pacto Fiscal: *Concerted Efforts at Guatemalan Tax Reform*

The rescheduling of the 1996 Peace Accords' goal in October 1998 led to the eventual formation of a commission to ad-

45. See EL COLECTIVO DE ORGANIZACIONES SOCIALES [COS], UNA GOTA EN EL DESIERTO: APROBACIÓN DE LA LEY MARCO DE LOS ACUERDOS DE PAZ (Aug. 2005), available at <http://www.derechos.org/nizkor/guatemala/doc/cos2.html>.

46. See COS, *Proposal for Political Commitments and Lines of Finance for the Meeting of the Consultative Group 2003*, at 5 (April 2003) [hereinafter COS 2003 Proposal]; Interview with Carlos Barreda, Coordinator, Colectivo de Organizaciones Sociales, in Guat. City, Guat. (Oct. 5, 2006).

47. COS 2003 Proposal, *supra* note 46, at 6.

48. See Interview with Carlos Barreda, *supra* note 46.

dress fiscal reform, originally known as the Preparatory Commission of the *Pacto Fiscal* ("2000 *Pacto Fiscal* Commission").⁴⁹ This initiative was only one in a series of prior and subsequent tax reform efforts, which have been on the whole unsuccessful in reaching the 1996 Peace Accords' goal or implementing other major tax reforms.⁵⁰ In fact, at the time of the writing of this article, a voluntary commission, the Group for Promotion of Dialogue on Fiscal Reform, had been formed, including seven voting and two ad hoc members from government, academia, and civil society (the "2006-07 *Pacto Fiscal* Commission"). This new commission will revisit tax reform and hopes to establish a plan before the 2007 presidential elections.⁵¹ This subsection analyzes the work of the 2000 *Pacto Fiscal* commission, in order to frame and contextualize the proposed recommendations outlined further below. Since tax and corporate governance laws grant legal status to Guatemalan nonprofit organizations—much like they do in the United States—discussion of this tax reform effort is necessary context.

As mentioned above, the Commission Accompanying the Peace Accords formed the 2000 *Pacto Fiscal* Commission in 1999 as a result of the rescheduling of the 12% tax ratio goal from 2000 to 2002.⁵² The members of the 2000 *Pacto Fiscal* Commission released a preparatory document on the third anniversary of the 1996 Peace Accords entitled, *Toward Fiscal Reform in Guatemala*, describing the Commission's goals to the Guatemalan people and forming the basis for a more difficult phase of political negotiation.⁵³ There was a great sense of hope and anticipation

49. ARNOLDO NORIEGA ET AL., CUANDO LA SOCIEDAD GUATEMALTECA SE ENCUENTRA: LA NEGOCIACIÓN POLÍTICA DEL PACTO FISCAL 84, 89 (July 2001).

50. See, e.g., BAHL ET AL., *supra* note 16 (regarding the 1992 tax reform efforts); 2000 PACTO FISCAL, *supra* note 39.

51. See *Juramentan a Grupo Promotor de Diálogo para Pacto Fiscal*, GUATEMALA HOY, Aug. 17, 2006 (also discussing the claim of the 2006-07 Pacto Fiscal commission that its authority derives from the law establishing the National Commission of the Peace Accords or CNAP); Paredes, *supra* note 7; see also NETHERLANDS INST. FOR MULTIPARTY DEMOCRACY & U.N. DEV. PROGRAMME, AGENDA NACIONAL COMPARTIDA: UN ESFUERZO MULTIPARTIDARIO PARA LA GUATEMALA DEL SIGLO XXI (2003) (a dialoguing group of Guatemala's major political parties, which also recommended the formation of a new Pacto Fiscal commission).

52. See NORIEGA ET AL., *supra* note 49; NURIA GAMBOA M. & BARBARA TRENTAVIZI, LA GUATEMALA POSIBLE: LA SENDA DEL PACTO FISCAL 22-25 (Apr. 2001).

53. *Hacia un Pacto Fiscal en Guatemala: Propuesta de la Comisión Preparatoria del Pacto Fiscal*, Guatemala (Dec. 29, 1999); see GAMBOA & TRENTAVIZI, *supra* note 52, at 73; NORIEGA ET AL., *supra* note 49, at 94.

about the work of the Commission. One commentator at the time said:

[The *Pacto Fiscal*] is part of the transition from an elitist political system to a pluralistic one, from a weak State to a strong one, from an authoritarian state with little or no legitimacy to one that has the support and acceptance of civil society. Civil society, [alongside tax reform], will be strengthened as a consequence of this process of democratization and the construction of peace.⁵⁴

After reviewing forty-eight written proposals on tax reform from universities, civil society organizations, and the business sector, the 2000 *Pacto Fiscal* Commission held working sessions throughout May of 2000, culminating in a national forum with more than fifty civil society organizations.⁵⁵ On May 25, 2000, the commission signed the carefully negotiated agreement, A Fiscal Pact for a Future of Peace and Development.⁵⁶ As a symbol of the agreement's inclusiveness, more than 130 social organizations also signed the document to support the goals set out by the commission's members and to reiterate the collective hope of reaching the 1996 Peace Accords' 12% tax ratio goal.⁵⁷ Despite this participation, the document is aspirational in the purest sense and does not hold the weight of law, so a "technical team" was formed to promote the goals of the 2000 *Pacto Fiscal* among the members of Congress, who would be responsible for passing implementing legislation.⁵⁸ It was at this point that the government and the Portillo administration became more intimately involved with the negotiations process.⁵⁹

Intense negotiations following the May 25, 2000 document

54. URRUTIA, *supra* note 8, at 10; *see also* URRUTIA, *supra* note 8, at 59-60 (including comments of other political leaders).

55. *See* GAMBOA & TRENTAVIZI, *supra* note 52, at 118-20; NORIEGA ET AL., *supra* note 49, at 101, 110.

56. GAMBOA & TRENTAVIZI, *supra* note 52, at 120; NORIEGA ET AL., *supra* note 49, at 110.

57. *See* 2000 PACTO FISCAL, *supra* note 39, at Anexo 3.

58. NORIEGA ET AL., *supra* note 49, at 112.

59. Government officials, however, were not always supportive of the technical team's direction. One representative of Congress attended the meetings as an observer, swearing not to sign any agreements because they were in contradiction to the Congress's sovereignty. Also, critics reported that the executive branch only promoted measures that they considered politically convenient, refusing to make concessions on hot-button issues like increasing the IVA rate or eliminating tax privileges for big business. *See* NORIEGA ET AL., *supra* note 49, at 112-18.

led to the signing of a more detailed agreement, the Political Accord for Financing Peace, Development, and Democracy, on June 20, 2000, which recommended specific measures to change existing tax law, and a timetable for reforms to take place.⁶⁰ Although the accord only plotted an increase to a tax ratio of 11.5%, it was widely received by the international community as realistic and politically feasible.⁶¹ Unfortunately, when the accord was signed, it did not match the prevailing legislative proposals in Congress at the time, nor did the negotiations process involve Congress to any great degree.⁶² In addition to a breakdown among the members of COS and ASC, as well as reversals by CACIF on previously negotiated points, partisanship by the Vice-President and a lack of commitment from the Congress ultimately led to the failure of any major tax reforms resulting from the work of the 2000 *Pacto Fiscal* Commission.⁶³ A few reforms were passed by the Congress in the form of Decree Number 44-2000, reforms which were quite inadequate compared to the large-scale measures advocated by the 2000 *Pacto Fiscal* Commission.⁶⁴ Ultimately, the 2006-07 *Pacto Fiscal* Commission picks up where the 2000 Commission failed, bringing together different sectors of society for another pass at major fiscal reform.

The 2000 tax reform process demonstrated an inclusion of civil society and a willingness to look at all sides of the issues and consider all types of potential reforms.⁶⁵ A close reading of the

60. ACUERDO POLÍTICO PARA EL FINANCIAMIENTO DE LA PAZ, EL DESARROLLO Y LA DEMOCRACIA EN GUATEMALA (June 20, 2000). This agreement was signed by the 2000 *Pacto Fiscal* Commission, as well as representatives of the business and civil society sectors. See GAMBOA & TRENTAVIZI, *supra* note 52, at 161-62; NORIEGA ET AL., *supra* note 49, at 123.

61. See NORIEGA ET AL., *supra* note 49, at 124; see also 2000 PACTO FISCAL, *supra* note 39, at "Presentación" (regarding USAID's support of the *Pacto Fiscal* process).

62. See GAMBOA & TRENTAVIZI, *supra* note 52, at 164, 166; NORIEGA ET AL., *supra* note 49, at 126.

63. See NORIEGA ET AL., *supra* note 49, at 207-11.

64. See generally Ley de Supresión de Privilegios y Beneficios Fiscales, de Ampliación de la Base Imponible y de Regularización Tributaria, Decreto No. 44-2000 (2000) (Guat.); CENTRO DE ESTUDIOS TRIBUTARIOS [CENSAT], APLICACIÓN DE LAS REFORMAS CONTENIDAS EN EL DECRETO NÚMERO 44-2000 DEL CONGRESO DE LA REPÚBLICA; GAMBOA & TRENTAVIZI, *supra* note 52, at 141, 168; NORIEGA ET AL., *supra* note 49, at 127.

