

A CRITICAL EVALUATION OF THE CONCEPTUAL FOUNDATION OF INDONESIAN DEVELOPMENT TRUST FUND*

Hendra Wahanu Prabandani, SH, MH, LL.M.
Biro Hukum Bappenas



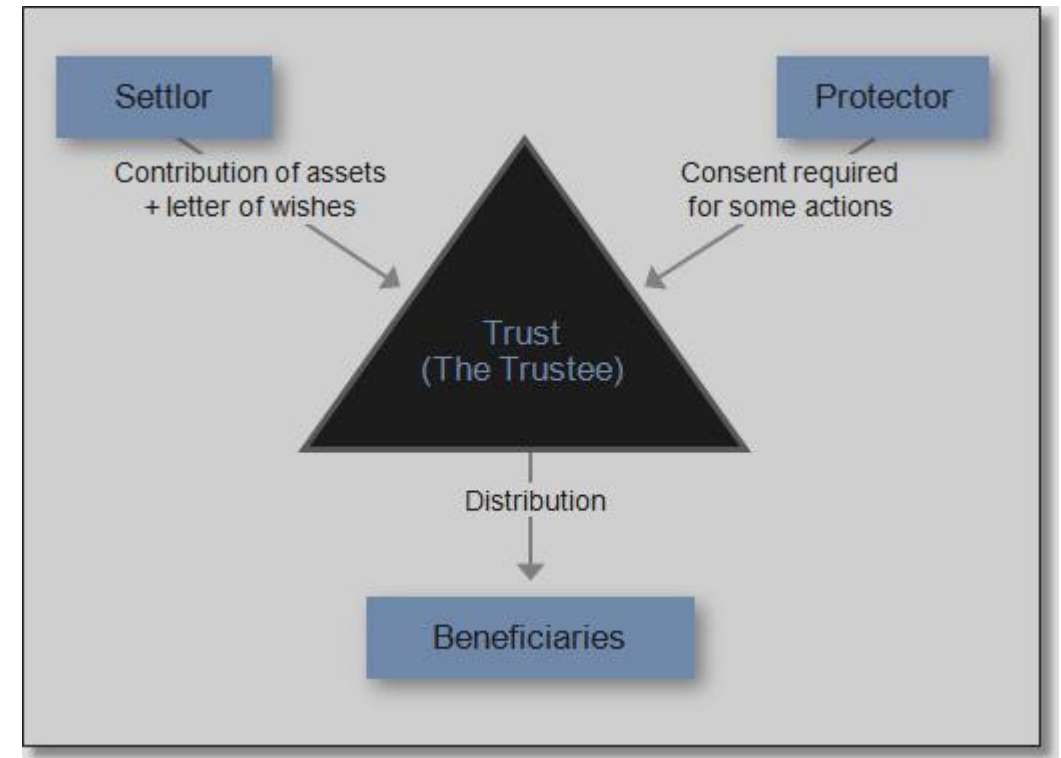
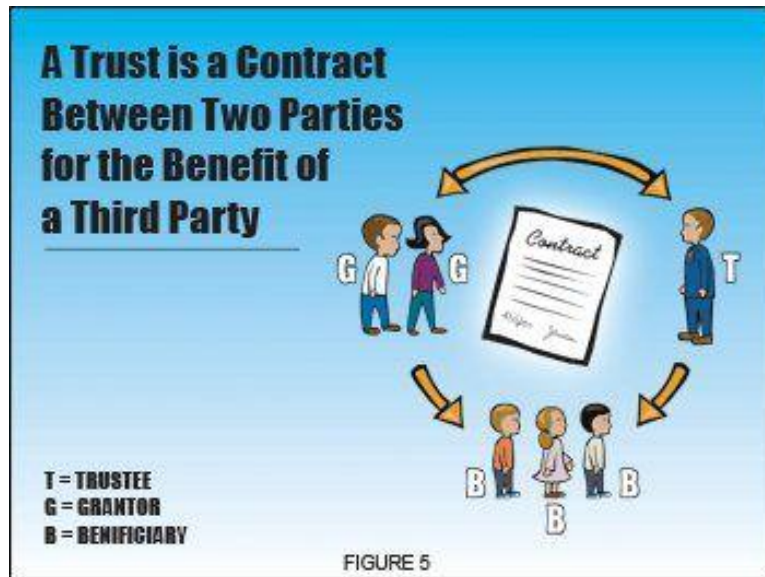
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Jakarta 24 August 2016

