

# Conservation Trust Funds

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In her book, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, Professor Edith Brown Weiss describes a theory of intergenerational equity in which:

[E]ach generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations. This relationship imposes upon each generation certain planetary obligations to conserve the natural and cultural resource base for future generations and also gives each generation certain planetary rights as beneficiaries of the trust to benefit from the legacy of their ancestors. These planetary obligations and planetary rights form the corpus of a proposed doctrine of intergenerational equity, or justice between generations.<sup>1</sup>

As we begin a new millenium, it is no mystery that human demands on Earth's natural systems have reached unsustainable levels, resulting in environmental trends such as "population growth, rising temperature, falling water tables, shrinking croplands per person, collapsing fisheries, shrinking forests, and the loss of plant and animal species."<sup>2</sup> Vast improvements in technology, proven to be a mixed blessing, account for part of the problem. The global economy also plays a significant role: the market, although "a remarkably efficient device for allocating resources and for balancing supply and demand . . . does not respect the sustainable yield thresholds of natural systems."<sup>3</sup> If we do not want to pass the point of no return and head towards

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1. EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* 2 (1989).

2. LESTER R. BROWN, *Challenges of the New Century*, in *STATE OF THE WORLD 2000* (World Watch Institute ed., 2000) 5.

3. *Id.* at 9.

ecological disaster, we must develop a policy ethic sensitive to the "basic features of the natural world: we will never understand it completely, it will not do our bidding for free, and we cannot put it back the way it was."<sup>4</sup> Equally important, we must alter the way we view the global economy and find new ways to finance projects to protect what has not yet been destroyed.

Conservation trust funds are one financing mechanism that has been recently employed, building on lessons learned from other models in the areas of conservation and development. Conservation trust funds are well suited to conserving natural resources due to their long time frame, their stable and enduring structure, and their ability to build local capacity in order to sustain it independent of outside agencies. As Professor Weiss points out, "[t]he basic principle of intergenerational equity requires that the present generation compensate future generations for the costs that it imposes on them for its own use of the planet and natural and cultural resources."<sup>5</sup> This is precisely what conservation trust funds set out to do.

This article will discuss the origins of the trust fund concept and the development of trust funds in the context of conservation. It will highlight the basic principles that should be taken into consideration and the issues to be addressed in designing the framework of a trust fund. Finally, this article will describe concrete steps to developing and implementing a trust fund, and relate through specific case studies some of the lessons learned from past experiences.

## TRUST FUNDS: GENERAL BACKGROUND

### What is a Trust Fund?

A trust is a legal arrangement in which assets are managed by one group (the trustee) on behalf of another group (the beneficiary).<sup>6</sup> In the case of conservation trust funds, the assets are grants and/or other donor funds, the trustee is usually a board of directors, and the beneficiary is usually the host country and/or a non-governmental organization ("NGO") in that country. Conservation trust funds are considered "public" or "charitable"

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4. CHRIS BRIGHT, *Anticipating Environmental 'Surprise'*, in STATE OF THE WORLD 2000 37 (World Watch Institute ed., 2000).

5. WEISS, *supra* note 1.

6. THE WORLD BANK, ISSUES AND OPTIONS IN THE DESIGN OF GEF SUPPORTED TRUST FUNDS FOR BIODIVERSITY CONSERVATION 6 (1995) [hereinafter *The World Bank, Issues and Options*].

trust funds, because they “finance projects that serve a public purpose, and the legally-designated beneficiary is the general public.”<sup>7</sup> Trusts have a long history in the English common law and in those countries whose legal systems are based on English law.<sup>8</sup> In countries with legal systems other than the common law, trust funds can be established through national legislation or in analogous forms, such as “foundations” in civil law countries, which have a separate legal personality of their own.<sup>9</sup>

### A BRIEF HISTORY OF THE LAW OF TRUSTS

Modern English and American trust doctrines can be traced back to the English *use*: a general trust concept that “entailed the transfer of legal title (*enfeoffment*) to a person who was to hold the property (the *feoffee to uses*) for the benefit of another (the *cestui que use*).”<sup>10</sup> The *use*, similar to trust concepts in other societies, developed as an equitable response to positive-law deficiencies and a restrictive English common law of property.<sup>11</sup> This method of circumventing the law was first and most extensively used by religious orders seeking to get around the Mortmain Acts – a series of acts prohibiting clergy from receiving donations of land for the purpose of “prevent[ing] the alienation of lands to religious corporations that consequently became perpetually inherited in one ‘dead hand,’ hence, the term ‘Mortmain.’”<sup>12</sup> By conveying the land to a *feoffee to uses*, clergy could reap the benefits of land ownership without violating the Mortmain Acts.<sup>13</sup> Other groups who regularly employed the *use* include debtors attempting to evade creditors, vassals seeking to escape the burdens of feudal landholding, men trying to avoid

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7. Kyle W. Danish, *International Environmental Law and the “Bottom-Up” Approach: A Review of the Desertification Convention*, 3 *IND. J. GLOBAL LEG. STUD.* 133, 168 (1995) [hereinafter Danish I].

8. THE INTERAGENCY PLANNING GROUP, *THE IPG HANDBOOK ON ENVIRONMENTAL FUNDS: A RESOURCE BOOK FOR THE DESIGN AND OPERATION OF ENVIRONMENTAL FUNDS* 23 (1999) [hereinafter IPG Handbook].

9. See Danish I, *supra* note 7, at 167.

10. Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 *TUL. L. REV.* 1139, 1143 (1996).

11. See *id.* at 1141. Positive law is defined as “Law actually and specifically enacted or adopted by proper authority for government of an organized jural society.” *BLACK’S LAW DICTIONARY* 806 (6th ed. 1991).