65. The question of democratic representation—specifically how successful the *Pacto Fiscal* efforts and other similar consensus-building exercises have been at representing the vast majority of Guatemalan citizens—is beyond the scope of this article, but an interesting point for further research. Aspirational or dialoguing groups like the 2000 *Pacto Fiscal* Commission have been criticized for not involving the Guatemalan

agreements, however, belies a striking lack of self-reflection on the part of the social organizations involved in the process. The tax reform efforts did not directly address philanthropy, NGOs, or charitable giving, except to briefly consider the array of tax exemptions and deductions under the various regimes. By this point, ASC had already identified the problematic issue of government contracts with NGOs, and the need for regulation was certainly widely accepted.⁶⁶ Alongside the involvement of so many NGOs, private foundations, and other civil society associations, the lack of analysis about the state of philanthropy and charitable giving in Guatemala can be read as: (1) a lack of concern about in-country charitable giving due to reliance on funds from international organizations for development projects; (2) a possible resistance to addressing nonprofit regulation as outside the scope of other tax (and revenue-raising) reforms; and/or, (3) self-protection by the sector, to stay insulated from government intrusion, particularly given Guatemala's history of military rule and suppression of civil rights and association. As discussed in Part III below, any proposed recommendations in the present-day are grounded in the work of the 2000 *Pacto Fiscal* Commission, which points to the potential of, and indeed the vital necessity for, more examination of the philanthropic sector itself.

C. *Transnational Considerations: DR-CAFTA and Remittances*

In the current era of globalization, there are many transnational considerations informing a study of philanthropy and tax reform in Guatemala, such as strategic philanthropy by U.S. or European private foundations to Guatemalan NGOs, or donations by multinational businesses operating in Guatemala in an

Congress to a greater extent, since the Congress is the body of government elected democratically by the people. However, the partisanship and ever-present campaigning for elections every four years diminish the ability of the Congress to think long-term and to negotiate beyond their term limits. This is an issue that merits further analysis in the arena of nonprofits specifically, since civil society organizations are more and more seen as proxies for the poor populations of Guatemala in terms of representing their interests in front of political commissions. See GAMBOA & TRENTAVIZI, *supra* note 52, at 191, 195, 205; NORIEGA ET AL., *supra* note 49, at 118; URRUTIA, *supra* note 8, at 64-65; see also Interview with Ariel Irias Rivera, Dean, Department of Political and Social Sciences, Universidad Rafael Landívar, in Guat. City, Guat. (Nov. 2, 2006).

66. See ASC CUMBRE, *supra* note 40, at 10-11; FÉLIX ALVARADO BROWNING ET AL., *PERFIL DE LAS ORGANIZACIONES NO GUBERNAMENTALES EN GUATEMALA* 45-46, 94-95 (1998).

environment of growing “corporate social responsibility.” DR-CAFTA and remittances are foremost among such transnational concerns for this study.

The multi-lateral trade treaty DR-CAFTA went into effect in Guatemala on July 1, 2006. Analysts predict that there will be some loss in tax revenue for Guatemala due to the treaty’s provisions on customs tariffs.⁶⁷ In order to make up the difference and achieve a balanced budget, some kind of tax reform is needed. It will also be important to strengthen governmental institutions⁶⁸—perhaps with the help of the NGO sector as well—to ensure that Guatemala’s poor populations see the benefits of any wealth generated by DR-CAFTA. It is interesting to note that the ratification process of DR-CAFTA mobilized many NGOs and other civil society organizations—particularly in protest of the treaty.⁶⁹ And yet, after ratification, DR-CAFTA has created a productive line of work for many of the same NGOs—particularly in training small farmers and manufacturers so as to counter the trade asymmetry that might exacerbate Guatemala’s poverty.⁷⁰ This Article is interested in private philanthropy’s ability to cushion Guatemala from possible hardships related to DR-CAFTA, and to take advantage of the treaty’s potential beneficial effects.

As another transnational consideration, twenty million fami-

67. See, e.g., José Alejandro Arévalo, *Estado, Empresa y Sociedad: Pacto Fiscal, otra vez*, PRENSA LIBRE (Guat.), Mar. 8, 2006, at 23, available at <http://www.prensalibre.com/pl/2006/marzo/08/136321.html>; Interview with Ariel Irías Rivera, *supra* note 65.

68. See U.N. DEVELOPMENT PROGRAMME [UNDP], GUATEMALA: UNA AGENDA PARA EL DESARROLLO HUMANO, 2003 INFORME NACIONAL DE DESARROLLO HUMANO XXIV (2003); Interview with Ariel Irías Rivera, *supra* note 65; Interview with José Alejandro Arévalo, *supra* note 8; Interview with Dr. Edgar Balsells, *supra* note 12. See generally Gallagher, *supra* note 10.

69. See Daniel Mato, *Procesos Culturales y Transformaciones Sociopolíticas en América ‘Latina’ en Tiempos de Globalización*, in PROCESOS CULTURALES Y TRANSFORMACIONES SOCIO-POLÍTICAS 11, 24 (Daniel Mato et al. eds., 1996), available at <http://www.globalcult.org.ve/doc/mato/Intro96.pdf>; see also, e.g., COS, *No a la Ratificación del TLC con EEUU* (2005), available at <http://www.flacso.edu.gt/revista/marzo05/docs/Documentos/4TLC-COS.pdf#search=%22Colectivo%20de%20Organizaciones%20Sociales%20guatemala%22>. This is particularly notable as civil society in Guatemala is often understood as a proxy for the country’s poor population. See, e.g., Gamboa & Trentavizi, *supra* note 52, at 204-05.

70. See Interview with Ariel Irías Rivera, *supra* note 65; Interview with José Alejandro Arévalo, *supra* note 8; Interview with Dr. Edgar Balsells, *supra* note 12. For example, two organizations doing this kind of work are Oxfam (<http://www.oxfamamerica.org/>) and Mesa Global (<http://www.mesaglobal.net/>).

lies across Latin America and the Caribbean receive remittances, or payments from family members who have migrated to wealthier nations, often the United States.⁷¹ Recipient families live primarily in rural areas, and generally use the payments to cover basic living and household expenses.⁷² Remittances from Guatemalans in the United States are an impressive form of revenue for the nation; in 2006 for example, \$3.6 billion flowed from the United States to Guatemala.⁷³ This flow of remittances can be analyzed as a form of philanthropy, supporting and uplifting very poor, rural communities. One enlightening example of remittances as philanthropy is the recent phenomenon of so-called “hometown associations,” where a group of immigrants from the same region of Guatemala for example, come together in the United States to gather funds and donate to community projects in their homelands.⁷⁴ It should be noted, though, that there is no systematic regulation of remittances, which often flow via informal channels. There is a need for more systems to be put in place to allow this incredible influx of funds to truly make an impact in terms of strategic development alongside more traditional philanthropy.⁷⁵

II. *NGOs LANDSCAPES – MAPPING THE LEGAL AND REGULATORY FRAMEWORK*

Part II of this Article analyzes the current provisions in Guatemalan law regarding philanthropy and the NGO sector. Part II(a) begins with an overview of NGO formation in Guatemala,

71. See Pedro de Vasconcelos, *Improving the Development Impact of Remittances* 5, U.N. Doc. POP/MIG/2005/10 (July 5, 2005) (prepared for United Nations Expert Group Meeting on International Migration and Development).

72. See *id.*

73. See Byron Dardón G., *Ingresan más de US\$3 mil millones*, PRENSA LIBRE (Guat.), Jan. 10, 2006, at 19.

74. See de Vasconcelos, *supra* note 71, at 8-9; Sanborn, *supra* note 4. Daniel Mato also points out that migration of indigenous people away from their traditional homes has in some ways improved their organizational capacities in terms of civil society, while changing some of their customs. See Mato, *supra* note 69, at 28-30.

75. See de Vasconcelos, *supra* note 71, at 12-13. Although outside the scope of this article, de Vasconcelos argues that remittances should remain untaxed. The author believed that regulation or community organizing around these types of payments should remain—at least initially—in the voluntary sphere, within the ambit of NGOs and other civil society organizations. However, as discussed further below, government regulation and oversight of the NGO sector is required to maintain confidence in the sector overall and to work against fraud and corruption.

plus a discussion of oversight and accountability under Guatemala's Civil Code and a new law for development NGOs. Part II(b) outlines the tax exemptions available to nonprofit organizations, and the deductions available to donors. This subsection addresses the two major tax regimes in Guatemala, the income tax and the value-added tax, with brief discussion of other, smaller taxes. Part II(c) delves into constitutional issues, with particular emphasis on a series of cases that distinguish between classes of nonprofits based on their charitable activities. Understanding this legal landscape brings to clear relief the reforms required to promote the sustainable growth of civil society in Guatemala's current atmosphere of tax and other regulatory reform.

A. NGO Formation and Accountability

Guatemala's *Código Civil*, or Civil Code, provides the legal basis for the formation of nonprofit organizations of all kinds, not just development-oriented NGOs.⁷⁶ Specifically, Article 15 of the Civil Code authorizes the establishment of NGOs, private foundations, and other civil society associations and organizations, granting them status as "juridical persons" similar to U.S. corporate, limited liability entities.⁷⁷ In order to gain entry into this attractive regime, such associations must register as a nonprofit with their municipalities of domicile to avoid treatment as a commercial business.⁷⁸ Articles 20 to 22 distinguish between charitable or nonprofit organizations and private foundations, stating that private foundations are established through a legal document or will; with some amount of "patrimony" advancing the charitable goals of the founder.⁷⁹ Article 20 of the Code places responsibility on the *Ministerio Público*, or Attorney General, for oversight of foundations to ensure that foundation resources are used consistently with the donor's intent.⁸⁰ This article is one indication of which government agency could be responsible in terms of increased nonprofit oversight.

The more recent Law of Non-Governmental Organizations for Development ("Decree Number 02-2003") expands upon the

76. CÓDIGO CIVIL, Decreto Ley No. 106 (Guat.).

77. *See id.* art. 15.

78. *See id.*

79. *See id.* art. 20-22.

80. *See id.* art. 20.