OUTLINE

- BACKGROUND
- THE BASIC CONCEPT OF TRUST
- DEVELOPMENT TRUST FUND
- INDONESIAN DEVELOPMENT TRYST FUND
- EVALUATING INDONESIAN DEVELOPMENT TRUST FUND
- CONCLUSION

THE BASIC CONCEPT OF TRUST

- A trust is, functionally speaking, an arrangement whereby a trustee manages property as a fiduciary for one or more beneficiaries.

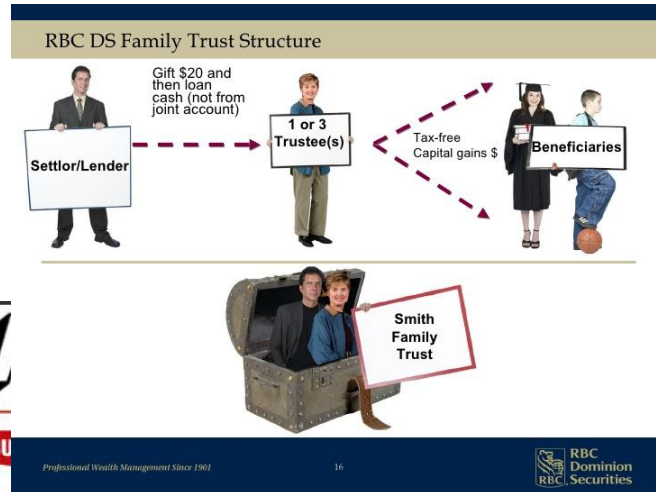


- A Trust Fund is thus a sum of money that is legally set aside and whose use is restricted to specific purposes for designated beneficiaries.

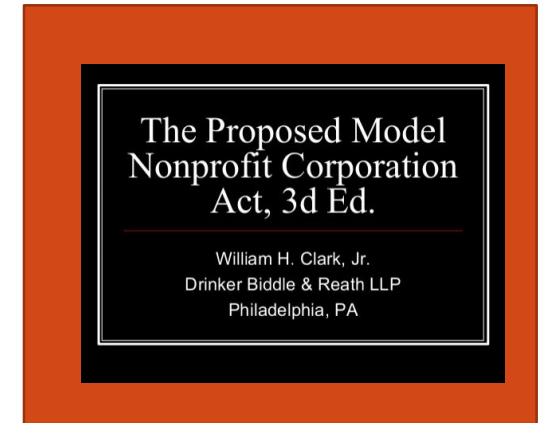
TRUST PURPOSES

- Private Trust

Jimenez v. Lee



- Charitable Trust



Leona Helmsley's \$12 million pooch dies - NY Daily News
9 Jun 2011 - **Leona Helmsley's** pampered pooch "Trouble," who inherited \$12 million from the real estate mogul, has died at the age of 12.



nationalpensiontrust

DEVELOPMENT TRUST FUND

- ...an **intergovernment trust** is premised on the the following characteristics: a **contractual relationship** between a donor state or international organization (**the donor**) and a s trustee state or international organization (**the trustee**) for the benefit of a future class of **beneficiaries**, or an intended purpose, whereby the beneficiaries are distinct persons of the trustee or donor and the trustee possesses sufficient independence from the donor to carry out its mandate (Ilias Bantekas, 2011).
- A trust thus is a **fiduciary relationship** in which **a trustee** (or trustees) holds legal (custodial) title to specific property including money under a fiduciary duty to deal with it for the benefit of **the beneficiaries**, who hold equitable title (including the right to sue the trustee to carry out the terms of the trust). (the World Bank, 1995)

TRUST FUND UNDER INTERNATIONAL LAW (1)

