

# MENDING GUATEMALA’S TOURISM INDUSTRY THROUGH PRIVATE REGULATION

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*Tourism is an increasingly important source of capital in numerous developing nations, and it accounts for an inflow of nearly \$1.4 billion to Guatemala each year. Yet tourism also carries with it negative side effects, principally environmental and cultural degradation. International NGOs working in Guatemala tout a preservationist brand of tourism, yet anthropologists and environmentalists have documented how the tourism industry—and the NGOs that compose it—continually fall short of preservationist goals. This Note suggests that a solution to the industry’s harms lies in private regulation, specifically in a tourism-specific code of conduct. This Note demonstrates how a code would fit within the industry’s current regulatory scheme, explains why the NGOs that dominate the industry would adhere to a code, and identifies specific provisions that should be included in a code to directly target tourism’s environmental and cultural harms.*

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## INTRODUCTION

Twenty-five years ago, the people, volcanoes, historic ruins, and colonial towns of Guatemala were staged, photographed, and presented to North Americans in the glossy pages of *National Geographic* magazine.<sup>1</sup> This article was one of the first to present Guatemala—which covers a swath of Central America slightly smaller than Tennessee<sup>2</sup> but contains more than twice Tennessee’s population<sup>3</sup>—as a tourist destination.<sup>4</sup> The magazine’s pages showcased Maya men and women in traditional dress,<sup>5</sup> depicted Maya ruins and artifacts carefully restored by archaeologists,<sup>6</sup> flaunted the nation’s extraordinary biological diversity,<sup>7</sup> and juxtaposed the precolonial with the

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<sup>1</sup> Wilbur E. Garrett, *La Ruta Maya*, NAT’L GEOGRAPHIC, Oct. 1989, at 424. Highlighting both the magazine’s wide distribution and its importance, anthropologist Walter Little explains that *National Geographic* “has been significant in shaping U.S. perceptions of people and places.” WALTER E. LITTLE, *MAYAS IN THE MARKETPLACE: TOURISM, GLOBALIZATION, AND CULTURAL IDENTITY* 38 (2004).

<sup>2</sup> See *Geography & Quick Facts*, TN.GOV, <http://www.tn.gov/local> (last visited Aug. 18, 2014) (stating that the geographic area of Tennessee is 42,146 square miles, which equates to 109,157 square kilometers); *The World Factbook: Guatemala*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html> (last visited Aug. 18, 2014) (reporting that Guatemala covers a geographic area of 108,889 square kilometers).

<sup>3</sup> Guatemala has a population of 14,647,083 as of July 2014. *The World Fact Book: Guatemala*, *supra* note 2. In comparison, Tennessee is home to only 6,495,978 people, as of 2013. *State and County QuickFacts: Tennessee*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/47000.html> (last visited Aug. 18, 2014).

<sup>4</sup> See Garrett, *supra* note 1, at 424 (highlighting the desirability of Guatemala as a destination, particularly in light of the new “Ruta Maya”); see also Quetzil E. Castañeda & Jennifer Burtner, *Tourism as “A Force for World Peace”: The Politics of Tourism, Tourism as Governmentality and the Tourism Boycott of Guatemala*, 1 J. TOURISM & PEACE RES., no. 2, 2011, at 1, 15, available at <http://www.icptr.com/wp-content/uploads/2011/01/Tourism-as-a-Force-for-World-Peace.pdf> (“Guatemala has increasingly packaged itself since the mid-1980s for educational, adventure, cultural, and ecological tourisms . . .”). While Guatemala has attracted tourists for decades (including before 1989), the *National Geographic* article and the transition into the mid-1990s marked the first time that Guatemala entered the mainstream of tourism. For example, the *New York Times* travel section featured its first article on Guatemala in 1980; the newspaper featured four articles on the country as a travel destination in the 1990s and ten thus far in the 2000s. For access to these articles, see *Travel Guides: Guatemala*, N.Y. TIMES, <http://travel.nytimes.com/travel/guides/central-and-south-america/guatemala/overview.html> (last visited Aug. 18, 2014).

<sup>5</sup> Garrett, *supra* note 1, at 430–31, 436, 465, 476–79. The “packaging” of Guatemala using images of its indigenous population continues today: “Mayas present and past are one of that country’s primary ways of expressing nationalism, promoting economic resources, and attracting tourists.” Walter E. Little, *Living Within the Mundo Maya Project: Strategies of Maya Handicrafts Vendors*, LATIN AM. PERSP., May 2008, at 87, 90.

<sup>6</sup> Garrett, *supra* note 1, at 435, 451–53, 460–61, 468.

<sup>7</sup> *Id.* at 456–59. Guatemala has fourteen different ecoregions and is considered the fifth “biodiversity hotspot” in the world. Cassandra Lynne Miller, *Evaluating the Design and Management of Community-Based Ecotourism Projects in Guatemala* 17 (Dec. 2008)

postcolonial by capturing the vibrant colors of indigenous *huipiles*<sup>8</sup> in the flickering candlelight of Christian churches.<sup>9</sup>

In the intervening years, and particularly following the signing of the 1996 Peace Accords, which ended the country's thirty-six-year civil war,<sup>10</sup> Guatemala's tourism industry has flourished. By 1988, the year before the publication of the *National Geographic* article, the governments of Guatemala, Honduras, Mexico, El Salvador, and Belize had already agreed to promote tourism through the creation of "La Ruta Maya," a project which connected a number of Maya sites and was designed to showcase and preserve these countries' shared cultural heritage.<sup>11</sup> A few years later, in 1996, seven Central American countries signed the Declaration of Montelimar, a pact that sought to make tourism fundamental to the region's growth and development.<sup>12</sup> Numerous Central American governments, including Guatemala's, have continued to actively court tourism.<sup>13</sup>

The "packaging" originally introduced in *National Geographic* has changed little: Guatemala continues to be marketed for its Maya ruins, indigenous cultures, colonial remnants, and biological diversity.<sup>14</sup> As the tourism industry has grown and flourished, however, the

(unpublished M.S. thesis, University of Montana), available at <http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1413&context=etd>.

<sup>8</sup> *Huipiles* are woven garments traditionally worn by indigenous women in Guatemala. *Images of the Maya*, FLA. MUSEUM NAT. HIST., <http://www.flmnh.ufl.edu/maya/maya5.htm> (last visited Aug. 18, 2014).

<sup>9</sup> Garrett, *supra* note 1, at 470.

<sup>10</sup> ELIZABETH ADAMS ET AL., GATEWAY TO THE MAYAN WORLD: AN ASSESSMENT OF COUNTERPART INTERNATIONAL'S COMMUNITY DEVELOPMENT AND SUSTAINABLE TOURISM PROJECT IN CHISEC, GUATEMALA 7, 8 (2005).

<sup>11</sup> Garrett, *supra* note 1, at 435–37. The successor project is called the "Mundo Maya." Little, *supra* note 5, at 98 n.1.

<sup>12</sup> See Lucy Ferguson, *Tourism Development and Regional Integration in Central America (ARI)*, REAL INSTITUTO ELCANO (May 20, 2010), [http://www.realinstitutoelcano.org/wps/portal/web/rielcano\\_en/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/Elcano\\_in/Zonas\\_in/ARI86-2010#.VAiDvdU4k](http://www.realinstitutoelcano.org/wps/portal/web/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/Elcano_in/Zonas_in/ARI86-2010#.VAiDvdU4k) (noting that the Declaration recognized tourism as a force for enhancing Central American global competitiveness and increasing the diversification of the region's economies); Peter S. Moreno, *Ecotourism Along the Meso-American Caribbean Reef: The Impacts of Foreign Investment*, 33 HUMAN ECOLOGY 217, 218 (2005) (noting that the 1996 pact "attracted support from the World Bank, Inter-American Development Bank (IDB), United States Agency for International Development (USAID), and the United Nations, all of which played key financial and technical roles").

<sup>13</sup> Moreno, *supra* note 12, at 218.

<sup>14</sup> See CAMTUR, GUATEMALA: GUIA OFICIAL DEL VISITANTE 4 (2011) (echoing Garrett, *supra* note 1, in portraying Guatemala as the "Heart of the Mayan World"); *Mayan World*, PROMOTORA TURISTICA PANAMERICANA, <http://ptpmundomaya.com/en/> (last visited Aug. 18, 2014) (offering tours of the "Maya world"); *Tourism*, INVEST GUAT., [http://investinguatemala.org/investors\\_guide/content/tourism](http://investinguatemala.org/investors_guide/content/tourism) (last visited Aug. 18, 2014) (explaining that Guatemala offers a variety of tourism attractions, including Maya ruins, a UNESCO World Heritage Site, and natural beauty).

industry's financial upside has become clear. In 2002, Guatemala's international tourism receipts<sup>15</sup> were more than \$640 million;<sup>16</sup> in 2010, this number ballooned to nearly \$1.4 billion.<sup>17</sup> Today, tourism accounts for the country's second highest source of foreign exchange behind only coffee exportation.<sup>18</sup> Similar trajectories in other developing countries have led one group of scholars to label this industry a "truly important source of foreign exchange inflows, significant employment opportunities, development capital, and economic diversification."<sup>19</sup> Recognizing the industry's promise, the United Nations recognized sustainable tourism as a social, environmental, and economic development tool in 2010.<sup>20</sup>

Yet a number of social scientists—primarily anthropologists and environmentalists—have documented tourism's negative side effects, particularly the industry's environmental and cultural impacts. For

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<sup>15</sup> "International tourism receipts are expenditures by international inbound visitors, including payments to national carriers for international transport . . . [and] any other prepayment made for goods or services received in the destination country. They also may include receipts from same-day visitors." *International Tourism, Receipts (Current US\$)*, WORLD BANK, <http://data.worldbank.org/> (follow "indicators" hyperlink; click on "All indicators"; then follow the hyperlink labeled "International tourism, receipts (current US\$)" under the heading labeled "Private Sector") (last visited Aug. 18, 2014).

<sup>16</sup> *Id.* (listing Guatemala's international tourism receipts at \$647 million for 2002); see also ADAMS ET AL., *supra* note 10, at 8 (citing a higher figure than the World Bank's: \$695 million for 2002).

<sup>17</sup> *International Tourism, Receipts (Current US\$)*, *supra* note 15.

<sup>18</sup> E.g., Robert E. Lutz, Essay, *A Piece of the Peace: The Human Rights Accord and the Guatemalan Peace Process*, 2 SW. J.L. & TRADE AM. 183, 190 (1995); Miller, *supra* note 7, at 1; see also CAMTUR, *supra* note 14, at 26 ("The Tourism Industry is the main economical and social pillar for the country's development. It constitutes the second largest source of foreign exchange and it is an important employment generator."). While scholars and the Guatemalan government continually recognize tourism as the country's second largest source of foreign exchange, tourism would fall to third place in these rankings if remittances (funds sent to Guatemala by migrants who have left the country) were included. See D'VERA COHN ET AL., PEW RESEARCH CTR., REMITTANCES TO LATIN AMERICA RECOVER—BUT NOT TO MEXICO 9 tbl.3 (2013) (indicating that Guatemala received more than \$5.4 billion in remittances in 2013).

<sup>19</sup> Eduardo García-Frapolli et al., *Adaptations of a Yucatec Maya Multiple-Use Ecological Management Strategy to Ecotourism*, ECOLOGY & SOC'Y, Dec. 2008, at 31, available at <http://www.ecologyandsociety.org/vol13/iss2/art31/ES-2008-2627.pdf>, at \*15; see also ADAMS ET AL., *supra* note 10, at 4 ("From a macroeconomic perspective tourism provides governments with an increasingly significant source of revenue, with international tourism holding a special status due to its ability to generate foreign exchange."); José-Roberto Pérez-Salom, *Sustainable Tourism: Emerging Global and Regional Regulation*, 13 GEO. INT'L ENVTL. L. REV. 801, 803 (2001) (noting the steady growth of the tourism industry and the sector's importance in "international and national development policies"); Christine Gudaitis, *Essay: Tourism in Developing Countries – Panacea or Poison?*, 9 U. MIAMI INT'L & COMP. L. REV. 265, 267 (2001) ("The economic impact of tourism has the potential to help less developed and economically disadvantaged countries . . .").

<sup>20</sup> See G.A. Res. 65/173, U.N. Doc. A/RES/65/173 (Dec. 20, 2010) (recommending that ecotourism be used as a tool for fighting poverty and promoting sustainable development).

example, much of Guatemala's biodiversity and natural beauty, which the *National Geographic* article featured and which continues to attract tourists, is slowly being destroyed.<sup>21</sup> Tourism also bears detriments for the local population, altering cultural traditions and expropriating traditional activities into "performances" to be viewed by foreign tourists.<sup>22</sup>

At the heart of Guatemala's burgeoning tourism industry is the country's northern Maya Biosphere Reserve, a protected area of land designated by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The reserve model seeks to reconcile environmental protection and the preservation of local livelihoods by allowing residents to continue to live and work on the land in a manner consistent with a broader conservation plan.<sup>23</sup> International nongovernmental organizations (NGOs) in the Reserve have, since its creation, promoted tourism as an activity that simultaneously serves the economic and subsistence interests of the local indigenous population and the conservationist goals of the reserve model. However, even as the mission statements of these organizations support a preservationist brand of tourism, anthropologists and environmentalists have shown that the industry—composed of NGOs—continually falls short of these laudable goals. Yet, little ink has been spilled crafting ways for NGOs to foster the economic gains of tourism while still preserving local culture and the environment. This Note aims to

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<sup>21</sup> See Bill Talbot & Kevin Gould, *Emerging Participatory Monitoring and Evaluation Programs in Two Ecotourism Projects in Petén, Guatemala*, 99 YALE SCH. FORESTRY & ENVTL. STUD. BULL. SERIES 95, 97 (1996) (noting the ecological harm that has resulted from subsistence farming in Guatemala's forest). In recent years, as the population in the Petén region (Guatemala's northernmost department, which encompasses the Maya Biosphere Reserve) has increased, the health of the forest has decreased. See Juanita Sundberg, *NGO Landscapes in the Maya Biosphere Reserve, Guatemala*, 88 GEOGRAPHICAL REV. 388, 391 (1998) ("[T]he Petén has lost approximately 50 percent of its forest cover over the past thirty years. Commercial logging, cattle ranching, oil exploration, illegal drug plantings, roads, and agriculture have brought deforestation."). While the deforestation effects are not debated, some scholars have said the root causes are in the country's land ownership structure and multiple failures to distribute land ownership more evenly among the country's population. See Nancy Peckenham, *Land Settlement in the Petén*, LATIN AM. PERSP., Spring & Summer 1980, at 169, 169 (explaining that only 2% of the population owns land, discussing that 97% of the population has access to only 19% of the country's (barely) arable land, and surveying a number of failed attempts at redistribution and resettlement in the 1940s, 1950s, and 1960s).