12. Avini, *supra* note 10, at n.26.

13. See *id.* at 1144.

the duties of dower, and those who wanted to convey land without having to deal with the constraints on a legal estate.<sup>14</sup>

Increasingly frequent employment of the *use* as an instrument of fraud led to the enactment of the Statute of Uses in 1535 (Statute).<sup>15</sup> The Statute tried to convert all equitable *uses* into legal estates by eliminating the *feoffee to uses*, making the beneficiary the legal owner.<sup>16</sup> However, some equitable interests escaped conversion due to the Statute's plain language and the interpretation of its construction by the common law courts.<sup>17</sup> Therefore, modern English and American trusts survived the Statute as a result of the Court of Chancery's interpretation of the *uses* as "trusts."<sup>18</sup>

As one ventures farther back in history, the origin of the English *use* itself has been topic of much academic debate.<sup>19</sup> The earliest theory maintains that the Roman *fideicommissum* was responsible for the origin of the trust.<sup>20</sup> Since Roman law served as the basis for the canon law of the church, and the ecclesiasts, who sought to circumvent the Mortmain Statute of the late fourteenth century, were the originators of the *use*, it seemed logical that the *fideicommissum* would be the direct ancestor of the *use*.<sup>21</sup> However, critics of this theory point out that the *fideicommissum* is by nature a testamentary bequest, while the *use* rarely arose by will.<sup>22</sup> Another theory, propounded by Frederic William Maitland and Oliver Wendell Holmes, attributed the origin of the trust to the Salic *salmannus* – a position that is likened to that of the *feoffee to uses*.<sup>23</sup> This Germanic theory has also been

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14. See *id.* at 1145-46.

15. See *id.* at 1146.

16. See *id.* at 1146-47.

17. *Id.* at 1147. For example, the Statute only addressed real property, so personal property was deemed to be a permissible subject of a *use*.

18. *Id.*

19. See *id.* at 1140.

20. See *id.* at 1148; see also 2 WILLIAM BLACKSTONE, COMMENTARIES \*328 (12th ed. 1896).

21. See Avini, *supra* note 10, at 1148-49.

22. See *id.* at 1149; see also Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. PA. L. REV. 1231, 1241 (1988).

23. See Gaudiosi, *supra* note 22, at 1242-43. The *salmannus* is a fifth-century institution of the *Lex Salica*, which is the legal code of the German tribe of the Salian Franks and one of the first written legal codes in the early sixth century. Avini, *supra* note 10, at 1149-50.

criticized as drawing only superficial similarities between the *salmannus* and the English trust.<sup>24</sup>

More recently, scholars of Islamic law and others have put forth the theory that the Islamic *waqf* (pl. *awqaf*) most likely inspired the creation of the English trust, due to historical proximity and structural similarities.<sup>25</sup> The *waqf* is a legal institution developed by Muslim jurists in the seventh, eighth, and ninth centuries A.D. and existed in two forms: “the *waqf khairi* – an endowment for an object of a religious or public nature – and the *waqf ahli* or *dhurri* – a family endowment.”<sup>26</sup> The Islamic theory maintains that by the twelfth century, the *waqf* was already a well-established and widespread legal device in the Middle East, and Franciscan Friars returning from the Crusades in the thirteenth century brought the new concept back to England for the purpose of circumventing their Order’s religious vow of poverty.<sup>27</sup> Of equal importance is the fact that structurally, the *waqf* and the English *use* are almost identical institutions.<sup>28</sup>

Regardless of the exact origin of the modern Anglo-American trust, these four institutions – the Roman *fideicommissum*, the Salic *salmannus*, the Islamic *waqf*, and the English *use* – all “emerged as a result of positive-law deficiencies and restrictions concerning the ownership and devolution of property,” and to some extent their origins are “properly found in the historical circumstances in which [they] arose.”<sup>29</sup> The same can be said of modern trust institutions in other areas of the world, such as the *yayasan* in Southeast Asia,<sup>30</sup> and the *fideicomiso* in Latin America.<sup>31</sup> Conservation trust funds, as we shall see, are no exception.

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24. See Avini, *supra* note 10, at 1151.

25. See *id.* at 1141-42.

26. Gaudiosi, *supra* note 22, at 1233.

27. See Avini, *supra* note 10, at 1159-60.

28. See *id.* at 1161. The *waqf* and the *use* are similar in purpose and structure. Both were used to circumvent the burdens of land ownership, and both institutions have a settlor, a trustee, and beneficiaries (both present and future.) See *id.*

29. *Id.* at 1139.

30. See e.g. Paul H. Brietzke and Thomas A. Timberg, *An Economic Reform Agenda for Indonesia?*, 31 LAW & POL’Y INT’L BUS. 1 (1999). The *yayasan* is a charitable, tax-exempt foundation widely-used in Indonesia. See *id.* at 5, n.13.

31. See e.g. John A. Barrett, Jr., *Mexican Insolvency Law*, 7 PACE INT’L L. REV. 431, 439 (1995).

## THE HISTORY OF CONSERVATION TRUST FUNDS

Trust funds have only recently been employed to achieve conservation purposes. They arose in response to various issues that surfaced in the late 1980's, in particular "debt-for-nature-swaps" – transactions in which a developing country's foreign debt is canceled in return for a commitment to domestic conservation investment.<sup>32</sup> The debt-for-nature swap was one reaction to the developing country debt crisis, which officially began in 1982 when Mexico announced that it would not be able to make payments on its international debt.<sup>33</sup> Despite their successes, these financial transactions often generated large amounts of local currency that local beneficiaries could not adequately absorb. In addition, there was an increasing need for *long-term* financing of conservation projects;<sup>34</sup> but what was lacking was a visible, transparent, and intermediary structure between various sources of financing and conservation projects.

In response to these concerns, the trust fund concept was imported from the estate-planning field to the conservation field, growing out of "the need for long term sustainability beyond the initial infusion of funds that a swap transaction creates."<sup>35</sup> This latest innovation in conservation finance was facilitated by Congress's enactment of legislation in the Fiscal Year 1993, which allows NGOs to retain the interest on, and establish endowments with, dollars appropriated to the United States Agency for International Development ("USAID").<sup>36</sup> Prior to the enactment of this legislation, NGOs could only establish endowments with local currency, the value of which tended to decrease over time.<sup>37</sup>

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32. See CONSERVATION INTERNATIONAL FOUNDATION, *THE DEBT-FOR-NATURE EXCHANGE: A TOOL FOR INTERNATIONAL CONSERVATION* 14 (Supp. 1991). See generally Amanda Lewis, Notes and Comments, *The Evolving Process of Swapping Debt for Nature*, 10 *COLO. J. INT'L ENVTL. L. & POL'Y* 431 (1999).