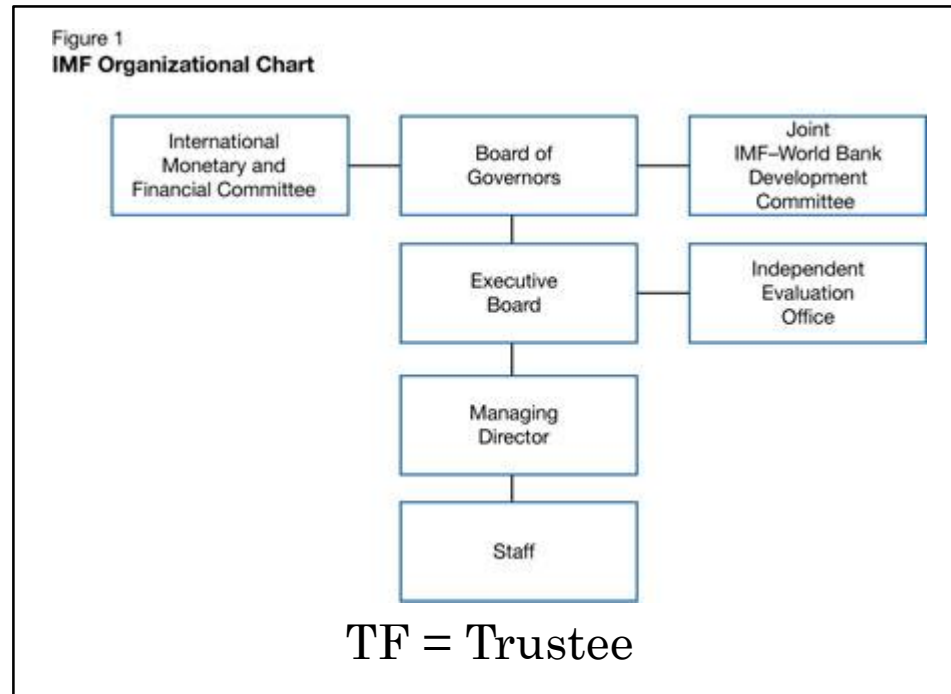
- Under institutional international law, international organizations may create development trust funds for specific activities outside their regular budget (*See generally* Henry G. Schermers).
- Funds are usually created and administered by the host organizations but they have their own governance structures and they are maintained separately from the resources of the institutions that administer them.
- 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



WHO

TRUST FUND UNDER INTERNATIONAL LAW: IMF

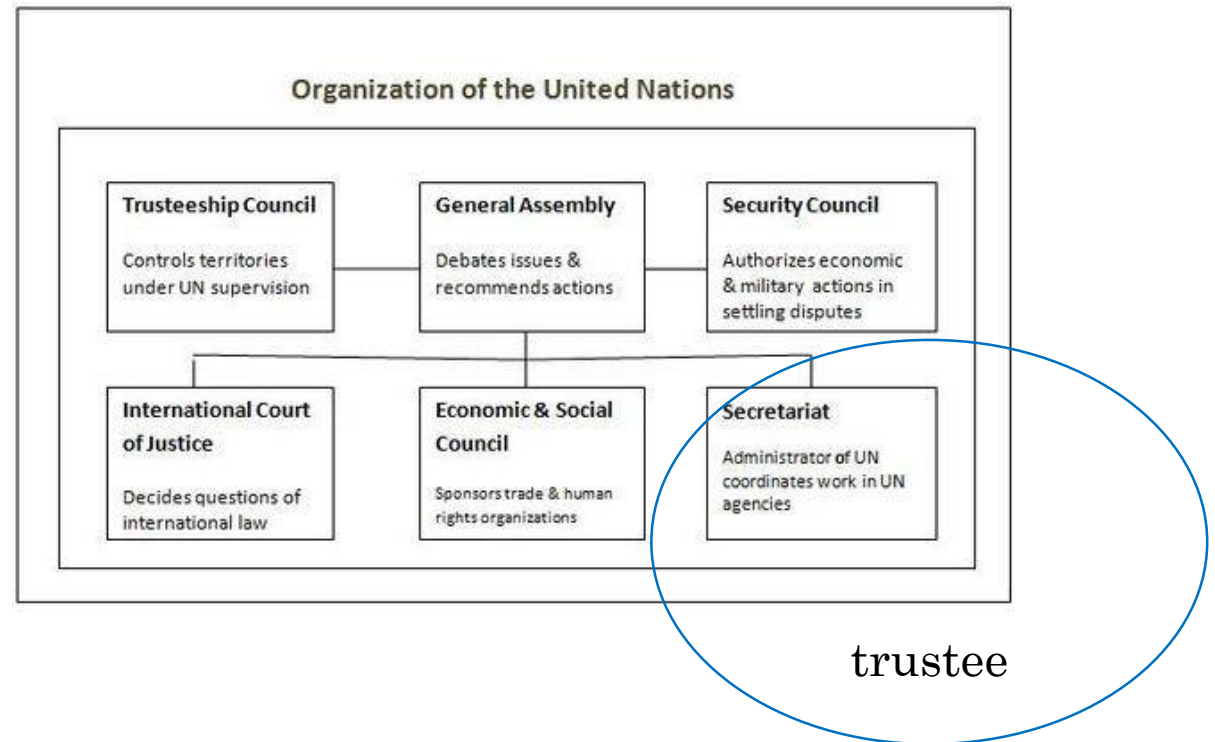
- In the case of the Trust Fund of the IMF, the IMF owns the resources of the development trust fund as a trustee, but they may be used in accordance with the trust instrument solely for the benefit of the 61 members that have been selected as potential beneficiaries