Civil Code to regulate the formation and supervision of “development NGOs” in Guatemala.⁸¹ The 2003 law was a result of calls for legislation to regulate this growing industry before donor fatigue and public cynicism took their toll,⁸² partially based on the recent perceived proliferation of NGOs in Guatemala. For example, the number of NGOs, although hard to measure, has certainly grown over the past five years, with some estimates stating that the number has exploded from approximately 1,500 to 2,000 in the year 2001,⁸³ to as many as 10,000 at the present time.⁸⁴ Other experts disagree with the prospect of such a steep increase, but advocate for increased regulation nonetheless.⁸⁵ Decree Number 02-2003, however, fell short in terms of the specifics of state oversight of NGOs as well as the systematization of the different categories of nonprofit organizations. Prior drafts of the law neglected these issues entirely, since oversight and categorization were contentious issues during the political negotiations and remain so today.⁸⁶ This gap again underscores the

81. Law of Non-Governmental Organizations for Development, Decreto No. 02-2003 (2003) (Guat.). Regulations have not yet been promulgated for this law, although they are expected.

82. See BROWNING ET AL., *supra* note 66, at 45-46; Jorge Luján Muñoz, *Guatemala*, in EL TERCER SECTOR IBEROAMERICANO: FUNDACIONES, ASOCIACIONES Y ONGs 573 (José Luis Pinar Mañas & Ricardo Sánchez Rivera eds., 2001); Foro de ONG de Guatemala & Consejo de Fundaciones Privadas de Guatemala [CFP], *Institucionalización del Sector ONG en Guatemala: Estrategia de Gestión del Desarrollo Sectorial* 18 (Aug. 2000). Luján and other scholars also point out that many NGOs have organized themselves into “federations” at the second and third levels, making it harder to track statistics properly and harder to oversee NGO activities. See, e.g., Luján Muñoz, *supra* note 82, at 571; M. CARRERA GUERRA, CARACTERÍSTICAS DEL SECTOR ONG EN GUATEMALA 5 (2002); Ana Paula López Illescas, *Estrategias para el Fortalecimiento de las Organizaciones No Gubernamentales en la Búsqueda de Sostenibilidad Financiera e Institucional* 13-19 (2004) (unpublished thesis, on file with the library at Universidad Rafael Landívar).

83. See Luján Muñoz, *supra* note 82, at 571; see also BROWNING ET AL., *supra* note 66, at 42 (estimating the number of NGOs in Guatemala in 1998 to be “in the thousands”).

84. See Interview with José Alejandro Arévalo, *supra* note 8. These figures are notoriously difficult to find across Latin America due to inconsistent methods of record-keeping and differing registration processes. See Cynthia Sanborn & Felipe Portocarrero, *Editors’ Introduction*, in PHILANTHROPY AND SOCIAL CHANGE IN LATIN AMERICA xi, xviii (Cynthia Sanborn & Felipe Portocarrero eds., 2005). The Guatemalan Congress agrees with the notion that there has been rapid growth in the country’s NGO sector. See *Jurisprudential Review of the Constitutional Court [CC] file 538-2003 III(A)* (2004) (Guat.) [hereinafter *CC file 538-2003*].

85. See, e.g., Interview with Lic. Helmer Velásquez, Executive Director, Coordinación de ONG y Cooperativas (“CONGCOOP”), in Guat. City, Guat. (Dec. 8, 2006).

86. See BROWNING ET AL., *supra* note 66, at 45, Table 2 (regarding oversight); Interview with Lic. Helmer Velásquez, *supra* note 85 (regarding categorization); see also Hil-

need for further regulation, with Decree Number 02-2003 being a good point of departure.

The first clause of the preamble to Decree Number 02-2003 bases the law on Guatemala's Constitution, which "recognizes the right to free association, and the purpose of financing programs of economic and social development conducted by legally recognized nonprofit organizations of the private sector."⁸⁷ The second clause turns to the other foundational document of modern Guatemalan law, the 1996 Peace Accords. This clause states: "[T]he Peace Accords recognize the need to include all social and institutional actors, [especially] NGOs, which in local spaces have specialties and the capacity to contribute [to] the country's social and economic development, without intentions for profit."⁸⁸ Together, these two clauses demonstrate the government's desire to move from a democratic vision of inclusion to necessary regulation. By grounding the very practical rules of Decree Number 02-2003 in the lofty ideals of both the Constitution and the Peace Accords, the law takes on a special importance, highlighting a healthy civil society as a key part of Guatemala's new democracy. The same underlying policy ideals could form the basis for further regulation in terms of ongoing oversight of NGOs, reporting requirements, and sanctions for corruption.

After the preamble, Decree Number 02-2003 turns to the specifics. Article 2 of Chapter I defines NGOs as organizations that are founded for charitable reasons, and not for profit. NGOs are unique in their source of "patrimony" or charitable revenue—which can come from either national or international sources.⁸⁹ Chapter II delves into the particulars of formation, requiring the registration of each NGO with the Civil Registry in the municipality of the NGO's domicile.⁹⁰ Article 12 specifically mandates that international NGOs register in the capital city.⁹¹ Articles 7 and 8 describe the specific requirements of NGO gov-

ary Burger, *Strengthening Philanthropy in Latin America*, REV. – HARV, REV. LATIN AM. Spring 1999, at 22-24.

87. Law of Non-Governmental Organizations for Development, Decreto No. 02-2003, pmbl. ¶1 (2003) (Guat.); LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 34 (Guat.).

88. Decreto No. 02-2003, pmbl. ¶2 (2003).

89. *See id.* art. 2.

90. *See id.* art. 5.

91. *See id.* art. 12.

ernance, including the composition of the board of directors and the contents of by-laws.⁹² Decree Number 02-2003 seems to have eased some of the burdens and costs associated with forming an NGO in Guatemala in the past, particularly for specialized, development-oriented or religious nonprofits.⁹³ But, Decree Number 02-2003 does not supersede the Civil Code's provisions on civil associations, thus adding a layer of confusion about the process for forming an NGO or any other type of nonprofit organization or civil society association.⁹⁴

After municipal registration, NGOs under this law are required by Article 13 to register with the Superintendence of Tax Administration ("SAT"), which has jurisdiction to oversee their accounting, presumably to confirm ongoing tax-exempt status.⁹⁵ Decree Number 02-2003 does not address tax exemption issues specifically, since that is currently the purview of the Tax Code and resulting laws, which are described in the next subsection. Article 15 of Decree Number 02-2003 does mandate that NGOs issue receipts to donors using a form authorized by the SAT, an action also addressed by the tax laws.⁹⁶ In addition, the Regulations for the Registration of Civil Associations were promulgated prior to Decree Number 02-2003, but are still in effect based on the prior procedures for establishing "juridical personhood" for an array of nonprofit associations under the Civil Code.⁹⁷ They contain details about registration procedures, such as the contents of the by-laws (Article 3) and the documents required for

92. *See id.* arts. 7-8 (art. 7(c) interestingly limits the number of an NGO's foreign "associates" to twenty-five percent).

93. *See* Fundación Arias para la Paz y el Progreso Humano, *En Busca de una Legislación que Fortalezca la Participación y Acción de la Sociedad Civil* 71 (1995) [hereinafter *En Busca de una Legislación*]; Fundación Arias para la Paz y el Progreso Humano, *Situación Legal de las Organizaciones Sin Fines de Lucro: Síntesis Regional Centroamericana* 17 (Oct. 1994) (working paper, on file with the library at Universidad Rafael Landívar).

94. The Guatemalan Constitutional Court described this confusion as an advantage for civil society associations. These associations can currently choose what legal regime governs them by using a particular mechanism for formation. *See* CC file 538-2003, *supra* note 84, at Holding IV. This is confirmed by a look at the SAT form for taxpayer registration, which contains at least four different categories of nonprofit organizations. *See* SAT-No.0014, *Formulario de Inscripción y Actualización de Información de Contribuyentes en el Registro Tributario Unificado*, instructions to box 18.

95. Law of Non-Governmental Organizations for Development, Decreto No. 02-2003 art. 13 (2003) (Guat.).

96. *See id.* art. 15.

97. Reglamento de Inscripción de Asociaciones Civiles, Acuerdo Gubernativo No. 512-98 (1998) (Guat.); *see also* CÓDIGO CIVIL, Decreto Ley No. 106 art. 15 (Guat.).

registration of nonprofits with municipalities (Article 4).⁹⁸

Article 16 of Decree Number 02-2003 originally gave oversight power of all NGOs to Guatemala's General Controller of Accounts ("GCA"), or primary government audit agency.⁹⁹ Shortly after the law's passage, several civil society organizations, including the Coordinator of Non-governmental Organizations and Cooperatives ("CONGCOOP"), the Guatemalan Network of Microfinance Institutions, and others, came together to argue in front of the Guatemalan Constitutional Court that Article 16 of Decree Number 02-2003 was unconstitutional.¹⁰⁰ The court agreed, basing their decision on Article 232 of the Guatemalan Constitution, which created the GCA and gave the agency oversight power over all State entities and public funds.¹⁰¹ The court held that NGOs by nature are private entities, and that Article 232 of the Constitution only extends the GCA's authority to those NGOs receiving public funds.¹⁰² This case is specific to the GCA's authority over NGOs in Guatemala; but, accepted practice says that all State oversight power of NGOs extends only to those organizations receiving public funds from the national budget, and not to those NGOs funded entirely through private donations.¹⁰³ This disconnect in perceived oversight power can be read as a reflection of: (1) confusion about the different corporate forms that a nonprofit association can take in Guatemala, and therefore a lack of clarity about what qualifies as an NGO under the law in the first place; (2) an acknowledgment of limited government resources, which are consumed with the higher priority of enforcement against pervasive corruption and tax evasion; (3) a lack of NGO enforcement power granted to any specific governmental agency according to the various statutes and Civil Code; and, (4) a fear of government intrusion beyond strict constitutional boundaries in Guatemala's postwar period.

