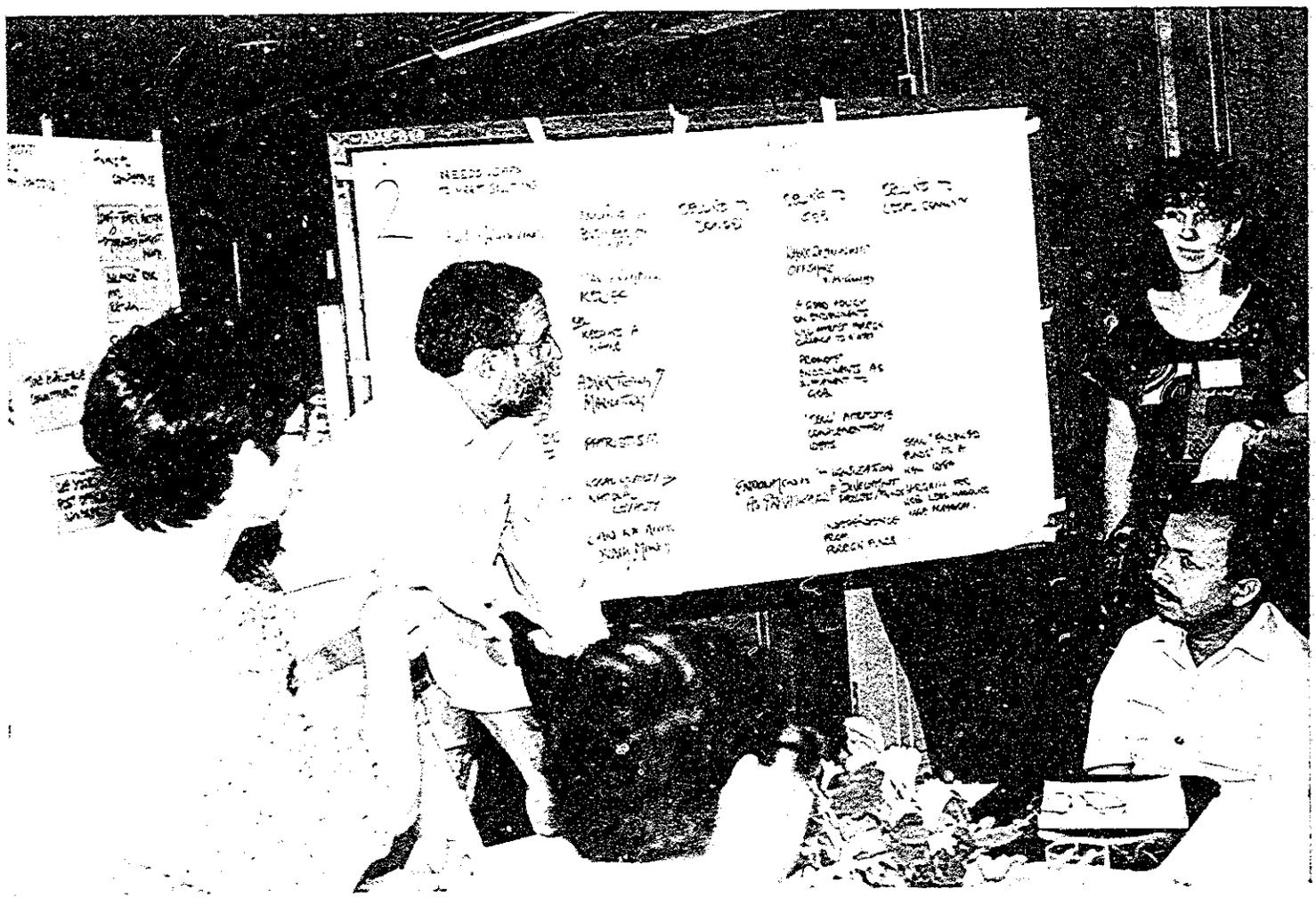


# Options for Sustainability Reader

## on Endowments as a Modality for Funding Development Work



(Companion volume to Report of a Seminar  
Dhaka, Bangladesh Nov.1993)

# Supporting the Sustainability of the NGO Sector, not just More Funds for NGOs.

by Richard Holloway, PACT Bangladesh

## Synopsis

*Southern NGOs work for sustainable improvements in the lives of the poor is increasingly recognized, and potential donors are increasingly eager to offer resources. In turn southern NGOs are heavily reliant on external foreign funding which is usually offered to NGOs as time specific project funds: the NGOs are the instrument by which a particular project is implemented. Serial project funding does not lead to sustainability - but very few suppliers of external funding to NGOs appreciate that the continued ability of NGOs to do what they are valued for depends on a sustaining environment of policy, legislation, human resource development and, very importantly, sustainable funding modalities. NGOs in the North use the modality of an endowed foundation for their development work, but this instrument has been little used in the South. Donors interested in sustaining the NGO sector, so that NGOs can be a continuing agent of sustainable development for the poor, need to consider this instrument more.*

## Background

It is increasingly recognized that Non-Governmental Organisations (NGOs) often have a comparative advantage over Government agencies for reaching the very poor, providing low cost services, building grass roots organisations, and adapting or creating innovative programs to meet local needs. Agencies concerned with promoting sustainable improvements in the lives of grass roots populations are increasingly interested in the question of how NGO contributions can be strengthened and expanded.<sup>1</sup>

In most cases the answer to the question is a pledge to make available more funds to NGOs - arguing that NGOs' comparative advantage could be strengthened if they had more funding. Such an answer deals with one role of NGOs as complementing Government services ("reaching the very poor" and "providing low cost services"). The setting is there, and greater results can be achieved with larger resources. Part of the uniqueness of NGOs is, however, that they have another role - they can strengthen independent local institutions, promote local innovations, and build local capacities. In such cases they supplement or provide alternatives to the work of Governments. In most cases the setting is not there, and while funds are needed, they need to be programmed carefully - and are only one part of the problem.

## The Precarious Environment

NGOs exist in a precarious environment bounded by political space, legislation, human resources and funding. Those who wish to support NGOs to do the work for which they have a comparative advantage must be prepared to build and strengthen the NGO sector and the institutions of NGOs, not merely assume that more resources to NGOs will result in their doing more of the work that they are good at. They should also be committed to the values of democratic pluralism that NGOs represent, not just looking for a short term way of spending money effectively.

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The strengthening of the NGO sector means, in most cases:

- policy reform work with government to enable and promote the independent, non-profit, non-government "Third Sector"
- legislative reform to back policy with enabling rather than restricting legislation
- training and other forms of institutional development assistance
- sustainable funding independent of donor "fashion" or government tolerance

Bilateral agencies, the World Bank, and regional Banks are already at work on issues of policy and legislation reform (though much more needs to be done) and there are competent support or intermediary NGOs whose mission and competence is in NGO institutional development<sup>2</sup>: there is as yet, however, little attention in the donor community to sustainable funding modalities.

### Alternatives to Project Funding

The present common modality is for Donors to make time specific grants to Southern NGOs (either directly, or, where negotiable, via Government) to carry out, typically, three to five year projects.<sup>3</sup> The grant is given so that the local NGO can implement the project, but, however successfully the project is implemented, and however great are the improvements in the lives of the poor, the local NGO is in the same financial position at the end of the project grant as it was at the start - namely seeking another grant so that it can implement another project. At the end of the project grant the Southern NGO, which usually has very few sources of self-financing, comes back to the original (or another) donor to initiate the lengthy process of seeking further project funding. After some time (frequently ten years), donors, even if they are very satisfied with the NGO's work, usually say that their policy is not to fund the same organisation for more than ten years, and advise the NGO to seek others' funding.