IMF
members=beneficiaries

TRUST FUND UNDER INTERNATIONAL LAW: UN

- In the case of 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



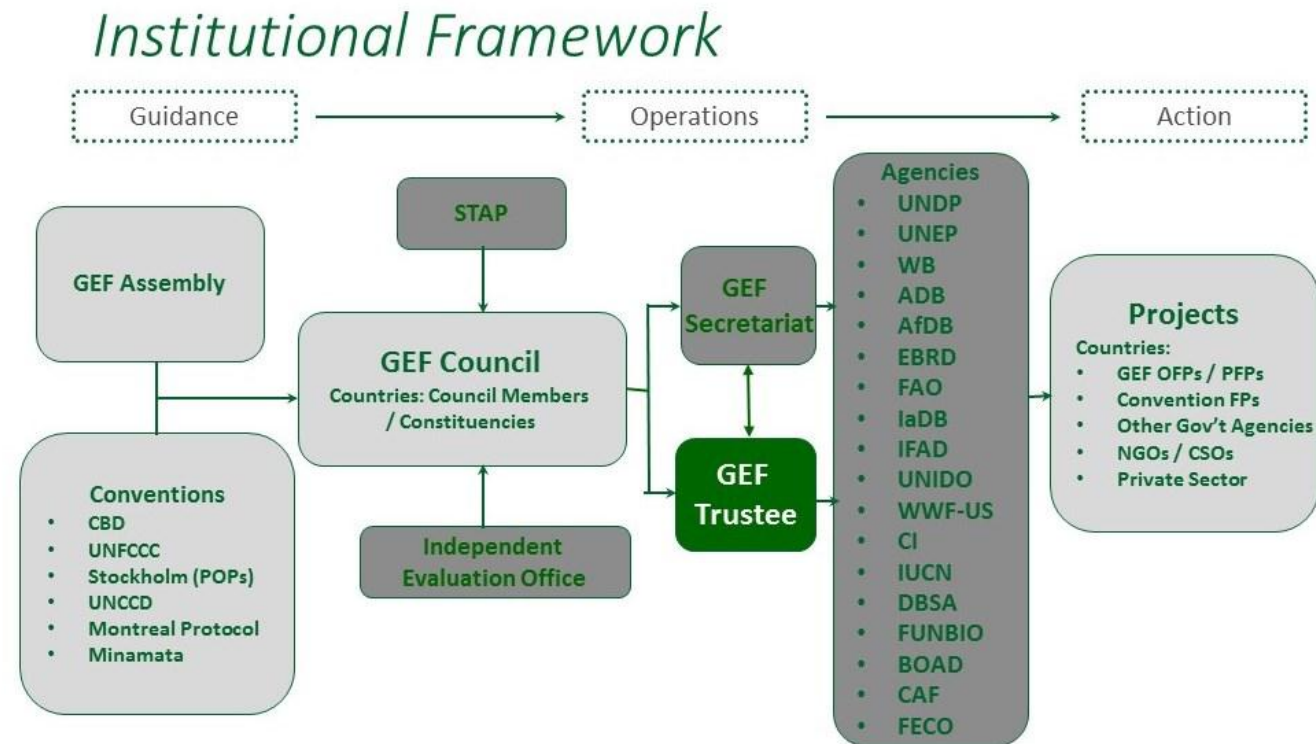
DEVELOPMENT TRUST FUNDS CREATED UNDER INTERNATIONAL ARRANGEMENTS

- 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.
- 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.
- They generally **cannot enter into contracts** or to be subject of privileges and immunities.

DEVELOPMENT TRUST FUNDS CREATED UNDER INTERNATIONAL ARRANGEMENTS:

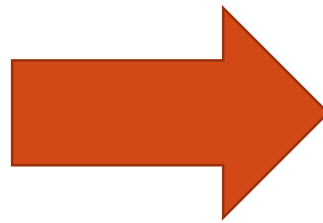
GEF (THE GLOBAL ENVIRONMENT FUND)

- 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



DEVELOPMENT TRUST FUNDS CREATED UNDER INTERNATIONAL ARRANGEMENTS: **THE GLOBAL FUND** (THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA)

- 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.



INDONESIAN DEVELOPMENT TRUST FUND



BACKGROUND

- Indonesia has recently authorized development trust funds based on Presidential Regulation No. 80/2011 regarding Trust Funds.
- They pooling external funding resources from various development partners to improve the effectiveness of external assistance and domestic needs.
- 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).

THE BASIC CONCEPT OF 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 “semi-independent” institution that represents the Government of Indonesia 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 Government of Indonesia to oversee manage and implement the Program.

THE TRUSTEE INSTITUTION, THE BOARD OF TRUSTEE AND THE FUND MANAGER