98. See Acuerdo Gubernativo No. 512-98 arts. 3-4 (Guat.).

99. See Decreto No. 02-2003 art. 16.

100. See CC file 538-2003, *supra* note 84, at Holding IV.

101. See *id.* at Holding V.

102. See *id.*

103. See *id.*; Fundación Arias, *En Busca de una Legislación*, *supra* note 9393, at 74; Interview with José Alejandro Arévalo, *supra* note 8; Interview with Dr. Edgar Balsells, *supra* note 12.; see also Ana Lucía Blas, *ONG manejaron Q650 millones*, PRENSA LIBRE (Guat.), Jan. 18, 2007, at 8 (reporting that sixty-eight NGOs received approximately 650 million quetzales from the government of Guatemala for various state-sponsored projects).

It is important to anticipate that without proper oversight and enforcement against fraud, private donors—both from Guatemala and from abroad—will tire of corruption and nepotism, losing confidence in the NGO sector. Part III below addresses this concern with proposed reforms to enhance the accountability of NGOs, whether their revenue is from public or private sources. As discussed below, Articles 13 and 16 of Decree Number 02-2003 could form the basis for stricter oversight of the NGO sector by the SAT (for those NGOs receiving only private donations) and the GCA (for those NGOs receiving public funds), as well as the Attorney General, under Article 20 of the Civil Code and Decree Number 40-94.¹⁰⁴

Article 13 of the 2007 national budget proposes specific rules for the coincidence of NGOs and public funds, speaking to the concerns raised by COS, ASC and others about the 'outsourcing' of public services to NGOs.¹⁰⁵ The provision subjects NGOs—as well as local community governments and international or regional organizations—to stricter rules of administration when they receive public funding to execute projects contained within the 2007 budget. The article mandates quarterly reporting to the Ministry of Public Finances and the GCA; payment of interest by the recipient agencies into a common fund; and, regular reporting by the private organizations, with public disclosure on a registry created by the Ministry of Public Finances in January 2007.¹⁰⁶ The new law is meant to quiet critics from public agencies who have complained that NGOs manage public funds in executing many of their programs but do not have to submit to the same level of scrutiny or transparency as state organisms.¹⁰⁷ The law is also the probable result of scandals involving the ever-more common trend of the government contracting public services to private organizations.¹⁰⁸ Some civil society organizations, for example COS, rightly favor this new legislation since the law reduces corruption, yields more re-

104. See CÓDIGO CIVIL, Decreto Ley No. 106 art. 20 (Guat.); Decreto No. 02-2003 arts. 13, 16 (Guat.). See generally Ley Orgánica del Ministerio Público, Decreto No. 40-94 (1994) (Guat.).

105. See generally Ministerio de Finanzas, *Proyecto de la Ley del Presupuesto de General de Ingresos y Egresos del Estado para el Ejercicio Fiscal 2007*, tit. III, art. 13 (2006) (Guat.), available at <http://www.minfin.gob.gt/archivos/presu2007/doc04.pdf>.

106. See *id.*

107. See Lix, *supra* note 11.

108. See, e.g., Paredes, *supra* note 12; see also UNDP, *supra* note 68, at XXIV.

sources for social spending by the government, and raises the level of confidence in the nonprofit sector.¹⁰⁹

Decree Number 02-2003 and Article 13 of the 2007 budget together demonstrate the beginnings of a legal framework for nonprofit regulation in Guatemala, particularly within the ambit of NGOs that receive public funds. As discussed further below, more regulation is required for the oversight of privately funded NGOs—regulations that do not overreach in terms of the government resources required nor in terms of intrusion into private activities; but at the same time which deter fraudulent nonprofit activity, ease the confusion about the formation of nonprofit organizations, and ensure the proper use of charitable funds.

B. *Selected Tax Exemptions & Deductions for NGOs and Donors*

This subsection maps and analyzes briefly some of Guatemala's major taxes, focusing to the greatest extent on the nation's income tax and value-added tax as the most prominent tax regimes. This conceptual map is necessary context for the recommendations contained in Part III since each of the tax laws addresses charities to some extent or another. Therefore, the scope of this subsection is narrowed to consideration of specific provisions concerned with charities and donors.

Income Tax – Decree Number 26-92 is the original law imposing a tax on income for individuals and corporations in Guatemala, known as the “Tax Upon Income” (“ISR”). The ISR made up about 19% of Guatemala's total tax collection in the country's last fiscal year.¹¹⁰ Like Decree Number 02-2003 and the other tax laws, the preamble of this decree refers back to the Guatemalan Constitution for the decree's legal authority. The original law has been subject to many reforms in subsequent legislation, primarily through Decrees Number 117-97 and 44-2000. The preambles of these two reforms cite the 1996 Peace Accords alongside the Constitution for their authority,¹¹¹ demonstrating the lawmakers' reliance on both aspirational documents as maps

109. See Lix, *supra* note 11.

110. Superintendencia de Administración Tributaria, *Recaudación de Ingresos Tributarios 2006*, <http://portal.sat.gob.gt/portal/estadisticas/Prueba/RECAUDACION%20POR%20IMPUESTO%202006.htm> (last visited Sept. 17, 2007).

111. See Ley de Supresión de Exenciones, Decreto No. 117-97 Preamble paras. 1-2 (1997) (Guat.); Decreto No. 44-2000 pmb. ¶ 1-2 (Guat.).

for Guatemala's economic future. Also, the references to both the Constitution and the 1996 Peace Accords once again highlight the integral role played by tax reform in the country's modern development. For example, the second paragraph of the preamble to Decree Number 44-2000 states:

The [2000] *Pacto Fiscal* constitutes a broad and representative social accord about the rights and obligations of Guatemalans in front of the State, containing a vision of the nation that we wish to achieve, founded on the principles and compromises laid out in [the Constitution] and the Peace Accords; it addresses themes of fiscal policy . . . [including] the sustainability of a minimal tax ratio that permits the satisfaction of the levels of social investment and a stabilized economy contained in the Peace Accords for the short, medium, and long-terms.¹¹²

Chapter IV of the ISR law lists the exemptions from taxation on income, particularly granting charitable exemptions in Article 6, much like section 501(c) of the U.S. Internal Revenue Code.¹¹³ Exemptions are listed for the State and its agencies,¹¹⁴ universities,¹¹⁵ nonprofit associations and foundations,¹¹⁶ and religious organizations.¹¹⁷ It is worth noting here that the exemption for nonprofits extends only to income derived from donations and fees, but not business income, whether related or unrelated to the nonprofit's charitable activities.¹¹⁸ The law contains many other exemptions as well. For example, remuneration to international consultants for services provided to the government, including those consultants employed by the many international NGOs operating in Guatemala, is exempt from income taxation.¹¹⁹ Income received by cooperative organizations

112. Decreto No. 44-2000 pmb. (Guat.).

113. See Ley del Impuesto Sobre la Renta, Decreto No. 26-92 Ch. IV (1992) (Guat.); I.R.C. § 501(c) (2006).

114. Decreto No. 26-92 art. 6.

115. *Id.* art. 6(b).

116. *Id.* art. 6(c).

117. *Id.* art. 6(d).

118. See *id.* art. 6(c). For example, a federation of nonprofits is registered in Guatemala City with the mission of educating the public about the NGO sector and lobbying on behalf of the sector's interests. The income from books publishing the federation's research is taxable since it is derived from business activities and not from donations or membership fees. See Interview with Lic. Helmer Velásquez, *supra* note 85.

119. See Decreto No. 26-92 art. 6(j); see also MARTINI, *supra* note 16, at 43.

is also exempt,¹²⁰ thereby subsidizing a wide array of trade associations and other collectives that are not necessarily operated for charitable purposes.¹²¹

Article 37 lists the deductions available to taxpayers under the income tax regime.¹²² Subsection d provides for a charitable deduction limited to the lesser of five percent of the taxpayer's annual income or Q.500,000 (about US\$67,000.), for donations to organizations other than universities, scientific organizations, or cultural organizations.¹²³ Thanks to a recent high court decision and subsequent reform of the law, Guatemalan donors to these last three categories of charities receive an unlimited deduction that will be examined more in the next subsection. The limit of five percent is rather low when compared to the United States and other Latin American countries.¹²⁴ However, since such a small part of Guatemala's population is subject to the ISR and the nation's tax ratio overall is so low, the limit's impact is rather difficult to measure, and increasing the limit may be unrealistic. Regulations promulgated in 2004 detail the process for taxpayer registration and for receiving the charitable deduction. Article 2 of the Regulation on the Income Tax Law (Governmental Accord Number 206-2004) describes the documents required for different types of taxpayers to register with the SAT, including "juridical persons" like NGOs.¹²⁵ Article 18 of the regulations—along with Decree Number 44-2000—outlines the procedure for verifying donations so that donors can receive an income tax deduction. A charity must send an acknowledgment letter, with specific content specified by Article 18, to a donor for

120. See Decreto No. 26-92 art. 6(o) (Guat.).

121. See generally Ley General de Cooperativas, Decreto No. 82-78 (1978) (Guat.). The law governing cooperatives, or cooperative business units, which meant to promote social development particularly in rural areas, will be discussed further in Part III below regarding oversight recommendations.

122. See generally Decreto No. 26-92 art. 37. Taxpayers are granted many deductions, including a substantial personal deduction to narrow the base of taxpayers affected by the income tax, as well as a tax credit for taxes paid under the value-added tax regime. See *id.* arts. 37(a), 37A.

123. See *id.* art. 37(d).

124. See I.R.C. §170(b) (2006) (Guat.); Ignacio Irrarázaval & Julio Guzmán, *Too Much or Too Little? The Role of Tax Incentives in Promoting Philanthropy*, in *PHILANTHROPY AND SOCIAL CHANGE IN LATIN AMERICA* 285, 295 (Cynthia Sanborn & Felipe Portocarrero eds., 2005).