<sup>22</sup> See *infra* notes 32–36 and accompanying text (describing this problem in detail).

<sup>23</sup> For a discussion of the Maya Biosphere Reserve, see *infra* notes 40–41 and accompanying text. For a discussion of the large presence of NGOs in the Reserve, see Claudette Juska & Cynthia Koenig, *Planning for Sustainable Community-Based Ecotourism in Uxactun, Guatemala* 47 (June 2006) (unpublished M.S. thesis, University of Michigan), <http://www.erb.umich.edu/Research/Student-Research/PracticumUxactun.pdf>.

fill that gap. Recognizing the power and influence that international NGOs wield in this space, I argue that establishing more stringent standards—in the form of a tourism-specific voluntary code of conduct<sup>24</sup>—to which these influential players would adhere can mitigate the negative side effects of the tourism industry.

This Note's narrow focus on private regulatory solutions and on Guatemala exclusively is intentional. First, I ground my solution in private—as opposed to public—regulation because the Guatemalan government, while focused on harnessing the economic benefits of the tourism sector, has failed to acknowledge the environmental and cultural implications at the center of this Note's analysis.<sup>25</sup> Private regulation in the form of codes of conduct has existed since the 1980s, but no code has sought to align the goals of tourism with those of NGOs, nor have any organizations formally or comprehensively created a mechanism to address the documented harms of the tourism industry. This Note takes this additional step by proposing a code of conduct that holds the NGOs at the heart of Guatemala's tourism industry accountable to their mission statements and, using these organizations' already existing goals, addresses the industry's cultural and environmental harms. Second, I focus on Guatemala because the environmental and cultural harms I seek to remedy, and the NGO presence within the country's tourism industry, are well documented. While my solution is specific to the Guatemalan context, similar proposals could be used by other countries in which nature and indigenous populations are harmed by tourism industries dominated by NGOs.

This Note proceeds in three parts. Part I explores the landscape of Guatemala's tourism industry. Part I.A describes the cultural and economic detriments and benefits of the industry.<sup>26</sup> Part I.B explains the dominant role played by international NGOs in Guatemala's tourism sector, highlighting the three largest players in this region:

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<sup>24</sup> As used in this Note, a “voluntary code of conduct” is a set of rules, principles, or standards that guide organizational decisions and to which an organization decides to adhere independently of any formal government requirements. For more information on how I conceptualize voluntary codes of conduct within Guatemala's tourism industry, see *infra* Part III.B, which identifies specific code provisions that would mitigate tourism's environmental and cultural harms.

<sup>25</sup> See *infra* notes 96–100 and accompanying text (discussing the Guatemalan government's tourism plan in more detail).

<sup>26</sup> This Note does not discount the importance of tourism's economic benefits. The Guatemalan government has stressed the importance of economic growth—a goal to which tourism contributes—for accelerating development. SECRETARÍA DE PLANIFICACIÓN Y PROGRAMACIÓN DE LA PRESIDENCIA, INFORME ANUAL 2012 POLÍTICA DE DESARROLLO SOCIAL Y POBLACIÓN [2012 ANNUAL POLICY REPORT OF SOCIAL AND POPULATION DEVELOPMENT] 32 (2012).

Counterpart International (CPI), The Nature Conservancy (TNC), and CARE International (CARE). Part II explains why Guatemala's tourism industry is one in which private regulation—of which codes of conduct are one example—is a viable solution. Part III explains why the industry's NGOs would adhere to voluntary regulation and explains how specific provisions in a tourism code of conduct would mitigate the harms identified in Part I.A.

## I

### GUATEMALA'S TOURISM INDUSTRY

#### A. *Tourism's Cultural and Environmental Harms*

Tourism is one of the world's fastest growing industries.<sup>27</sup> In Guatemala's Maya Biosphere Reserve, tourism is the single largest income producer.<sup>28</sup> Despite these economic benefits, social scientists have shown that the industry also causes cultural degradation and environmental destruction. This Subpart summarizes the harms these scholars have observed.

##### 1. *Effects of Tourism on Local Culture*

Anthropological fieldwork in Guatemala demonstrates that tourism is a double-edged sword, accounting for both benefits and harm to the local culture. On the one hand, scholars have argued that tourism leads to increased "cultural pride" and "a sense of ownership and control."<sup>29</sup> When outsiders show an interest in an indigenous culture, local awareness of and pride in that culture often increases, motivating the local population to showcase, revitalize, and preserve its traditions. For example, this interest can result in the resurrection of a previously languishing traditional art form<sup>30</sup> or the restoration of historical buildings.<sup>31</sup>

On the other hand, when tourism is imposed from the outside, local culture is altered and defined by foreigners, causing severe harm. For example, the transformation of traditional handicrafts into tourist

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<sup>27</sup> See *supra* note 19 and accompanying text (discussing the growth of the tourism industry and identifying the industry's economic impact).

<sup>28</sup> *Biosphere Reserve Information*, UNESCO, <http://www.unesco.org/mabdb/br/brdir/directory/biores.asp?code=GUA+01&mode=all> (last updated Mar. 8, 2011).

<sup>29</sup> ADAMS ET AL., *supra* note 10, at 8 (quoting WORLD TOURISM ORG., TOURISM AND POVERTY ALLEVIATION 21 (2002)).

<sup>30</sup> See Matthew Krystal, *Cultural Revitalization and Tourism at the Morería Nima' K'iche'*, 39 ETHNOLOGY 149, 158 (2000) (explaining how tourism has helped revitalize traditional dance practices in one Guatemalan town).

<sup>31</sup> See LITTLE, *supra* note 1, at 71 (noting how tourism has allowed for the restoration of Antigua, which, prior to the influx of tourism in the 1900s, had languished after the country's capital was moved to Guatemala City).

attractions, as in the case of weaving, thrusts a traditionally private activity into the public eye.<sup>32</sup> This exposure results in what several scholars have labeled a “performance.”<sup>33</sup> A Maya woman weaving in the marketplace can be viewed through one lens as representing the preservation of the traditional activity. This same act, however, can be viewed through a different lens as a performance that is dictated by what tourists desire.<sup>34</sup> These women thus alter their culture to conform to tourists’ preconceived notions of what that “traditional culture” is.<sup>35</sup> Even Guatemala’s official tourism brochures and marketing materials employ idealized images of indigenous women in traditional dress to promote the country’s “cultural, ethnic, and national identity in order to attract foreign tourists.”<sup>36</sup>

Further, this “packaging” and externally imposed tourism model prevent local populations from receiving the tourism industry’s short- and long-term benefits. In the short term, for example, participation in foreign-run tourism operations “is often[ ] ‘just a job’ which may provide income but fails to offer a sense of pride, ownership, or professional development.”<sup>37</sup> Over the long term, external packaging hinders local ownership and thus endangers the survival of tourism projects following the outsiders’ departure. As a result, few indepen-

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<sup>32</sup> See Walter E. Little, *Performing Tourism: Maya Women’s Strategies*, 29 *SIGNS* 527, 527–28 (2004) (describing how Maya women weave bracelets on the streets to get the attention of tourists and, once tourists have taken notice, draw them in further by having a conversation about traditional handicrafts, including the meaning of decorative patterns and how the crafts are made).

<sup>33</sup> Little uses the “performance” description throughout his scholarship. See, e.g., Walter E. Little, *Home as a Place of Exhibition and Performance: Mayan Household Transformations in Guatemala*, 39 *ETHNOLOGY* 163, 166–67 (2000) (describing various “performance[s],” such as traditional loom weaving and flaunting traditional clothing). Christine Gudaitis also uses the performance metaphor to describe the effect of tourism on local populations. See Gudaitis, *supra* note 19, at 268 (comparing tourism to theater).

<sup>34</sup> Little explores the effect of this performative phenomenon on one community in particular, Santa Catarina Palopó. The tourism industry in Santa Catarina has propelled the town’s women into the public eye, where the women conform to the images of their town and of themselves that they believe tourists desire, making their “traditions and identity a commodity for sale to tourists.” LITTLE, *supra* note 1, at 259. The townspeople recognize the importance of this representation for their own monetary gain. See *id.* at 227 (describing how being a good salesperson is a sought-after characteristic in the town).

<sup>35</sup> See Little, *supra* note 32, at 532 (describing how the Maya “pattern their lives in ways that exploit tourists’ perceptions of Maya women”). When tourists participate in traditional activities, even simply through observing or viewing, their meaning changes. See Krystal, *supra* note 30, at 159 (providing an example of this phenomenon in the context of a dance festival).

<sup>36</sup> Little, *supra* note 5, at 89. The cover of the 2011 brochure by CAMTUR, Guatemala’s chamber of tourism, depicts a photograph of an indigenous baby nestled among brightly colored traditional weavings. CAMTUR, *supra* note 14.

<sup>37</sup> ADAMS ET AL., *supra* note 10, at 13.



dent or long-lasting benefits may be experienced locally.<sup>38</sup> Consequently, numerous scholars have argued that the success of any single tourism project hinges upon the buy-in and involvement of the local beneficiary population.<sup>39</sup>

## 2. *Effects of Tourism on the Environment*

Environmentalists have analyzed the effects of the tourism industry on Guatemala's environment. This assessment is particularly salient in Guatemala's northern region because of the Maya Biosphere Reserve, an enormous conservation project that covers more than 21,000 square kilometers of the country's tropical forest<sup>40</sup>

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<sup>38</sup> See, e.g., Miller, *supra* note 7, at iii, 3 (noting the high rates of project failure when NGOs that initiate projects do not leave the community with the skills or knowledge to continue the initiative after the NGO departs); see also Sundberg, *supra* note 21, at 401–02 (identifying another problem with the NGOs' dominance in that NGOs choose the areas for ecotourism projects, but "often these areas do not coincide with those to which the state gives high priority," and once the NGO departs, locals often must turn to the government "to rescue the project in an area in which it had not planned to invest because it was not considered a viable tourist destination").

<sup>39</sup> See, e.g., Moreno, *supra* note 12, at 238 ("Achievement of ecotourism benefits depends at least partly on the extent of governmental and community commitment to advancing ecotourism elements . . . ."); Ellen J. Kohler, Comment, *The Maya Biosphere Reserve Project: Coming Closer to the Ideal with the Help of Outsiders*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 269, 293 (1993) (stating that organizations involved with biosphere reserves "must . . . take seriously their responsibility to empower rural communities and to give the people . . . more control over the decisions made about their lives"); Juska & Koenig, *supra* note 23, at 32, 95 (discussing the importance of local investment and community involvement as an alternative to the domination of foreign investment).

<sup>40</sup> See *Biosphere Reserve Information*, *supra* note 28 (stating that the Reserve encompasses more than 2.1 million hectares, which is equivalent to more than 21,000 square kilometers). Guatemala signed on to participate in UNESCO's Man and the Biosphere Programme (MAB) in 1990. *Id.* This program seeks "to promote sustainable development based on local community efforts and sound science," *Biosphere Reserves – Learning Sites for Sustainable Development*, UNESCO, <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/> (last visited Aug. 18, 2014), and was intended as an alternative to the national park model, which was often found to neglect the concerns of local populations and worsen existing socioeconomic problems, see Sundberg, *supra* note 21, at 388 (listing these concerns as reasons why the national park model fell out of favor). Instead of the preserve model, which forbids nearly all activity on protected land, see Michael J. Zamba, *Entrepreneurs of Ecotourism*, AMÉRICAS, Sept.–Oct. 2011, at 60, 60 (describing how villagers saw a national park in their backyard as a barrier because it prevented farming and hunting), the reserve model continues to allow local use of the protected land, seeking to make local livelihoods sustainable, see *Biosphere Reserves – Learning Sites for Sustainable Development*, *supra*. The land within the Reserve's protected area "is divided into zones that are designated for various uses, each with a distinctive protective status." Sundberg, *supra* note 21, at 392. The Maya Biosphere Reserve was designated by UNESCO. See *Biosphere Reserve Information*, *supra* note 28 (stating that the Reserve was designated in 1990); *Designation of Biosphere Reserves*, UNESCO, <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/designation-process/> (last visited Aug. 18, 2014) (describing the designation procedure). The Reserve is administered by

and is home to Tikal, a landmark Maya site and one of Guatemala's most visited tourist attractions.<sup>41</sup>

Similar to its mixed cultural effects, tourism also carries both environmental promise and destruction. Many scholars view tourism as a means to raise the financial resources and create the awareness necessary to protect environmentally important regions. These commentators argue that tourism links "livelihoods to resource protection" and, in doing so, presents a solution to environmental degradation.<sup>42</sup> Moreover, they reason that tourism has the power to shift perspectives on conservation.<sup>43</sup> That is, when foreign tourists arrive to view the natural and untouched beauty of a location, the cost of destroying those natural surroundings increases. As a result, efforts

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Guatemala's National Council of Protected Areas (CONAP, its Spanish acronym). Sundberg, *supra* note 21, at 392. Like all of UNESCO's reserves, it undergoes periodic review every ten years. See *Periodic Review Process*, UNESCO, <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/periodic-review-process/> (last visited Aug. 18, 2014) (describing the periodic review process); see also UNESCO, BIOSPHERE RESERVES WHICH HAVE PROVIDED PERIODIC REVIEW REPORTS REPORTS [SIC] EXAMINED BY THE MAB ICC AS OF SEPTEMBER 2013, at 2 (2013), [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/Periodic\\_review\\_BR\\_sept\\_2013\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/Periodic_review_BR_sept_2013_en.pdf) (indicating that the Maya Biosphere Reserve provided its first periodic review report in 2001).