- The Trustee is an organization established by ministries/agencies to manage the development trust fund with authorities that has been agreed in the grant agreement. Initiate minister/head of agency may only establish the Trustee after obtained consideration from the Head of Indonesian National Developing Agency (Bappenas) and the Minister of Finance. This is done to ensure that the Fund will be created to finance activities in accordance with the national development priorities.
- Generally, the Trustee's structure shall consist of a board of trustee and a fund manager. The trustee institution will be directed by the Board of Trustees (The Board). The Board will have a conditional independent decision making authority. The Board is to be independent and the final decision maker with respect to the Fund's programs.
- The member of the Board consists of government and non-government officials, including representatives of civil society and private sector. Board members who come from government agency are nominated by heads of agencies/minister. The non-government representatives are appointed based on their own election system.

THE OPERATIONS

- Every Ministry, government agency, local government, Non-Governmental Organisation, or Private Institution may propose their prospective activity to be funded by the development trust fund directly to the Board. However, the activity shall be with reference to the national Medium Term Development Plan; the objective of the grant; and the thematic targets of the Fund.
- The Board will conducted an assessments for every proposed activities. The Board required to maintain the assessment record as a basis for the approval or rejection of the proposed activities. The Presidential Regulation delegate authority to the Board to develop their own assessment method.

