

# AN EVALUATION OF THE CONCEPTUAL FOUNDATION OF INDONESIAN DEVELOPMENT TRUST FUNDS

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## Abstrak

Indonesia telah memiliki peraturan tentang pengelolaan dana perwalian (*trust fund*) dengan diundangkannya Peraturan Presiden No. 80/2011 tentang Dana Perwalian. Dana perwalian tersebut dimaksudkan untuk menampung dana hibah yang berasal dari dalam maupun luar negeri untuk kepentingan pembiayaan pembangunan. Tulisan ini bermaksud untuk menguraikan beberapa permasalahan mendasar dari aspek hukum dan organisasi dana perwalian di Indonesia. Analisa yang digunakan untuk menjawab permasalahan tersebut adalah menggunakan perbandingan hukum, analisis peraturan perundang-undangan serta diperkuat dengan studi pustaka dari berbagai sumber. Berdasarkan analisa yang telah dilaksanakan, penulis menemukan bahwa peraturan tentang dana perwalian yang ada saat ini masih belum menjelaskan kedudukan hukum dana perwalian dalam konteks subyek Hukum Internasional. Sedangkan dari aspek organisasi, perwalian yang saat ini ada masih belum memenuhi standar minimal organisasi yang baik dan akuntabel.

## Introduction

Even though it has the largest economy in Southeast Asia and is a member of the G-20 major economies with the Gross Domestic Product (GDP) over US\$ 888 billion,<sup>2</sup> Indonesia still faces a lot of challenges with its financial capacity to sustain development funding.<sup>3</sup> Ideally, there are four major sources that can be used for the purpose of development funding: private savings, public savings, foreign trade or investment and foreign assistance. Public and private savings and foreign investment were all, however, insufficient to

meet country capital needs.<sup>4</sup> The next appropriate alternative is to intensify the foreign trade or to boost exports. However, this will take longer than just one, two or three years.<sup>5</sup>

In this regard, external financing such as loans and grants could serve a strategic role to fill the gaps and to provide vital inputs, which often are not readily forthcoming from the domestic resources. One of the alternatives in which the government can effectively make best use of prevailing resources is through development

2 World Bank, *GDP based on Official Exchange Rate 2014* (Aug 12, 2015, 10:15 AM), available at [http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?order=wbapi\\_data\\_value\\_2014+wbapi\\_data\\_value+wbapi\\_data\\_value-last&sort=desc](http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?order=wbapi_data_value_2014+wbapi_data_value+wbapi_data_value-last&sort=desc)

3 The Aid of Development Effectiveness Secretariat, *National Trust Fund Aid for Development Effectiveness Arrangement in Indonesia*, 1-2 (Dec. 31, 2011) (unpublished working paper) (on file with author).

4 Radius Prawiro, *Indonesia's Struggle for Economic Development: Pragmatism in Action* 72 (Oxford University Press, 1998).

5 Emil Salim, *Pengalaman Pembangunan Indonesia: Kumpulan Tulisan Dan Uraian Widjojo Nitisastro [Indonesian Development's Experience: the Writings and Explanation of Widjojo Nitisastro]* 245 (Institute of Southeast Asian Studies, 2011).



trust funds.<sup>6</sup> Development trust funds are a fund established using money from either foreign or domestic grants that legally set aside from the regular state budget. The funds will be used for the development purposes and managed by the trustee institution.<sup>7</sup> The trustee institution is an ad-hoc government entity established by a ministerial regulation that governed by the Board of Trustee. The member of the Board of Trustee consists of government and non-government officials, including representatives of civil society.

Begin in 2011, Indonesia has permitted development trust funds based on Presidential Regulation No. 80/2011 regarding Trust Fund (Perpres No. 80/2011). The enactment of Perpres No. 80/2011 was followed by the establishment of two national development trust funds in Indonesia: Millennium Challenge Account-Indonesia (MCA-I) and Indonesia Climate Change Trust Funds (ICCTF).