My experience of four years work in Bangladesh (and twenty five years in other countries of the South) tells me that this modality is arbitrary, illogical, wastes scarce NGO management time, does not build up the competence and sustainability of the Southern NGO in question, and, most importantly, does not build up the competence and sustainability of the NGO sector as a whole. A strong and sustainable NGO sector will continue to breed competent NGOs who will be able to exhibit the comparative advantages for which NGOs are prized. What is needed is a modality which will not only fund NGOs to do valuable development work, but which will also strengthen the Third Sector - local civil society - for its long term stability, financial self-reliance and sustainability. I suggest this modality is endowment grants.

### Considerations of Endowments

Endowments can be of two kinds: they can be sufficient to provide an income big enough to cover all the operating costs of the NGO, or they can provide enough income to cover the organisations core administrative costs, in the expectation that the income for operating programs will continue to come from grants. In both cases the endowment will build the organisations sustainability, and allow it to make long term decisions on staff, training, program choice, and policy reform, knowing that it does not have to reconsider these elements with the end of every grant.

Grants for endowments will be invested locally (or, in some cases, off-shore) and the NGO will operate, wholly or partially, on the income derived from the investment. When

funds are so provided to create endowments for local foundations in the South, and when these funds are duly and carefully invested to provide a regular income to the NGO, they not only provide sustainable funding for the organisation, but also do more: they reduce the bureaucracy for the NGO and donor of the project funding process, they protect NGOs from vagaries of donor fashions and changeable Government policies towards NGOs, and, if used to develop an indigenous grant making foundation, can also build the on-going capacity of civil society in that country.

Humanitarian NGOs in the North are very familiar with endowed foundations and managing invested funds - Ford, Rockefeller, Van Leer, Toyota, to take a few examples. It is not a new or unusual concept for them. The novelty and vision for a donor comes in suggesting that it employs this accepted Northern modality in funding the work of civil society in the countries of the poor South. Bilateral or multilateral agencies or international NGOs are well able to identify and provide to local NGOs, along with funds, technical expertise in appropriate laws, tax legislation, investment management procedures, foundation management - and to make sure that endowments are set up wisely and safely.

Endowments are not a panacea - I suggest that a donor would only consider making an endowment grant to an NGO if they had worked with them for at least five years and trusted each other, and there are many important hurdles to be cleared concerning organisational forms, investment opportunities, governance, trustee education etc.<sup>4</sup> I suggest, however, that this approach, which makes a one time grant of foreign funds to a duly established local organisation, in which the funds are (usually) locally invested, and in which the income from the investment then becomes local funding - rather than foreign funding, that this approach allows NGOs to make the long term plans which are necessary for the NGO sector's development. It will allow NGOs the benefits of investing in staff development, policy research, strategic program choice, policy reform, and it will also reduce bureaucratic time spent in negotiating with donors. This package of benefits results from the donor choosing to invest in the institutional growth of an NGO, not just in its ability to deliver a particular project's benefits.

A further use of endowments would be to endow not just a specific competent NGO, but to use such funds to set up a new foundation whose mandate would be to on-grant from its income to smaller NGOs - in effect setting up local versions of a Ford or Van Leer Foundation.<sup>5</sup>

Why has this not been done before? I think the general reason is donors' hesitation in allowing tight control to pass out of their hands. An organisation that has received an endowment is no longer dependant for its funding on providing six monthly reports and audits to a donor. Further I think that the necessary research on investment possibilities and organisational forms has not been done sufficiently. There is no reason to suppose, however, that a duly set up foundation with well-chosen trustees, clear internal procedures, and good management should be any the less accountable to its trustees, than an NGO is to its donors.

A respected and far-sighted retired civil servant who advises our work in Bangladesh, K.F.Rahman, said sadly to me: "If grants to NGOs in Bangladesh were cut off tomorrow, NGOs would have to stop functioning. What would donors have to show for the millions they have spent on projects in the past? There must be a better way to sustain the NGO sector to carry on its valuable work". It is my belief that endowments are such a way, but it requires donor education to its value before its use will become widespread. It

needs some courageous donors to see the benefits, and to be prepared to invest in the technical assistance that will be necessary to develop the new modality.

**Notes:**

- 1 This paragraph is extracted from "Public NGO-Financing Institutions In India - An Exploratory Study" by David Brown of IDR, Boston
- 2 Recent work undertaken, or underway by Asian Development Bank with IDSS Australia, by the NGO unit of the World Bank, and by IDR, Boston in collaboration with PRIA, India and PACT.
- 3 This is explained clearly in "Towards Greater Financial Autonomy" by Fernand Vincent and Piers Campbell of IRED, Switzerland.
- 4 Work on this is being done by USAID in Africa through EPAT
- 5 The South North Development Institute, a spin-off from the Synergos Institute, New York, is working along these lines

*Revised Draft*

**Guidelines  
for Planning and Programming  
Endowments and  
Endowed Foundations  
in Africa**

A report to  
AID/AFR/ARTS/FARA

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The second source of ideas and comments comes from a wide range of knowledgeable persons from the development, environmental, nongovernmental, governmental, financial, legal, donor, and foundation communities. Fifty of these persons participated in a 1 December 1992 colloquium in Washington, which also provided much feedback on the first draft. Extensive quotations of those discussions are given as an annex to this draft.

Tony Pryor of AID's Africa Bureau provided timely guidance as well as Gary Cohen and Ben Stoner, also of AID's Africa Bureau. They also led panels or working groups at the colloquium. Others who contributed either to the colloquium or the committee which planned the colloquium, included: Tom Fox, David Barker, Russell Misheloff, Francisco Turreilles, John Sutter, John Rigby, Glenn Prickett, Larry Williams, Steve Rubin, Randy Curtis, Ken Locklin, and many others. I wish to thank all for their contribution to this effort.

However, the views expressed in these "Guidelines" are, until further action by AID, are those of the author and should not at this time be attributed to AID or any of the persons, named here or not, who have contributed to this effort.

W. Paul Weatherly  
7 January 1992

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## PART I—THE CASE FOR ENDOWMENTS

### A. Introduction

#### A.1. Guide to the "Guidelines"

This report offers AID field missions in Africa help in considering and planning the use of a new programming tool—endowments, i.e. assets which are invested to earn income to be used in support of a defined purpose. Until recently U.S. Government wide regulations prevented the use of interest income earned on federally appropriated monies, including local currency generations arising out of AID-funded activities. Now the Foreign Assistance Act specifically authorizes an exception to this general prohibition for creating endowments expressly for the purpose of generating interest income. Consequently, many AID missions are now asking whether an endowment may be an appropriate element of their overall strategy, both in the natural resource sector as well as in other sectors.

Readers of this document need to begin with an appreciation of the range of possible uses of endowments. It is helpful at the early stages of thinking about the possible appropriateness of endowments to distinguish between an endowment's purpose and use, which would be answers to the "why" and "how" questions respectively. A purpose would be the goal of an endowment, e.g. supporting long term agricultural research, or providing for the care of AIDS orphans. On the other hand defining the endowment's use, or the way its assets are managed and its income put to the best purpose, and who has responsibility for these functions, challenges would-be endowment creators with difficult questions. Answers to these questions, more than answers to purpose questions, will determine how a mission would manage the process of creation, i.e. these answers would determine the sequence of steps and who should be involved at each step.

This document, "Guidelines," offers missions help in understanding the range of uses of endowments. The "Guidelines" should help readers choose a use which not only addresses the endowment's intended purpose, but also would be an effective way to spend the endowment income given the social, political and economic constraints of a particular country.