REPORTING, MONITORING AND EVALUATION

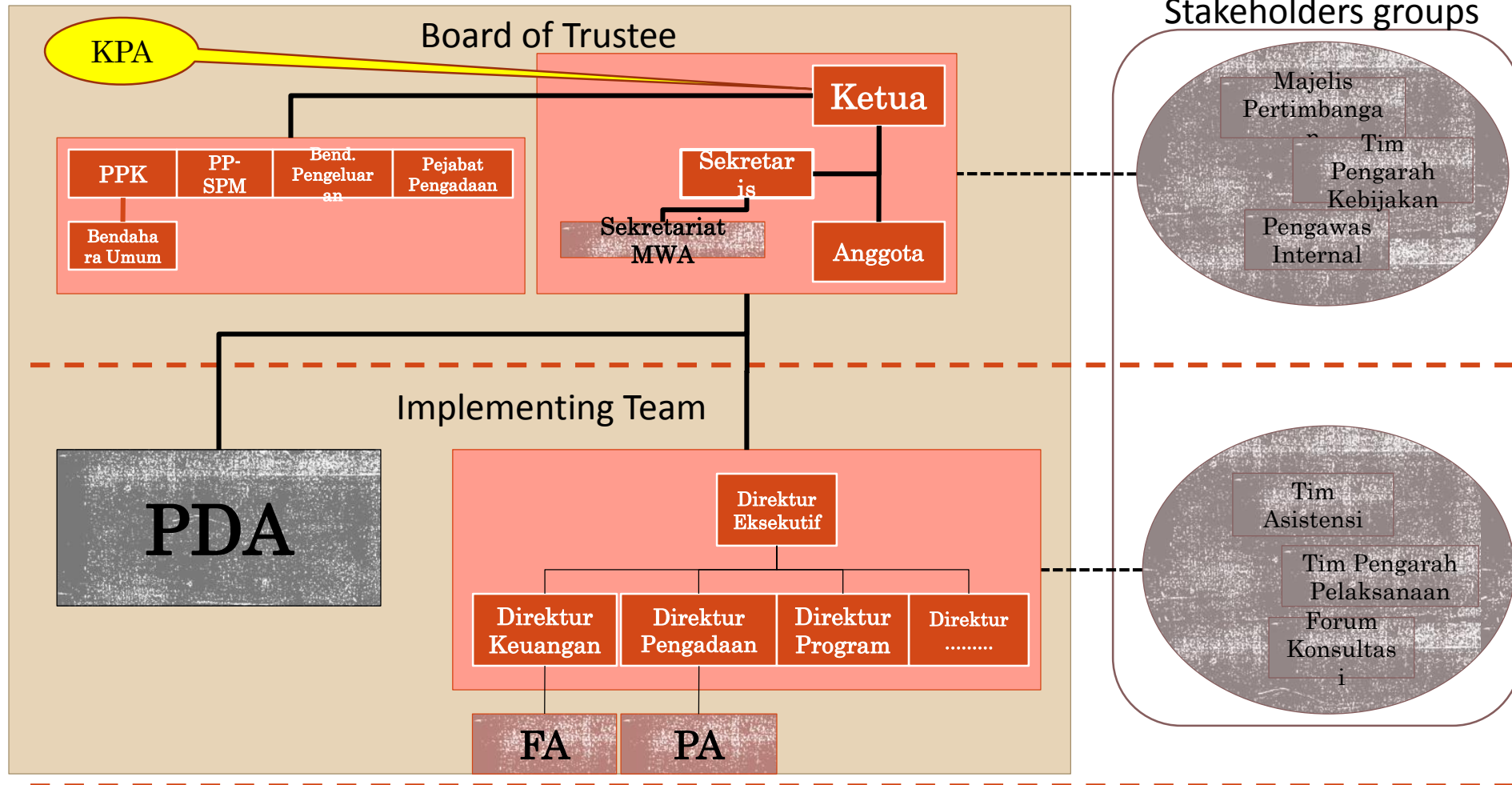
- Ministry/government agency, Local Government, Non-Governmental Organisation and Private Institution as implementing agents, shall submit quarterly reports which consist of implementation and financial report to the Board.
- The Board then shall submit a semester progress report on the implementation of activities and management of trust fund to Head of National Development Agency, Minister of Finance and other relating minister. The Host Minister/Head of Agency who established the trust fund require to continuously oversight, monitor and evaluate the implementation and management of the trust fund institution.