Despite Indonesia's best effort to set up development trust funds to maximize its financial capacity for development, the legal and organizational framework of the trust funds has yet an uncertain conceptual foundation. This situation will lead to several fundamental problems, such as uncertain legal status of the trust funds, inadequate governance procedure and lack of accountability of the organization's activity. This work evaluates the Indonesian development trust fund regulation as well as the implementation of the existing development trust funds as currently constituted.

### Development Trust Fund in Several Countries

Because they enable international organizations to react quickly to emerging needs, development trust funds are very attractive to donors. Channelling contributions through trust funds allows donors to create governance

structures that differ from those of the organizations acting as trustee. Moreover, development trust funds also provide financing targeted for specific thematic areas or purposes.<sup>8</sup>

Following on the successful operation of the development trust fund created by the international donor, some countries has been creating a development trust fund under their national system. This fund is designed as a nationally owned and administered for pooling external funding resources from various development partners in a manner that could improve alignment between external assistance and national system.<sup>9</sup>

#### 1. The Mgahinga Bwindi Impenetrable Forest Conservation Trust (MBIFCT)

In 1994, the Mgahinga Bwindi Impenetrable Forest Conservation Trust (MBIFCT) was established by the Government of Uganda to conserve Mgahinga Gorilla and Bwindi Impenetrable National Parks (MGNP & BINP), two critical forest habitants which provide a home to half of the world's remaining population of mountain gorillas in South Western Uganda.<sup>10</sup> The MBIFCT was private, legally independent grant-making institutions<sup>11</sup> that incorporated under the Uganda Trustees Incorporation Act.<sup>12</sup>

The MBIFCT became effective on July 12, 1995 with a Global Environment Fund (GEF) grant of US \$ 4.3 million invested in the Trust Fund under the Bwindi Impenetrable National Park and Mgahinga Gorilla National Park Conservation Project.<sup>13</sup> During its first seven years of operation,

6 Government Regulation No. 10/2011 regarding Procedure to Administer Foreign Loans and Grants (hereinafter PP No. 10/2011) and Presidential Regulation No. 80/2011 regarding the Establishment of Trust Fund (hereinafter Perpres No. 80/2011).

7 Perpres No. 80/2011, at Art. 3 a.

8 Gerd Drosse, *Funds for Development Multilateral Channels of Concessional Financing* 79 (Asian Development Bank, 2011).

9 *The Aid of Development Effectiveness Secretariat*, supra note 3, at 3-4.

10 *Bwindi Mgahinga Conservation Trust, About Us*, available at <http://www.bwinditrust.org/page/about-us/> (Nov, 7, 2015, 2:35 PM).

11 *US Agency Int'l Dev (USAID), Uganda Biodiversity Trust Fund Study 1 (July, 5 2014) (Unpublished Final Report) (On File With Author)*.

12 Uganda Trustees Incorporation Act 1939.

13 *The World Bank, Bwindi Impenetrable National Park and the*



co-financing secured from United States Agency of International Development (USAID) (US\$890,700) and the Government of the Netherlands (DGIS) (US\$ 2.7 million) enabled the initial investment in the Trust Fund to grow virtually unimpeded.<sup>14</sup> The MBIFCT was assigned to oversee the management of the Fund and managing grant making operations for local community development, parks management and research projects.<sup>15</sup>

## 2. Bhutan Trust Fund for Environmental Conservation (BTF)

Determined to prevent environmental degradation that has occurred elsewhere in the Himalayas, the Royal Government of Bhutan (RGOB) directed that 60 percent of its land remain under forest cover. However, in the early 1990s, RGOB faced serious financial constraints in implementing conservation activities.<sup>16</sup>

To address these constraints, RGOB in association with World Wildlife Fund (WWF-US) and UNDP created the Bhutan Trust Fund (BTF) in March 1991.<sup>17</sup> RGOB then sought financing from the Global Environment Facility (GEF) and other donors to capitalize the BTF.<sup>18</sup> The sponsors of BTF felt that, in order to be an effective instrument for sustainable financing, BTF should have a minimum capital of US\$ 20 million of which US\$ 10 million would be sought from the GET and US\$10 million from other donors.<sup>19</sup> On May 21, 1992, grants in the amount of US\$ 10 million was approved by the GEF and made effective on November 2,