The intended use will largely determine the kind of analysis and decisions missions will have to address. At one end of the range endowments can be limited to the exclusive use of an existing institution. For example a university in a developing country, just as a university in the U.S., might well benefit from endowment income which could be used for general budget support or for a specific purpose. The biological resources in a national park could be made more secure by providing an endowment and dedicating its income, along with income from user fees and governmental sources, to the use of the institution responsible for the park's management. Such an endowment has great value in that it provides a significant measure of financial security for an indefinite period of time. If missions seek this kind of limited use, then the kinds of analysis required and the sequence of steps can be kept to a minimum.

At the other end of the range of application an endowment could be the funding source for new kind of local institution patterned on a U.S. community foundation, i.e. a not-for-profit organization under the management of a board of directors drawn from the community which the organization helps. Such a foundation, depending on the scope of its activities which its charter allows, would be able to provide funding for a

wide range of local nongovernmental organizations (NGOs) and local community groups (LCGs).

An endowed foundation could become a national donor agency. It could be a vehicle for fund raising—from both local and international sources. Such an institution not only has flexibility it also can serve to empower local communities because the endowment board is controlled by members of the community served. However, creating an endowment for multiple uses, i.e. financial security, flexibility and empowerment, will require much more careful attention to design than would an endowment limited to a specific institution or to a single budgetary use.

If missions decide to explore a complex set of uses for an endowment because of the chance to achieve difficult, but useful, *developmental* purposes, then all sections of the "Guidelines" will likely be of use. On the other hand missions seeking a more limited use, say only financial security for an institution, will only need to use a few sections. However, the "Guidelines" are written so that missions which are unsure of the most appropriate use will be able to gain insight into the difficulty, time necessary, and likely costs, of different options. Therefore, missions should consider the "Guidelines" to be both a guide for decision making about the appropriateness of an endowment and its use, as well as a source of references and recommendations for tackling each step of the process.

For the purpose of illustration in this introduction, two kinds of endowments have been described—those linked to a single use, i.e. financial security, and those supporting multiple uses, i.e. the foundation. However, the picture is not so straightforward. Purposes can be multiple as well as uses. Missions may have to consider many permutations to determine which set of purposes and uses "fit" national priorities and are, at the same time, viable in the local milieu. Therefore in order to help missions understand the implications of various permutations, these "Guidelines" emphasize the analysis of the more complex, multiple use endowments. In many situations missions will be able to simplify the task if they find that a more limited set of purposes and uses will suffice to their needs. A later section gives a table of options for configuring an endowment.

## A.2. The environmental case for endowments

Under AID's Africa Bureau's Development Fund for Africa, the Bureau has been assisting Missions to identify and develop programs promoting improved natural resource management. Essential to the ultimate success of these programs is the sustainability of activities which missions initiate. Sustainability requires both continued financial support and maintenance of a critical mass of competent and dedicated human resources.

Environmental sector projects, especially efforts to preserve biological diversity, need patient work by skilled persons in an atmosphere of steady financial and institutional support. In other, more traditional development sectors a longer history provides a sense of which approaches work. Relatively less experience in tackling environmental problems means that stability in the level of resources committed to a long-term goal, from problem identification through to evaluation, occupies a prominent place among factors determining success.

Missions contemplating environmental efforts should take a long view and examine what steps they can take to provide the climate necessary for sustainability. Many may well find that they will have to help found or enhance appropriate local institutions if they want to see their efforts lead to continued action beyond the life of

an AID project. In this context endowments may have a useful, even critical, role to play.

AID missions should work with host country governments to explore options for ways to commit resources to environmental problems. A likely conclusion is that present mechanisms and institutions do not have sufficient reach and capacity to assure a long term commitment. Missions may then wish to consider helping to set up a new institution which is endowed with local currency so that it can provide a secure source of funding for environmental (or other) purposes. Because such an institution, referred to in this paper as an "endowed foundation," or simply, "foundation," would be designed to last indefinitely, it must have sound management, i.e. a capability to guard its assets, develop programs for making grants and evaluating and monitoring its grantees.

To be truly sustainable the management, whether via a new foundation or via an existing institution, of an endowment or other long term funding source must be as independent as possible from short sighted policies and the pressure of momentary crises. Through its priorities for use of funds, an endowment's management must establish and maintain a framework which provides, and encourages participation by individuals, and other elements of society in solving environmental problems. On the other hand to maintain effectiveness such a source needs methods of operation which can evolve as the absorptive capacity of local NGOs, LCGs, and other implementers change.

This paper envisions that if a new institution is to be created to manage the endowment, that it would be modeled on U.S. community foundations. That models calls for these institutions to be governed by boards of directors representing a broad cross section of the community served by the foundation. If the endowment is for an existing institution, then the governance of that institution, appropriately strengthened, would manage the endowment.

### A.3. The developmental case for endowed foundations

Solutions to environmental issues demand responsible trade-offs between conflicting, but legitimate desires. Often these conflicts are rooted in antagonisms between different groups within society. No foreign donor or international NGO has the moral authority to impose a view of how these trade-offs should be worked out. Rather the society of a country must find its own solutions based on compromise which takes into account different viewpoints and balances present aspirations and future needs. A donor could push for an agreement on a particular issue, but such an agreement if it does not reflect long-standing local political and social attitudes will not be very secure.

Environmental problem solving is on better footing if it occurs through a mechanism by which a broad cross section of local society can participate in a process of creating (and updating!) a national consensus on priorities and approaches. To see environmental view points flourish donors must acknowledge that ultimate responsibility rests with the society. A donor's best long term strategy may be to plant "environmentalism" at the grassroots of society and nurture its growth in the understanding that it will change form as societal values change.

If a donor created institution is to identify and address national environmental priorities, it must be able to marshal local support, both political and financial, for a national environmental agenda. Donors have a role, not of determining the priorities of this agenda, but of seeing that institutions which they help set up have a scope which

is broad, i.e. supportive of efforts to preserve as appropriate, protect where necessary, and sustainably develop when possible, the nation's natural resources. Whether preserving biological diversity or cleaning up water resources, the institution needs to provide financing which is secure in the face of shifts in national policy, political party, or donor priority. At the same time the ideal institution should reflect the evolution of national priorities as economic and social conditions change.

AID missions should consider the concept of an endowed foundation as holding the potential for a better way to provide development assistance. However, such institutions are capital intensive and require a concentrated effort by skilled persons to set up. And, they do not necessarily lead to fundamental changes in local power structure.

#### A.4. Recent AID initiatives to create endowments

Within the last three years interest in endowments has grown rapidly. While AID has had the ability to work with host governments to create endowments for some time, most of this experience has been limited to endowments for individual institutions, typically an educational or research institution which needed longer term financial security than afforded by annual project funding from foreign donors (see AID publication, "Terms of Endowment," for a review of this experience).

AID created endowments are just beginning to address environmental issues at a national level. The Foreign Assistance Act (FAA) now allows AID to create local currency endowments with grant money from either development assistance (DA) or economic support funds (ESF). This authorization specifically provides for the creation of endowments which can use interest earnings for supporting a range of activities. AID is currently applying this mechanism in the Philippines, Costa Rica, the Dominican Republic, and Madagascar.

#### A.5. Alternative endowment uses and creation paths

The report describes several types of endowments; however, missions should carefully consider the path to creating an endowment before settling on a final choice. Table I shows a series of columns which offer a range of answers to the key questions posed in the captions across the top of the table. Answers to these questions, in the form of one box from each column constitute a first approximation of the path of creation. Later sections of these guidelines will refer to Table I in working through the choices necessary in creating an endowment. These questions are:

- A) How (and who) is to be involved in the creation of the endowment (and a new institution, such as a foundation, to manage the endowment)?
- B) How are funds to be moved into the endowment?
- C) Who has oversight on assets and grants?
- D) How is the endowment's income to be used?
- E) What set of purposes will be served?