<sup>41</sup> Tikal was declared a national park in 1955 and a UNESCO World Heritage Site in 1979. *Tikal National Park*, UNESCO, <http://whc.unesco.org/en/list/64> (last visited Aug. 18, 2014). The preserved city, "one of the major sites of Mayan civilization," consists of more than 3000 buildings. *Id.* Garrett describes the city as the benchmark against which other Maya sites are compared: "It had the largest ceremonial center, the tallest collection of pyramid-temples, the largest city area . . . and a population estimated at 55,000. In sophistication it rivaled any world capital of the time and held perhaps the greatest collection of artists, artisans, and architects ever assembled in the Maya world." Garrett, *supra* note 1, at 468. The site continues to be important for the country's tourism industry. A 2005 estimate found that Tikal accounts for fifteen percent of the tourists that visit Guatemala. Juska & Koenig, *supra* note 23, at 86.

<sup>42</sup> ADAMS ET AL., *supra* note 10, at 9; accord Pérez-Salom, *supra* note 19, at 834 (explaining that tourism relies on an unspoiled environment, thus making conservation important); Talbot & Gould, *supra* note 21, at 102 ("Local sustainable economic development and biodiversity conservation are highly compatible, and rural communities that gain economic benefit from forest products (or in this case, ecotourism) will be more inclined to protect the forest and the biodiversity within it."); Miller, *supra* note 7, at 77 ("When the community benefits as a whole from the institution of a [tourism] project, the entire population has the incentive to conserve certain resources so that tourists will pay to enjoy them."). Absent tourism, community resources may face a "tragedy of the commons" problem in which no one is clearly responsible for their maintenance and all exploit them for their own gain. Moreno, *supra* note 12, at 236.

<sup>43</sup> See Zamba, *supra* note 40, at 63 (noting that the "message of profiting through the protection of natural resources is resonating" in several Guatemalan villages); *supra* note 42 and accompanying text (explaining that because tourism links environmental resources to the local population's livelihood, it can lead locals to view preservation of these resources as a matter of utmost importance).

to protect these resources increase as the local population comes to view the resources as a source of income and pride.

However, scholars also point to the unsustainability of tourism and the manner in which it shifts livelihoods away from traditional employment sources to suggest that the environmental benefits of the industry are not that easily attained or maintained. For example, the economic growth accompanying tourism may spur migration into areas that cannot handle large population increases.<sup>44</sup> Such movement stresses the land,<sup>45</sup> increases waste,<sup>46</sup> and dramatically impacts local wildlife.<sup>47</sup> Environmental harm may also stem from the employment shift that results from the tourism industry. Tourism provides an alternative to traditional reliance on subsistence agriculture.<sup>48</sup> While such diversification may be economically beneficial, it carries with it direct environmental harms: Plots farmed by service-oriented households lack the sustainability of those farmed by agricultural households.<sup>49</sup>

Finally, in examining the environmental gains and losses associated with Guatemala's tourism industry, environmentalists have identified the important role played by the UNESCO Biosphere Reserve model itself. This model provides a number of benefits: careful monitoring of biological factors and statistics, continued local access to the Reserve, and a greater number of subsistence opportunities when compared with a traditional preserve model (in which nearly all

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<sup>44</sup> See ADAMS ET AL., *supra* note 10, at 11 (noting that increases in tourism can place burdens on natural resources and the resulting new businesses can “spur immigration to an area unable to handle the influx of population”); Tamar Diana Wilson, *The Impacts of Tourism in Latin America*, *LATIN AM. PERSP.*, May 2008, at 3, 14 (noting that “[e]conomic carrying capacity is threatened as tourist resorts add more and more visitors in the interest of profit making” and that “physical and environmental carrying capacity is breached when use begins to interfere with the environment’s capacity for regeneration”).

<sup>45</sup> See *supra* note 44 (discussing how tourism stresses the land).

<sup>46</sup> See Garrett, *supra* note 1, at 472 (documenting such harms in Lake Atitlán, a tourist destination in Guatemala, by noting how, over the course of twenty-nine years, tourism caused “a 1,600 percent increase in vacation homes on the lake and more tour boats and hotels—all dumping sewage into the lake”).

<sup>47</sup> See Wilson, *supra* note 44, at 14 (listing negative environmental effects of tourism, including disruption of breeding patterns, air and water pollution, problems with sewage and trash disposal, and erosion); Garrett, *supra* note 1, at 472 (noting, as a result of the population increases around Lake Atitlán, “an 80 percent loss of wildlife habitat”).

<sup>48</sup> See Talbot & Gould, *supra* note 21, at 96 map 1 (describing several tourism projects for rural communities in the Maya Biosphere Reserve that are intended to serve as economic alternatives to slash-and-burn agriculture).

<sup>49</sup> García-Frapolli et al., *supra* note 19, at \*10 (noting that plots belonging to service-oriented households are cleared every five years on average, whereas plots belonging to agricultural households are cleared every eighteen). The main economic activity of service-oriented households is within the service industry and involves minimal work on agricultural plots, whereas agricultural households engage primarily in the management of agricultural plots. *Id.* at \*9.

activity on the protected land is prohibited).<sup>50</sup> However, the Maya Biosphere Reserve is no exception to the outsider-imposed tourism model;<sup>51</sup> it was created by UNESCO and imposed without the voices of local communities.<sup>52</sup> Scholars have repeatedly emphasized the importance of local involvement in achieving conservation goals.<sup>53</sup> The fact that the Reserve was imposed by outsiders creates tangible and intangible harms for the local population. At the same time, the lack of local voices also directly impairs the central goal for which the Reserve was created: environmental protection. The outsider-imposed model makes it so that decisions regarding the Reserve have been made without valuable local information about “ecosystem processes and sustainable harvesting,”<sup>54</sup> for example. This problem is longstanding; the Reserve has been maintained by foreign NGOs rather than locals since its creation.<sup>55</sup>

In short, environmentalists raise concerns about the absence, and central importance, of local inclusion that are similar to those raised by anthropologists and discussed in Part I.A.1. In addition to emphasizing local inclusion, environmentalists also note the importance of balancing multiple considerations and the interests of multiple constituencies—including the livelihoods of the local population and the Reserve’s conservation goals—for achieving positive long-term results.

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<sup>50</sup> See *supra* note 40 (discussing the Reserve in detail and comparing the Biosphere Reserve model to that of a traditional preserve); see also Kohler, *supra* note 39, at 270 (“[The] goal [of the Reserve] is to support the local community without depleting the resources within the most biologically diverse areas, making the protected area an integral part of land management rather than an untouchable island.”).

<sup>51</sup> See, e.g., ADAMS ET AL., *supra* note 10, at 10 (providing an example of tourism beginning with a strong outside influence); Talbot & Gould, *supra* note 21, at 105 (“Tourism is a foreign idea that has taken several years to teach in the rural communities.”).

<sup>52</sup> See Kohler, *supra* note 39, at 292 (“The Maya Biosphere Reserve has not been successful at incorporating local people in the decision-making processes.”).

<sup>53</sup> See *id.* at 294 (arguing that the focus of biosphere reserves “must now shift to incorporating local people in reserve management and developing viable systems to support their economy without destroying the ecosystem”). For further discussion on the importance of local participation for continued sustainability and conservation of protected areas, see Jason Gray, *Indigenous Communities and Biodiversity Conservation: Protected Areas and the Right to Consultation*, 12 GONZ. J. INT’L L., no. 2, 2009, <https://www.law.gonzaga.edu/gjil/2009/04/indigenous-communities-and-biodiversity-conservation/>.

<sup>54</sup> Kohler, *supra* note 39, at 293.

<sup>55</sup> See generally *id.* (discussing the UNESCO biosphere reserve model in general and specifically exploring the role of NGOs in the Maya Biosphere Reserve).

### B. A Landscape Dominated by International NGOs

As in many parts of Latin America, there is a strong NGO presence in Guatemala<sup>56</sup> and the country's tourism industry is no exception. This presence may be due in part to the fact that the Guatemalan government has openly recognized that NGOs play an important role in the country's economic and social development.<sup>57</sup> The presence of international NGOs in Guatemala's tourism industry is most evident within the Maya Biosphere Reserve.<sup>58</sup> Three NGOs in particular—CPI, TNC, and CARE—have been identified by numerous scholars as the primary international players in this region.<sup>59</sup>

None of these organizations are expressly focused on tourism, yet they have each become involved in Guatemala's tourism sector because of their intimate involvement in the country's environmental and social goals, which have been interlaced with the country's tourism industry.<sup>60</sup> For example, from 2006 to 2012, CPI—which seeks

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<sup>56</sup> See Jorge Balbis, *NGOs, Governance and Development in Latin America and the Caribbean* (UNESCO Mgmt. of Soc. Transformations, Discussion Paper No. 53, 2001), available at [http://www.unesco.org/most/dsp53\\_en.htm](http://www.unesco.org/most/dsp53_en.htm) (explaining that “NGOs have for a long time been at the forefront of the fight against scourges such as poverty, famine, illiteracy and social marginalization” in Latin America and the Caribbean, and that the number of NGOs in this region grew dramatically between 1960 and 1990).

<sup>57</sup> See LEY DE ORGANIZACIONES NO GUBERNAMENTALES PARA EL DESARROLLO [LAW OF NONGOVERNMENTAL DEVELOPMENT ORGANIZATIONS] pmbL (Guat.) (stating that the Peace Accords following the end of the country's civil war recognize the necessity of involving all actors and specifically NGOs, which have the experience and capacity to contribute to the economic and social development of the country).

<sup>58</sup> See, e.g., Kohler, *supra* note 39, at 270 (discussing the central role that NGOs have played in implementing the UNESCO biosphere project); *supra* notes 52–55 and accompanying text (discussing the outside maintenance and creation of the Reserve).

<sup>59</sup> See, e.g., Sundberg, *supra* note 21, at 393 (identifying the three major players as The Nature Conservancy, CARE International, and Conservation International); Kohler, *supra* note 39, at 286 (same). I focus on Counterpart International (CPI) rather than Conservation International (CI) because, while CI has played a large role in environmental conservation in the Reserve, CPI increasingly has been recognized for its work in the region's tourism industry. See, e.g., ADAMS ET AL., *supra* note 10, at 3 (analyzing the tourism work of CPI in Chisec, a municipality located in Alta Verapaz); Zamba, *supra* note 40, at 60 (discussing a specific CPI project in Alta Verapaz). Thus, I discuss the environmental work of NGOs through my focus on The Nature Conservancy, and omit discussion of CI to discuss CPI, a more tourism-focused NGO.

<sup>60</sup> As Jeffrey Fischer explains, the Reserve is threatened by both inside and outside forces—poverty on the inside and industries such as logging on the outside; the solution to the continued environmental destruction “may lie in the ever-growing industry of tourism.” Jeffrey Fischer, *Eco-tourism as a [sic] Impetus for Economic Development in Guatemala*, ETHICS DEV. GLOBAL ENV'T: TRADE & ENV'T, [http://www.stanford.edu/class/e297c/trade\\_environment/photo/hdevelop.html](http://www.stanford.edu/class/e297c/trade_environment/photo/hdevelop.html) (last updated Dec. 28, 1999). The role of NGOs in this environment would otherwise be filled by large corporations. See *id.* (describing how “companies are only interested in making money and have no designs on maintaining the goals of responsible eco-tourism” and so other sources of tourism funding must be found, i.e., through NGOs).

to provide communities with “the tools necessary for sustained social, economic and environmental progress”<sup>61</sup>—worked in Guatemala’s rural communities implementing tourism programs that highlighted Maya ruins and natural attractions.<sup>62</sup> TNC, which at its heart is a conservation organization,<sup>63</sup> has worked in Guatemala for nearly twenty-five years and has played a central role in the development of the Maya Biosphere Reserve, including “promot[ing] sustainable tourism-based livelihoods” in the region.<sup>64</sup> CARE—which works to reduce poverty by improving “gender equality and empowering women and girls”<sup>65</sup>—also has long worked in the Maya Biosphere Reserve and with the local population in the region to encourage environmentally sound livelihoods.<sup>66</sup>

While I focus on these three international NGOs because of their central role in the country’s tourism landscape, there are also for-profit entities<sup>67</sup> and Guatemalan NGOs<sup>68</sup> involved in this industry. My

<sup>61</sup> McGLADREY & PULLEN, COUNTERPART INTERNATIONAL, INC.: FINANCIAL REPORT 6 (2008).

<sup>62</sup> *Guatemala Community Tourism Alliance*, COUNTERPART INT’L, <http://www.counterpart.org/our-work/projects/community-tourism-alliance-in-guatemala> (last visited Aug. 18, 2014); see generally Zamba, *supra* note 40 (describing the work of CPI in Alta Verapaz, a department in North Central Guatemala).

<sup>63</sup> See *Our History*, NATURE CONSERVANCY, <http://www.nature.org/about-us/vision-mission/history/index.htm> (last visited Aug. 18, 2014) (noting that TNC is “the world’s leading conservation organization”).

<sup>64</sup> *Maya Forest*, NATURE CONSERVANCY, <http://stage.nature.org/ourinitiatives/regions/northamerica/mexico/placesweprotect/maya-forest.xml> (last visited Aug. 18, 2014).

<sup>65</sup> CARE INT’L, ANNUAL REPORT 2011, at 3 (2011).

<sup>66</sup> When the Biosphere Reserve was first created, CARE was tasked with “implementing the environmental education component” of the Reserve. Kohler, *supra* note 39, at 289. This education focused on helping local residents “learn about the need to conserve the ecosystem and sustain economic development in the region.” *Id.* at 290.

<sup>67</sup> For example, all of the major hotel chains operate in Guatemala. See *Guatemala City, Guatemala*, HOTELS.COM, <http://www.hotels.com/> (enter “Guatemala City, Guatemala” under “Hotel search”; leave “Check in” and “Check out” dates blank; select “1 room, 2 adults” under “Rooms”; then click “Search”) (last visited Aug. 18, 2014) (listing the hotels in Guatemala City). Tour companies like Caravan Tours and Overseas Adventure Travel offer complete tour packages targeted toward United States travelers. See *Guatemala with Tikal, Atitlán and Antigua*, CARAVAN.COM, <http://www.caravan.com/tour/Guatemala> (last visited Aug. 18, 2014) (listing the itinerary for this tour); *Route of the Maya*, OVERSEAS ADVENTURE TRAVEL, <http://www.oattravel.com/trips/land-adventures/central-america/route-of-the-maya/2014> (last visited Aug. 18, 2014) (same).