1992 as part of GEF Pilot Phase.<sup>20</sup> The remaining capital was co-financing WWF-US, Government of Norway, Government of Netherlands, Government of Finland, Government of Switzerland, and Government of Denmark.<sup>21</sup>

The Trust Fund is governed by the Royal Charter of 1996 and a high-level Management Board that was fully Bhutanese. The day to day business is conducted by the secretariat headed by the Director as the Chief Executive Officer.<sup>22</sup>

## 3. Amazon Fund

The Amazon Fund aims at contributing to reducing Greenhouse Gas (GHG) emissions from deforestation and forest degradation in the Amazon area. The Amazon is one of the largest gene banks on the planet; a natural heritage of unique proportions, with vast rivers and diverse ecosystems along its plains, plateaus and mountains. It has natural gas and oil reserves, and it is also one of the biggest mineral deposits in the world.<sup>23</sup> The Fund is a fundraising tool involving voluntary donations for non-reimbursable application to prevent, monitor and combat deforestation and to foster the conservation and sustainable use of the Amazon Biome.<sup>24</sup>

Amazon Fund was established in 2011 with Presidential Decree No. 6,527 under the management of the Brazilian Development Bank (BNDES), a federally-owned company founded in 1952.<sup>25</sup> The BNDES is authorized to allocate the amounts of donations received in cash, acquired through a specific account called the Amazon Fund,

*Mgahinga Gorilla National Park Conservation Project 3 (May 25, 2007) (Project Assessment Report No. 39859) (On File with Author).*

14 *Id.* at ix.

15 *Id.* at 4.

16 The World Bank, *The Implementation Completion Report: Bhutan Trust Fund for Environmental Conservation 1* (April 2, 1998) (Completion Report No. 17642) (On File with Author).

17 *Id.*

18 *Id.*

19 Global Environment Facility, *Bhutan Trust Fund for Environmental Conservation 1* (May 1992) (Project Document No. 10323. BHU) (On File with Author).

20 The World Bank, *supra* note 16, at i.

21 *Id.*

22 Bhutan Trust Fund for Environmental Conservation, *About Us*, available at <http://www.bhutantrustfund.bt/about-bhutan-trust-fund/the-organisation/> (Nov 7, 2015, 7:217 PM).

23 *Brazilian Development Bank, Amazon Fund: Basic Concept 2011*, at 15 (2011) (Activity Report) (On File with Author).

24 *Id.* at 10.

25 *Presidential Decree N<sup>o</sup>. 6,527, of August 1, 2008 (hereinafter as the Presidential Decree)*. See generally *Brazilian Development Bank, Amazon Fund: Activity Report 2014*, at 33 (2014) (Activity Report) (On File with Author).



to conduct non-reimbursable investments in efforts to prevent, monitor, and combat deforestation and to foster conservation and sustainable use in the Amazon Biome.<sup>26</sup>

Beside the BNDS as trustee, the Amazon Fund governance structure comprises two formal committees; Technical Committee of the Amazon Fund (TCFA) and Guidance Committee of the Amazon Fund (GCAF).<sup>27</sup> The GCAF was established under the same Decree with the Amazon Fund, Presidential Decree No. 6,527, which charged of establishing the guidelines and criteria to apply resources, as well as approving information to apply the resources and the Annual Report of the Amazon Fund.<sup>28</sup>