This report offers analysis useful in choosing among the options given in the columns as well as recommendations for programming an endowment creation effort. Missions should explore many if not most of these options before they settle on one from each column. It will be helpful if the process considers each column separately as the choice of one answer in any one column does not necessarily limit the choices in another column.

In Table I, the options ("answers") grow more complex toward the bottom row. Experience which can offer guidance also grows scarcer toward the bottom row. Consequently the analysis offered by this "Guidelines" concentrates on the more difficult, less well understood options so that missions may consider them more fairly.

TABLE I

## Options to consider when designing an endowment

<i>A. What set of purposes will be served</i>	<i>B. How is the endowment's income used</i>	<i>C. Who has oversight on assets &amp; grants</i>	<i>D. How funds are moved to endowment</i>	<i>E. What process creates an endowment</i>
defined goal with explicit task, e.g. managing a national park, educating AIDS orphans, doing agric. research	budget support for programs implemented by the endowment's manager	under the management of an existing institution	debt swap (exchange rate leverage)	via partnership between International NGO and local group(s)
set of long-term goals, with flexibility in strategy chosen to reach goals, e.g. NEAP	grants to local NGOs	under the management of a new institution created for a specific purpose	Non-Project Assistance (policy leverage)	via a national consortia of local NGOs
empowerment, i.e. giving society the means both to set priorities and choose strategy	grants to local communities	under the management of a foundation with a broad mandate	direct grant to an existing or new institution (possibly for an account in US \$)	via participation of local communities

Options offered in this table are listed as alternatives in columns under five key decisions which will determine the structure of the endowment as well as whether a new institution, i.e. an endowed foundation will be created.

If missions wish to consider the most complex option, the endowed foundation, then considerable effort must go into the planning phase in advance of any irrevocable decision. Widespread participation, including local community groups is key, as such a foundation would need a mandate from society to be able to function as a kind of

national donor agency. Such a mandate requires that the grassroots of society understand and support the work of such a foundation. Because this mandate is so critical, these "Guidelines" devote a great deal of analysis to understanding how to approach the creation process in a way which builds and maintains this mandate.

There are also other possibilities which vary from the answers given in the columns. In Bolivia a foundation is being set up with a board of directors, involving both governmental and nongovernmental representatives, which has control over the totality of the endowment's assets with the proviso that special subaccounts are set up for special purposes. These subaccounts are in effect a form of restricted gift. This endowment has yet to be finalized, but it may offer an example of another option beyond those of Table I.

#### A.6. The role an endowed foundation might be able to play

In providing long term financial and political security for the environment, an endowment, whatever its genesis, purposes and form of use, will foster new interrelationships among AID, the host government, local NGOs, LCGs, and U.S. NGOs. These changes will be more extensive as the endowment is made more accountable to local society. For example, an endowed foundation which can play an independent role within a national society and which has the financial clout to advocate a long term perspective will work to open up governmental process to more viewpoints. Assuming such a role will mean that the endowed foundation will be able to open a constructive dialogue with the government on national priorities. It will also be able to negotiate as an equal with foreign NGOs over the shape of environmental programs and projects which foreign donors and NGOs seek to promote.

Much of the analysis of these "Guidelines" focuses on the process of creation—who leads, who participates, and how that process determines ultimately who controls. To choose one approach to the creation inevitably sets up a bias which favors either a continued control or dominant influence from outside the country or control from within local society. Thus if local control, i.e. "empowerment," is a desired outcome, then especially careful attention must be paid at the early stages to the approach.

#### B. Summary of experience with endowments to date

##### B.1. How interest in endowments evolved

The current interest in endowments has its origins in two bodies of experience. One, primarily in Latin America, represents experience with endowments for existing institutions. Most of the experience with this kind of endowment (see "Terms of Endowment") grew from the financial needs of established institutions, i.e. the need anticipates the money. A second, more recent set of experience comes from efforts to place more resources over the long term behind conservation oriented efforts. The driving force behind this kind of endowment is less an effort to address the future needs of existing institutions and more an attempt to promote the growth of new or greatly expanded institutions. In the second type money anticipates the need. And, in many, but not all, cases, "debt-for-nature" swaps have been used to generate the money in local currency.

Because the debt swaps generate local currency in quantities which cannot easily be used in a short period of time, the debt swapping organization needs to bank the swap proceeds until needed. In many countries with high domestic price inflation, the value of the proceeds erodes quickly unless interest can be earned and used. This need

has been one of the factors behind recent AID's recent legislative authority to create endowments. AID's current appropriations bill (PL 102-391) states:

"Sec. 567. In order to enhance the continued participation of nongovernmental organizations in economic assistance activities under the Foreign Assistance Act of 1961, including endowments, debt-for-development and debt-for-nature exchanges, a nongovernmental organization which is a grantee or contractor of the Agency for International Development may place in interest bearing accounts funds made available under this Act or prior Acts or local currencies which accrue to that organization as a result of economic assistance provided under the heading 'Agency for International Development' and any interest earned on such investment may be for the purpose for which the assistance was provided to that organization."

### **B.2. Why debt-for-nature swaps are associated with endowments**

In Africa and in other regions, many missions and U.S. NGOs have viewed debt-for-nature swaps as an attractive option for programming in the natural resource area. Missions have favored them because they have confidence in the managerial and administrative capacity of international NGOs. These NGOs offer a complete service: they arrange the swap with First World bankers; they coordinate the exchange of purchased debt with the host country Central Bank in return for local currency; they find a local NGO to serve as a counterpart; and, they manage the local currency to support biodiversity and conservation activities which they and their local partner program and manage.

The NGO community has been particularly attracted to swaps because of several benefits: leverage on the conversion of their grant funds to local currency; publicity; and, opportunities to work cooperatively with Central Banks and private commercial banks which have traditionally not been actors in the conservation of biological diversity.

Few donors interested in the environmental problems of developing countries—the public, foundations or corporations (including banks)—have sought out more direct alternatives to using these U.S. NGOs as intermediaries. Partly this represents a bias toward the familiar as well as an actual absence of alternative, more direct channels to support grassroots efforts.

However, AID's experience in developing countries gives it a wide array of options for delivering financial support. That body of experience gives AID missions the perspective to base their natural resource programming on an objective comparison of alternative mechanisms of dealing with environmental needs.

### **B.3. Limitations of debt-for-nature swaps as programming tools**

Even the groups which advocate debt swaps acknowledge limitations such as: the lack of buyable debt; a swap's inflationary impact (and conflicts with IMF mandated efforts to control the money supply); as well as the difficulty in administering and programming a sudden and large infusion of local currency. With more experience with debt swaps—especially those tied to biological diversity—other criticisms have been heard: lack of participation by either local NGOs or communities in and near areas proposed for protection; the growth of a perception among the leaders of local society that environmentalism is a foreign agenda; and perpetuation of a senior-junior relationship between foreign NGOs and local NGOs.

Another problem is that the technique of the debt-for-nature swap has tended to take precedent over the patient, less glamorous work of program development. The negotiations necessary for arranging a debt swap must take place according to the pace of business of the international banking community and in response to market opportunities for getting a favorable leverage in a debt purchase. In other words the process of making a swap drives the program funded by the swap rather than the reverse. In such an atmosphere it is difficult to find and follow a process which provides local communities with a sense of ownership and control over activities.