33. See Lewis, *supra* note 32, at 432.

34. One example of a conservation project is covering the recurrent costs of park management.

35. Steven M. Rubin, Jonathan Shatz, and Colleen Deegan, *International Conservation Finance: Using Debt Swaps and Trust Funds to Foster Conservation of Biodiversity*, 19 *J. SOC'L, POL. & ECON. STUD.* 40 (1994).

36. See KATHLEEN HORKAN & PATRICIA L. JORDAN, UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEVELOPMENT INFORMATION AND EVALUATION, WORKING PAPER NO. 221: ENDOWMENTS AS A TOOL FOR SUSTAINABLE DEVELOPMENT 3 July 1996 [hereinafter USAID Paper]. An endowment is a fund that has been set aside for a specific purpose, and are designed to disburse only the income from the assets – the principal or "corpus" of the fund remains intact and invested. See *id.* at 2.

37. See Rubin, *supra* note 35, at 36.

Allowing NGOs to establish dollar-funded endowments increases the stability and value of trusts as a financing alternative to debt-for-nature swaps.

The first conservation trust fund (or “national environmental fund”) created in 1991 between Bhutan, the World Wildlife Fund (“WWF”), and the Global Environment Facility (“GEF”) provides an excellent example of the flexibility of trust funds and the issues from which they arose.<sup>38</sup> Bhutan made for a “self-selected pilot country for experimenting with the trust fund mechanism”<sup>39</sup> due to its biological and geographical appeal, its government’s strong commitment to conservation, and its governmental structure which facilitates implementation of funds.<sup>40</sup> However, the country was not eligible for a debt-for-nature swap because it had no significant debt.<sup>41</sup> As a result, Bruce Bunting and Barry Spergel of the WWF came up with the idea of a national-level trust fund in order to secure conservation aid for Bhutan,<sup>42</sup> a concept that had been used previously in Latin America to accept money released from debt swaps.<sup>43</sup> Utilizing a trust fund “would not only establish an attractive financial mechanism for a country with no debt, it would also address Bhutan’s insufficient institutional capacity by providing a steady, long-term source of funding for conservation programs.”<sup>44</sup> Following the decision to use this innovative financing mechanism, officials from the WWF and Bhutan signed a memorandum demonstrating the flexibility of trust funds.<sup>45</sup> The memorandum sets forth a range of eligible project activities designed to foster long-term sustainability, from training programs to educational and public awareness programs.<sup>46</sup> As a result of the success of the Bhutan trust fund, conservation trust funds have rapidly emerged in other developing countries and “may increasingly become an element of international environmental agreements.”<sup>47</sup>

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38. See Kyle W. Danish, *The Promise of National Environmental Funds in Developing Countries*, 7 INT’L ENVTL. AFF. 154-60 (1995) [hereinafter Danish II]. For more details on the Bhutan trust fund, see *id.*

39. *Id.* at 160.

40. See *id.*

41. See *id.* at 156.

42. See *id.*

43. See Rubin, *supra* note 35, at 25.

44. Danish II, *supra* note 38, at 156.

45. See *id.* at 157.

46. See *id.*

47. *Id.* at 160.

## Creating a Trust Fund

A study conducted by the Global Environment Facility on conservation trust funds found that in order to be successful, trust funds must be more than just financial mechanisms.<sup>48</sup> They should be self-governing institutions, play key roles in the development of national conservation strategies, work with public and private agencies to develop effective management approaches, and aid in capacity-building of local NGOs.<sup>49</sup> In order to do so, trust funds need more than financial management systems and skills. They need clear sets of objectives, governance structures, financial structures, staff, and the ability to operate independently, flexibly, and efficiently.

### STEP ONE: FEASIBILITY STUDY

The establishment of an environmental trust fund generally begins with a feasibility study that seeks to answer some key questions: Does the nature of the environmental threat call for the use of a trust fund?<sup>50</sup> Are there lower-cost, equally sustainable alternatives to the trust fund?<sup>51</sup> Will the trust fund concept work in the target community?<sup>52</sup> Is there a legal and financial framework in the host country to support the trust, and do the legal and financial practices inspire confidence domestically and abroad?<sup>53</sup>

The need for long-term sustainability creates the need for trust funds. Conservation trust funds are most useful when the environmental threats “require a sustained response over a number of years. [They] are not the solution when the environmental issue in question faces major, urgent threats requiring mobilization of significant amounts of funding in a short time.”<sup>54</sup> Therefore, a well-designed trust fund should address the wider objectives that the fund can serve, beyond the specific goals of the fund itself, which can “generate a range of benefits that contribute in non-

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48. See GLOBAL ENVIRONMENT FACILITY, EVALUATION OF EXPERIENCE WITH CONSERVATION TRUST FUNDS 11 (1998) [hereinafter GEF, Evaluation].

49. See *id.* at 11-12.

50. See IPG Handbook, *supra* note 8, at 11.

51. See The World Bank, Issues and Options, *supra* note 6, at 11.

52. See Marianne Guerin-McManus, Kent C. Nnadozie, & Sarah A. Laird, *Biodiversity Prospecting Trust Funds: Sharing Financial Benefits*, in *The Tools of the Trade in Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice: A People and Plants Conservation Manual* (2000).