### International Institutional Law Perspective

One key principle of the establishment of the development trust fund is that international organizations should have a role in managing the fund that they help finance. Under institutional international law,<sup>29</sup> international organizations may create development trust funds for specific activities outside their regular budget.<sup>30</sup> These Funds have a wide variety of purposes and they can be established for a limited time frame.<sup>31</sup> The Funds can support a wide range of initiatives falling within any of the statutory purposes of an organization. The only general condition for their establishment is that their purpose should fall

within the aims of the organization.<sup>32</sup> Although these Funds are usually created and administered by the host organizations, they have their own governance structures and they are maintained separately from the resources of the institutions that administer them.<sup>33</sup> The establishment of development trust funds within the international organizations do not typically require approval in the formal governing body, and decision-making procedures and internal accountability mechanisms may be different as compared to core funding.<sup>34</sup> The trust fund of International Monetary Fund (IMF) as well as several development trust funds administered by the United Nations (UN), the Food and Agriculture Organization, the World Health Organization the International Labour Organization, and the Inter-American Development Bank fall under this category.<sup>35</sup>

In the case of the Trust Fund of the IMF, the IMF owns the resources of the development trust fund as a trustee, but they may be used in accordance with the trust instrument solely for the benefit of the 61 members that have been selected as potential beneficiaries.<sup>36</sup> Unlike the IMF account, in respect that the IMF was both the creature and trustee, the UN General Assembly account are set-up by the Assembly and administered by the Secretary General as his capacity of chief administrator of the Organization. The UN Secretary General manages the special account which distinct from the fund of the UN general budget.<sup>37</sup>

26 Paragraph 1 Article 1 of the Presidential Decree.

27 Brazilian Development Bank, *Amazon Fund: Activity Report 2014*, at 17 (2014) (Activity Report) (On File with Author).

28 Brazilian Development Bank, *Amazon Fund: Activity Report 2014*, at 19 (2014) (Activity Report) (On File with Author).

29 See generally Henry G. Schermers, *International Institutional Law* 509 (Sijthof & Nordhof International Publisher, 1980). *International institutional law is a systematic study of the institutional problems which are arise or may arise in all or most international organizations. International institutional law also covers many rules of law formulated by international organizations such as the monetary rules of International Monetary Fund.*

30 Joseph Gold, *Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles*, 72 *Am. J. Int'l L.* 1, 858 (1978).

31 Gerd Drosse, *supra* note 8, at 61.

32 Henry G. Schermers, *supra* note 29, at 419-20.

33 Sophie Smyth, *A Practical Guide To Creating A Collective Financing Effort To Save The World: The Global Environment Facility Experience*, 22 *Geo. Int'l Envtl. L. Rev.* 29, 31 (2009).

### Development Trust Funds Created Under

34 Gerd Drosse, *supra* note 8, at 114.

35 *Id.*

36 Joseph Gold, *supra* note 30, at 863.

37 Ilias Bantekas, *The Emergence Of The Intergovernmental Trust In International Law: The British Yearbook of International Law* 254 (Oxford, 2011).



## International Arrangements

Development trust funds also can be created outside of the host organizations. A group of donors (states or international organizations) acting as a collective principal may enter into international arrangement to create a new agent constructing from “scratch” an organization of the donors’ own design.<sup>38</sup> This collective financing effort have generally not been created as new entities under international law. Instead, they use those aspects of the World Bank or the U.N. (or others international organizations) that seem useful but set up a different entity to perform the functions that they do not want those institutions to perform.<sup>39</sup>

In relation to the assets subject to the trust, there exists some division of the full rights of ownership between a trustee and a beneficiary, together with the intention that the assets may be used or disposed of only for the advantage of the beneficiary and not the trustee.<sup>40</sup>

Under this approach, development trust funds are technically a financial vehicles without independent legal personality, created by an administrative agreement between donor(s) and multilateral trustee.<sup>41</sup> The legal person of the trust is distinct from that of the donor, as well as from the other assets of the trustee, even though the assets of the trust pass to the ownership of the trustee for the duration of the trust relationship.<sup>42</sup> Due to this constraint, they generally cannot enter into contracts or to be subject of privileges and immunities.<sup>43</sup> Donors maintain effective control over trust funds, which are not commingled with

the general resources of multilateral agencies.<sup>44</sup>

The Global Environment Fund (GEF) is an example of this model. It is a multi-billion dollar Fund created in 1994 by the World Bank to provide financial support to developing countries for projects designed to protect the environment.<sup>45</sup> Its structure grew out of donors’ (internally conflicting) desires to avail themselves of the World Bank’s capacity to manage the Fund while simultaneously preventing the World Bank from exercising complete control over it.<sup>46</sup>