Nonetheless, the debt-for-nature swap, in the tradition of appropriate technologies in other sectors, has acquired a life of its own. Swaps have become accepted as more than just a financial transaction. The term, "debt-for-nature" swap implies a set approach to programming. However, in reality a swap is just an exchange of foreign currency for local currency at a favorable rate. As such a swap could be a part of any endowment creation effort as a way to move hard currency into local currency.

It behooves AID missions to examine carefully the stated aims of a proposed swap to compare attached programming mechanisms with alternatives. The use of a direct grant (i.e. keeping funds in dollar accounts) or a government grant linked to a NPA policy reform process may offer a preferable option if a goal is constructing an institution with widespread participation in advance of funding.

On the other hand a debt swap may be an option to consider once a process of endowment creation has been agreed upon and progress made. Since the process of creation may take several years, the choice of method of creating a source of local currency may not be on the table until after the optimal secondary market opportunity for purchasing debt has passed.

#### **B.4. The analytical framework of these Guidelines**

Whatever the financial and institutional mechanism chosen, a mission should aim to create a more stable base, both financially and politically, for the support of long term efforts to conserve and preserve the environment. This long term goal defines the set of needs which any proposed mechanism must meet. This set of needs provides the context for the analysis of this paper.

This paper analyzes issues surrounding the use in Africa of local currency endowments, possibly managed by new foundation-like institutions, and offers recommendations for use by missions and mission contractors as they design projects. This paper will focus on the process and what programming issues will have to be considered.

## PART II—OPTIONS: ENDOWMENTS & FOUNDATIONS IN AFRICA

### A. Articulating a rationale for an endowment purpose & use

#### A.1. The existing setting is not favorable

At the outset, it must be stated that for all the potential value of an endowment managed as a foundation, the climate is not favorable in most African countries. No African country (and few developing countries anywhere) have a tradition of charitable foundations which could serve as a framework for establishing an endowed foundation. Consequently there is a shortage of professionals with the expertise necessary to establish and operate a foundation. Experience in managing assets, designing environmental grant programs is not so limited, but still hard to find. And, finding expertise willing to dedicate themselves to the long incubation period necessary for an endowed foundation is difficult when so much money is available for natural resource projects.

The final difficulty lies in the poor track record grassroots empowerment projects have had to date in Africa. [The colloquium discussion at the end of the "Guidelines" touches on this point.] However, notable among those which have been able to link grassroots empowerment, resource management, and innovative funding mechanisms is the West Africa Rural Foundation (WARF), which has been nurtured by the Ford Foundation [see reference].

Missions which wish to consider the most elaborate options of Table I, should take great care to work out a plan with the maximum amount of consultation and participation with all potential players. Missions should allocate funds to the exploratory and design phases sufficient to allow for false starts, blind alleys, etc.

#### A.2. The need for an explicit rationale before creating an endowment

As described in the introductory sections, the choice among possible purposes, ways of using income, and institutional home for an endowment must have an explicit rationale. Missions should be able to articulate a rationale which covers the following:

- A statement of mission which is bigger than the endowment.
- A convincing argument that a purpose and an institution should be given perpetual life
- A clear grounding in a national goal (e.g. the National Environmental Action Plan, or NEAP) which has broad support within all elements of society

The three attributes of a convincing rationale apply to all options contained in columns A, B, & C of Table I. However, if a mission wishes to consider the more complex option of creating not only an endowment, but a new institution (e.g. a foundation) to manage it, then the rationale needs to be expanded to cover additional questions. These questions arise not just because the task is more complicated, but because of the inherent danger of a "runaway" with a flexible institution which has its own source of money and which is independent of donor or governmental control.

Missions should bear in mind that the rationale for a foundation and the strategy for creating one are intimately related. Thus, readers will find some overlap between the discussions of rationale of Part II and of steps of Part III of these "Guidelines."

**B. Choosing a purpose (column A) and a use (column B)**

Virtually all long term environmental goals could be advanced by an endowment for a single purpose or for a range of purposes. Column A of Table I offers a range of options from the relatively inflexible and dependent to the flexible and independent. At the top of column A is the least complex option. An endowment for an readily defined purpose, as in the examples in the box, are the simplest for missions to program. Nonetheless, even these options require missions to make a careful analysis of each option in subsequent columns and articulate a rationale based on objective arguments for the selection of each option.

The middle option of column A offers flexibility, but not necessarily independence of management. It could allow for participation of different elements of society in its work of developing program strategies and approaches to national and local environmental problems. Environmental programs, especially efforts to conserve biodiversity, benefit from the participation of local communities in the affected areas in decisions of strategy.

The last option in column A, that of an endowed foundation, would be able to provide not only funding, but funding with the support of a broad cross-section of society. The concept is that the endowed foundation would have the ability to set not only strategy within given priorities, but also the priorities themselves. Such an institution, equivalent to a national donor agency, would be able in national policy debates to influence national environmental and developmental goals.

A choice among options of column A needs to be judged to the extent that it meets the needs described in the following sections.

**B.1. Long-term funding—lasting beyond the project cycle**

Missions may wish to start with the aim of making support of conservation and renewable natural resource management and development activities less vulnerable to: 1) changes in AID's priorities; 2) evolving relations between host country governments and foreign donors; and, 3) host country political and policy shifts.

A long-term goal may be to create a source of money which is independent and stable. In the case of a specific purpose endowment the question of whether this goal can be reached is most easily addressed by selecting the top option in column C. In that case the track record of the existing institution would provide the answer. However, if a new institution is to be created, then careful attention must be paid to the management capability of that institutions as it would, once established and funded, not be subject to AID oversight—unlike existing local currency accounts over which AID has a continuing management role.

**B.2. Innovative mechanisms—moving beyond dependency on donor aid**

Supporting sustainable development and renewable natural resource conservation will require long term aid for finding and nurturing new ways to encourage individuals and communities to view their resource base as a trust to be cared for in light of the needs of future generations. These new mechanisms may include decentralization, stronger NGOs, and LCGs innovative partnerships among NGOs, LCGs and government agencies, and new roles for the private sector. Institutions, whether existing or new, should be given an endowment of if this step will help address this need of moving beyond the "aid trap," i.e. a dependency on donor assistance which stifles initiative.

For example, an endowed foundation could support decentralization strategies in several ways: it could provide direct grants to local communities, who then could hire local NGOs or others to help them in identifying resource problems and opportunities, to provide technical assistance. Such direct grants, which WARF is now making, could help communities form cooperatives for credit, inputs, and marketing. Since many of these strategies would involve closer collaboration between local communities, NGOs and governmental extension agents, the foundation's support would create an indirect incentive for NGOs and governmental agencies to strengthen their field presence in order to fulfill their role in partnerships with local communities.

An endowed institution, however, needs to recognize and support NGO-based activities which contribute to sustainable use of renewable natural resources. Presumably such an institution would support NGOs in these efforts through long-term institutional development, training, information gathering, and planning. This strengthening needs to occur at two levels—at the grassroots for local communities and at the national level to enhance NGOs' ability to articulate policy alternatives. An endowed institution in the form of a community foundation would be able to serve these two levels not only directly in the form of sustaining financial support but also indirectly through Board level decisions which set priorities for the foundation's approach to environmental issues.

Renewable natural resources management problems are intimately linked with problems of economic development, poverty alleviation, livelihood creation, social organization, etc. Solutions to these problems require innovation, cooperation, and the mobilization of all sectors of society. Success will come about in different ways in different societies; however, in all cases success depends on creating and sustaining cost-effective ways to tackle renewable natural resources problems and economic development opportunities. New partnerships will be necessary.