53. See IPG Handbook, *supra* note 8, at 11.

54. *Id.*

specific ways to the development of sustainable societies.”<sup>55</sup> For example, the primary focus of a fund may be to finance recurring costs of park management, but the wider objectives may be to make financing available in absorbable amounts so that the funds can build the capacity of local implementing organizations, and to strengthen civil society through the transparent, participatory processes of trust funds.<sup>56</sup> In addition, trust funds can help create new parks, build capacity among NGOs or governments for generating and managing financial resources, foster a feeling a “ownership” among stakeholders by encouraging direct participation, heighten conservation awareness, and boost community involvement.<sup>57</sup>

Despite these advantages, trust funds “are subject to complex financial and administrative arrangements and the opportunity cost of tying up the substantial capital required to generate very small amounts of net income.”<sup>58</sup> Therefore, alternatives to the trust fund should be considered during the feasibility phase. One such alternative requires the host government to make a political commitment to long-term support of conservation by underwriting recurrent costs of conservation as counterpart funding for donor supported costs of conservation projects or programs.<sup>59</sup> Park fees and ecotourism, as well as levies in production zones for forestry, mineral extraction, or other such uses, may also generate revenue that can sustainably fund conservation projects.<sup>60</sup> These and other lower-cost alternatives may avoid the legal and financial complexities of a trust fund, which may have very little net income and may require considerable management skill to stabilize.<sup>61</sup>

The feasibility study must also address whether or not the trust fund concept will work in the target community. It has been suggested that trust funds have a legalistic and bureaucratic structure that may conflict with the ways in which local communities traditionally manage and distribute benefits.<sup>62</sup> On the other hand, societies that traditionally own resources in common frequently use community development associations and coopera-

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55. Guerin-McManus, *supra* note 52, at 6.

56. *See id.*

57. *See id.*

58. The World Bank, *Issues and Options*, *supra* note 6, at 11.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See* Guerin-McManus, *supra* note 52, at 5.

tives for rural development and renewal.<sup>63</sup> If this is the case, the creators of the trust fund must consider if there is “a community of organizations able to implement the range of activities needed . . . . This includes not only organizations to conduct field-level activities, but also supporting institutions to carry out monitoring and data collection, raise awareness and provide environmental education, and offer management training to support local groups.”<sup>64</sup>

Equally important is the trust fund’s ability to operate within the context of national and international law and policy; namely, whether local and national laws in the host country provide for trusts or trust-like devices.<sup>65</sup> If the trust lacks a legal framework, alternatives such as partnerships between governments and private parties, or establishment of a trust through an act of legislature, might be considered.<sup>66</sup>

As the GEF evaluation of conservation trust funds pointed out, “two conditions are essential for the success of an environmental fund.”<sup>67</sup> The first is “active government support – not just acquiescence or agreement – for a mixed, public-private sector mechanism in which the government actively participates but that operates beyond its direct control.”<sup>68</sup> Therefore, once the trust option has been identified as the most appropriate, the NGO and the host government should discuss special features of trust funds and gauge the government’s willingness to proceed.<sup>69</sup> The second condition is “a critical mass of people from diverse sectors of society – NGOs, government, the academic and private sectors, and donor agencies – who can work together despite what may be different approaches to conservation and sustainable development.”<sup>70</sup> To consider the issues involved, then, the feasibility study should involve consultations between the NGO interested in managing the fund and a host of stakeholder representatives, government representatives, scientists, conservationists, business representatives and community leaders.<sup>71</sup> This group will determine the needs of the target community, the trust

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63. *See id.*

64. IPG Handbook, *supra* note 8, at 12.

65. Guerin-McManus, *supra* note 52, at 5.

66. *See id.*

67. IPG Handbook, *supra* note 8, at 12.

68. *Id.*

69. *See* The World Bank, Issues and Options, *supra* note 6, at 12.

70. IPG Handbook, *supra* note 8, at 12.

71. *See* Guerin-McManus, *supra* note 52, at 5.

fund's primary and wider objectives and the types of conservation projects it will finance.<sup>72</sup> The group might procure international expertise on trust funds, as well as local legal and financial assistance, to facilitate the design process.<sup>73</sup> Exploring the scope of the fund through a participatory process with such a diverse and representative group of people will help build awareness and support for the fund, as well as benefit from the experience available among those such as potential grantees.<sup>74</sup>

## STEP TWO: DESIGNING THE TRUST FUND

### Goals and Objectives

“One of the key lessons learned from existing [conservation trust funds] is that it is critical to have the basic vision of the fund in place before making decisions on design issues.”<sup>75</sup> Deciding on the scope of the fund first makes it easier to identify the environmental threats and plan projects and activities accordingly. Also, it is “more congenial and less controversial” to discuss the potential scope of the fund before there is “a sum of money over which various constituencies are already competing.”<sup>76</sup> Finally, “[f]unds that lack a focused strategy run the risk of spreading their resources too thinly, financing many discrete efforts but cumulatively failing to achieve any significant impact,”<sup>77</sup> highlighting even more the importance of discussing “scope” before “design.”

Conservation trust funds can range in size and scope, depending on the needs of the particular host country. On one end of the spectrum, trust funds can be financed with a start-up capital of little more than \$50,000, such as Suriname's Forest People's Fund, “which was established to facilitate benefit-sharing from biodiversity prospecting and foster biodiversity conservation in a small community.”<sup>78</sup> Similarly, Nigeria's Fund for Integrated Rural Development and Tradition Medicine received original financing of \$40,000.<sup>79</sup> The small size of the start-up funding in these cases was due to the fact that both funds are designed to

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72. *See id.*

73. *See id.*

74. IPG Handbook, *supra* note 8, at 34.

75. *See id.*

76. *Id.*

77. *Id.* at 33.