The intergovernmental trust fund arrangement may also lead to the creation of development trust funds that governed under national law of specific state. This approach has been used by the G8 countries when setting-up the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) in 2001. The alternative the Global Fund’s donors selected was to set the Fund up as a non-profit foundation under Swiss law.<sup>47</sup>

## The Existing Indonesian Development Trust Funds

Perpres No. 80/2011 defined a trust fund or development trust fund is a grant provided by one or several Donors which is managed by a trustee institution for a specific use. The grant which is pooled into development trust fund may be sourced domestically as well as internationally. The trust fund is technically an “independent” institution that represents the Government of Indonesia (GoI) in the implementation of activities and manages the program that has been set-up. The development trust fund acts as the primary agent to implement the targeted program and to perform the right and obligation of the GoI to oversee manage

38 Sophie Smyth, *Collective Action for Development Finance*, 32 U. Pa. J. Int’l L. 961, at 987 (2011).

39 *Id.* at 988.

40 *Id.*

41 Bernhard Reinsberg, *The Implications of Multi-Bi Financing On Multilateral Agencies: The Example of the World Bank 3* (University of Zurich Center for Comparative International Studies, 2015).

42 Ilias Bantekas, *supra* note 37.

43 Gerd Drosse, *supra* note 8, at 61.

44 *Id.* at 113.

45 Sophie Smyth, *supra* note 33, at 40.

46 Sophie Smyth, *supra* note 38, at 990.

47 Sophie Smyth, *supra* note 33, at 1001. See also The Global Fund, Fifth Board Meeting, Report Of The Governance and Partnership Committee, Annex 6, at 2-3 (2003), available at <http://www.theglobalfund.org/documents/board/05/gfb57annex6.pdf> (Aug 18, 2015, 10:15 AM) (providing a historical analysis of why the Global Fund chose to incorporate itself as a nonprofit under Swiss law).



and implement the Program. The management of the development trust fund shall be managed by a trustee institution. A trustee institution is an organization established by ministries/agencies to manage a development trust fund with authorities that has been agreed in the grant agreement. Generally, a trustee institution's structure shall consist of a board of trustee and a trust fund manager. The trustee institution will be directed by the Board of Trustees. The Board of Trustees will have a conditional independent decision making authority. The Board of Trustees will elect the trust fund manager to manage the Trust Fund.

Not so long after the enactment of Perpres No. 80/2011, the GoI has successfully established two national development trust funds namely Millennium Challenge Account-Indonesia (MCA-I) and Indonesia Climate Change Trust Funds (ICCTF). The MCA-I was officially established in 2012 while the ICCTF was in 2014. These two national trust funds are being managed by a national trustee institution under coordination of Bappenas.