<sup>68</sup> For example, EntreMundos is a Guatemalan NGO that engages in community tourism in Quetzaltenango and has partnered with other larger foundations and NGOs, such as the Planet Wheeler Foundation. *Our Partner Organizations*, ENTREMUNDOS, <http://www.entremundos.org/partner-organizations.html> (last visited Aug. 18, 2014). Quetzaltrekkers is a Guatemalan nonprofit trekking and outdoors association. *What We’re All About*, QUETZALTREKKERS, <http://www.quetzaltrekkers.com/guateabout.html> (last visited Aug. 18, 2014). The organization’s income funds sixty percent of the operating costs of another Guatemalan NGO, a school for local children, which is simultaneously sustained by partnerships with larger organizations, such as Save the Children. *History of*

focus on nonprofit entities rather than for-profit players stems from this Note's concern with tourism's effects on local indigenous populations and the environment. The goals of local inclusion and environmental conservation that I discuss in this Note are inherently more aligned with the missions of nonprofit organizations than for-profit corporations.<sup>69</sup> I further narrow my focus to international nonprofits because Guatemalan NGOs do not have the financial resources to independently support large-scale tourism projects and thus often partner with international organizations on these matters.<sup>70</sup>

## II

### GUATEMALA'S TOURISM INDUSTRY AS A CANDIDATE FOR PRIVATE REGULATION

A tourism-specific code of conduct—which falls within the category of “private regulation”—could help address the environmental and cultural harms that stem from the tourism industry. This Part identifies the current industry regulatory scheme and explains how the industry fulfills the conditions scholars have identified as essential to the formation of private regulation.<sup>71</sup>

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*the School*, ESCUELA DE LA CALLE EDELAC, <http://www.escueladelacalle.org/history-school/> (last visited Aug. 18, 2014).

<sup>69</sup> See Fischer, *supra* note 60 (explaining that major corporations, such as the companies that own resort hotels, are focused on generating profits, not environmental protection). It is true that, in the 1990s, for-profit corporations increasingly began to adopt corporate codes of conduct in response to pressure demanding that they consider and address the impacts of their activities. See Frederick Mayer & Gary Gereffi, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, 12 BUS. & POL., no. 3, art. 11, 2010, at 5 (tracing the evolution of corporate social responsibility). Ultimately, however, the central goal of for-profit corporations is profit maximization and the interests of their shareholders. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”). But see William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992) (noting disagreement as to whether the corporation should be viewed as existing solely for the benefit of the shareholders or as a “social institution” with a broader public purpose). The end goal for nonprofit organizations, in contrast, is ensuring positive results in their respective fields of operation, which will attract the donations necessary for continued operations. See *infra* note 89 and accompanying text (emphasizing the importance of NGO accountability to donors).

<sup>70</sup> See, e.g., Vicky Brehm, *NGOs and Partnership* 1 (Int'l NGO Training & Res. Ctr., NGO Policy Briefing Paper No. 4, 2001), available at [http://www.dochas.ie/Shared/Files/4/INTRAC\\_policy\\_paper\\_on\\_NGO\\_partnership.pdf](http://www.dochas.ie/Shared/Files/4/INTRAC_policy_paper_on_NGO_partnership.pdf) (“Partnerships between NGOs based in the ‘North’ and the ‘South’ have become a key part of international development processes.”); see also Fischer, *supra* note 60 (“The poor Latin American communities . . . do not possess the resources to start a tourism industry on their own.”).

<sup>71</sup> The conditions discussed here have been identified as necessary for the development of private regulation, but research has yet to suggest that these conditions are sufficient for such regulation. I thus suggest that because the conditions are met, the industry is one in which private regulation conceivably could arise. There is no evidence that this type of

### A. *An Overview of Codes of Conduct*

Private regulation—“rule-making by non-governmental actors”<sup>72</sup>—is a regulatory category that includes codes of conduct and is proliferating across a variety of industries.<sup>73</sup> In defining private regulation, scholars have explained that this form of regulation “encompasses other private leading regulators (NGOs) or multi-stakeholder scenarios” as opposed to just the rule-makers and targets, and that “[a] distinctive feature of private regulation is the participation of actors coming not only from the industry but also from the public or NGO sector and from epistemic communities.”<sup>74</sup>

Tourism codes of conduct were first widely used in the 1980s and 1990s.<sup>75</sup> These codes were largely directed at tourists (listing various “dos” and “don’ts” of visiting a particular location) and were principally government driven.<sup>76</sup> Today, tourism codes of conduct target the

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private regulation is taking place in the Guatemalan tourism industry yet. However, at least one NGO working in Guatemala—Norwegian Church Aid, an organization that works to improve women’s rights and indigenous land rights, and to provide relief in the wake of disasters—is incorporating the HAP Standard, discussed in more detail in Part III.B, into its work in the country. See *Guatemala, NORWEGIAN CHURCH AID* (May 6, 2013), <http://www.kirkensnodhjelp.no/en/where-we-work/guatemala/> (describing cooperation with local organizations to address women’s and indigenous people’s rights). This example supports the conclusion that more stringent accountability mechanisms—such as those reflected in the HAP Standard and those proposed in this Note—can be successfully adopted in this setting. See *NORWEGIAN CHURCH AID, COUNTRY PLAN 2011–2015: GUATEMALA 16* (2010) (describing a deep commitment to accountability to all stakeholders throughout all stages of project design and implementation). For further discussion of the HAP Standard, see *infra* notes 158, 173–75, 186–96 and accompanying text.

<sup>72</sup> Tim Büthe, *Private Regulation in the Global Economy: A (P)Review*, 12 *BUS. & POL.*, no. 3, art. 2, 2010, at 1 n.1.

<sup>73</sup> See, e.g., Tim Bartley, *Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia*, 12 *BUS. & POL.*, no. 3, art. 7, 2010 (forestry and apparel manufacturing); Doris Fuchs & Agni Kalfagianni, *The Causes and Consequences of Private Food Governance*, 12 *BUS. & POL.*, no. 3, art. 5, 2010 (agricultural production, processing, and trade, and retail sale of food); Jessica F. Green, *Private Standards in the Climate Regime: The Greenhouse Gas Protocol*, 12 *BUS. & POL.*, no. 3, art. 3, 2010 (greenhouse gas emissions); Margaret L. Satterthwaite, *Indicators in Crisis: Rights-Based Humanitarian Indicators in Post-Earthquake Haiti*, 43 *N.Y.U. J. INT’L L. & POL.* 865 (2011) (humanitarian NGOs); Shana Starobin & Erika Weinthal, *The Search for Credible Information in Social and Environmental Global Governance: The Kosher Label*, 12 *BUS. & POL.*, no. 3, art. 8, 2010 (kosher food labeling).

<sup>74</sup> Fabrizio Cafaggi & Agnieszka Janczuk, *Private Regulation and Legal Integration: The European Example*, 12 *BUS. & POL.*, no. 3, art. 6, 2010, at 2.

<sup>75</sup> See Peter Mason & Martin Mowforth, *Codes of Conduct in Tourism*, 2 *PROGRESS TOURISM & HOSPITALITY RES.* 151, 152 (1996) (explaining that, although the British Countryside Commission’s Country Code was devised and promoted in the 1960s, codes of conduct for tourists did not proliferate until the 1980s and 1990s).

<sup>76</sup> See *id.* at 154–57 (detailing examples of government-driven tourism codes in England and Costa Rica). Government involvement in Guatemala’s tourism industry is relatively weak, making adoption of such a government-driven code less likely. See *infra*



conduct of the tourism industry,<sup>77</sup> the activities of travelers in various countries,<sup>78</sup> and the sexual exploitation of children in connection with the tourism industry.<sup>79</sup> The United Nations, recognizing the importance of tourism to both the countries being visited and the people visiting them, adopted a Global Code of Ethics for Tourism in 2001, which affirms the importance of tourism, encourages the use of environmentally sustainable forms of tourism (such as ecotourism), and advocates for the use of tourism as a tool to aid local populations.<sup>80</sup> While these codes of conduct are directed at the tourism sector generally, none tackle the problems addressed in this Note. They do not recognize the role that NGOs play in the industry and thus are not directed at these organizations. Moreover, existing codes read more as precatory guidelines rather than actual rules of conduct and lack enforcement mechanisms. However, in recognizing that the tourism industry can create both positive and negative effects, existing tourism codes of conduct support the underlying premise that the sector must find an effective way to minimize its harms and maximize its benefits.

Private regulation of NGOs—through codes of conduct, standards, and indicators—was “born of the major shifts in humanitarianism of the late 1980s and early 1990s.”<sup>81</sup> Despite an increasing presence in recent years, however, private regulation is still an area that has been little studied,<sup>82</sup> and examinations of its on-the-ground

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notes 91–95 and accompanying text (describing the lack of government regulation and involvement in the industry).

<sup>77</sup> E.g., CODE OF CONDUCT FOR SAFE & HONOURABLE TOURISM (Incredible India 2010), available at [http://iato.in/pdf/Code\\_of\\_Conduct\\_for\\_Safe\\_and\\_Hon%27ble\\_Tourism.pdf](http://iato.in/pdf/Code_of_Conduct_for_Safe_and_Hon%27ble_Tourism.pdf) (code for India); CODE OF CONDUCT FOR TOURIST GUIDES (Travel Indus. Council of H.K. 2010), available at [http://www.tichk.org/public/website/en/guides/code\\_of\\_conduct\\_e\\_2010\\_07.pdf](http://www.tichk.org/public/website/en/guides/code_of_conduct_e_2010_07.pdf) (code for Hong Kong); *Code of Ethics*, TOURISM INDUS. ASS'N N.Z., <http://www.tianz.org.nz/main/code-of-ethics/> (last visited Aug. 18, 2014) (code for New Zealand).

<sup>78</sup> E.g., *Code of Ethics for Travellers*, LAST FRONTIERS, [http://www.lastfrontiers.com/rt\\_code.php](http://www.lastfrontiers.com/rt_code.php) (last visited Aug. 18, 2014).

<sup>79</sup> E.g., *About*, THECODE.ORG, <http://www.thecode.org/about/> (last visited Aug. 18, 2014).

<sup>80</sup> G.A. Res. 56/212, U.N. Doc. A/RES/56/212 (Dec. 21, 2001).

<sup>81</sup> Satterthwaite, *supra* note 73, at 884; *see also id.* at 884–85 (explaining that the rise of these forms of regulation occurred in response to a number of humanitarian aid failures—such as the aftermath of the 1994 Rwandan genocide—and that these failures led to a broad understanding of “[t]he need for NGOs to improve their performance” (alteration in original) (quoting JOHN BORTON ET AL., *THE INTERNATIONAL RESPONSE TO CONFLICT AND GENOCIDE: LESSONS FROM THE RWANDA EXPERIENCE* (1996))). In the corporate setting, private governance arose in response to globalization. *See* Mayer & Gereffi, *supra* note 69, at 3–5 (detailing the historical circumstances under which private governance arose).

<sup>82</sup> *See* Büthe, *supra* note 72, at 1 (explaining that there have been few studies of private regulation that analyze more than a single issue area); *see also* Cafaggi & Janczuk, *supra*

impact are even more recent phenomena.<sup>83</sup> This Note works within the framework of a code of conduct because it is a form of governance with which NGOs are already familiar and that, as explained in Part III.A, carries a built-in enforcement and adherence apparatus.

While the current implementation of tourism programs leaves much to be desired, an entire regulatory overhaul is not necessary to reverse the industry's current harms. Nonetheless, the code of conduct suggested in this Note goes much further than the generalized advice of existing tourism codes of conduct. Rather than providing vague "dos" and "don'ts" for travelers or tour companies, it goes to the heart of the industry's problems: the NGOs that dominate the industry. Moreover, any proposed government regulation has thus far failed to recognize the connected problems of cultural harm and environmental destruction, focusing instead solely on harnessing the economic benefits of the industry.<sup>84</sup> A code of conduct can fill the current gap and give substance to existing NGO mission statements, thus ensuring that the benefits of the tourism industry serve local communities and the environment, as well as NGO constituencies.

### B. *Establishing a Code of Conduct in Guatemala*

The existing literature identifies four threshold conditions that are necessary for private regulation to arise: economic and/or political gain for the suppliers of the regulation, a lack of existing governmental regulation, public outcry over existing conditions, and a cross-border relationship in the regulated industry. Each of these conditions is met in Guatemala's tourism industry, demonstrating that it is one in which private regulation could arise.

First, Tim Büthe has articulated the importance of economic or political gain for the suppliers and drivers of private regulation, stating that "the supply of private regulation virtually never occurs unless it also brings private political-economic benefits to the suppliers."<sup>85</sup> While Büthe and others discuss these gains in terms of for-profit cor-

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note 74, at 1 (noting the lack of any systematic analysis of the role of private regulation in the context of European legal integration).

<sup>83</sup> See Mayer & Gereffi, *supra* note 69, at 2, 7 (explaining that research to date is largely descriptive and anecdotal); see also Bartley, *supra* note 73 (exploring the on-the-ground implications of private regulation by looking closely at the forestry and apparel industries in Indonesia).

<sup>84</sup> See *infra* notes 96–100 and accompanying text (discussing the Guatemalan government's industry plan).

<sup>85</sup> Tim Büthe, *Global Private Politics: A Research Agenda*, 12 *BUS. & POL.*, no. 3, art. 12, 2010, at 6 n.1; see also Büthe, *supra* note 72, at 9–10 (noting that one of the most important drivers behind the creation of private regulation is the associated increased economic efficiency and decreased transaction costs).

porations,<sup>86</sup> a similar analysis can be employed to understand the benefit of private regulation to NGOs. Making a formal commitment to a code of conduct signals an NGO's commitment to its donors, members, and beneficiary populations. The organization makes a strong statement that only conduct that meets the requirements of the code will be tolerated, thus increasing accountability, transparency, and, in turn, legitimacy.<sup>87</sup> For example, in explaining the benefits of the People In Aid Code, the organizers explain that “[i]mplementing the Code gives evidence to internal and external stakeholders of the quality of your human resource management and the improvements your agency is committing to making.”<sup>88</sup> The Code serves as a third-party “stamp of approval,” which indicates that the organization can be trusted to use donations wisely and make good on promises in its marketing materials.<sup>89</sup> Just as consumers will purchase the products they view to be the safest, donors will donate to the organizations they trust the most. The NGOs discussed in this Note are no different; adhering to a code of conduct would signal greater accountability to the organizations' missions and beneficiary populations, thereby carrying the promise of increased donations.