125. Reglamento de la Ley del Impuesto Sobre la Renta, Acuerdo Gubernativo No. 206-2004 art. 2. (2004) (Guat.).

every deductible donation.¹²⁶ This article also restates the deduction limits and the exceptions for universities, cultural organizations, and scientific organizations.¹²⁷

Value-Added Tax – Guatemala's value-added tax ("IVA") is contained in Decree Number 27-92.¹²⁸ The IVA affects many more Guatemalan taxpayers than does the ISR since every consumer pays the IVA on most transactions.¹²⁹ The IVA forms the basis of a larger percentage of the country's income as well. Specifically, the IVA on domestic goods made up 16.7 percent of the country's revenue last year,¹³⁰ while the IVA on imports made up slightly more than 30 percent.¹³¹ Rates for the value-added tax have been a source of great debate throughout the various tax reforms in Guatemala, since the value-added tax is considered by many to be regressive and out of line with constitutional principles of equity and progressivity.¹³² Civil society organizations specifically, in their role as a proxy or lobby for the poor citizens of Guatemala, have protested any proposed increases in the IVA, generally advocating increases in the ISR and improvement in tax administration in place of IVA rate hikes.¹³³

The IVA law addresses charities throughout Decree Number

126. *See id.* art. 18.

127. *See id.*

128. *See generally* Ley del Impuesto al Valor Agregado, Decreto No. 27-92 (1992) (Guat.).

129. *See id.* Although beyond the scope of this article, exemptions and zero-rating exist for certain types of taxpayers and goods or services. In addition, evasion of the IVA is believed to be widespread. *See* Wisecarver, *supra* note 36, at 42.

130. *See* Superintendencia de Administración Tributaria, *Recaudación de Ingresos Tributarios 2006*, available at <http://portal.sat.gob.gt/portal/estadisticas/Prueba/RECAUDACION%20POR%20IMPUESTO%202006.htm>.

131. *See id.*

132. *See* ASC, *supra* note 26, §3.1 (advocating a reduction in the IVA rate); MARTINI, *supra* note 16, at 15-16 (describing the "initial convulsion" and uncertainty when the IVA first went into effect); COS 2003 Proposal, *supra* note 46; NORIEGA ET AL., *supra* note 49, at 118-19 (describing the intense negotiations around the IVA during the 2000 Pacto Fiscal effort). *But see* Wisecarver, *supra* note 36, at 17 (arguing that IVA could be more similar to the income tax and less regressive than is generally assumed, depending on enforcement against evasion by wealthier taxpayers and the economics of passing the tax burden on to employees and consumers); MARTINI, *supra* note 16, at 35 (hypothesizing that the IVA may not be as regressive as is generally assumed since it is under-collected in rural areas, and affects higher classes that consume imported products to a greater extent).

133. *See* MARTINI, *supra* note 16, at 26 (describing the role of civil society in protesting any tax increases). *See generally* Ileana Alamilla, *El IVA, el Causante*, SIEMPRE!, Aug. 29, 2001.

27-92, discussing nonprofit organizations as both sellers and final consumers. With such a broad tax base captured by the IVA, charitable exemptions under this regime are more circumscribed than under the income tax. Article 7 of Decree Number 27-92 offers general exemptions, stating that donations to nonprofit organizations and foundations are exempt from the value-added tax, as are membership dues to nonprofits, private schools, and political parties.¹³⁴ Also exempt from taxation are payments for services performed by educational, social services, and religious nonprofit organizations.¹³⁵ The law points out that in order for a taxpayer to take advantage of this general exemption, the NGO at issue must be not-for-profit, as well as properly registered with its municipality and legally authorized by the tax agency.¹³⁶ Possibly due to concern about tax evasion, these requirements are reiterated several times throughout Article 7.¹³⁷

Article 8 of Decree Number 27-92 offers more specific exemptions regarding nonprofits and other taxpayers as sellers under the IVA regime. The article lists six categories of persons who are exempt from the IVA in all of their operations: (1) public and private educational centers (whether they are organized as NGOs or other corporate forms); (2) universities; (3) the Guatemalan Olympic Committee and Autonomous Sporting Confederation; (4) the Guatemalan Institute for Social Security; (5) diplomatic missions and their employees (provided that this tax treatment is reciprocated); and, (6) international organizations that have signed treaties with Guatemala.¹³⁸

134. *See* Decreto No. 26-92 (1992) at art. 7.9-10.

135. *See id.* art. 7.13.

136. *See id.* art. 7.9-10.

137. *See id.*

138. *See id.* art. 8. Article 9 of Decreto No. 27-92 provides details about the specific IVA exemptions listed in Article 8, including requirements of documentation. In general, the seller (or service-provider) must give an invoice or receipt to the exempt taxpayer, who must in turn provide the seller with a certificate of exemption authorized by the tax administration. Articles 12 and 13 of the regulations go on to describe the registration process for the specifically exempt organizations and diplomatic missions, including the contents of the certificate of exemption, the approval process by the SAT, and the procedure for reporting such exemptions on monthly IVA tax returns. *See id.* art. 9. In practice, however, it is difficult to obtain such a certificate from the SAT without influence. *See* Interview with Lic. Helmer Velásquez, *supra* note 85. For example, many schools absorb the IVA as final consumers, due to an inability to obtain a certificate of exemption. *See* Brenda Paola Rímola Illescas, Centros Educativos, Cumplimiento de sus obligaciones tributarias y aprovechamiento de las exenciones que les

It is interesting to note the specific categories of nonprofits granted the exemption for services in Article 7 and listed as exempt in Article 8. By granting tax benefits in this way to only certain types of nonprofits—like religious organizations and universities—the State widens the divide between different types of NGOs, and not always for apparent policy reasons. The granting of such privileges under the IVA tax regime is similar to the privileged treatment that universities and scientific and cultural organizations receive under the ISR (through an unlimited charitable deduction for their donors).¹³⁹ The Constitutional dimensions of this tiered treatment will be addressed further in the next subsection.

New regulations under the IVA law were promulgated in July 2006 after limited tax reforms earlier that year.¹⁴⁰ Article 9 of the regulations clarifies the tax treatment of nonprofit organizations under the IVA regime, particularly those that are not subject to other, more beneficial, statutory or Constitutional protections.¹⁴¹ As described by this regulation, even if a nonprofit organization has a general exemption from charging the IVA on donations or services that it provides under Article 7 of Decree Number 27-92, that nonprofit must still pay the tax on its purchases as a final consumer.¹⁴² Unless a nonprofit fits within any of the specific exemptions in Article 8 of the IVA law, or is subject to special Constitutional protections (such as universities), it does not gain the benefit of the full array of IVA exemptions.

Other Taxes – The government of Guatemala imposes a range of other, smaller taxes on its citizens. Many of these also include exceptions for charities. For example, Article 12 of Decree Number 15-98, the property tax law, grants limited exemptions to certain categories of nonprofit associations, such as universities and other educational centers.¹⁴³ The statute's exemp-

aplican 3 (2004) (unpublished thesis, on file with the library at Universidad Rafael Landívar).

139. See Decreto No. 26-92 art. 37(d).

140. See generally Reglamento de la Ley del Impuesto al Valor Agregado, Acuerdo Gubernativo No. 424-2006 (2006); Disposiciones Legales para el Fortalecimiento de la Administración Tributaria (Ley Antievasión), Decreto No. 20-2006 (2006).

141. See generally Acuerdo Gubernativo No. 424-2006, art. 9.

142. See *id.*

143. See Ley del Impuesto Único Sobre Inmuebles, Decreto No. 15-98 art. 12 (Guat.).

tion for religious organizations probably stems in part from Article 37 of the Constitution, which grants all churches an exemption from property taxes, provided that the property is used for social services, education, or religious purposes.¹⁴⁴ Also, Article 10 of the so-called "stamp tax" on legal documents grants an exemption for documents executed by a range of nonprofit organizations, as well as cooperatives and agencies of the State.¹⁴⁵

C. *The Constitution & Its Implications*

The Guatemalan Constitution and its interpretation by the Constitutional Court play a strong role in shaping tax reform efforts and a somewhat lesser role in shaping nonprofit law. Specifically, Article 239 states: "The Congress of the Republic has the exclusive right to legislate ordinary and extraordinary tax laws, discretionary and special contributions, conforming to the needs of the State and in accord with [principles of] equity and tax justice."¹⁴⁶ Also, Article 243 states: "The tax system should be just and equitable. Tax laws will be structured in conformity with the principle of capacity to pay . . ."¹⁴⁷ Consensus in most sectors holds that the Guatemalan tax system should be designed in a progressive way, largely relying on these constitutional principles of "equity" and "capacity to pay."¹⁴⁸ As demonstrated in the previous subsection, many tax laws refer to these principles in establishing the laws' legitimacy. The Constitution also establishes specific tax exemptions for charities, trumping the ISR and other tax laws. For example, Article 88 states that universities are exempt from all classes of taxes.¹⁴⁹ This article also provides that contributions to universities, cultural organizations, and scientific organizations are all deductible under the income tax.¹⁵⁰ Article 37 of the Constitution, as another example, ex-

144. See LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 37 (Guat.).

145. See Ley del Impuesto de Timbres Fiscales y de Papel Sellado Especial Para Protocolos, Decreto No. 37-92 art. 10 (Guat.).

146. See LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 239.

147. *Id.* art. 243. As mentioned above, the Constitution also mandates obligatory spending on health, education, housing, security, and justice. See generally LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA GUATEMALA.

148. See LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA GUATEMALA art. 243; VALDEZ, *supra* note 17, at 37.

149. See LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 88.

150. See *id.*

empts all religious organizations from property taxes.¹⁵¹ As described in the previous section, other charitable tax exemptions and deductions stem from the tax code and specific tax laws, while a chosen few find a place in the Constitution itself. Finally, Article 242 recommends that the government pass a law to create a national fund to support the work of private NGOs doing development work.¹⁵² This has not yet been accomplished.