**Table of the Existing Indonesian Development Trust Funds<sup>48</sup>**

	MCA-Indonesia	ICCTF
<b>Proposed Life of Fund</b>	5 years	Unlimited time
<b>Establishment Documents</b>	Ministry of Nat'l Dev. Planning/Head of Bappenas Regulation No. 2 Year 2012	Ministry of Nat'l Dev. Planning/Head of Bappenas Regulation No. 3 Year 2013
<b>Activities Supported</b>	<ul style="list-style-type: none"> <li>• Green Prosperity</li> <li>• Community-Based Health and Nutrition to Reduce Stunting</li> <li>• Procurement Modernization</li> </ul>	<ul style="list-style-type: none"> <li>• Land Based Mitigation</li> <li>• Adaptation and Resilience</li> <li>• Energy</li> </ul>
<b>Accessing the Fund</b>	Sectorial ministries, NGOs or academic institutions, and local governmental bodies are invited to submit proposals for activities to be funded by the MCA-Indonesia.	Sectorial ministries on their own, or through joint proposals with NGOs or academic institutions, and local governmental bodies are invited to submit proposals for activities to be funded by the ICCTF.
<b>Decision Making Structure</b>	Board of Trustee	Board of Trustee
<b>Governing Documents</b>	<ul style="list-style-type: none"> <li>• MCA-I Implementing Bylaws Regulation.</li> <li>• MCC guidelines.</li> </ul>	<ul style="list-style-type: none"> <li>• ICCTF Bylaws</li> <li>• ICCTF Guidelines.</li> </ul>
<b>Donors</b>	MCC-US.	<ul style="list-style-type: none"> <li>• UK (DFID);</li> <li>• Australian Aid (AusAID),</li> <li>• Swedish International Development Agency (SIDA)</li> <li>• United Nation Development Programme (UNDP)</li> </ul>
<b>Authority to Allocate</b>	Board of Trustee	Board of Trustee

<sup>48</sup> Data collected from several sources (2014-2016).



## Evaluating Indonesian Development Trust Funds: An International Law Perspective

Since the increasing number of trust funds that are governed by international law, there are already desirable attempt to create a codification of the fundamental principles that should be observed in the administration of the trust funds.<sup>49</sup> Many development practitioner, scholars and international donor agencies have issued guidebooks, handbooks or standard manuals in order to promote accountability in setting up, managing, monitoring, and evaluating a development trust fund in various area.<sup>50</sup>

Based on international best practices, some of the standard principles of development trust funds includes: a solid legal status, standard of good governance and housekeeping requirements, and the fiduciary responsibilities of governing body members.<sup>51</sup>

### Unclear Legal Status

The legal status of the development trust funds may take one of two distinct legal forms. The most common form is without independent legal personality, involves setting up the trust fund under the auspices of the host institution. The other form of the trust funds is legally independent, involves setting up the trust fund as a legal entity under the national law.

49 Joseph Gold, *supra* note 30, at 865.

50 See, e.g., Barry Spergel & Kathleen Mikitin, *Practice Standards for Conservation Trust Funds* (CFA Publication) (Dec 2014); Flynn Cassie, *Blending Climate Finance Through National Climate Funds: A Guidebook For The Design And Establishment Of National Funds To Achieve Climate Change Priorities* (UNDP New York) (2011); Marianne Guerin-McManus, *Conservation Trust Funds*, 20 UCLA J. Envtl. L. & Pol'y 1 (2001/2002); Ruth Norris (Ed), *The IPG Handbook on Environmental Funds: A Resource Book For The Design And Operation Of Environmental Funds*, (IPG by Pact Publications New York) (1999); Sophie Smyth, *A Practical Guide To Creating A Collective Financing Effort To Save The World: The Global Environment Facility Experience*, 22 Geo. Int'l Envtl. L. Rev. 29, 31 (2009).

51 Other standard principles of development trust funds include: a solid legal status, goals and objectives, governing documents, a governing body, standard of good governance and housekeeping requirements, the fiduciary responsibilities of governing body members, manager fiduciary arrangements, positions of head of management unit and the funding mechanism.

Perpres No. 80/2011 provides that development trust fund is established within the initiate ministerial/agency. Moreover, the trust fund will be treated as a state budget working unit (Satker).<sup>52</sup> Under this provision, trust fund clearly becomes part of the ministerial/agency who created it. The ministry who host the trust fund maintains effective control over trust funds. Thus, Indonesian development trust funds will not have independent legal personality. The governing body of the trust cannot enter into agreement on behalf of the trust funds.

In this case, an understanding regarding the concept of the state budget working unit (Satker) is vital. Based on the Government Regulation regarding The Preparation of Ministry/Agency's Working and Budget Planning<sup>53</sup> provided that the Satker is part of the ministerial working unit that conducting some activities as part of the organization's programs.<sup>54</sup> Furthermore, others regulation<sup>55</sup> mentioned that the head of state budget working unit (KPA) is authorized to sign a contract with a third party.