THE EXISTING INDONESIA DEVELOPMENT TRUST FUNDS (1)



Date created	April 20, 2012	July 9, 2013
Proposed Life of Fund	5 years	Unlimited time
Establishment Documents	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
Activities Supported	<ul style="list-style-type: none"> • Green Prosperity • Community-Based Health and Nutrition to Reduce Stunting • Procurement Modernization 	<ul style="list-style-type: none"> • Land Based Mitigation • Adaptation and Resilience • Energy
Accessing the Fund	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.
Decision Making Structure	Board of Trustee	Board of Trustee
Non-Government Stakeholder Participation	As voting member of the Board: representative from civil community organizations, one representative from the private sector, one representative from universities.	As voting member of the Board: representative from civil community organizations, one representative from the private sector, one representative from universities and donors.
Governing Documents	<ul style="list-style-type: none"> • MCA-I Implementing Bylaws Regulation. • MCC guideline. 	<ul style="list-style-type: none"> • ICCTF Bylaws
Donors	MCC-US.	<ul style="list-style-type: none"> • UK (DFID); • Australian Aid (AusAID), • Swedish International Development Agency (SIDA) • United Nation Development Programme (UNDP)
Authority to Allocate	Board of Trustee	Board of Trustee

MCA-I ORGANIZATION'S STRUCTURE

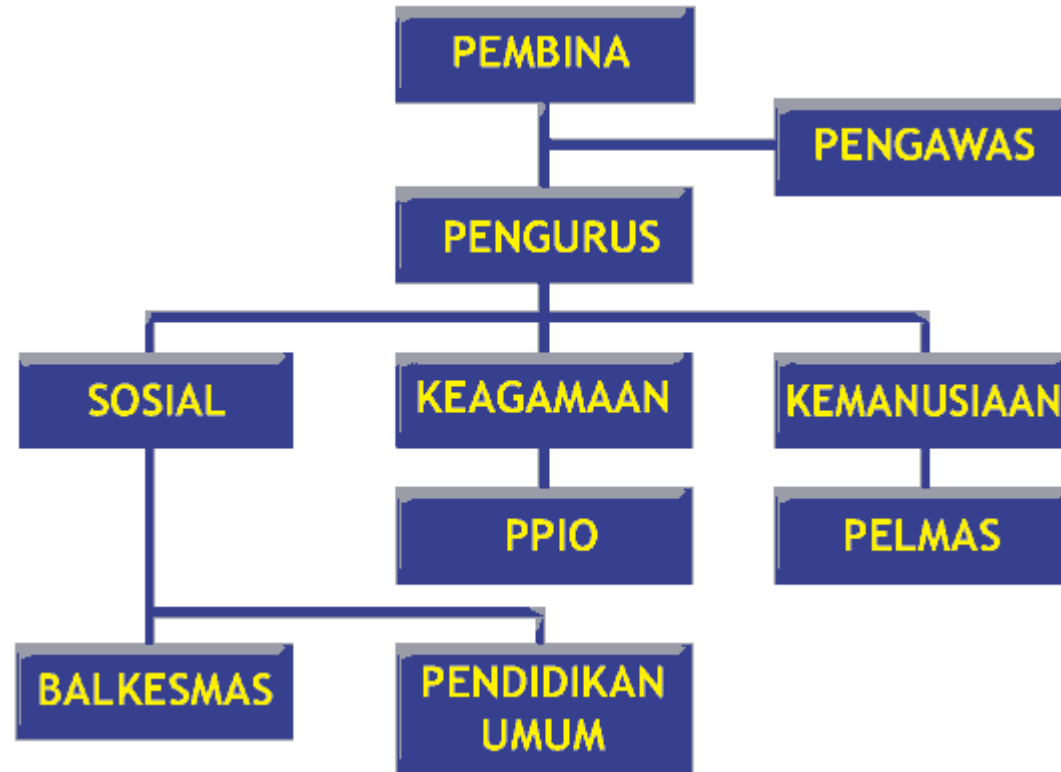


Implementing Entities



TRUST LIKE DEVICES IN INDONESIA

FOUNDATION/YAYASAN

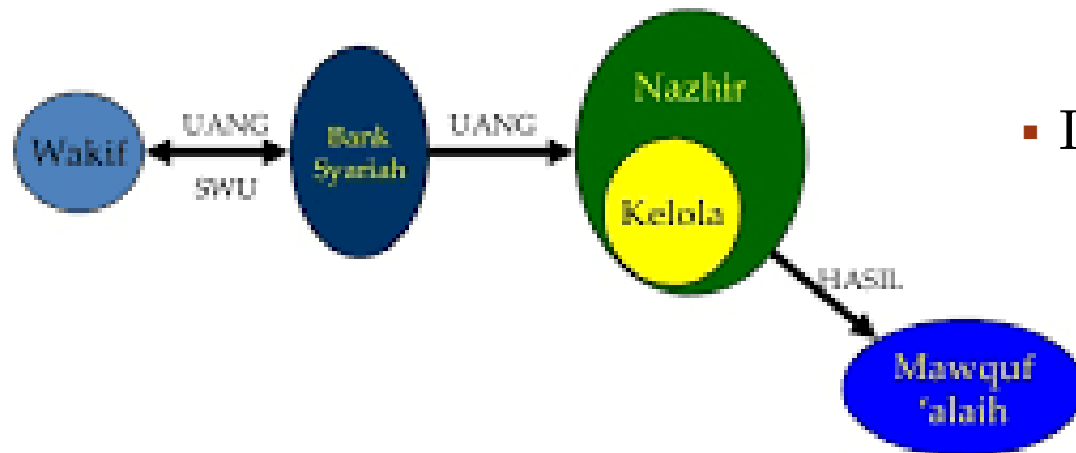


- LAW NO. 28/2004 on Foundation

WAKAF

Bank Syariah Sebagai Penerima
Wakaf Uang

ALT 1



- LAW NO. 41/2004 on Waqaf

14/5/2013

Evaluating Indonesian Development Trust Funds

LEGAL PERSONALITY (UNDER INT'L LAW)

- Presidential Regulation regarding Trust Funds 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**).
- 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 with others Int'l Law Entities (State/Int'l Organization)^{3444w}.

MISSING PROVISIONS REGARDING HOUSEKEEPING REQUIREMENTS

- Some 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 outside experts.
- Unfortunately, neither Perpres No. 80/2011 nor the establishment documents of the development trust funds does not even mention about good governance and housekeeping requirements such as the board's special meeting, how should the meeting be conducted or details of the voting right at the board meetings.

POTENTIAL CONFUSIONS OF GOVERNING BODIES' POWERS