The Constitutional Court, the highest court in the land, has issued many decisions interpreting the constitutional articles on taxation. These cases, based on Article 243 and other articles of the Constitution, establish interesting jurisprudence on taxation, more often than not protecting and promoting taxpayers' rights.¹⁵³ One series of Constitutional Court cases touches directly on charitable giving within the constitutional framework, shedding light on the potential for reform in this arena.¹⁵⁴ In these three related court cases, CACIF and other taxpayers argued in front of the high court that the five percent (or Q.500,000) limitation on the income tax deduction granted for donations to universities and scientific and cultural organizations was unconstitutional.¹⁵⁵ The taxpayers based their position on the explicit constitutional protection for these three categories of contributions contained in Article 88.¹⁵⁶ The Court held that the deduction limit was unconstitutional with regard to these three categories, although the limit remains constitutional with regard to other types of charities.¹⁵⁷ The holding resulted in reform of the law itself to ensure that the deduction is unlimited in only these specific categories.¹⁵⁸

In terms of policy, the Court stated the logic behind the strict constitutional protection of these three categories of charities in defending its decision in favor of the taxpayer. The Court

151. *See id.* art. 37

152. *See id.* art. 242.

153. *See* Gallagher, *supra* note 10, at 4-5 (discussing two significant high court decisions that could harm the country's revenue stream, which held unconstitutional: 1) the elimination of the IVA deduction against income tax, and 2) the alternative minimum tax); *see also* MARTINI, *supra* note 16, at 26; URRUTIA, *supra* note 8, at 52 (referring to these Constitutional articles as "padlocks" preventing tax reform).

154. *See CC files 1226-2001, 1492-2001, 401-2002, supra* note 10.

155. *See id.*, at I.b.2.

156. *See id.*, at IV.

157. *See id.*

158. *See* Decreto No. 26-92 art. 37(d).

held that the deduction limit not only contravened the explicit language of Article 88, but also the spirit of Articles 59, 62, and 80, which describe the State's duties to:

Protect, foment, and disseminate national culture through the emission of laws and dispositions that: encourage its enrichment, restoration, preservation, and recuperation; promote and regulate scientific investigation, such as the creation and application of appropriate technology; protect national artistic expression, popular art, folklore, and artisans and cottage industries, with the goal of preserving their authenticity; and recognize and promote science and technology as the fundamental basis of national development.¹⁵⁹

The Court goes on to add the following, emphasizing the importance of these tax incentives for charitable giving as a crucial part of building Guatemala's future:

These duties will only be fulfilled in as much as incentives, especially of a tax character, are regulated, which would benefit financially the specialized entities that engage in these types of activities in science, technology, and culture – that is to say, universities or associations and foundations of a scientific or cultural nature.¹⁶⁰

These high court cases demonstrate therefore that charitable deductions are viewed as more than mere favors granted by the State when they are described in the Constitution. Rather, they rise to the level of a right on the part of the charities and taxpayers, and a duty on the part of the State. They are also considered a key tool in the development of a successful and prosperous Guatemala. In this sense, an open-minded examination of constitutional law—including the possibilities for amendment by national referendum or reversal by the high court—is necessary for certain important tax reforms to take place, particularly in the sphere of charitable giving.¹⁶¹ As discussed in the next section, the holding of these cases on Article 88 of the Constitution deserves particular reexamination since the Court privileges certain classes of charities above others. The policy reasons described by the Court may either no longer be relevant to

159. See CC files 1226-2001, 1492-2001, 401-2002, *supra* note 10, at IV.

160. *Id.*

161. See generally NORIEGA ET AL., *supra* note 49, at 253-59 (regarding Constitutional provisions ripe for amendment, not necessarily related to charitable giving).

the needs of Guatemala, or may be drawn too narrowly when compared to the work of other charities.

III. *A DELICATE BALANCE – RECOMMENDATIONS FOR REFORM*

Like Latin America as a whole, economic inequality plagues Guatemala and impedes its development. Recent statistics indicate that the wealthiest ten percent of Guatemala's population receives almost one-half of all income and the top twenty percent receives two-thirds of all income.¹⁶² Tax reform efforts have struggled with the right balance to alleviate this inequality, focusing on the refinement of a broad-based, yet progressive tax system that does not sacrifice foreign investment, nor the promotion of export industries that generate economic growth. To address this aspect of Guatemala's economic imbalance, broad reforms are required in all realms of tax law.

Another delicate balance is at issue as well. Private philanthropy and civil society play a specific and unique role in the country's fiscal reform agenda because of the nonprofit sector's ability to initiate valuable social projects alongside, or on behalf of, the government. While encouraging such private initiatives, there is also a need for additional regulation of the NGO sector—whether from the government or voluntary self-regulation—to create accountability and build capacity. Regulators must strike the right balance between instituting effective oversight and avoiding onerous and expensive reporting and investigation. In this spirit, this section lists below several reforms for Guatemala, with the goal of promoting equity, NGOs and philanthropy.

This Article's recommendations are grounded in extensive study of the work of the 2006-07 *Pacto Fiscal* Commission, and primarily the representation of COS and the International Center for Research on Human Rights ("CIIDH") in the commission. These two groups—one a policy think-tank, and the other a social justice NGO—describe themselves as representing the majority of Guatemalan citizens who live in poverty and are indigenous. The ideals laid out in visionary documents such as the Guatemalan Constitution and the 1996 Peace Accords guide

162. See Background Note, *supra* note 2.

the following recommendations, much like the proposals of COS and CIIDH. And, like the proposals of other scholars of philanthropy in Latin America, the recommendations are rooted in the goal of regional tax systems that are equitable and progressive, alongside the active participation and encouragement of civil society.

As a final note before presenting the recommendations, major tax reform in Guatemala is certainly required. Adjustments in all of the country's tax regimes would impact the overall philanthropic environment and build a crucial foundation for specific reforms with regard to charitable giving and NGO regulation. The 1996 Peace Accords, the 2000 *Pacto Fiscal* Commission, as well as many other scholars, have proposed excellent recommendations to the overall tax system—recommendations which must still be implemented.¹⁶³ There seem to be three avenues for tax reform in Guatemala, as in other developing nations: (1) increase tax rates, (2) broaden the tax base and eliminate exemptions, and (3) improve administrative efficiency and reduce corruption.¹⁶⁴ This Article argues that as a baseline, the SAT needs to improve enforcement against tax evasion and administrative efficiency before creating new taxes or revoking any charitable exemptions. The creation of the SAT in 1998 was an excellent first step, but the agency now requires more professionalization, operational help, and enforcement tools.¹⁶⁵ In addition, the *Pacto Fiscal* Commission should consider increasing income tax rates in a progressive way, while maintaining value-added tax rates at the current level. This would be the most practical way to increase tax revenue while not unduly impacting the poor.¹⁶⁶ Finally, as far as general reforms are concerned, the *Pacto Fiscal* Commission should consider increasing wealth taxes since they

163. See, e.g., ACUERDO SOBRE EL CRONOGRAMA PARA LA IMPLEMENTACIÓN, CUMPLIMIENTO Y VERIFICACIÓN DE LOS ACUERDOS DE PAZ, §§ III-IV; 2000 PACTO FISCAL, *supra* note 39, at Anexo 1; LIONEL FIGUEREDO ARA & JUAN JOSÉ NARCISO CHÚA, ADMINISTRACIÓN TRIBUTARIA 74-80 (2000); VALDEZ, *supra* note 17, at 80-86.

164. See MARTINI, *supra* note 16, at 10; VALDEZ, *supra* note 17, at 35.

165. See USAID, USAID ASSISTANCE IN FISCAL REFORM TO THE GOVERNMENT OF GUATEMALA 5 (2004), available at http://www.fiscalreform.net/pdfs/guatemala_tax_administration_reform.pdf (saying, "[The establishment of SAT] by itself is a significant achievement in a society historically averse to paying any taxes at all.").

166. Although it is difficult to measure how regressive the value-added tax really is, as well as how progressive Guatemala's tax system is or could be. See Richard M. Bird & Eric M. Zolt, *Rethinking Redistribution: Tax Policy in an Era of Rising Inequality*, 52 UCLA L. REV. 1627, 1650-52 (2005); LARIOS, *supra* note 148.

are also inherently progressive. For example, they could propose reforms to the property tax valuation procedures and revive the estate tax.¹⁶⁷

Turning to specific reforms in the arena of philanthropy, this Article builds on the current academic conversations about philanthropy in Latin America and hopes to contribute to that same dialogue through the case study of Guatemala. For example, scholars have raised thematic issues for this region concerning NGO oversight, tax incentives for charitable giving, and measuring the impact of the private nonprofit sector's activities.¹⁶⁸ This Article builds on that conversation to tailor potential initiatives to Guatemala, which has somewhat unique circumstances, such as the country's extremely low tax ratio, its rapidly proliferating NGO sector, its proximity to the United States, the recent signing of DR-CAFTA, and the present *Pacto Fiscal* effort.

Pacto Fiscal 2006-07 – The new fiscal reform commission and other dialoguing groups, like the *Plan Visión de País*,¹⁶⁹ should look closely at the nonprofit sector and charitable giving as an area for study and reform. The Inter-American Development Bank ("IDB") and United Nations Development Programme ("UNDP") have both taken the position that the growth of NGOs in Guatemala is a positive step, and that the undertaking by nonprofits of formerly state-sponsored activities reflects progress and successful privatization.¹⁷⁰ As evidenced above in the statements of ASC and COS, this opinion is not necessarily shared by all of Guatemalan civil society.¹⁷¹ This debate raises a need for more regulation and oversight, as well as a critical reas-

167. See Richard M. Bird, *Taxation in Latin America: Reflections on Sustainability and the Balance Between Equity and Efficiency* 40-43 (2003) (unpublished paper, Univ. of Toronto Int'l Tax Program Paper No. 0306), available at <http://www.rotman.utoronto.ca/iib/ITP0306.pdf>. In addition, some scholars recommend an increase in public spending on social programs to raise citizen satisfaction and trust; this could be an alternative to complex progressive tax reform. See, e.g., ROY BAHL & SALLY WALLACE, *COMPREHENSIVE TAX REFORM: FINAL REPORT*, Jamaica Tax Reform Project, Andrew Young School of Policy Studies, Georgia St. Univ. xxvi (Dec. 2004); Bird & Zolt, *supra* note 166, at 1630.