Based on the interpretation above, when Perpres No. 80/2011 mentions that the trust fund institution is treated as a Satker, means that the chairperson of the Satker (KPA) is authorized to enter into agreement with a third party<sup>56</sup> on behalf the ministry/agency.

In sum, we may say that Indonesian development trust funds are technically has a quasi-independent legal personality. As it is part of working unit at the institution who own the trust fund, they don't have separate legal personality. But, as a state budget working unit, they are

52 Perpres No. 80/2011, at Art. 7.

53 Government Regulation No. 21/2004 regarding The Preparation of Ministry/Agency's Working Plan and.

54 It also has been defined similarly by the Presidential Regulation No. 5/2015 on Government Procurement and Ministry of Finance Regulation No. 170/PMK.05/2010 on Completion of State's Budget Working Unit Claims.

55 *Id.*

56 Guidelines for Accountable Entities and Implementation Structures, MCC US (July 21, 2008), at Sec. 2.1.A.



authorized to act independently and to enter into contract with the third party.

With the current legal status, it is unclear whether the Indonesian development trust fund has its own legal personality or not. Another question that also arises is whether Indonesian development trust funds has a legal capacity to enter into agreement with foreign donor or with international organizations other than goods and services provider?

### Lack of Provisions Regarding Fiduciary Responsibility

The fiduciary responsibilities of members of a board of directors or board of trustees of a charitable institution as well as trust funds are defined by both the English "common law" (which applies in the UK, US and British Commonwealth countries) and by the statutory laws of most "civil law" countries.<sup>57</sup>

The fiduciaries are, in many different ways, obliged to act unselfishly and to give other persons or institutions the advantage of their knowledge and skill. The fiduciary concept arises in the study of corporations and torts, and it also is a fundamental principle in agency relationship in non-profit organizations.<sup>58</sup> International best practices has also given some example of a fiduciary obligations which arise from the relationship between trust funds and its board member, such as being familiar with Fund's activities, and fully informed of the financial status of the fund; ensuring that the Fund complies with its purpose; ensuring that the Fund operates in a transparent, accountable manner, as required by its legal documents and operation manual(s).<sup>59</sup>

Governing body members understand their fiduciary responsibilities and ensure they have (or acquire) the competence necessary to carry

them out.<sup>60</sup> Fiduciary arrangements will facilitate relationships between the Board and different actors in the trust fund structure. Sound fiduciary management provides the foundation for the efficient movement and tracking of funds flowing to and from the trust fund.<sup>61</sup>

Unfortunately, as we examine either in Perpres 80/2011 or in the establishment documents, a statutory provision of fiduciary obligations cannot be found.

In opposite with its higher documents, the MCA-I's Implementing Bylaws provides details information about the fiduciary duty of the board to the trust funds.<sup>62</sup> The MCA-I's board has several fiduciary duty such as to exercise objective and independent judgment and discharge their duties in a manner that is in the best interests of the Program Compact and MCA-Indonesia and also by staying informed and providing appropriate oversight and holding regular meetings to consider and approve activities of MCA-Indonesia as necessary.<sup>63</sup> The ICCTF's Bylaws also have this provision, even though it's not as comprehensive as the MCA-I. In some part of the Bylaws it's mentioned that each Deputy Director and staff of Secretariat is obliged to carry out all their duties for the best interest of ICCTF.<sup>64</sup>

### Housekeeping Requirements Provisions

Every legal entity is required to observe a number of organizational formalities (often referred to as corporate housekeeping) in accordance with their articles of incorporation, bylaws, law and regulation. Good governance is the implementation of certain principles or policies that should protect the organization from misconduct.<sup>65</sup> Some

57 Barry Spergel & Kathleen Mikitin, *Practice Standards for Conservation Trust Funds* (CFA Publication) (Dec 2014).

58 James J. Fishmen, et al, *Nonprofit Organizations: Cases and Materials* 110 (5<sup>th</sup> Ed, Foundation Press) (2015), at 120.