78. Guerin-McManus, *supra* note 52, at 4.

79. *See id.*

receive additional financial benefits over time.<sup>80</sup> Meanwhile, Colombia's ECOFONDO, which was designed to promote the country's sustainable development and environmental conservation, received \$41.6 million in local currency over four years, paid for by the Colombian government as part of a debt swap.<sup>81</sup>

Funds with narrow scopes enjoy many advantages over those with broader scopes.<sup>82</sup> First of all, focusing on parks and park systems may appeal to private foundations in industrial countries that support national parks as one of their own objectives.<sup>83</sup> Funds with narrow scopes may also make the mission more easily comprehensible, and as well as reduce opportunity for disagreement on the governing board.<sup>84</sup> If the focus is too broad, the fund may be swamped with many more proposals than it has time to consider or has resources to fund.<sup>85</sup> For example, in its first call for proposals, the Mgahinga-Bwindi Impenetrable Forest Conservation Trust (MBIFCT) in Uganda only had enough money to support approximately 50 community projects.<sup>86</sup> However, it received 4,750 applications, which took the staff several months to process, leaving them with "50 'winners' and 4,700 'losers' – not a good public relations position, to say nothing of efficiency."<sup>87</sup> Also, a narrow scope allows a fund's staff and technical advisory committee to be geared to the areas the fund chooses to support, instead of engaging in the difficult task of aggregating many skills in a small staff.<sup>88</sup> A limited scope can lead to a more successful fundraising strategy, and enable the fund's management or trustees to acquire expertise that, over time, will translate into greater efficiency in the handling of operations.<sup>89</sup>

On the other hand, establishing a fund with a broad focus "could maintain flexibility, allowing [the focus to shift] in light of emerging scientific or other information, and experiment with novel forms or partnerships between public and private sec-

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80. *See id.*

81. *See id.*

82. IPG Handbook, *supra* note 8, at 34.

83. LINDA STARKE, UNDP/GEF FOR THE INTERAGENCY PLANNING GROUP ON ENVIRONMENTAL FUNDS ENVIRONMENTAL FUNDS: THE FIRST FIVE YEARS (ISSUES TO ADDRESS IN DESIGNING AND SUPPORTING GREEN FUNDS) 5 (1995).

84. *See id.*

85. IPG Handbook, *supra* note 8, at 34.

86. *See id.*

87. *Id.*

88. *See id.*

89. *See* Guerin-McManus, *supra* note 52, at 7.

tors.”<sup>90</sup> These types of funds usually take on broader ways of preserving biological diversity, such as keeping “an inventory of biological resources, [managing] buffer zones outside protected areas, or [helping] to provide sustainable livelihoods for those who live in or around such areas.”<sup>91</sup> Some funds attempt to cover an even wider area, such as the Fondo Nacional Para El Medio Ambiente (“FONAMA”) in Bolivia, which is really a branch of government that all funding for the environment must pass through.<sup>92</sup> As mentioned above, the “broadest category of objectives often includes the goal of capacity building for both government environment agencies and NGOs.”<sup>93</sup> Long-term capacity-building, along with flexibility, are among the most persuasive reasons to maintain a broad focus for a trust fund.

In keeping with varying scopes and sizes, trust funds can also be administered at different levels.<sup>94</sup> For example, the Suriname trust fund operates at the community level, while the Nigeria trust is a national fund.<sup>95</sup> Moreover, conservation trust funds can be administered by governments, research institutions, non-profit organizations or community associations.<sup>96</sup> In Fiji, the community-based Verata Tikina Biodiversity Trust Fund has been part of a three-year project “intended to link pharmaceutical drug development with conservation and community development.”<sup>97</sup> The project was developed jointly by The University of the South Pacific, the Verata Tikina communities, and various commercial partners, demonstrating that administration by both a variety and combination of different groups can lead to the success of a fund.<sup>98</sup>

### Origination Documents

In common law countries, trust funds can be legally established by registering the trust’s basic legal document (which may be called a Deed of Trust, Charter, or Articles of Incorporation), with or without accompanying statutes or by-laws, in the appro-

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90. Starke, *supra* note 83, at 5.

91. *Id.*

92. *See id.*

93. *Id.*

94. *See* Guerin-McManus, *supra* note 52, at 4.

95. *See id.*

96. *See id.*

97. *Id.*

98. *See id.*

priate government office.<sup>99</sup> This document “set[s] up the trust, [establishes] the fund’s goals and objectives, and [institutes] the mechanisms by which grants will be awarded and other benefits distributed.”<sup>100</sup> Not only does the document establish the legal right for the board of trustees to initiate suits on behalf of the trust, it also forms the basis for removing the board when there is any wrong-doing or dissolving the trust when the objectives are not being carried out.<sup>101</sup>

Although the substance of the documents is the same, there are some slight differences between them. A Deed of Trust is “a legal document which transfers the ownership of a sum of money or other property, from the donor to the trustee, in order for the trustee to administer it for a specific purpose, or for the benefit of specific named individuals.”<sup>102</sup> Articles of Incorporation (or Articles of Association) are a legal document used to establish a corporation or association (nonprofit or for-profit), describing such details as the organization’s governance structure, the rights and obligations of its members and its financial management scheme.<sup>103</sup> A Charter is similar to a Deed and Articles of Incorporation, but it is used specifically in the case of an entity that is established by an act of the country’s legislation or by an executive decree of its President, King or other ruler.<sup>104</sup> Whether the trust document is called a Deed, Articles, or Charter will depend on the host country’s legal system and the specific legal form of the trust entity.<sup>105</sup> In addition, by-laws can be drafted to govern the day-to-day operations of the trust, allowing the trust deed to avoid frequent amendments.<sup>106</sup>

Regardless of name, trust funds that are set up for charitable purposes must have some specific information in its trust deed.<sup>107</sup> The deed must describe the goals and objectives of the trust as well as the location of its main offices and its duration. The trust can exist either “in perpetuity” or “until dissolved by an act of law or a vote of its Trustees.”<sup>108</sup> The document must also set

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99. See IPG Handbook, *supra* note 8, at 23.