An endowed foundation would be better able than purpose specific institutions to respond to opportunities to try new ways to manage resources with whatever combination of institutions and services is most effective. These combinations may be partnerships or formal collaborations between public and private sector, between NGOs and entrepreneurs, between NGOs and government agencies, etc. Therefore, even though the guiding purposes of a foundation have specific ends, a foundation needs to be able to support innovative partnerships which can find and demonstrate the most effective approaches to renewable natural resources management problems. Thus both a foundation's charter and government regulation would need to allow for the broadest possible array of actions.

### B.3. Local control—promoting innovation

If a central purpose of an endowment is to provide support for innovative action, then procedural barriers to new approaches and methods of funding need to be minimized. At the same time flexibility in management must not compromise accountability—both to the peer community of local NGOs or to donors. No type of activity should be ruled out of bounds *a priori* without clear reasons presented by donors which the NGO community understands and accepts.

Missions which seek to engage host governments and local NGO communities in discussions of the need for and structure of endowments which would provide grants to local NGOs and local community groups (options 2 and 3 in column B) need to write down general guidelines for what the endowment would do. These guidelines should

relate more to the type of organizations to be supported rather than to the particular technology or technique to be used.

A rationale for the choice of column B should outline the scope of programming activities with several statements of general aims, e.g. the endowment seeks to reach a broad range of NGO types and an ever increasing number of individual organizations and/or the endowment seeks to develop NGO capacity as regards financial management, activity planning, and project direction. A statement about the range of NGO activity the endowment's funds would support should include (or explicitly rule out) public education, research, credit mobilization, training, advocacy, lobbying, political activity, etc.

If the bottom option of column A is chosen then the specific sectors to be supported would have to be subject to review and modification by the board. The choice of the third option in column A represents the fullest commitment to the philosophy that participatory processes should and do have great influence on the setting of priorities. Such a policy, which is necessary for truly local control, may lead to conflicts with donors more interested in specific issues rather than the growth of local institutions dedicated to grassroots determination of priorities. For example the board may decide that biodiversity should be less of a priority than other environmental needs, e.g. community waste recycling. In this situation a potential donor may well be reluctant to endow a program whose purpose could be changed. In such cases, it may be possible to negotiate time-limited program restriction on donor contributions to an endowment which would give the donor agency assurance yet not negate the principle of local control

#### **B.4. Increased participation—empowering communities**

If the goal is to provide the most secure base of funding for the long term, then it seems prudent to provide a funding base for local NGOs and local community groups which is independent of, and complementary to, the funding resources available to the international NGOs, i.e. foundations, corporations, and the concerned public of the developed world. Further, growing tension between NGOs of the North and South over issues of program direction and management argue that AID should not rely exclusively on international NGOs as agents to address long term goals.

The endowment mechanism offers an advance beyond traditional options. As local NGOs continue to improve their project capacity, the endowed foundation could be one way to increase their participation in national policy dialogue as well as enhancing their role as partners with their own government in environmental activities.

Sustainability of natural resource management can not be assured by a focus on technical and scientific aspects of problems alone. Viable solutions to environmental issues, perhaps more than other development issues, require that leaders and leading institutions of society become actively committed to the process. While a strong governmental commitment is needed, government actions alone cannot assure sustainability. What is needed is the active participation of as broad a range as possible of people and constituency based local NGOs in the facilitation and implementation of environmental and conservation activities.

The process of forming a Board for the endowment's management (which is necessary under those options calling for a new institution) is crucial to the participation question. If the process is open to all local NGOs and community groups which represent constituencies within society, then a broad range of NGOs and groups would be much more likely to participate in the endowment's activities. On the other hand, if

the formation process is limited to a few and conducted in secret, then many might well view the result as an institution under the control of a small, elite group.

Long term stability of the management of renewable natural resources requires that the understanding of environmental principles and the will to act in the long term interest of a nation's resource base become widespread within society. To do so requires that an endowed foundation be set up and managed by individuals and organizations seen by the public as holding the public interest foremost. The growth of "grassroots" support also requires that the government recognizes the value of the activities to be supported. In other words an endowed foundation must gain and keep "legitimacy" both in the view of the people and the government.

The concept of a locally managed foundation derives from three bodies of experience, which are: the community foundation concept; AID's local currency endowment in the Philippines and under development in Madagascar. In all of these cases the fundamental concept is to give local communities a long lived institution which is managed by and for the people of those communities, whether at the level of the nation, a region, or a local community. This concept may be termed a "democratic" foundation. In the U.S. this concept most closely parallels the "community" foundation which is meant to imply that the foundation's board is drawn from the community it is intended to serve.

In the U.S. the community foundation concept is widespread and offers many examples of purpose and ways to establish and operate. There are community foundations dedicated to public education, local arts, community services, poverty alleviation, civil rights, as well as local environmental problems. Many community foundations were established by local philanthropists, others by church councils and social service organizations as cooperative funding vehicles. Many have as an explicit purpose the empowerment of disadvantaged communities. This body of experience offers lessons in how to conduct a process of recruiting a board of directors which the community the foundation is intended to serve can accept as representative.

### C. Managing assets and making grants (column C)

The options in column C differ more in their implications for management of grants than they do for the management of assets to generate income for making grants. Therefore the following section does not distinguish between the options in terms of their implications for asset management. However, the management of grant programs goes beyond questions of technical feasibility to questions of power and influence.

#### C.1. Managing assets: investing capital

The financial *raison d'être* of an endowment is to protect the value of assets while generating income from the use of those assets through investments. Traditionally, private donors and bilateral and multilateral aid agencies focus on short term projects, approximately five years, which often fail to have a lasting impact when the money runs out. These agencies look to endowments to guarantee a steady commitment to long term goals and overcome budgetary and political fluctuations. Fulfilling this objective, however, necessitates acquiring and managing assets so as to maintain their value and yield income.

Numerous options are open to the managers of an endowment's assets. Among these are: deposits in local private commercial banks, holding of government bonds or notes, equity or debt of privatized national companies (e.g. the telephone company),

real estate, etc. Limits on the mix should be determined at the time of the endowment's creation.

The assumption is that an endowment's assets can be managed to keep a principal intact with a net interest and investment income available to support project activities of LCGs and NGOs. Ideally, an endowment portfolio should generate a four to five percent return after adjustment for inflation and the cost of portfolio management. This level of asset management while possibly achievable in a few African countries, will prove difficult in most.

While an endowment, whether for an existing or new institution, should seek to maintain the value of the principal in perpetuity, unstable or nonexistent markets in local currency denominated assets may force asset managers to step back from this goal. In this situation, managers would draw the endowments assets down over time (i.e. a sinking fund) and need to manage donations so as to stretch them beyond the normal donor life-of-project cycle.

Regardless of the state of local financial markets, building a financial management capacity will pay off when local financial markets develop to the point where an endowment can be managed in perpetuity. An endowment's financial managers should anticipate the various pressures on a endowment's assets, including: donor gift restrictions; reporting requirements of national governments, and donors; and, the need for transparency and avoidance of conflicts of interest in asset management decisions. Anticipating and dealing with these pressures effectively will enhance the endowment's attractiveness to potential donors.

## C.2. Making grants: a participatory process

A primary reason for a mission to consider an endowment stems from a need to provide responsible elements within society with a long term source of financing to help them build commitment to the solution of environmental problems. Achieving this purpose, i.e. long term commitment to environmental goals, requires that various communities, both local and national, identify with this purpose through *participation* in shaping endowment-funded programs. This need is valid whatever option in column C is chosen.

If the third option in column C is chosen, then the choice of activities to be funded by the endowment must be able to evolve in response to changes in the social, economic and resource conditions. In this case the opportunity for popular participation must be broad. This need for participation effectively rules out a governing structure over which the host government retains a veto. However, at the same time, governments have legitimate interests in how the endowment manages its finances and how grantees use their money.