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<sup>86</sup> See Bütke, *supra* note 72, at 10 (noting examples in which “[d]emand for private regulation . . . is fully explained by private parties’ . . . anticipated . . . efficiency gains”); Green, *supra* note 73, at 26–27 (explaining how establishing a single system for calculating and measuring greenhouse gas emissions reduces the transaction costs of switching between multiple protocols). For example, in the for-profit space, the most highly regarded mark of safety for electronics is approval by Underwriters Laboratories (UL). See Yesim Yilmaz, *Private Regulation: A Real Alternative for Regulatory Reform* 9 (Cato Inst., Cato Policy Analysis No. 303, 1998) (“Today, it is almost impossible for a producer of electronic appliances and equipment to claim that its products are safe without the approval of Underwriters Laboratories . . .”). UL is an independent third party whose stamp of approval does not coincide with any government regulatory scheme. Still, consumers and insurers alike look to UL approval as a mark of product safety. *Id.*

<sup>87</sup> See MARIE CHÊNE, U4 ANTI-CORRUPTION RES. CTR., DEVELOPING A CODE OF CONDUCT FOR NGOS 3 (2009), available at <http://www.u4.no/publications/developing-a-code-of-conduct-for-ngos/> (explaining the benefits to NGOs of developing codes of conduct). For an analogous example in the for-profit market, consider StellaService, a company that rates online companies on the basis of their customer service performance. Companies that perform highly on StellaService's administered tests are awarded a StellaService Seal, which carries with it three primary benefits: (1) “[v]alidat[ing] the company's] top-rated customer service through an independent third party,” (2) “[i]ncreas[ing] [its] conversion rate and lower[ing] [its] bounce rate,” and (3) “[I]ncreas[ing] the seal across online and offline marketing channels.” *Use the StellaService Seal to Communicate Your Outstanding Customer Service*, STELLASERVICE (Oct. 11, 2012), <http://happycustomer.stellaservice.com/2012/10/11/use-the-stellaservice-seal-to-communicate-your-outstanding-customer-service/>.

<sup>88</sup> CODE OF GOOD PRACTICE IN THE MANAGEMENT AND SUPPORT OF AID PERSONNEL 23 (People In Aid 2003) [hereinafter PEOPLE IN AID CODE].

<sup>89</sup> See CHÊNE, *supra* note 87, at 2 (“The legitimacy of the NGOs is tied to its accountability to its constituency . . . , the transparency of its processes, its adherence to its mission and its effectiveness in fulfilling its mandate.”).

Second, private regulation arises when there is no public regulation of an industry,<sup>90</sup> a condition that is clearly present in Guatemala's tourism sector. Françoise Simon, speaking about regulation of the tourism industry as a whole, has called the current framework "a patchwork of agreements and treaties that concern trade more than tourism and are often in conflict."<sup>91</sup> Guatemala has no uniform body or code that regulates the tourism industry. For instance, in Guatemala, handicraft vendors dot the streets and plazas, catering to tourists' purchasing desires and teaching foreigners Spanish and local culture.<sup>92</sup> Yet there is little regulation of these sales<sup>93</sup> and the money made from these transactions goes unregulated and untaxed.<sup>94</sup> These actions are significant not only because traditional handicrafts are an enormous tourist draw, but because more than half of the country's population is self-employed, and many self-employed workers are street vendors.<sup>95</sup>

In more recent years, however, the Guatemalan government has motioned toward possible industry regulation. In 2012, the govern-

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<sup>90</sup> See, e.g., Büthe, *supra* note 85, at 5 (explaining that private regulation often fills a void in the event of "political deadlock"); Büthe, *supra* note 72, at 4 (explaining why governments are providing fewer regulations for the global economy and increasingly leaving such rulemaking to private bodies). Private regulation need not, however, diminish or displace the power of the State. See, e.g., Bartley, *supra* note 73, at 2 (noting that private regulation does not need to trump or bypass the State); Büthe, *supra* note 72, at 22 (same); Cafaggi & Janczuk, *supra* note 74, at 21 (same). Moreover, the eventual coalescing of private and public regulation may be important for the regulation to continue to have traction. See Mayer & Gereffi, *supra* note 69, at 19 (arguing that private regulation alone cannot provide adequate global governance). Private regulation is, however, an important stepping stone toward public regulation. See *id.* at 20 (explaining why private regulation has preceded public governance). This Note recognizes the value of private regulation; however, it does not suggest that government regulation or involvement in the industry is unnecessary.

<sup>91</sup> Françoise Simon, *Regulating Ecotourism: Legal Frameworks and Market Guidelines*, 99 YALE SCH. FORESTRY & ENVTL. STUD. BULL. SERIES 192, 197 (1996).

<sup>92</sup> See Little, *supra* note 5, at 94 (explaining the "performance" that handicraft vendors engage in as they sell to tourists); see also Little, *supra* note 32, at 528–29 (same).

<sup>93</sup> See Little, *supra* note 32, at 530 (noting that there is no law prohibiting handicrafts sales by street vendors). Despite not breaking the law, these vendors find their merchandise seized by the police, incur fines, and sometimes even face jail time for doing something that is entirely legal. *Id.*

<sup>94</sup> LITTLE, *supra* note 1, at 87.

<sup>95</sup> See SECRETARÍA DE PLANIFICACIÓN Y PROGRAMACIÓN DE LA PRESIDENCIA, *supra* note 26, at 35 (highlighting that the public perceives street vending as the most common form of employment in the informal sector). The perceived dominance of street vending is supported by a study that found that 64% of the "economically active population" is self-employed and that 58% of the self-employed population works in commerce. *Id.* (quoting ESTUDIO DE OPINIÓN PÚBLICA SOBRE TRABAJO DECENTE Y ECONOMÍA INFORMAL [STUDY OF PUBLIC OPINION ON DECENT WORK AND THE INFORMAL ECONOMY], ASOCIACIÓN DE INVESTIGACIÓN Y ESTUDIOS SOCIALES [ASSOCIATION FOR RESEARCH AND SOCIAL STUDIES] 24 (2012)).

ment released a ten-year plan for the country's tourism industry, with goals of vastly growing the sector by 2022<sup>96</sup> and using it as a "motor" for the nation's economy.<sup>97</sup> While this plan signals governmental commitment to the tourism industry, it focuses principally on economic growth. Thus, while the government's plan may be viewed as strengthening the traditional regulatory apparatus,<sup>98</sup> it does so in the economic realm, only tangentially mentioning the environmental and cultural implications that are the focus of this Note. Moreover, in recognizing the necessity of alliances between the public and private sectors,<sup>99</sup> the government plan leaves a door open for the NGO solutions proposed here. For example, the government plan expressly states that it will promote alliances and cooperation with institutions and organizations that promote sustainability, signaling that private and public regulation can coexist.<sup>100</sup>

Büthe explains that private regulation arises during instances of minimal government regulation because industry players in these situations have the opportunity to "lock[] in policy preferences,"<sup>101</sup> essentially setting the rules themselves and preempting less favorable government regulation.<sup>102</sup> For the NGOs discussed in this Note, acting within the industry's void would not only allow them to determine the standards for future tourism projects, but also permit them to "bring about rules and outcomes closer to their normative preference than

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<sup>96</sup> GOBIERNO DE GUATEMALA, PRESIDENCIA DE LA REPÚBLICA, POLÍTICA NACIONAL PARA EL DESARROLLO TURÍSTICO SOSTENIBLE DE GUATEMALA 2012–2022 [NATIONAL POLICIES FOR SUSTAINABLE TOURISM DEVELOPMENT IN GUATEMALA 2012–2022], at 13–14 (2012).

<sup>97</sup> *Id.* at 7.

<sup>98</sup> The tourism development plan creates a minister of tourism and restructures INGUAT (the Guatemalan Tourism Commission) and the Tourism Development Cabinet. *Id.* at 25–26.

<sup>99</sup> *See id.* at 20 (recognizing that the attainment of the plan's goals will require (1) action by the State; (2) action by the Tourism Development Cabinet; and (3) alliances between the public sector, the private sector, the academic community, and destination communities).

<sup>100</sup> *Id.* at 37; *see also* Mayer & Gereffi, *supra* note 69, at 17 ("The rise of state governance does not imply the abandonment of private governance.").

<sup>101</sup> Büthe, *supra* note 72, at 11.

<sup>102</sup> *See, e.g., id.* at 12 (explaining that third-party demands for regulation in a regulatory void often leads industry participants to turn to private regulation "to forestall government regulation"); Cafaggi & Janczuk, *supra* note 74, at 22–23 (noting that private regulation often arises in order to displace or preempt government regulation); Green, *supra* note 73, at 26–27, 32 (noting that a public regulatory void can serve as a "window of opportunity" and can carry with it a strong "first mover" advantage, allowing early entrants to shape the rules to favor their interests, particularly in industries that see regulation as ultimately inevitable).

they would obtain by seeking to influence public laws and regulations.”<sup>103</sup>

Third, some form of public outcry is necessary to motivate private regulation.<sup>104</sup> The plethora of environmental and anthropological research illustrating the harms perpetrated by NGOs in Guatemala’s tourism industry, as well as the fact that scientists and activists are increasingly attempting to market alternative forms of tourism that are less harmful to the local environment and people, marks the beginnings of this kind of outcry.<sup>105</sup> The fact that this “outcry” springs from academic literature and not from the public’s first-hand experiences with the tourism industry may help to explain why private regulation of Guatemala’s tourism industry has not yet taken root. As this academic literature moves into the mainstream—through avenues such as Elizabeth Becker’s 2013 exposé on the travel industry<sup>106</sup>—the requisite social pressures will be strengthened.

Fourth, the regulated industry must have an international component before private regulation will arise. Tim Bartley deems this “export dependence,” explaining that private regulation is more likely to arise in “export-oriented production in developing countries”<sup>107</sup> rather than in sectors that “produc[e] for domestic consumption.”<sup>108</sup> This type of connection exists in Guatemala’s tourism industry in the sense that the tourist attractions are in the developing world, yet those consuming—and “packaging”—the events largely come from the developed world.<sup>109</sup>

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<sup>103</sup> Bütthe, *supra* note 72, at 13.

<sup>104</sup> See Bartley, *supra* note 73, at 4–5 (stating that one major factor required for private regulation to arise is public controversy); Bütthe, *supra* note 72, at 12 (noting that demands for private regulation commonly come from “third parties who feel that their *non-material* interests are affected by the existing or missing regulations,” and that “[t]hese private actors are often social activists, motivated by normative commitments that are altruistic”); Mayer & Gereffi, *supra* note 69, at 1 (“The move towards private governance is best seen as a response to societal pressures spawned by economic globalization and by the inadequacy of public governance institutions in addressing them.”).

<sup>105</sup> See *supra* Part I.A (describing the cultural and environmental harms perpetrated by the tourism industry).

<sup>106</sup> See generally ELIZABETH BECKER, *OVERBOOKED: THE EXPLODING BUSINESS OF TRAVEL AND TOURISM* (2013) (examining the impact of tourism by focusing on what tourism means—and who its winners and losers are—in a number of countries across the globe). Demonstrating its wide reach, Becker’s book was reviewed in the *New York Times*’s Sunday Book Review just after its release. Joshua Hammer, *100 Places to Visit Before They Die*, N.Y. TIMES, Apr. 21, 2013, (book review), at BR19.

<sup>107</sup> Bartley, *supra* note 73, at 5.

<sup>108</sup> *Id.* at 5–6.

<sup>109</sup> This relationship can be seen in the billions of dollars in international tourism receipts that flow to Guatemala every year. See *supra* notes 15–18 and accompanying text (identifying these statistics).

Thus, Guatemala's tourism industry meets the four conditions academics have identified as necessary for private regulation to arise: a capacity for economic or political gain through regulation, an absence of governmental regulation, a prominent public outcry over existing conditions, and an international attribute to the industry.

### III

#### CODES OF CONDUCT: ADDRESSING TOURISM'S HARMS BY FILLING THE REGULATORY GAP

Social scientists have identified three key proposals to ensure that the tourism industry's benefits to the host country outweigh its detriments: (1) local inclusion; (2) balancing interests; and (3) monitoring, evaluation, and transparency. Nonetheless, no scholar has proposed a comprehensive legal framework for implementing these proposals. Rather, the social scientists who have identified these factors have simply stated that any tourism project must be designed with these points in mind. In this Part, I explain how a comprehensive code of conduct adhered to by the tourism industry's largest players—CPI, TNC, and CARE—would be a first step toward implementing these proposals and thus mitigating the sector's harms. While I do not discuss in detail the process by which a code would be adopted (focusing instead on the substance of its provisions), a code could be developed either by the work of an independent body created specifically for this purpose<sup>110</sup> or through a collaborative effort by the relevant NGOs.<sup>111</sup>

Part III.A explains why the NGOs that dominate Guatemala's tourism sector would adhere to a voluntary, industry-wide code of conduct. Part III.B suggests preliminary ways in which this code may be defined and shaped to directly address the harms perpetuated by the industry. Specifically, the code of conduct discussed in Part III.B builds upon the vague mission statements of CPI, TNC, and CARE by suggesting tangible code provisions that would hold the organizations accountable to their stated goals.

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<sup>110</sup> This is more akin to how the HAP Standard was developed. See *The History of HAP*, HUMANITARIAN ACCOUNTABILITY PARTNERSHIP, <http://www.hapinternational.org/who-we-are/about-us/the-history-of-hap.aspx> (last visited Aug. 18, 2014) (explaining how the HAP Standard emerged from the work of the Humanitarian Ombudsman Project, an independent organization hosted by the British Red Cross).

<sup>111</sup> The Red Cross Code of Conduct was developed in this manner, through a collaboration among "eight of the world's largest disaster response agencies." *Code of Conduct*, INT'L FED'N RED CROSS & RED CRESCENT SOC'YS, <http://www.ifrc.org/en/publications-and-reports/code-of-conduct/> (last visited Aug. 18, 2014).