- In practice, the existing development trust funds at least have four level of governing documents: 1) Ministerial regulation as a charter of the trust fund; 2) Ministerial decree for the appointment of the Board of Trustee; and 3) A set of governing guideline as the Bylaws of the trust funds and 4) a set of standard operating procedures for the day to-day operations and administration of the trust fund institution.
- The governing documents of current Indonesian trust funds still contain a problem of delegation of authority.
- In the case of the MCA-I, it's supposed to be there is nothing in the Perpres No. 80/2011 or in the establishing documents which mentioned that the MCA-I have independent legal personality. However, the MCA-I's Bylaws mentioned that the MCA-I is having legal capacity to sue and be sued in before the court

LACK OF PROVISIONS REGARDING FIDUCIARY RESPONSIBILITIES

- International best practices has 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 the Fund complies with its purpose; ensuring that the the Fund operates in a transparent, accountable manner, as required by its legal documents and operation manual(s).
- Unfortunately, as we examine either in Perpres 80/2011 or in the establishment documents, a statutory provision of fiduciary obligations are cannot be found.

CONCLUSION

- The current regulation is still absent from some substantial provisions regarding the **legal status** 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.

INDONESIAN STATE BUDGET SYSTEM LIMITS THE ORIGINAL POWER OF HEAD OF MANAGEMENT UNIT

- In MCA-I the Program Implementation Unit, a management level unit, led by the Executive Director who managed the day to-day activities of MCA-Indonesia.
- The Officers are supported by appropriate administrative and other personnel as needed. The MCA-I also has KPA Supporting Unit to assist the board when they have to deal with the state budget matters.
- A state budget mechanism becomes the biggest problem in this area. National regulations hindered the trust fund manager/executive Director to sign a contract on behalf the trust funds.
- Under Indonesian regulation, every activity which engage with the government project can only be administered by a government's project director who have a status of a government employee.

UNCLEAR GUIDANCE OF GOALS AND OBJECTIVES

- Perpres 80/2011 is not clearly mentioned about the provisions regarding goals and objectives of the trust fund.
- It is just implicitly stated that the trust fund can only be established in order to achieve a thematic goals of national development priorities.