An effort to found a new institution with an endowment must simultaneously follow a process to establish a governing board and rules of governance independent of the government as well as a process to define the relationship between the endowed institution, its finances and operations, and the government. In the first process society defines the institution's mandate and in the second the government recognizes the institution.

Each process needs to be guided by early decisions about the desired end product. For example, the major question concerning the board's make-up revolves around how best to ensure that board is free enough to rise above the "web of obligation" yet structured enough so that through time as board members change the

overall composition of the board does not drift toward a particular viewpoint, i.e. become a runaway board. For foundations to succeed, the organizers must create an "ethos" of service to society. The board must be dedicated to nurturing this ethos.

### C.3. Achieving creditability: models for governance

The importance of the process of selection of the members of a governing board cannot be overemphasized. The board, whether an existing institution or a new, endowed foundation, will be responsible for all decisions affecting endowment generated funds, including: personnel, investments, grants, and priorities. They are ultimately responsible for maintaining good relations with all the groups important to the endowment, including: foreign donors, local and international NGOs, the host government, local and international private sector.

Choosing a method for selecting a governing board is a key step in the creation process of an endowed foundation (column E). This step needs to build a mandate from their local NGO community for the foundation's board. Two concerns should guide choice of a board selection method. One is the need for accountability and the second is the need for independence. From these two viewpoints, the first question to address concerns the makeup of the board and what restrictions are placed on its members. There are several models. The creation process might consider boards whose members:

1. represent different interest groups or organizations
2. select their own replacements
3. occupy seats with different, restricted qualifications

These types of boards, respectively known as: "representative," "self-perpetuating," and "restricted," are not the only ways to specify the initial selection and periodic replacement of a board; however, these do cover the major options. The following section discusses what each model implies for the replacement of board members. A study of the process of replacement will illustrate the factors which need to be considered when considering the restrictions placed on a board.

### C.4. Maintaining creditability: renewing board membership

Foremost is the need to find and continue to find replacements candidates for board membership who have a demonstrated ability to think creatively with a minimal obligation to a fixed point of view or philosophy or a particular group. A representative board would likely tend to reinforce a members obligation to the group which chose him or her. Even if members were to be limited to only one term, the possibility of that member returning to that group will exert a strong influence over that member's decisions while on the board. On the other hand a purely representative board would more likely keep the endowed foundation from drifting or evolving in its understanding of issues and in its choice of priorities. Such a drift would only be possible if the groups chosen to select board members become marginalized within the community of local NGOs and local community groups.

Self-perpetuating and restricted boards would expect that their members would be less bound by old associations with particular philosophies. The self-perpetuating board would be the freest in this regard, but the danger is that it can over time and replacement drift to extreme positions. In the U.S. there are cases of non-profits whose boards developed particular views which were extreme in the context of the times and mainstream social concerns. In the U.S. experience, contributions, both from the public

and foundations, declined as the board drifted. However, in the case of capitalized foundations, such as most major U.S. foundations, the role of gifts is less influential in maintaining a check on board drift.

The restricted board offers a compromise between the self-perpetuating and representative board. The charter of an endowed foundation may specify specific seats on the board with special qualifications, e.g. experience of a minimum period in the community development field, residence outside the capital city of specific duration, indications of leadership on particular issues as evidenced by published articles or speeches, etc.

As U.S. experience offers few examples of boards other than self-perpetuating (although a few U.S. environmental organizations have boards elected by member groups), it seems wise to look to local traditions of self-governance for inspiration. Boards whose membership selection derives at least in part from local models may offer promise of wider acceptance locally; however, this gain needs to be weighed against the same need for international donors to see a structure recognizable from their own experience.

Whatever structure and scheme for selecting board members, AID needs to face another issue early in the design process—the question of how broad a base of experience can be tapped. In essence the question is: Does the endowed foundation derive its mandate only from environmentally-oriented NGOs or from a broader constituency, such as women's groups, local community organizations, etc.? If the fundamental purpose of the foundation is to plant the seed of environmentalism at the grassroots of society, then it would seem necessary to include as broad as possible a range of groups. And, this broad range needs to be included both in the process of formal establishment (writing a charter) as well as in the initial and subsequent selection of board members.

#### D. Method of moving money to the endowment (column D)

This section of the "Guidelines" reviews the major options and describes the steps involved in designing projects which incorporate various combinations of the options of Table I.

##### D.1. Use of debt-for-nature swap to fund an endowment

The traditional "debt-for-nature" swap involves the following steps which are usually taken in the order given (note that variations are possible):

- i. A donor makes available cash in a hard currency (say 1,000,000 U.S. dollars) to a U.S. NGO, i.e. a non-profit, for the purposes of funding a conservation (or sustainable development) project in country X.
- ii. The U.S. NGO negotiates in advance with the Central Bank of country X for a swap "quota" (say \$5,000,000 in face value of debt) which would allow the NGO to swap notes it would purchase for local currency obligations of the Central Bank at a set exchange rate. Note that this swap may occur in several tranches up to the total of face value agreed to by the Central Bank.
- iii. The U.S. NGO then goes to the secondary market in the debt of country X to purchase Central Bank obligations from U.S. commercial banks at the prevailing market discount of 60% in country X (i.e. buys notes with a face value of \$2,500,000 for 40% of the face value—note that the market

discount is different in different countries and varies over time in each country as a result of many factors, including political change, shifts in international commodity prices, debt restructuring plans, as well as the supply of money from donors for the purchase of debt instruments in the secondary market).

- iv. The U.S. NGO then swaps the notes for local currency obligations of the Central Bank, often at a redemption discount on the official exchange rate, say 20%, and often with staggered dates of maturity and interest (thus the U.S. NGO in country X would get a package of obligations worth \$2,000,000 in the local currency of country X).
- v. The U.S. NGO then turns over the local currency proceeds of the swap, whether in cash or Central Bank bonds to its counterpart local NGO which may or may not be an affiliate of the U.S. NGO for funding of a program of conservation activities, typically including some or all of the following: surveying biological resources of particular note, determining what land is worthy of status as a national park or protected area, buying land found to be prime habitat for endangered species, setting up park management plans, sponsoring research into endangered species and their habitat, paying for the services of park rangers and guards, educating the public about conservation, training park staff, employing local residents as guides, informants, etc.
- vi. If the money needed (say only \$250,000 worth of local currency) is less than the amount proceeding from the swap, then the rest (\$1,750,000 worth) may be put into a bank to earn interest. Such an account may be managed as a sinking fund which is slowly depleted over several years or it may be managed as an endowment where only the net interest earnings are spent each year.

Each of the participants in a "debt-for-nature" gains a benefit: the donor gains a bigger impact from its grant through the leverage of the secondary market discount; the international NGO gains funding and valuable free publicity from arranging a swap; the Central Bank of country X retires debt; and, the local NGO partner (or affiliate) of the international NGO gains support.

#### **D.2. Dealing with inflation: asset transfer**

In either approach to the creation of an endowment, an AID mission (and an AID recognized U.S. PVO or NGO in the case of a debt-for-nature swap) will have to negotiate with the host government the terms of endowment. In a debt swap traditionally the U.S. NGO deals directly with the host government's Central Bank to set the terms of the swap, i.e. the discount rate, the period of maturity of notes if it is not a cash transaction. A concern of the Central Bank is the inherent inflationary impact of a swap which involves an increase in the money supply. AID is often indirectly involved in these negotiations as a member of the donor committee for the host country.