59 Barry Spergel & Kathleen Mikitin, *supra* note 391, at 20.

60 *Id.* at 20.

61 Cassie Flynn, *supra* note 404, at 25.

62 Chapter III B-5 of MCA-I Implementing Bylaws Regulation.

63 *Id.*

64 Chapter 3.2 of ICCTF's Implementing Bylaws (November 12, 2014).

65 James J. Fishmen, et al, *Nonprofit Organizations: Cases and Materials* 110 (5<sup>th</sup> Ed, Foundation Press) (2015).





aspects of good governance are obvious: regular board meetings with agenda, annual elections of directors, minutes of meetings, directors' access to book and records, the delegation of responsibility to board committees or delegation in appropriate situation to outsiders experts.<sup>66</sup>

In practice, a governing body has at least two face-to-face meetings per year, and maintains accurate written records of all meetings and decisions. A governing body meets regularly in order to ensure that it is able to make informed decisions and to carry out its fiduciary responsibilities to govern the trust fund.<sup>67</sup>

A trust fund's chief executive or a Fund's manager is present and allowed to speak at meetings of the governing body (except when his/her own performance or compensation is being discussed or if the governing body meets in closed session), but is not a voting member of the governing body, and normally should not be the person who records the minutes.<sup>68</sup>

It should also have an internal check and balance system to prevent domination by one constituency. To accomplish this, the board can rotate its members to encourage the introduction of new ideas and to broaden ownership in the fund. It can also employ special voting systems; for instance, giving certain members veto power on certain issues, or requiring super-majorities on certain issues, to keep one group from gaining power at the expense of the objectives of the fund.<sup>69</sup>

Unfortunately, neither Perpres No. 80/2011 nor the establishment documents of the development trust funds do not even mention about good governance and housekeeping requirements such

as the boards special meeting, how should the meeting are conducted or details of the voting right at the board meetings.

Despite the facts that the good governance principles have been covered by the Bylaws of every trust fund in Indonesia, it is important, as a practical matter, to stipulate the requirements both in Perpres No. 80/2011 and in the establishing documents.

### Conclusion and Recommendation

This study has explored the development of Indonesian Development Trust Funds. The most important conclusion is that there are set of guidelines or regulations that should be added in the future development trust funds in Indonesia such as regulation in the area of state budget that specially governed for development trust funds and tax regulation for development trust funds activity. A clear and reliable guideline and regulation will protect both the trust funds institution and donors, also to encourage efficient and fair use of development money.

The foundation of Indonesian development trust fund actually has already crystalized prior to the enactment of regulation regarding development trust fund in 2011. It is created from the government's experience with various multi-donor trust funds ranging from large multi-donor trust funds to quite small and ad hoc trust funds to support very specific government's activities. However, the current regulation is still absent from some substantial provisions regarding the legal status, and provisions related to good and accountable governance of Indonesian development trust funds. The lack of substantial provisions of the development trust fund has created some problems in the operational level such as an uncertain legal status, inadequate governance procedure, lack of efficiency and accountability of the organization's activity.

This work has made clear that the government of Indonesia should amend the current trust fund regulation in order to make the development trust fund operated more accountable, effective and efficient.

66 *Id.*

67 Barry Spergel & Kathleen Mikitin, *supra* note 57, at 18.

68 *id.*

69 See generally Kathleen Mikitin, *Issues and options in the Design of GEF Supported Trust Funds for Biodiversity Conservation* 28 (April 1995) (World Bank Env. Dep't., Paper No. 11, 1995); Marianne Guerin-McManus, *Conservation Trust Funds* 17, 20 UCLA J. Envtl. L. & Pol'y 1 (2001/2002); Barry Spergel & Kathleen Mikitin, *Practice Standards for Conservation Trust Funds* 15 (CFA Publication) (Dec 2014).



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