168. See, e.g., PHILANTHROPY AND SOCIAL CHANGE IN LATIN AMERICA, *supra* note 1515.

169. See *Plan Visión de País*, <http://planvisiondepais.org/iricio.html> (last visited Sept. 25, 2007).

170. See Ruthrauff, *supra* note 4, at 1.2 (regarding the IDB and World Bank); UNDP, *supra* note 68 at XXIV.

171. See COS 2003 Proposal, *supra* note 46, at 2; ASC CUMBRE, *supra* note 43, at 11.

assessment of the growing third sector by commissions such as the *Pacto Fiscal*, which are tasked with not only an examination of tax revenue but also state expenses and the country's overall fiscal situation.

Questions to be addressed by the current and future *Pacto Fiscal* commissions include: Is it beneficial for the nonprofit sector to take over traditional state functions based primarily on evidence of state corruption? Is the nonprofit sector sufficiently regulated to avoid the same sort of corruption? What kinds of tax incentives could be instituted to promote legitimate philanthropy and support much-needed social services? What is the government's role in encouraging NGO transparency? Great strides have been made in terms of process; specifically, the inclusion of civil society as a party to the 1996 Peace Accords and subsequent fiscal negotiations.¹⁷² More needs to be done, however, by way of collective thinking about the governance and oversight of these very same civil society organizations.

Reform of Decree Number 02-2003 and Tax Laws – As described above, Decree Number 02-2003 stops short of creating a workable and consistent regulatory framework for NGOs in Guatemala. The government could amend the law and promulgate regulations mirroring those governing cooperatives, which are quite thorough and practicable.¹⁷³ Various nonprofit federations have suggested reforms of the NGO law to better address oversight and clarify the rules for forming all types of nonprofit organizations.¹⁷⁴ The government and the 2006-07 *Pacto Fiscal* Commission should consider these reforms seriously. Such changes to the law could: (1) clarify the definition of an NGO to make the law mandatory for all nonprofit organizations, in contrast to the current optional regime whereby an association could register either under the law or the Civil Code; (2) establish a small oversight commission within the executive branch with members from the NGO sector and the government; (3) impose reporting requirements and sanctions for violations, taking care to avoid creating unreasonable burdens; and, (4) estab-

172. See JOSÉ FERNANDO VALDEZ & MAYRA PALENCIA, *LOS DOMINIOS DEL PODER: LA ENCRUCIJADA TRIBUTARIA* 438 (1998); GAMBOA & TRENTAVIZI, *supra* note 52, at 204.

173. See *Ley General de Cooperativas*, Decreto No. 82-78 (1978) (Guat.).

174. See Interview with Lic. Helmer Velásquez, *supra* note 85. The author is grateful to Mr. Velásquez and the proposals of CONGCOOP for providing the framework for this recommendation.

lish a comprehensive national registry of NGOs, nonprofit organizations, and civil society associations to make the collection of statistics and oversight more manageable. Arguments against such reform include a fear of adding additional bureaucracy to a shrinking State, as well as the fact that a system of oversight already exists—however ineffective—through external audits undertaken by the NGOs themselves, as well as self-reporting to the SAT. These arguments are not persuasive in the face of the confusion and potential for corruption that is rooted in the Guatemalan NGO sector presently.

In addition to reform of Decree Number 02-2003, reform of the tax laws is required to clarify the exemptions and deductions related to nonprofits, since this area is also fraught with confusion. For example, while nonprofits do not pay income on donations or membership fees received, the ISR law is less clear about how income from business activities is taxed. Reforms of Decree Number 26-92 could create an administrable system of determining unrelated business income, as in the United States, a system that governs all types of NGOs equally. In addition, the discretionary process for receiving an IVA certificate of exemption should be replaced with a more automatic process to avoid the current perception of corruption and influence. A good model would be the automatic sales and use tax exemptions available in states like New York and Massachusetts. Finally, the charitable deduction under the ISR is simply too low at five percent, and should be increased to compare with Guatemala's neighbors across Latin America. The discrepancy regarding the charitable deduction is also unfair and requires modification as addressed below regarding the Constitution.

Constitutional Doctrine and Statutory Discrepancies – The Guatemalan high court and Congress should revisit Constitutional doctrine on tax issues, as suggested by other practitioners and scholars of Guatemala in the past.¹⁷⁵ Within the realm of philanthropy, there is a narrower need for reform regarding the laws governing nonprofit organizations and particularly the disparate treatment under the tax regimes for different types of nonprofits. As demonstrated in previous sections, the Constitution itself

175. See, e.g., NORIEGA ET AL., *supra* note 49, at Annex XXII; Gallagher, *supra* note 10, at 5; NETHERLANDS INST. FOR MULTIPARTY DEMOCRACY & U.N. DEV. PROGRAMME, *supra* note 51, at 86.

enshrines income tax benefits for universities and scientific and cultural organizations through unlimited charitable deductions. In addition, the value-added tax regime privileges educational centers and other very specific categories of nonprofits as both buyers and sellers. Harmful court decisions or statutory provisions like these promote inequality between different types of NGOs, create discrepancies regarding the treatment of donors/taxpayers, and increase confusion about charitable donations.

The underlying policy basis for such distinctions would be an excellent point of discussion by the 2006-07 and future *Pacto Fiscal* Commissions. The policy could also be the subject of further debate among members of Congress, the courts, and the President's office, with possible actions for change. While it is difficult to ascertain if the legislature intended to benefit the elite through these types of tax privileges, it is clear that the policy effect of such privileges positively impacts the elite more so than the poor populations living in the rural areas of the country. Looking at Guatemala's social indicators, it is easy to assume that the elite are more likely to attend private universities as well as attend cultural performances or benefit from advanced science and technology. For example, the total adult literacy rate in Guatemala stands at only 69 percent, and secondary school enrollment (with completion being a prerequisite for university) hovers around 40 percent of the population.¹⁷⁶ Interviews conducted at the time of the 2000 *Pacto Fiscal* Commission showed that members of the business and social sectors felt that the priorities in terms of social spending in Guatemala ought to be primary education, health care, and infrastructure,¹⁷⁷ all areas highlighted in the 1996 Peace Accords in terms of increased spending targets, and much more central to citizens' basic needs.¹⁷⁸

The amendment process to remove special treatment for only certain categories of charities in the Constitution is unlikely to be successful, although this suggestion was proposed around the time of the 2000 *Pacto Fiscal* Commission.¹⁷⁹ Since it is ex-

176. UNICEF, *Statistics At-a-glance: Guatemala*, http://www.unicef.org/infobycountry/guatemala_statistics.html (last visited Sept. 11, 2007).

177. See VALDEZ, *supra* note 17, at 44-47.

178. See Socio-Economic Accord, *supra* note 5, §§22(a), 23(c), 23(d), 25(j).

179. See Silvia López Ribas & Eduardo Sanz Gadea, *Informe sobre el Sistema de Imposición sobre la Renta en Guatemala*, in *LA POLÍTICA FISCAL EN GUATEMALA* (Vol. I) 105, 125-26, 132 (1999).

tremely difficult and almost unheard of to amend the Constitution due to a lengthy process of popular referendum,¹⁸⁰ advocates of this action should consider pursuing high court reversals of Files 1226-2001, 1492-2001, 401-2002 as an alternative. Another option is seeking extensions of the income tax deduction and IVA benefits through the legislative process, focusing primarily on nonprofit organizations in the fields of primary education and health care. Finally, it would be instructive to examine the issue and propose possible solutions from a regional perspective, since much of Latin America has been grappling with the same issue of different treatment of certain types of nonprofit organizations alongside extreme inequality.¹⁸¹

Administrative Burden – The Guatemalan Congress should consider amending the income tax law's provisions regarding how NGOs verify contributions they receive. Such reform could reduce the administrative burden on NGOs as well as the SAT. As described above, there is currently no threshold amount in Guatemala that triggers the requirement for sending a donor a SAT-approved form receipt or acknowledgment letter.¹⁸² In other words, if a taxpayer wants a deduction under the ISR for a charitable contribution in any amount, he or she must have documentation from the NGO. Setting a threshold, like the US\$250 limit in the United States,¹⁸³ would free resources for Guatemalan nonprofit organizations to focus on other types of reporting as well as programmatic activities. In addition, the SAT's ability to oversee verification on every donation for income tax purposes is questionable. The SAT has been trying to reduce its administrative costs since its inception in 1998,¹⁸⁴ reducing the administrative burden imposed on NGOs while preserving some reporting requirements would be a practical step in this direction.