100. Guerin-McManus, *supra* 52, at 8.

101. See *id.*

102. IPG Handbook, *supra* note 8, at 22.

103. See *id.*

104. See *id.*

105. See *id.*

106. See The World Bank, Issues and Options, *supra* note 6, at 18.

107. See IPG Handbook, *supra* note 8, at 24.

108. See *id.*

forth the composition of the Board of Trustees and the details of its management, legal capacity and voting requirements.<sup>109</sup> It should provide for the appointment and responsibilities of the directors and other staff, and establish any non-voting advisory committees or councils.<sup>110</sup> It should identify the potential sources of revenue for the fund, and establish rules for investment of funds.<sup>111</sup> The document should set forth accounting procedures, and list the categories of activities that can (and cannot) be funded by the trust.<sup>112</sup> It should set up rules “requiring Board members and staff to disclose any potential conflicts of interest.”<sup>113</sup> Finally, the trust deed should describe conditions and procedures for dissolving the trust, should that ever be necessary.<sup>114</sup>

### Governance Structure

It has been said that deciding on the composition and structure of the governing board “has universally been the most difficult and time-consuming aspect of setting up a trust fund or foundation.”<sup>115</sup> Because conservation trust funds reflect a wide variety of interests and require the support of many interest sectors in order to succeed, the governing board must be similarly diverse. Therefore, governing boards should “represent the interests of all stakeholders, including government, community, industry, and NGO members.”<sup>116</sup> Diverse board membership also helps the board to fulfill a broader set of leadership functions. For example, members knowledgeable in specialized areas of expertise can handle the fund’s organizational needs without seeking outside help.<sup>117</sup> Most importantly, having different representatives on the board helps to maintain linkages to those sectors of society.

Designing the structure of the board is also extremely critical. In a report on the design of trust funds for biodiversity conservation, the World Bank listed several key factors that must go into the design of the board of directors.<sup>118</sup> First, the board must re-

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109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *Id.*

114. *See id.*

115. Starke, *supra* note 83, at 7.

116. Guerin-McManus, *supra* note 52, at 9.

117. *See* IPG Handbook, *supra* note 8, at 30.

118. *See* The World Bank, Issues and Options, *supra* note 6, at 27.

main functional – not too large, not too political, and able to meet reasonably frequently. 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.<sup>119</sup> 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>120</sup> Finally, the board should represent the critical stakeholders for the project and have access to special expertise on environmental, financial, and legal issues – all of which can be accomplished by intelligent and informed decisions about the composition of the governing board.<sup>121</sup>

Depending on the host country, failing to strike a balance in the design of the board can lead to serious problems. If there are too many government representatives on the board, local officials might see the fund as a branch of the ministry and be unwilling to share power.<sup>122</sup> Moreover, other stakeholders may feel that the fund only serves the government's agenda and be less willing to support it. For example, in the interest of promoting and building civil societies, the United States Agency for International Development ("USAID") and the GEF refuse to contribute to the capital of a fund whose board has more than 50 percent government representation.<sup>123</sup> On the other hand, if the board has too strong an identification with the NGO community or if it "does not have government representation, the government may distrust the organization and believe that it is trying to usurp its right to determine the disposition of natural resources."<sup>124</sup> Also, "[h]aving too strong an identification with a single NGO can create tensions in the local NGO community and make the fund as one-sided as if it were a branch of the government."<sup>125</sup> Once again, composing a board of directors with the right balance of government and non-governmental representatives depends on the needs of the host country and its particular approach to these types of projects. Whatever the

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119. See IPG Handbook, *supra* note 8, 30.

120. See The World Bank, Issues and Options, *supra* note 6, at 28.

121. See *id.* at 27.

122. See Starke, *supra* note 83, at 8.

123. See Guerin-McManus, *supra* note 52, at 9.

124. *Id.*

125. Starke, *supra* 83, at 8.

composition, a board must be dynamic, flexible, and self-assessing in order to function to its optimal capacity.<sup>126</sup> Most importantly, governance should be open and transparent, adhering to a participatory democracy – one of the basic principles of funds.<sup>127</sup>

### Finance

Deciding on the composition and structure of the governing board may be the most time-consuming and difficult task of creating a trust fund, but figuring out the financial structure and location of the assets is probably the most complex.<sup>128</sup> Assessing tax liability, ensuring the security of assets, and guarding against the risk of attachment all contribute to the difficulty of the decision-making process. In the end, “[t]rade-offs must be made in such a way that the most critical needs are met and risk is manageable.”<sup>129</sup>

There are four main options for the structure of a trust fund. The first is the *endowment*, which is “a fund that maintains a bulk sum of money as principal and only disburses the income earned on that amount.”<sup>130</sup> The capital, or *corpus*, of an endowment can only be invaded under specific circumstances.<sup>131</sup> Endowments have numerous advantages over other funding mechanisms, some of which were listed by USAID in its 1996 Working Paper on endowments, and these advantages are similar to those of trust funds in general.<sup>132</sup> One of the advantages is the ability to provide “a secure source of funding for an organization, to help it move toward financial sustainability, or to insulate it from government or donor agency budget fluctuations.”<sup>133</sup> Endowments also support local capacity building and can broaden the funding base for activities in particular sectors, such as the environmental sector. They can help develop civil society by encouraging local participation in developing the fund, and encourage local philanthropy by setting a good example.<sup>134</sup>

Another option for a trust fund’s financial structure is the *revolving fund*, which “has new assets added periodically (each

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126. See IPG Handbook, *supra* note 8, at 31.

127. See Starke, *supra* note 84, at 8.

128. See *id.* at 11.

129. *Id.*

130. Guerin-McManus, *supra* note 52, at 10.

131. See *id.*

132. See USAID Paper, *supra* note 36, at 3.

133. *Id.*

134. See *id.*

year, for example,) usually through fees, levies, or special taxes collected by the government."<sup>135</sup> In addition, "it can disburse the money collected and can also set aside a certain percentage to create an endowment that can be drawn on in case of need."<sup>136</sup> The Protected Areas Trust Fund ("PACT") in Belize is an example of a revolving fund. As of 1996, the fund was financed by a \$20 dollar conservation fee collected from each foreigner arriving to Belize by air or by sea, as well as park entry fees, recreational licenses, permit fees, concession fees, and fines.<sup>137</sup> These fees contribute to more than \$2 million dollars in new revenues for the trust fund.<sup>138</sup>