### A. *Attaining Industry Compliance with Private Regulation*

While there is little research on why organizations comply with voluntary private regulation,<sup>112</sup> it is well understood that the targets of regulation frequently comply with these rules, even when compliance is not governmentally mandated.<sup>113</sup> Early research on compliance indicates that reputational effects and economic structures are particularly important in encouraging voluntary compliance.<sup>114</sup>

Frederick Mayer and Gary Gereffi provide a comprehensive discussion of the circumstances under which private regulation is adopted and followed across a sector. They identify four key factors that must be present in the industry for successful adherence<sup>115</sup>: the presence of “a powerful lead firm,” heavy reliance on brand name and “consumer preferences,” the potential for mobilizing “social pressure,” and an alignment between the social goals driving the regulation and the commercial interests of adopters.<sup>116</sup> Discussing each of these factors in turn, this Subpart demonstrates that the conditions exist in Guatemala to ensure NGO adherence to a code of conduct like that suggested in Part III.B.

First, Mayer and Gereffi suggest that the impact of private governance is greatest when the regulated industry is dominated by a few

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<sup>112</sup> See Bütthe, *supra* note 85, at 9 (noting that “[t]here are few if any broad-based, systematic comparative studies of compliance with private regulations” and calling for comprehensive empirical research to be done in this area).

<sup>113</sup> See Bütthe, *supra* note 72, at 16 (“[T]he targets of private regulations often comply with those rules even when compliance is not required.”); Yilmaz, *supra* note 86, at 9 (“Even though compliance with private regulation is voluntary, market participants frequently choose to comply without any statutory mandates or government orders. In fact, firms perceive the compliance costs of private regulation as a necessity for survival in the marketplace rather than as a burden.”).

<sup>114</sup> See Bütthe, *supra* note 85, at 10 (“[C]ompliance is solely a function of private economic and socio-political incentives . . . .”); Bütthe, *supra* note 72, at 15–20 (discussing these factors).

<sup>115</sup> The authors discuss a total of six hypotheses. The fifth hypothesis is that “[t]he more production becomes concentrated in the larger emerging economies,” the stronger public regulation will become in those countries. Mayer & Gereffi, *supra* note 69, at 15. The sixth hypothesis suggests that “[s]tronger public regulation in developing countries will reinforce rather than replace private governance.” *Id.* at 17. The authors acknowledge that these final two hypotheses “are more forward looking.” *Id.* at 8. I omit discussion of the fifth condition because production and manufacturing are not applicable to this Note. I omit discussion of the sixth condition because it is a forward-looking hypothesis of what may eventually occur and it does not impact the solution proposed in this Note. Rather, the sixth hypothesis merely reaffirms the conclusion that the private regulatory scheme proposed in this Note could continue to coexist beside public regulation. This Note focuses only on the first four hypotheses, which “can be thought of as predicting the domain in which [Mayer and Gereffi] expect to see the most established and effective forms of private governance.” *Id.*

<sup>116</sup> *Id.* at 14.



lead firms<sup>117</sup> that exert influence over smaller players.<sup>118</sup> This hypothesis is supported by the work of Doris Fuchs and Agni Kalfagianni, who note the importance of having industry players with the power and authority to govern.<sup>119</sup> In “democratic societies, citizens accept public policies, i.e., governmentally decided rules, as legitimate because they participate directly or indirectly (through elected representatives) in the making of the rules,” but such participation and the resulting legitimacy do not exist in the realm of private regulation.<sup>120</sup> Instead, power in these settings is derived from (1) market power, concentration, and control,<sup>121</sup> and (2) legitimacy, which is often derived from the perception of “doing good” or “doing right.”<sup>122</sup> While Fuchs and Kalfagianni, like Mayer and Gereffi, primarily discuss the manufacturing industry, their proposals translate to other contexts as well. As explained in Part I.B, Guatemala’s tourism industry is characterized by a concentration of several large, key players.<sup>123</sup> These players set the tone for Guatemala’s tourism projects and control the country’s tourist destinations, such as the Maya Biosphere Reserve.<sup>124</sup> Moreover, because these players are nonprofit organizations driven by humanitarian and environmental goals, they have acquired the legitimacy that Fuchs and Kalfagianni argue is necessary for success.<sup>125</sup>

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<sup>117</sup> *Id.* at 8.

<sup>118</sup> *See id.* at 8–9 (“It is no accident . . . that many of the most prominent cases of private regulatory governance involve very large lead firms with more-or-less captive suppliers.”).

<sup>119</sup> *See* Fuchs & Kalfagianni, *supra* note 73, at 9 (tracing the success of private food regulation).

<sup>120</sup> *Id.* at 10.

<sup>121</sup> As Fuchs and Kalfagianni explain, “structural power emerges from material structures,” referring to those structures that enable private actors to control access to the market and key resources within that market. *Id.* at 12.

<sup>122</sup> *See id.* at 19 (arguing that legitimacy derives from actors operating within the limits of what is considered “appropriate” or “right”).

<sup>123</sup> *See supra* notes 59–60 and accompanying text (highlighting CPI, TNC, and CARE as the three largest players in the Maya Biosphere Reserve).

<sup>124</sup> According to Fuchs and Kalfagianni, who describe market control in the context of the manufacturing industry, such concentration has two key effects. First, it grants retailers the power to dictate prices. Fuchs & Kalfagianni, *supra* note 73, at 13. Second, it allows retailers to impose their own standards on suppliers, which exert less market influence. *Id.* at 15.

<sup>125</sup> Fuchs and Kalfagianni list four factors that point toward an entity attaining legitimacy: (1) the emergence and acceptance of a rule, (2) greater roles within public regulatory bodies, (3) private entities assuming a broader position vis-à-vis consumers, and (4) government recognition of the importance of these private organizations and their role. *Id.* at 17. Although no uniform “rules” governing Guatemala’s tourism industry have emerged (condition 1), the three NGOs discussed in this Note have taken on broad roles throughout Guatemala, including working closely with government organizations in the Reserve’s conservation and development (conditions 2 and 3). Observation of these

Second, Mayer and Gereffi reason that “[p]rivate governance is most likely for highly branded products and firms.”<sup>126</sup> That is, private regulation is more successful when the regulated entity is vulnerable to social pressures because it has a brand it depends on.<sup>127</sup> Although NGOs do not rely on a brand in the same way that Apple, Starbucks, or Walmart does, they depend on donations and grants, which in turn are tied to public perceptions of their effectiveness and trustworthiness.<sup>128</sup> Thus, NGOs that fail to fulfill their promises suffer at the hands of donors just as Starbucks could suffer at the hands of its patrons.<sup>129</sup>

Third, Mayer and Gereffi propose that adherence to private governance is often driven by “some form of external social pressure.”<sup>130</sup> As explained in Part II, this pressure has been identified in the academic literature discussing the environmental and cultural harms caused by NGOs in Guatemala’s tourism industry.<sup>131</sup>

Finally, Mayer and Gereffi note that the regulation’s commercial interests and effects must align with the social or environmental concerns driving the regulation in order to create a successful regulatory framework and ensure broad adherence to that framework.<sup>132</sup> Echoing the discussion in Part II of the importance of economic incentives in the development of private regulation,<sup>133</sup> these scholars explain that industry participants are most likely to adhere to private regulation when the costs of adherence are low or are greatly out-

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actions—and governmental recognition and support of these actions (condition 4)—enhances the NGOs’ legitimacy.

<sup>126</sup> Mayer & Gereffi, *supra* note 69, at 9.

<sup>127</sup> *Id.*; see also Green, *supra* note 73, at 27–28 (noting that players demanded and adopted private regulation because it enhanced their reputations); Starobin & Weinthal, *supra* note 73, at 29 (using kosher certification as an example to demonstrate that social capital can be important in keeping and maintaining credibility in private regulation).

<sup>128</sup> Consumer preferences strongly motivate firms’ compliance with voluntary regulation. For example, Bütthe explains that consumers have the power to incentivize firms “along the global value chain to act in accordance with the consumers’ preferences for sustainable resource use, higher wages/prices paid to farmer and farm workers, etc.” Bütthe, *supra* note 72, at 17. Moreover, consumers “may demand compliance through their purchasing behavior, subtly or vocally through an explicit boycott.” *Id.* at 19.

<sup>129</sup> Scholars have suggested that there is a correlation between the results that an NGO produces and the donations it receives. See Varun Gauri & Anna Fruttero, *Location Decisions and Nongovernmental Organization Motivation: Evidence from Rural Bangladesh 2* (World Bank, Policy Research Working Paper No. 3176, 2003) (noting the importance of NGO reputations to donors).

<sup>130</sup> Mayer & Gereffi, *supra* note 69, at 11.

<sup>131</sup> See *supra* notes 104–05 and accompanying text (tying the academic literature to an on-the-ground “outcry”).

<sup>132</sup> Mayer & Gereffi, *supra* note 69, at 13.

<sup>133</sup> See *supra* notes 85–86 and accompanying text (discussing the importance of economic gain for the developers of private regulation).

weighed by its benefits.<sup>134</sup> For example, a department store's efforts to replace all the lights in its stores with LED lighting not only is good for the environment, but saves the store money in the long run and thus is a change that is likely to be adopted.<sup>135</sup> While further study should be done to better quantify the costs and benefits to NGOs of adopting and adhering to international codes of conduct, I argue that the costs of adherence are relatively low, particularly when compared with the resulting benefits.<sup>136</sup> The costs include researching codes of conduct, continued adherence to the code's requirements, and periodic reporting or auditing to demonstrate continued compliance.<sup>137</sup> The benefits, on the other hand, include improved adherence to the organization's own stated values, enhanced reputation within the industry, and increased donations.

### B. Building a Viable International Code of Conduct

In this Subpart, I draw upon specific provisions of existing international codes of conduct to explain how a tourism-specific code of conduct could address and mitigate the harms caused by Guatemala's tourism industry. I organize the proposal in this section around the three central factors identified by the social scientists discussed in Part

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<sup>134</sup> See Green, *supra* note 73, at 26 (noting how engagement in a voluntary greenhouse gas emissions protocol was aided by the fact that participation carried with it reduced transaction costs); Mayer & Gereffi, *supra* note 69, at 14 ("To the extent that standards can be met without incurring significant costs, or better yet, when they actually are cost-saving, they are much more likely to be adopted.").

<sup>135</sup> See Mayer & Gereffi, *supra* note 69, at 14 (noting the publicity that Walmart received upon replacing the lights in its stores with LED lighting). LED lighting is more energy efficient. A 60-watt LED light bulb can save \$125 in energy over its lifetime compared to a 60-watt incandescent light bulb. Kimberly Janeway, *It's Lights Out for the Incandescent Lightbulb*, CONSUMERREPORTS.ORG (Jan. 3, 2014), <http://www.consumerreports.org/cro/news/2014/01/the-best-energy-saving-cfl-led-and-halogen-lightbulbs/index.htm>.

<sup>136</sup> A similar analogy can be drawn to companies who focus on investing money in building their "corporate culture." While the total costs and benefits of these investments may not be fully quantifiable, recent studies have started to indicate clear benefits to these companies' bottom lines over time. See, e.g., Steve Cooper, *Make More Money by Making Your Employees Happy*, FORBES (July 30, 2012, 3:20 AM), <http://www.forbes.com/sites/stevecooper/2012/07/30/make-more-money-by-making-your-employees-happy/> ("[C]ompanies that effectively appreciate employee value enjoy a return on equity & assets more than *triple* that experienced by firms that don't. When looking at *Fortune's* [']100 Best Companies to Work For' stock prices rose an average of 14% per year from 1998-2005, compared to 6% for the overall market." (quoting NOELLE C. NELSON, *MAKE MORE MONEY BY MAKING YOUR EMPLOYEES HAPPY* (2012))).

<sup>137</sup> Publicly reporting these efforts, however, may translate directly into benefits, as consumers view such transparency as a reflection of an organization's credibility. See Starobin & Weinthal, *supra* note 73, at 29 (explaining how, for kosher certification, transparency between certifiers and consumers is of utmost importance and how certifiers derive legitimacy from informing consumers of their certification processes and histories).

I.A: (1) local inclusion, (2) balancing interests, and (3) monitoring, evaluation, and transparency. I build primarily upon three of the five codes of conduct to which CARE already adheres: (1) the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, (2) the Humanitarian Accountability Partnership Standard, and (3) the People In Aid Code.<sup>138</sup> The code I suggest here would strengthen NGOs' accountability by concretizing their amorphous values and mission statements, ensuring not only that tourism's benefits outweigh its detriments but that the NGOs at the heart of Guatemalan tourism better achieve their own goals and values.

### 1. *Local Inclusion*

As explained in Part I.A, the Guatemalan people, in particular the country's indigenous population, traditionally have been excluded from the tourism industry's decision-making and planning processes.<sup>139</sup> Instead, members of the indigenous population, such as vendors, "are used primarily as props to help promote hotels, tour companies, and restaurants that cater to tourists."<sup>140</sup> This historic exclusion is not only unfair but also unwise because the success of a tourism project ultimately hinges upon buy-in from the local popula-

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<sup>138</sup> CARE is a signatory to five international codes of conduct. CARE INT'L, *supra* note 65, at 26. If CPI and TNC have signed on to similar codes of conduct, they do not make this information publicly available on their websites or in their annual reports. It is not clear why only CARE, and not the others, has signed on to these codes. One rationale may be the size of the organization; CARE is by far the largest of the three. *See* CARE USA, INC., RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (FORM 990) 1 (2011) (indicating that CARE USA, one of CARE's twelve member organizations, reported net assets of more than \$421 million); MCGGLADREY & PULLEN, *supra* note 61, at 2 (indicating that CPI had more than \$43 million in total assets in 2008); PRICEWATERHOUSECOOPERS LLP, THE NATURE CONSERVANCY: CONSOLIDATED FINANCIAL STATEMENTS FOR THE YEAR ENDED JUNE 30, 2012 AND REPORT THEREON 13 (2012), available at <http://www.nature.org/about-us/our-accountability/annual-report/2012-financial-report-with-report-of-independent-auditors.pdf> (indicating that TNC had \$6 million in total assets in 2012). CARE is also the oldest of the organizations. *See* CARE INT'L, *supra* note 65, at 3 (CARE founded in 1945); *History*, COUNTERPART INT'L, <http://www.counterpart.org/about/history> (last visited Aug. 18, 2014) (CPI established in 1965); *Our History*, *supra* note 63 (TNC founded in 1951). Codes of conduct aim to address accountability issues, CHÈNE, *supra* note 87, at 3, and these issues become more pronounced as an organization becomes larger and the amount of its donations increases.