Enforcement Agency – In Guatemala's current regulatory environment, there is great potential for nonprofit corruption and little incentive for transparency. If this situation continues, do-

180. See LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 277-80.

181. See Irrarázaval & Guzmán, *supra* note 124, at 303-04.

182. See Reglamento de la Ley del Impuesto Sobre la Renta, Acuerdo Gubernativo 206-2004 (2004) (Guat.).

183. See I.R.C. § 170(f)(8) (2007) (Guat.).

184. See generally Arthur J. Mann, *Estimating the Administrative Costs of Taxation: A Methodology with Application to the Case of Guatemala* (2002), <http://devtechsys.com/publications/documents/August2002.pdf> (last visited Sept. 11, 2007).

nors will become discouraged and less willing to donate private funds to important social initiatives in Guatemala. The government should implement a practicable system of oversight in order to prevent fraud and restore confidence in Guatemala's NGO sector. The authority granted by Article 13 of Guatemala's 2007 national budget is a good beginning for NGOs that receive public funds through government contracts. Since the Constitutional Court has held it unconstitutional for the GCA to oversee privately funded NGOs,¹⁸⁵ a new oversight mechanism is required that is consistent for all nonprofit associations—whether funded publicly or privately. Scholars of Guatemala and Central America have long identified the need for such regulation of the growing NGO industry, as well as for policing charitable tax exemptions that funnel money away from the State.¹⁸⁶ Although other government agencies like the SAT or the Attorney General are mentioned as potential enforcers in the various laws cited above, there appears to be no specific governmental unit dedicated to NGO oversight at the current time.¹⁸⁷

To address this gap, this Article recommends forming an inter-agency unit or entity dedicated to monitoring NGO legitimacy, accountability, and fundraising. Regulations have not yet been promulgated under Decree Number 02-2003; such regulations could describe the formation of this type of oversight entity. It will be important to ensure that the oversight agency meets constitutional requirements as described by the Guatemalan high court in File 538-2003.¹⁸⁸ The new agency could create and oversee reporting requirements for all types of Guatemalan nonprofits. For example, the agency could require an annual report, similar to the IRS Form 990, that collects information from nonprofit associations about their income, expenses, and

185. See CC file 538-2003, *supra* note 84.

186. See, e.g., Menaldo et al., *supra* note 8, at 31 (stating in 1999 that more monitoring of exempt organizations was required); Foro de ONG & CFP, *supra* note 82, at 5 (identifying the need for more transparency by nonprofits, for the benefit of donors and beneficiaries); Fundación Arias para la Paz y el Progreso Humano, *supra* note 93, at 47 (recommending stronger sanctions for nonprofit violations).

187. Without GCA authority, there is no one agency in charge of nonprofit oversight. Interviews and the organizational charts of the SAT and the Attorney General's office confirm this absence. See Ministerio Público Guatemala, *Organigrama Area de Fiscalia* (Jan. 2006), http://www.mp.lex.gob.gt/Acerca_mp/organigramas/org-fiscalia.htm (last visited Sept. 11, 2007); SAT, *Estructura de Organización Funcional* (May 2006), <http://portal.sat.gob.gt/portal/content/view/3/51/> (last visited Sept. 11, 2007).

188. CC File 538-2003, *supra* note 8484, at Holding VI.

programmatic activities during the prior year. The agency could also promote public education regarding philanthropy through conferences and publications. Finally, the agency could be responsible for administering a system of NGO accreditation alongside the registration process.¹⁸⁹

There are many models after which such an entity could be designed. First, the new agency or commission could be modeled after the one created by the Guatemalan government for oversight of small business cooperatives.¹⁹⁰ The 2000 *Pacto Fiscal* documents proposed the creation of an inter-agency entity to fight tax evasion;¹⁹¹ this proposal could be adjusted to create a similar entity regarding NGOs. The government could also look to the charity and consumer protection bureaus of the state-level Attorneys General offices in the United States for guidance.

Potential members of such an inter-agency task force or commission could include foremost the SAT and the Attorney General. According to Articles 13 and 14 of Decree Number 02-2003, the SAT has jurisdiction over the accounts of NGOs in order to monitor their tax-exempt status.¹⁹² According to Article 20 of the Civil Code, the Attorney General has jurisdiction to oversee private foundations.¹⁹³ Article 12 of the law establishing the Attorney General's office states that the agency has the power to create new units or sections that are considered necessary for the proper functioning of the agency.¹⁹⁴ Legislation could expand the authority of both these agencies in order to cover all types of nonprofits—whether civil associations, develop-

189. See Foro de ONG & CFP, *supra* note 82, at 5 (suggesting an accreditation system for Guatemalan NGOs, but not taking a position on whether it should be a system of self- or state-regulation). For more on self-regulation by nonprofits in the developing world see Mark Sidel, *The Guardians Guarding Themselves: A Comparative Perspective on Nonprofit Self-Regulation*, 80 CHI.-KENT L. REV. 803 (2005). Those who propose self-regulation or accreditation regimes should account for the potential administrative burdens imposed on smaller NGOs working with very scarce resources in rural areas of developing countries like Guatemala (as well as the practicability of their actual compliance). See *id.*

190. See generally, Ley General de Cooperativas, Decreto No. 82-78 arts. 49-56 (1978).

191. See 2000 PACTO FISCAL, *supra* note 39, at 10; *Hacia un Pacto Fiscal*, *supra* note 53, at 37.

192. Law of Non-Governmental Organizations for Development, Decreto No. 02-2003 arts. 13-14 (Guat.).

193. See CÓDIGO CIVIL, Decreto Ley No. 106 art. 20 (Guat.).

194. See Ley Orgánica del Ministerio Público, Decreto No. 40-94 art. 12 (1994) (Guat.).

ment NGOs, private foundations, or other. Such a law, or perhaps the agencies' decision alone, could form an inter-agency entity, specifically including representatives from one or more of the following: (1) the SAT's small business unit, which is currently studying the SAT's policies on NGOs; (2) the legal unit of the SAT, which is responsible for bringing cases against taxpayers; (3) the SAT's Planning and Institutional Development Board; (4) the Economic Crimes unit of the Attorney General's office; and, (5) the district attorney's office responsible for investigating "crimes against patrimony and the common good."¹⁹⁵ The unit should also include one or more members from the nonprofit sector to ensure that its policies are realistic and not too burdensome. Ideal for this role would be leaders from representative nonprofit federations, such as COS, CONGCOOP, and the Guatemalan Council of Private Foundations.

Public Education - Guatemala, like much of Latin America, does not yet have a flourishing culture of philanthropy on the part of its wealthy citizens. Private, grant-making foundations are few and far between, and corporations are only recently embracing large-scale philanthropy through the broader arena of corporate social responsibility. The promotion of private philanthropy, alongside the regulatory reforms discussed above, could impact the country positively, generating more enthusiasm from Guatemala's community leaders for social development programs, as well as more support for stricter governmental oversight to ensure the impact of their social investments.

This Article proposes using the SAT and the agency's so-called "special taxpayers unit" as a launching point for this type of philanthropic outreach. The unit for "special taxpayers" is responsible for communication with and oversight of the largest taxpayers in Guatemala, individual or corporate. In 2000, only 600 such taxpayers represented 60 to 70 percent of the country's annual tax revenue, and it was recommended at the time that the unit be expanded to capture the 1,500 taxpayers who contributed approximately 80% of the nation's tax revenue.¹⁹⁶ SAT

195. Ministerio Público Guatemala, *supra* note 187; see also Menaldo et al., *supra* note 8, at 14-15 (describing how the Attorney General and the SAT work together on cases of tax evasion and related criminal activity).

196. See MENALDO & MORALES, *supra* note 8, at 123. The authors did not address philanthropy in their discussion of the unit, recommending that it convert from a "customer service" attitude to one of more strict enforcement.

has already undertaken creative efforts at public education about taxes and the importance of obeying the laws and contributing to the State.¹⁹⁷ These efforts could be expanded to appeal to the wealthiest taxpayers in terms of charitable giving, dangling the so-called “carrot” of tax deductions alongside the “stick” of the unit’s enforcement authority. The personnel at the unit, for example, could: work with high net-worth taxpayers to disseminate information about the tax benefits of charitable giving; maintain and promote a database of NGOs registered with the SAT; and, clarify the oversight rules while sharing best practices and success stories of credible and effective NGOs.¹⁹⁸

Community foundation—Building on public education regarding taxes and charitable giving, private philanthropists could establish a community foundation for Guatemala and/or Central America in cooperation with the State. This would be an important step in capacity-building for the nation’s entire philanthropic sector. Such a foundation would employ a professionalized staff to make grants to smaller nonprofits across the country. Examples of community foundations have been successful in other Latin American countries, particularly in Mexico.¹⁹⁹ Initially, the organization could be funded by international foundations that have experience in NGO oversight and grants administration, and grow its base of local funding. The community foundation could offer private oversight of NGOs as well as site visits to ensure accountability and to measure impact. It could also take over efforts at public education to promote philanthropy, as well as host forums for other Guatemalan grant-making foundations on topics such as strategic philanthropy, ethical and effective fundraising, and legal requirements. Although not required, in order to give the community foundation credibility with the public and the State, a law could be passed granting it

197. See, e.g., Portal de Cultura Tributaria de la SAT, <http://portal.sat.gob.gt/ct/> (last visited Sept. 11, 2007) (a SAT website that uses an animated character named Simón Abel Tax to convey the importance of paying taxes).

198. Granted, for such public education to work, security and policing must be improved, as wealthy citizens of Latin America are often targeted for robbery and kidnapping, thereby discouraging large public donations. See Andres Oppenheimer, *Latin America’s Rich Should Donate More*, MIAAMI HERALD, Sept. 20, 2007, available at <http://www.miamiherald.com/418/story/243825.html>.

199. See Shari Turitz & David Winder, *Private Resources for Public Ends: Grantmakers in Brazil, Ecuador and Mexico*, in PHILANTHROPY AND SOCIAL CHANGE IN LATIN AMERICA 255, 280-83 (Cynthia Sanborn & Felipe Portocarrero eds., 2005).

authority and establishing an official relationship with one or more government agencies.²⁰⁰ Alongside a community foundation for Guatemala, the government should honor fully its obligation under Article 242 of the Constitution to establish a national fund for NGOs working in development.²⁰¹ The National Fund for Development (“FONADES”) was a step in this direction, although it did not refer to Article 242 for its legitimacy.²⁰² FONADES could take an active role in working with a Guatemalan community foundation under the auspices of Article 242 of the nation’s Constitution.

200. For discussion of a similar idea using a State-run “pseudo-NGO fund,” see *En Busca de una Legislación*, *supra* note 93, at 16-17.

201. See LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 242; Interview with Lic. Helmer Velásquez, *supra* note 85 (saying that the government administers many other funds that different types of NGOs can apply to—for example in agriculture or cottage industries—so there is no concerted political pressure from the NGO sector for a more general fund).

202. See Acuerdo que Crea el Fondo Nacional del Desarrollo FONADES, Acuerdo Gubernativo 448-2006 (2006) (Guat.).