A *sinking fund* "is designed to disburse its entire capital plus its income over a designated period of time."<sup>139</sup> USAID recommends that the principal of a sinking fund should not be drawn down faster than over 10-15 years, making it a long-term organization like the other funding mechanisms.<sup>140</sup> This type of funding is most suitable for projects with development or income-generating potential, which are expected to become self-sufficient after the initial startup phase.<sup>141</sup> One example of the sinking fund is PRONATURA in the Dominican Republic, which, as of 1995, had "disbursed some US\$1 million to 25 projects since 1991."<sup>142</sup> This type of structure is rare, because the time and effort necessary to accumulate the funds for the start-up capital generally result in the desire for a more long-term kind of fund, like the endowment or the revolving fund.<sup>143</sup>

Funds are often caught between the pressure to demonstrate results and success quickly in the initial stages, and the need to maintain sustainability in the long-term.<sup>144</sup> The solution to this problem may be the combination of different structures of funding.<sup>145</sup> For example, it may be useful to sink a percentage of the fund into key projects at the beginning, and save the remainder of the fund as an endowment.<sup>146</sup> Combining funding mecha-

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135. Starke, *supra* note 83, at 12.

136. *Id.*

137. *See id.*

138. *See* USAID Paper, *supra* 36, at 2.

139. Guerin-McManus, *supra* 52, at 10.

140. *See* Starke, *supra* note 83, at 12.

141. *See* Guerin-McManus, *supra* 52, at 10.

142. Starke, *supra* note 83, at 12.

143. *See* Guerin-McManus, *supra* 52, at 10.

144. *See id.* at 11.

145. *See id.*

146. *See id.*

nisms can be yet another example of remaining flexible and responding to the needs of the specific conservation project.

### *Sources of Funding*

Conservation trust funds need an enormous amount of funding in order to be more than just financial mechanisms. First, there are the standard operating costs of any organization: administrative costs such as staff salaries, office expenses, management costs, networking costs and fundraising projects.<sup>147</sup> There are also institutional building costs that contribute to the capacity-building potential of a fund, such as start-up capital, costs for training, orientation and consultations.<sup>148</sup> Finally, program support costs fund services designed to build the capacity of recipient organizations, aiding them in ways other than direct supervision.<sup>149</sup> Funds accomplish this through project funding or through direct technical assistance to those organizations.<sup>150</sup>

Trust funds receive their major sources of funding from bilateral debt conversion agreements and debt-for-nature swaps.<sup>151</sup> In debt conversions, "official development assistance debt has been converted into local currencies to fund development-related projects,"<sup>152</sup> thus allowing a debtor "to discharge a portion of debt when it agrees to pay for specified activities in its own country."<sup>153</sup> Debt-for-nature swaps, as described in the section on the history of conservation trust funds, are transactions in which "a developing country's debt is purchased at a discount on the secondary market by a donor and redeemed in local currency or government bonds at a higher value in return for agreed-on conservation activities to be undertaken by the debtor government."<sup>154</sup> The large amount of local currency generated by debt swaps can be used to create trust funds to facilitate the disbursement of the funds.

Major sources of funding for trust funds also come from multilateral donors, private and NGO donors, and even host governments.<sup>155</sup> The World Bank/GEF and the United Nations

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147. See IPG Handbook, *supra* note 8, at 38.

148. See *id.*

149. See *id.*

150. See *id.* at 39.

151. See Starke, *supra* 83, at 12.

152. *Id.*

153. *Id.*

154. *Id.* at 13.

155. See Guerin-McManus, *supra* note 52, at 11.

Development Program ("UNDP") are some examples of multi-lateral donors, which are banks and international agencies "that support economic development by channeling resources from the developed world."<sup>156</sup> Usually, projects submitted to these agencies for funding must be backed by the appropriate government agencies.<sup>157</sup> As of 1995, GEF was "supporting 11 trust-like national or regional funds on biodiversity conservation,"<sup>158</sup> focusing "on covering the long-term, recurrent costs of protected areas or providing them alternative livelihoods for communities putting pressure on such areas."<sup>159</sup> To date, it has supported at least fifteen trust funds with at least that many more in preparation.<sup>160</sup> Also, private foundations such as The MacArthur Foundation, and private corporations such as The Bank of Tokyo and J.P. Morgan Bank have donated to trust funds and other conservation projects.<sup>161</sup> Most importantly, some national governments have shown a commitment to conservation trust funds. "[T]he Royal Thai Government has earmarked specific budgetary items to be disbursed directly to the Thailand Environmental Fund and indirectly through support programs."<sup>162</sup> Governments also collect fees, levies, and specially earmarked taxes to support trust funds; future revenue may come from "brown funds" drawn from penalties for pollution.<sup>163</sup> For example, Belize collects tourist taxes and fees on the use of its park system for its revolving fund, while the Jamaican National Park Trust is funded in part by user fees and leases.<sup>164</sup> In addition, Papua New Guinea may support its fund with environmental levies on mining, oil and timber extraction, and fisheries.<sup>165</sup> As Scott Smith of GEF noted, active government support is essential to the success of a conservation trust fund, thus highlighting the significance of financial support from national governments.<sup>166</sup>

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156. IPG Handbook, *supra* note 8, at 65.

157. *See id.*

158. Starke, *supra* note 83, at 13.

159. *Id.*

160. *See* IPG Handbook, *supra* note 8, at 66.

161. Starke, *supra* note 83, at 13-14.

162. Guerin-McManus, *supra* note 52, at 11.

163. *See* Starke, *supra* note 83, at 14.

164. *See id.*

165. *See id.*

166. *See* IPG Handbook, *supra* note 8, at 12.