<sup>139</sup> *See* ADAMS ET AL., *supra* note 10, at 10 ("Tourism development in Guatemala has tended to neglect the participation of the surrounding poor communities, which has led to conflict, ecological damage and continued hopelessness and poverty."); *see supra* notes 37–39, 51–55 (highlighting the importance of local inclusion in mitigating the industry's cultural and environmental harms).

<sup>140</sup> Little, *supra* note 5, at 88.

tion.<sup>141</sup> In particular, some commentators have identified local management as perhaps the single most important factor in determining the outcome of a project.<sup>142</sup> Local involvement in a project's creation and management is crucial for a number of reasons: encouraging on-the-ground dedication to the project and its goals,<sup>143</sup> stimulating cultural pride,<sup>144</sup> decreasing economic leakage,<sup>145</sup> ensuring more equitable distribution of benefits,<sup>146</sup> and possibly increasing overall revenues.<sup>147</sup> In economies like Guatemala's, local involvement is particularly crucial: "[B]ecause governments in many developing countries do not have the monetary or human resources to manage large expanses of reserve lands, . . . restoring some degree of local control over resources is probably the only way that vast areas in the tropics can be managed at all."<sup>148</sup>

All three NGOs examined in this Note have language in their value statements and promotional materials that indicate the organizations' beliefs in the importance of local inclusion. CPI, for example, states that it "giv[es] people and local institutions the tools necessary for sustained social, economic and environmental progress."<sup>149</sup> TNC states that it maintains respect for the local communities with which it

<sup>141</sup> See *supra* notes 51–55 and accompanying text (explaining how local inclusion is essential in attaining conservation goals within the Maya Biosphere Reserve).

<sup>142</sup> See Kohler, *supra* note 39, at 293 ("[The] involvement of local people in planning and management is perhaps the most important variable determining the outcome of the plan." (quoting Patrick C. West & Steven R. Brechin, *National Parks, Protected Areas, and Resident Peoples: A Comparative Assessment and Integration*, in *RESIDENT PEOPLES AND NATIONAL PARKS* 363, 395 (Patrick C. West & Steven R. Brechin eds., 1991))).

<sup>143</sup> See Moreno, *supra* note 12, at 238 (noting that the success of ecotourism depends in part on the extent of government and community commitment).

<sup>144</sup> See Krystal, *supra* note 30, at 157–59 (explaining how one town has been able to maintain considerable local control over tourism and how the town's "young Maya activists are motivated by their desire to see their traditions survive").

<sup>145</sup> See, e.g., Garrett, *supra* note 1, at 441 (estimating that 70% to 90% of the profits accumulated in Cancun, Mexico leave the region); Moreno, *supra* note 12, at 219 (explaining that "severe economic leakage[ ]" is one of "the costs typically associated with traditional tourism in developing countries"); Juska & Koenig, *supra* note 23, at 26–27 (explaining that the profits and benefits of tourism often go to outsiders, and the costs are borne mainly by the local community).

<sup>146</sup> See García-Frapolli et al., *supra* note 19, at \*7 (explaining that the concentration of control over the tourism industry in the hands of a few families in one area leads to great income disparity). When benefits are distributed unequally within a community, fissures among its members often result. See Little, *supra* note 33, at 167, 176 (describing resentment toward a family in the village who were perceived to have "stolen" tourism business from others in the village).

<sup>147</sup> At least one study has found that tourists are willing to pay more money in entrance fees if they know that the money is going directly to the local population. Juska & Koenig, *supra* note 23, at 95.

<sup>148</sup> Kohler, *supra* note 39, at 293 (internal quotation marks omitted).

<sup>149</sup> MCGLADREY & PULLEN, *supra* note 61, at 6.

works.<sup>150</sup> CARE also indicates a commitment to respect the people with whom it works<sup>151</sup> and emphasizes the importance of local partnerships.<sup>152</sup> However, these vague statements leave room for abuse because they lack clear guidance about enforcement and do not include any concrete standards, steps, or protocols for actually involving the local population in the organizations' projects.<sup>153</sup>

There are a number of specific provisions, however, in existing codes of conduct—particularly the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief (Red Cross Code)<sup>154</sup> and the Humanitarian Accountability Partnership Standard (HAP Standard)<sup>155</sup>—that can fill the void left by these vague value statements and address the existing lack of local inclusion. The Red Cross Code, which is specifically focused on disaster relief,<sup>156</sup> recognizes values similar to those in the mission statements of CPI, TNC, and CARE: (1) respect for the culture, structures, and customs of communities, and (2) the importance

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<sup>150</sup> See *Our Values*, NATURE CONSERVANCY, <http://www.nature.org/about-us/vision-mission/values/index.htm> (last visited Aug. 18, 2014) (listing TNC's values as (1) integrity beyond reproach; (2) respect for people, communities, and cultures; (3) commitment to diversity; (4) conservancy; and (5) tangible, lasting results).

<sup>151</sup> The organization lists four core values: respect, integrity, commitment, and excellence. CARE INT'L, STRATEGIC PLAN 2007–2012, at 5 (2006), available at <http://www.care-international.org/uploaddocument/news/publications/general%20information/english/approved%20strategic%20plan%202007-2012.pdf>. CARE's programs also conform to six basic goals: (1) promoting empowerment, (2) working with partners, (3) ensuring accountability and promoting responsibility, (4) addressing discrimination, (5) promoting the nonviolent resolution of conflicts, and (6) seeking sustainable results. *Id.*

<sup>152</sup> See *Partners and Donors*, CARE INT'L, <http://www.care-international.org/about-us/partners.aspx> (last visited Aug. 18, 2014) (explaining the importance of local partnerships for understanding a community's culture and relating to the people with whom it works).

<sup>153</sup> For example, despite its presence in the country and its indication that it maintains respect for the people with whom it works, TNC's Latin American Conservation Council, a group that brings together representatives from a number of Latin American states to address development challenges in the region, has no member from Guatemala. NATURE CONSERVANCY, LATIN AMERICAN CONSERVATION COUNCIL – MEMBERS (2013), available at <http://www.nature.org/latin-america-conservation-council/lacc-members-pdf-july-2013.pdf> (listing the group's members); *About Us: Latin American Conservation Council*, NATURE CONSERVANCY, <http://www.nature.org/about-us/governance/latin-america-conservation-council/index.htm> (last visited Aug. 18, 2014) (describing the group's purpose).

<sup>154</sup> CODE OF CONDUCT FOR THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT AND NON-GOVERNMENTAL ORGANISATIONS (NGOS) IN DISASTER RELIEF (Int'l Fed'n of Red Cross & Red Crescent Soc'ys & ICRC 1994) [hereinafter RED CROSS CODE].

<sup>155</sup> 2010 HAP STANDARD IN ACCOUNTABILITY AND QUALITY MANAGEMENT (Humanitarian Accountability P'ship 2010) [hereinafter HAP STANDARD].

<sup>156</sup> RED CROSS CODE, *supra* note 154, at 2. Disaster is defined as “a calamitous event resulting in loss of life, great human suffering and distress, and large-scale material damage.” *Id.*

of building on local capacities. It also specifically aims to involve locals in managing aid, even in difficult times like disasters, although the code does not explain how to effectuate this involvement.<sup>157</sup> The HAP Standard addresses the requirement of local involvement even more explicitly than the Red Cross Code. The HAP Standard unambiguously states, as one of its “Principles of Accountability,” that “[m]embers [must] involve beneficiaries in the planning, implementation, monitoring and evaluation of programmes and report to them on progress, subject only to serious operational constraints.”<sup>158</sup> In expressly involving local people from the earliest stages of the project, these codes directly fill one of the most glaring gaps in the tourism industry and make room for increased local ownership of tourism businesses,<sup>159</sup> respect for local environmental knowledge and practices,<sup>160</sup> and greater understanding and incorporation of local culture.<sup>161</sup>

## 2. *Balancing Interests*

Scholars have explained that ecotourism projects, at their best, balance the interests of different stakeholders, including the State, the private sector, and tourists themselves.<sup>162</sup> Moreover, “NGOs are in a ‘relation of accountability’ to several sets of actors simultaneously” and must justify their behavior to each of these actors.<sup>163</sup> Here I focus on the balance between the interests of NGOs (including the individual and corporate donors funding these organizations) and the beneficiaries of NGO projects (the local population).

The organizations discussed in this Note mention balancing multiple interests in their value and mission statements. They indicate that

<sup>157</sup> *Id.* at 4.

<sup>158</sup> HAP STANDARD, *supra* note 155, at 25.

<sup>159</sup> For a discussion of the problems resulting from outsider-imposed tourism, see Moreno, *supra* note 12, at 224–25.

<sup>160</sup> See, e.g., García-Frapolli et al., *supra* note 19, at \*18 (highlighting the importance of local management knowledge to the success of ecotourism projects); Kohler, *supra* note 39, at 278 (“[L]ocal people must be integrally involved in the reserves . . . [They] possess the power, because of their proximity to the reserve, to sustain or destroy natural resource management in the reserve.”).

<sup>161</sup> See, e.g., García-Frapolli et al., *supra* note 19, at \*16 (identifying a need for projects to be tied to the cultural, productive, and ecological context of the region); Kohler, *supra* note 39, at 279 (highlighting the importance of using local knowledge “to avoid using management techniques that will inevitably fail”).

<sup>162</sup> ADAMS ET AL., *supra* note 10, at 12; see also Miller, *supra* note 7, at 4 (“Community support of a project is essential to sustainability and success. Anything that undermines that support and creates conflict may eventually cause rifts between the NGO and the community and thus, damage the project.”).

<sup>163</sup> Satterthwaite, *supra* note 73, at 907; see also *id.* at 908 (mentioning that NGOs are accountable to donors and beneficiaries at the same time).

they maintain accountability to both donors and communities and are committed to respecting the people and communities their work serves. CPI, for example, emphasizes the values of trust<sup>164</sup> and partnership.<sup>165</sup> Recognizing the challenge of balancing the interests of multiple constituencies, TNC explains that, when there is a conflict between the applicable law and internal TNC policies, “employees and volunteers are expected to comply with the stricter of the two unless to do so would be a violation of the law.”<sup>166</sup> TNC further highlights its accountability by boasting of an Ethics and Compliance Office<sup>167</sup> and publishing a list of third-party metrics that mark the organization as an economically responsible charity, thereby demonstrating the care it takes to serve the interests of its donors.<sup>168</sup> While these propositions seem to recognize the different interests at stake in each of the NGO’s activities, these value statements do not explain *how* to balance these competing interests in practice. That is, there is no indication within the organizations’ internal value statements as to how the NGOs would resolve a conflict between the interests of their donors and the interests of a project’s beneficiaries.<sup>169</sup>

The organizations’ internal statements of accountability and respect, however, can be given teeth through additional disclosure. Additional disclosure is required under one of the HAP Standard pro-

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<sup>164</sup> In 2011, CPI selected “Building Trust. Building Partnerships.” as its theme. COUNTERPART INT’L, 2011 ANNUAL REPORT (2011), *available at* [http://www.counterpart.org/images/uploads/CPI11105\\_AnnReport2011\\_v5FIN.pdf](http://www.counterpart.org/images/uploads/CPI11105_AnnReport2011_v5FIN.pdf).

<sup>165</sup> See *Values*, COUNTERPART INT’L, <http://www.counterpart.org/about/values> (last visited Aug. 18, 2014) (“Counterpart International’s values are a reflection of how we work as individuals, as an organization, and as partners with external stakeholders. We hold ourselves, and each other, accountable to practicing our core values on each of these levels and we seek partners that share similar values.”).

<sup>166</sup> *About Us: Ethics and Compliance*, NATURE CONSERVANCY, <http://www.nature.org/about-us/governance/ethics-and-compliance/index.htm> (last visited Aug. 18, 2014).

<sup>167</sup> This office is in charge of “training, policy and procedure development and oversight, risk assessment, and investigations of noncompliance.” *Id.*

<sup>168</sup> *Our Accountability*, NATURE CONSERVANCY, <http://www.nature.org/about-us/our-accountability/index.htm> (last visited Aug. 18, 2014). This list includes (1) meeting all Better Business Bureau Wise Giving Alliance Standards for Charity Accountability, (2) being rated as one of the most trusted organizations by Harris Interactive, and (3) being rated by *Forbes* magazine as having a fundraising efficiency of eighty-six percent. *Id.*

<sup>169</sup> It is recognized that the interests of donors might not necessarily align with the interests of beneficiaries. See Juska & Koenig, *supra* note 23, at 45 (“Large, international NGOs leverage support from multi-national corporations to promote biodiversity conservation, and are ultimately held accountable by funders and members, not local project beneficiaries.”). TNC, for example, indicates that it holds itself accountable to its members, the public, “and all creatures that have a stake in the preservation of the world’s natural resources.” *Our Accountability*, *supra* note 168. While the organization explains that it takes pride in the efficient and effective manner in which it uses donations, *id.*, it does not address the question of what to do when these goals conflict with what is best for or desired by a beneficiary population.



visions and is reflected in statements made by CARE, a HAP Standard signatory. While CARE advances goals similar to CPI's and TNC's—including partnership,<sup>170</sup> accountability,<sup>171</sup> and sustainable results guided by local aspirations<sup>172</sup>—its disclosures go further. The HAP Standard specifically requires the following:

The organisation shall make public a declaration of additional interests. These include additional affiliations, interests and values that may directly affect the people it aims to assist. The purpose of the declaration is to give a broad understanding of the nature of the organisation and vested interests in the organisation.<sup>173</sup>

In light of this requirement, CARE describes how it would resolve conflicts of interest between donors and beneficiaries. It explains that CARE is “[g]uided by the aspirations of local communities,”<sup>174</sup> and notes that, in instances where the interests of its stakeholders diverge, it “strive[s] to be accountable to all [its] stakeholders, but first and foremost to the poor, vulnerable and disaster-affected people and communities with whom [it] work[s], especially women and girls.”<sup>175</sup>

Each of the organizations discussed in this Note takes the first step toward balancing interests by identifying the responsibilities it owes to various groups. The HAP Standard takes the necessary next step by requiring formal recognition of possibly competing interests. However, another step beyond this disclosure is necessary. Once an organization recognizes the potentially competing interests it serves, it must be required to disclose how it would resolve any conflicts that might arise between these interests. Deciding in advance how any conflicts are to be resolved would help achieve a true balance of interests and, most importantly, ensure the tourism industry's benefits for all constituencies.