*Location of Trust and Assets*

Making a decision about where to place the trust physically is a sensitive matter that involves complex legal and financial concerns. There are two main components of the trust that must have a physical location: the board of trustees and the assets.<sup>167</sup> Depending on various factors, such as the legal restrictions of the donor or the political climate of the host country, the trust can be set up in one of three ways.<sup>168</sup> It could be established as a domestic trust with either a domestic or offshore asset management account, an offshore trust with offshore asset management, or a trust based in a multilateral agency.<sup>169</sup>

A domestic trust with domestic asset management may be the most effective way to build domestic capacity in trust and financial management and foster a perception of national “ownership” of the trust.<sup>170</sup> Especially in countries without a prior history of commitment to conservation, developing a sense of ownership in the trust can raise awareness of environmental issues and have an enormous amount of educational value for the target community.<sup>171</sup> However, domestic trusts run the danger of being perceived as subject to the control of the host government, which can undermine the trust of local NGOs and the foreign conservation community in the trust.<sup>172</sup> Moreover, donors may be discouraged by the possibility that “political instability and corruption can threaten trust objectives and safety of assets,” and local currency may devalue over time.<sup>173</sup> The legal status of the trust, which would be under the laws of the host country, may not meet the requirements of some possible donors. For example, domestic trusts would not have access to USAID funds.<sup>174</sup>

On the other hand, an offshore trust with offshore asset management provides more financial security than a domestic trust in that assets are kept in a hard currency in a secure market and location.<sup>175</sup> Also, offshore trusts have access to professional asset managers and are able to transfer assets to an alternative lo-

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167. See Guerin-McManus, *supra* 52, at 12.

168. See Starke, *supra* 83, at 14.

169. See *id.* at 15.

170. See *id.*

171. See *id.*

172. See *id.*

173. *Id.*

174. See *id.*

175. See *id.*

cation if the first becomes vulnerable.<sup>176</sup> Countries whose legal systems do not accommodate trust arrangements usually find it easier to establish offshore trusts in countries with a viable legal framework.<sup>177</sup> The net result is that donors often have more confidence in offshore trusts than domestic ones. However, offshore trusts are not able to build local capacity in the way that domestic trusts do, and they run the danger of losing a sense of national ownership and control, making it more difficult for the local community to play an active role in maintaining the trust.<sup>178</sup> It is possible to combine the advantages of both types of trusts through the “two-tier” system: pairing a domestic fund with access to local assets with an offshore trust with access to offshore assets in hard currency. This would ensure that local stakeholders are adequately represented, while protecting the majority of the assets in a more stable market.<sup>179</sup>

A third alternative is a trust established by a multilateral agency, which would enjoy tax-exempt status, security of assets and protection from attachment by commercial creditors seeking money owed them by the host government.<sup>180</sup> For example, the Bhutan Trust Fund for Environmental Conservation was set up in this manner under the auspices of the UNDP.<sup>181</sup> The disadvantages of such a trust involve administrative costs and delays which can lower potential returns and sacrifice the opportunity to fulfill one of the fund’s basic objectives – building capacity and fostering local ownership.<sup>182</sup> Unfortunately, no trust location scenario is perfect, and the particular legal and financial situation of the project must be considered when deciding which structure to use.

### STEP THREE: IMPLEMENTATION

Implementation of a trust fund begins with some important steps that must not be overlooked. First, as described above in the design process, a potential trust fund must have its deed and by-laws drafted in order to establish the legal identity of the fund, state its objectives and goals, and lay out its governing

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176. *See id.*

177. *See id.*

178. *See id.*

179. *See* Guerin-McManus, *supra* note 52, at 12.

180. *See* Starke, *supra* note 83, at 15.

181. *See* The World Bank, Issues and Options, *supra* note 6, at 46.

182. *See* Starke, *supra* note 83, at 15.

structure.<sup>183</sup> Selection of the members of the board must also take place, with special attention paid to the diversity of representation, both professionally and politically.<sup>184</sup>

Next, operation manuals should be developed and administrative and management staff should be selected.<sup>185</sup> The operation manual establishes the guidelines and rules for the grant process, sets up criteria for selecting from grant applicants and defines areas of funding.<sup>186</sup> Currently, there is a wide selection of operation manuals in a variety of languages that are available for use as models. The fund must also have a management unit responsible for a myriad of tasks: preparing annual work plans and budgets, developing and implementing systems for processing grant proposals and supervising project activities, developing strategies to meet needs for capacity building, developing systems for financial accountability, reporting to the board of trustees on program and project implementation and developing strategies for fundraising.<sup>187</sup> Funds have been able to recruit locally for these positions, but they must negotiate between wanting to hire qualified people and not wanting to project the image that a significant amount of the funds are spent on high salaries.<sup>188</sup>

Management units often rely on technical advisory committees ("TAC"s) to assist in conducting "adequate technical and financial review of proposals and projects, and launch extensive consultations and reviews, without building a large permanent staff."<sup>189</sup> Some conservation trust funds "use their TACs as a 'panel of experts' who are consulted on an individual basis, while others expect the TAC to meet periodically and deliberate on issues important to the fund, or vote as a group on the selection of a slate of projects."<sup>190</sup> A TAC-as-consultant might be a finance committee recruited to advise the board on the fund's economic health or potential investments, or a science committee advising on research priorities.<sup>191</sup>

The implementation phase also involves the training of the board of trustees, the management staff, and the administrative

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183. See Guerin-McManus, *supra* note 52, at 14.

184. See *id.*

185. See *id.*

186. See *id.*

187. See IPG Handbook, *supra* note 8, at 38.

188. See *id.*

189. *Id.* at 39.

190. *Id.*

191. See Guerin-McManus, *supra* note 52, at 14.

staff.<sup>192</sup> Information about the fund's activities and grant application process must also be disseminated to potential fund beneficiaries.<sup>193</sup> Finally, a monitoring and evaluation plan should be drafted to "allow [the fund] to measure the performance and assess the impact of [its] activities . . . [providing] a structure for [funds] and their partners to learn from experience, so this knowledge can be used to improve the projects and programs they support."<sup>194</sup> Workshops are a particularly good way of monitoring the progress of a fund, as it can bring together people from different sectors in conservation and facilitate a free exchange of ideas.<sup>195</sup>

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192. *See id.*

193. *See id.*

194. IPG Handbook, *supra* note 8, at 54.

195. *See id.* at 57.