### 3. *Monitoring, Evaluation, and Transparency*

Both the Guatemalan government and numerous academic scholars have highlighted the importance of increased monitoring and evaluation of tourism projects.<sup>176</sup> Discussing the effectiveness of pri-

<sup>170</sup> See *supra* note 152 (explaining CARE's attention to local partnerships).

<sup>171</sup> See *supra* note 151 (defining CARE's values and principles).

<sup>172</sup> *Core Values*, CARE INT'L, <http://www.care-international.org/about-us/core-values.aspx> (last visited Aug. 18, 2014).

<sup>173</sup> HAP STANDARD, *supra* note 155, at 10.

<sup>174</sup> *Core Values*, *supra* note 172.

<sup>175</sup> CARE INT'L, *supra* note 65, at 26.

<sup>176</sup> See CONSEJO NACIONAL DE AREAS PROTEGIDAS, PLAN MAESTRO DE LA RESERVA DE LA BIOSFERA MAYA 2001–2005 [MASTER PLAN FOR THE MAYA BIOSPHERE RESERVE 2001–2005], at 44–67 (2001) (illustrating the Guatemalan government's support for

vate regulation, Shana Starobin and Erika Weinthal explain that, “[w]ithout good mechanisms for monitoring and enforcement in place, the standards alone are . . . unlikely to suffice.”<sup>177</sup> Scholars have explained, moreover, the importance of placing control over monitoring in the hands of the local population.<sup>178</sup> Currently, any monitoring of tourism projects that does take place is undertaken by foreigners.<sup>179</sup> Not only does shifting monitoring and evaluation responsibilities to the local population go hand in hand with the goal of increased local participation discussed in Part III.B.1, it also puts the responsibility for these tasks in the hands of those who have the most direct contact with tourists and therefore have the largest stake in the tourism project.<sup>180</sup> Finally, monitoring and evaluating projects is necessary for NGOs to remain transparent and accountable to their donors.

The lack of concrete monitoring programs can be seen in the goals and policies of the three NGOs discussed in this Note. All three organizations seek to promote positive and measurable change. For example, the organizations’ internal value structures highlight ideals of “sustained . . . progress,”<sup>181</sup> “[t]angible, [l]asting [r]esults,”<sup>182</sup> and “lasting change.”<sup>183</sup> Yet despite these goals, the value statements themselves give little indication of how such change is or should be measured and give no explanation for what would actually constitute positive change.

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increased monitoring and evaluation by establishing tangible goals, each of which has corresponding strategies for attainment, for the Reserve); *infra* notes 177–78 and accompanying text (illustrating scholars’ discussion of this goal).

<sup>177</sup> Starobin & Weinthal, *supra* note 73, at 15.

<sup>178</sup> See, e.g., Juska & Koenig, *supra* note 23, at 37 (“[T]here is consensus in the literature about the importance of local participation . . .”). The type of local participation is important. Organizations must strive for “highly active, perhaps even self-motivated” participation. *Id.* at 30; see also Miller, *supra* note 7, at 5 (noting the importance of broad community participation).

<sup>179</sup> See Talbot & Gould, *supra* note 21, at 105–07 (discussing monitoring and evaluation programs and explaining that, like the majority of project decision making, these tasks are undertaken by outsiders rather than locals).

<sup>180</sup> See ADAMS ET AL., *supra* note 10, at 39 (making recommendations for ways to deepen local community participation and benefits). Adams explains: “[T]ourism operations should be community-owned and operated in order to ensure success. Local ownership greatly encourages community interest and participation in the project. Community members are also best able to meet the needs of tourists who as consumers seek to interact with the local populace . . .” *Id.* at 13; see also Starobin & Weinthal, *supra* note 73, at 16 (suggesting that monitoring the success of projects can be enhanced through greater collaboration among governments and private agencies).

<sup>181</sup> MCGLADREY & PULLEN, *supra* note 61, at 6.

<sup>182</sup> *Our Values*, *supra* note 150.

<sup>183</sup> *Core Values*, *supra* note 172.

Although the direct and indirect impact of complex projects—such as tourism ventures—may appear difficult to measure, entities such as the World Bank<sup>184</sup> and the Millennium Challenge Corporation (MCC)<sup>185</sup> have established indicators and benchmarks which gauge and quantify the progress of similar projects. I argue that tourism-focused indicators can be built from provisions found within existing international codes of conduct and that these indicators can provide viable and measurable benchmarks for the evaluation of Guatemala's tourism projects. In a similar manner to the World Bank and MCC, both the HAP Standard and People In Aid Code clearly tie the goals to which their signatories subscribe to various indicators and benchmarks. For example, the HAP Standard sets out six benchmarks and, much like the MCC, distills each of these overarching goals into requirements and means of verification.<sup>186</sup> People In Aid similarly organizes its code around “guiding principle[s],” each of which is

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<sup>184</sup> *How We Measure Results*, WORLD BANK, <http://go.worldbank.org/ZETAB6VBA0> (last updated Aug. 19, 2013). In January 2012, the World Bank approved a new financing instrument, Program-for-Results. *Program-for-Results Financing*, WORLD BANK, <http://go.worldbank.org/5XN35BS9C0> (last updated Sept. 2, 2014). This program ties funding disbursements directly to results and uses indicators to provide governments with incentives to improve performance. WORLD BANK, PROGRAM-FOR-RESULTS: AN OVERVIEW 1 (2013), available at [http://siteresources.worldbank.org/PROJECTS/Resources/40940-1393966271292/PforR\\_Overview\\_update.pdf](http://siteresources.worldbank.org/PROJECTS/Resources/40940-1393966271292/PforR_Overview_update.pdf).

<sup>185</sup> The Millennium Challenge Corporation (MCC) is a U.S. aid agency that was created by Congress in 2004. *About MCC*, MILLENNIUM CHALLENGE CORP., <http://www.mcc.gov/pages/about> (last visited Aug. 18, 2014). In determining which projects to fund, the MCC looks at country performance on a number of “indicators”—including access to credit, freedom of information, civil liberties, and immunization rates—and requires, among other conditions, performance above the median scores of the country's peer group on at least half of the indicators. MILLENNIUM CHALLENGE CORP., THE FISCAL YEAR 2013 SELECTION PROCESS FOR MCA ELIGIBLE COUNTRIES 2–3 (2012), available at <http://www.mcc.gov/documents/press/factsheet-2012002116401-fy13-selection-process.pdf>. Once a country is selected for funding, the project itself is broken down into objectives, each with a corresponding measurable indicator. *E.g.*, THE U.S. ACTING THROUGH THE MILLENNIUM CHALLENGE CORP. & THE GOV'T OF THE REPUBLIC OF MALI; AMENDMENT TO MILLENNIUM CHALLENGE COMPACT, annex III-2 to -5 (2008). For example, one of the project objectives in Mali was to “[e]stablish an independent and secure link to the regional and global economy” through airport improvements. *Id.* annex III-3. This objective is broken down into objective-level indicators, such as increasing the number of foreign visitors to the country, and outcome-level indicators, such as weekly flight arrivals and departures. *Id.*

<sup>186</sup> HAP STANDARD, *supra* note 155, at 10. An example benchmark is “[s]haring information” and, specifically, “ensur[ing] that the people [the organization] aims to assist and other stakeholders have access to timely, relevant and clear information about the organisation and its activities.” *Id.* at 15. One of the requirements for this benchmark is that the organization “define and document processes for sharing information.” *Id.* HAP determines whether this requirement has been met by examining documents produced by the organization, such as corporate or staff guidelines. *Id.*

broken down into concrete “indicators.”<sup>187</sup> As the organization explains, the indicators “provide guidance on what your agency needs to look at in order to quote the Principle with confidence.”<sup>188</sup>

While early codes of conduct had little teeth to ensure compliance with standards or indicators, newer codes, like the HAP Standard and People In Aid, “ha[ve] stricter provisions and, most importantly, an independent monitoring mechanism.”<sup>189</sup> Once an organization is a signatory to the HAP Standard, the NGO must undergo a regular audit procedure in order to ensure compliance with the Standard.<sup>190</sup> While scholars like Shana Starobin and Erika Weinthal trumpet this independent auditing procedure,<sup>191</sup> others are more cautious in their support. Margaret Satterthwaite, for example, notes the benefits of the audit procedures in the HAP Standard, explaining that under this code “process standards (accountability) are the means to improve quality and achieve impact,”<sup>192</sup> and that the code “is one of the only instances of downward accountability with real bite.”<sup>193</sup> At the same time, however, Satterthwaite warns of the audit procedure’s problems. Specifically, she warns of “the risk that measures of performance will become targets”: that simply attaining the required measurements, not actually engaging with the beneficiary

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<sup>187</sup> PEOPLE IN AID CODE, *supra* note 88, at 7.

<sup>188</sup> *Id.* at 24 (“In time, benchmarking data from implementing agencies may assist in defining sector-specific standards.”). Compliance with the organization’s guiding principles leads to public recognition on the People In Aid website. *Id.* at 23.

<sup>189</sup> Mayer & Gereffi, *supra* note 69, at 6; *see also* Satterthwaite, *supra* note 73, at 905 (discussing the increase in the use of standards and quantifiable measurements in the 1980s to “demonstrate [organizations’] accountability to the outcomes for which they were receiving funding”).

<sup>190</sup> HAP STANDARD, *supra* note 155, at 4. People In Aid implements a similar mechanism. Those who drafted this code specifically agreed “that a verification process should be introduced to the Code to distinguish it from other Codes to which NGOs could sign up.” PEOPLE IN AID CODE, *supra* note 88, at 24. This verification process ultimately took the form of a “social audit,” *id.*, in which an external third party identifies whether an organization is successfully implementing the code. *Certification*, PEOPLE IN AID, <http://www.peopleinaid.org/membership/certification.aspx> (last visited Aug. 18, 2014). The auditor’s report is presented to People In Aid for assessment. *Id.*

<sup>191</sup> *See* Starobin & Weinthal, *supra* note 73, at 20 (calling for the presence of independent third-party auditors to improve monitoring for kosher labeling); *supra* note 189 and accompanying text (discussing the development of monitoring mechanisms).

<sup>192</sup> Satterthwaite, *supra* note 73, at 897 (contrasting this focus on process with the focus on substantive quality standards seen in the Sphere Project). The Sphere Project is a voluntary initiative that aims to improve the accountability of humanitarian actors to constituents, donors, and affected populations. *The Sphere Project in Brief*, SPHERE PROJECT, <http://www.sphereproject.org/about/> (last visited Aug. 18, 2014).

<sup>193</sup> Satterthwaite, *supra* note 73, at 913.

population, will become the goal.<sup>194</sup> While Satterthwaite mentions some of the limitations of indicators more generally, she concludes by highlighting the strength of the HAP Standard: “In the end, data and measurement are not the problem. Indeed, more precise and accurate data is essential to ensuring that assistance . . . is carried out in ways that are more effective, rights-enhancing, and accountable.”<sup>195</sup> Instead, the problem lies in ensuring that indicators are carefully crafted so as to minimize the risk of generating a shift in focus from actually engaging the beneficiary population to simply undertaking the actions required to satisfy the indicators.<sup>196</sup>

Although the NGOs’ stated commitment to respectful, long-lasting, and measurable results is a first step toward recognizing the importance of evaluating projects’ impacts and ensuring transparency in the process, these statements do not go far enough. Each of the internal value statements discussed in this Subpart omits discussion of how to measure impact or what measurements are important. As numerous scholars have recognized, monitoring and evaluating a project’s progress and ultimate impact is important for ensuring that (1) the project has its intended positive effects (and does not have unintended negative consequences), (2) the organization remains accountable to its donors and beneficiaries, and (3) there is transparency in the organization’s operations. The importation of measurable indicators and benchmarks—as is already done by the World Bank and the signatories to the People In Aid Code and the HAP Standard—coupled with an audit procedure, would give greater teeth to the organizations’ internal values. Such provisions would allow for true measurement of a project’s impact and thus for determination of whether a given organization is meeting its goal of long-lasting, positive results.

Thus, the NGOs in Guatemala’s tourism industry could be regulated successfully through a voluntary code of conduct with tourism-specific indicators. This Part explained why the NGOs that dominate the industry would adhere to such private regulation and deconstructed specific provisions of existing codes of conduct that could be unified to form the base of a code governing those NGOs. By focusing on the provisions and suggestions identified in this Note, the industry could increase local inclusion, balance competing interests, and improve monitoring, evaluation and transparency, thereby mitigating

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<sup>194</sup> *Id.* at 914. Satterthwaite praises the most recent version of the HAP Standard, however, explaining that “the 2010 revision . . . goes as far as it can toward ensuring that agencies are truly engaging with beneficiaries.” *Id.* at 918.

<sup>195</sup> *Id.* at 963.

<sup>196</sup> *Id.* at 963–64; see also *supra* note 194 and accompanying text (noting this problem).

the sector's harms. I leave a more detailed discussion of the code's mechanics to future scholarship. As noted at the start of this Part, the suggested code could be developed either by an independent body or through a collaborative effort by the relevant NGOs.<sup>197</sup> Regardless of the mechanism through which the code is drafted, the process should be a collaborative and deliberative one in which the voices of all stakeholders are heard.<sup>198</sup>

#### CONCLUSION

Tourism is a significant source of revenue for many countries and ranks as Guatemala's second highest source of foreign exchange, accounting for inflows of nearly \$1.4 billion each year. Yet, as numerous social scientists have documented, tourism carries with it both cultural and environmental harms. In observing this destruction, environmentalists and anthropologists have suggested that successful tourism projects must involve the local population, balance the interests of multiple constituencies, and include metrics for monitoring and evaluating their success. Recognizing that Guatemala's tourism industry is dominated by international NGOs, this Note argued that these proposals can be implemented through a code of conduct to which the industry's NGOs would adhere. Such a code would simultaneously minimize the industry's harms and ensure better adherence to the NGOs' internal mission statements, thereby ensuring that all of the sector's constituencies come out ahead.

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<sup>197</sup> See *supra* notes 110–11 and accompanying text (discussing these two development options).

<sup>198</sup> See Green, *supra* note 73, at 9–10 (noting the importance of collaboration in the creation of private regulation).