A typical donor committee is concerned that a country maintain low inflation of domestic prices, a stable money supply, and sound Central Bank policies. At times many issues can become entangled. For example, if a Central Bank opens a debt swap window for the purposes of attracting investments, they may find that it may also allow persons of means to repatriate their holdings of foreign exchange at an exchange rate premium. Such a phenomenon could adversely impact the poor through domestic

price inflation. Thus both Central Banks and donor committees look carefully before taking steps which encourage large amounts of debt swapping and do look to limit swaps if inflation is feared.

Use of the NPA vehicle would eliminate an increase in the total money supply as the local currency used for the endowment would come from money already raised as revenue by the host government. However, if all this cash were released into circulation at one time, there could be transient inflationary pressure. Such pressure could have adverse effects in countries without exchange controls as it could stimulate imports of goods and services. By careful design missions can minimize the inflationary impacts of endowment creation in several ways.

If a mission pursues the NPA option, then it is likely that the host government would favor an endowment which was established with assets combining cash and notes of the Central Bank according to agreed terms. One scenario would be for the Central Bank to issue notes which have a staggered series of maturities lasting several years. In order to protect the endowment from loss of value of the notes, the Central Bank would pay interest at a rate several points over the rate of domestic price inflation as published by the World Bank annually. This rate, called the "indexed rate," would be set in the agreement and in the notes themselves. The notes would be assignable in order that the endowment may be able to sell them or deposit them with a local private commercial bank as loan collateral in order to raise cash if needed in advance of the maturity dates of note. Being assignable also affords more protection against default in payments.

If the debt swap route is favored, one way to minimize inflationary impact is for the swapping NGO to purchase foreign debt of a large company such as the national telephone company or electric power company. Because this debt is often guaranteed by the Central Bank it usually sells for the same discount in the secondary market as sovereign debt of the Central Bank. Consequently the Central Bank would still have to approve a swap, but the inflationary question could be finessed by swapping the debt not for local currency, but for equity in the private company. These shareholdings could immediately become the endowment's capital. As the endowment needed cash, it could sell the shares for local currency. The net result is little pressure to increase the inflation rate.

Governments are likely to be particularly attracted to this mechanism if the foundation board which controls the endowment is comprised entirely of local citizens as this means that there is less danger of control of important companies passing into foreign ownership.

A similar swap may be arranged in countries where the host government is in the process of privatizing national companies. As part of the privatization deal, the endowment could be given holdings in the publicly offered stock of the newly private company in exchange for foreign debt purchased at a discount.

### D.3. Use of NPA conditionality to create an endowment

Because the process of writing a NPA PAAD, or program document, follows a sequence parallel to the writing of a traditional project paper, there is ample opportunity to explore in systematic fashion a process for the use of freed up local currency funds for creation of an endowment. The process is similar to a debt-for-nature swap in that there are multiple parties involved and that local currencies wind up in an endowment managed by a local corporation. However, a major difference of

great interest to AID missions is that the local currency is "freed up" rather than "generated." There is no "swap."

In an NPA arranged endowment the host government agrees to use its own revenues of local currency, which had been budgeted to use for the purchase of foreign exchange to pay debt service, and give it to the endowment. As these local currencies are not generated as the direct result of an AID grant, then AID has no fiscal or programmatic responsibility over the use or accounting of those funds.

The NPA endowment process follows these steps:

- i. AID offers a hard currency NPA grant (say 20,000,000 U.S. dollars) to Country Y with the intention of making the grant conditional on a series of policy reforms in the natural resource area.
- ii. As part of the agenda of reforms, the national government agrees to work with local NGOs and community groups to develop a plan for an endowed foundation. As its counterpart contribution to the NPA, the national government agrees to donate \$5,000,000 worth of local currency to the foundation for an endowment.
- iii. As a part of the NPA agreement AID and the the government of Country Y would set out the terms under which Country Y's Central Bank would agree to turn either cash or notes or a combination over to a new entity when both the national government and AID certify that the new entity has met established criteria.
- iv. AID would also commit to fund (or arrange funding) for technical assistance for a period of approximately three years to work with the local NGOs and community groups to develop a plan, a charter, an administrative structure, and a board of directors for the endowment. Perhaps this TA might cost \$750,000. The source of the TA would likely involve professionals experienced in working with local PVOs/NGOs, from the U.S. foundation community, and also from the international community of NGOs concerned with a broad spectrum of environmental issues.
- v. AID and the national government could under the terms of the NPA or subsequent agreements require that certain program areas, e.g. those which are priorities in the NEAP, be given primary attention. However, such restriction need to be broadly sketched so as not to constrain the latitude of the new foundation's board to develop its own approaches and goals. The new foundation should be able to accept donations to its endowment either in foreign exchange or local currency to extend and enhance its programs. Host country tax law may need review and reform to encourage this fund raising as the potential to raise additional funds serves as a powerful incentive to maintain the highest standards of accounting and administrative control.

#### D.4. Use of direct grant

Other approaches which combine aspects of the debt-for-nature swap and NPA conditionality are possible. The variety is limited only by the creativity and openness of the process of negotiations between AID and the host government. In the Philippines, the AID mission developed a hybrid approach. The endowed foundation was set up under the terms of a large (~\$125,000,000) NPA. However, instead of the

money coming from the Philippine government, AID earmarked \$25,000,000 for funding a debt-for-nature swap as the way of moving local currency into the new foundation's endowment.

The AID mission, the Government of the Philippines and two consortia of local Philippines NGOs agreed on a process by which a board of directors dominated by local nongovernmental leaders would be selected as the governing structure for the endowment. The funds for this endowment are to be generated through a "debt-for-nature" swap to be carried out by a U.S. NGO—the World Wildlife Fund (WWF). All parties have agreed that WWF will eventually turn over management of the endowment funds to the board once the administrative structure capable of managing the endowment, its assets and grant making operations, has matured.

The Philippine experience offers lessons about how a process involving an equal say for the local NGO community can be started and conducted. This case example combines aspects of an NPA with the traditional debt-for-nature swap. The money will be moved via a U.S. NGO, but the swap will be linked to an NPA policy reform program which does address some of the policy (and regulatory) questions surrounding the activities of the nonprofit sector. Because it happened first, the Philippines offers a transitional example which has led to the Madagascar case. In Madagascar, AID is making the first use of the NPA mechanism to fund an endowment to encourage the host government to institute reforms which will support the aims and operations of the endowed foundation.

#### E. Options for the process of setting up an endowment (column E)

There are three principal categories of issues which must be addressed in the process of setting up an endowment whether the approach is via a U.S. NGO or through a process more controlled by local NGO(s). These areas are: manpower, finances, and regulation, which, broadly defined, define the milieu in which an endowed foundation will function. These three areas are used as categories for recommendations in a later section.

This section identifies and discusses concerns which are likely to arise in the course of designing an endowed foundation whether local currencies derive from a debt-for-nature swap or via a NPA grant through action of the host government. Many of these concerns are traditional ones which every institution building project must address. These familiar issues include: draining available human resources from other critical efforts; setting up reliable, but not burdensome accounting procedures; minimizing rivalries within the nonprofit sector; etc.

Other issues which will differ in their importance for different process choices are: conflict between international and local NGOs on leadership; fear of a decrease in foreign aid donations in general and for Africa specifically; and, the struggle for more democracy.

##### E.1 The role of government

Early in the process of design the host government's commitment to the need for an endowed foundation must be obtained. If a mission can get a solid expression of support, then an early effort should be made to review national law and regulation governing the nonprofit sector. The goal of this review is to define as clearly as possible what the current regulatory and legal framework is as well as how influential this framework is on the actual activities of local NGOs and community groups. If this

framework is influential and would likely limit activities of the endowed foundation or its anticipated community of NGO grantees, then reforms will be needed.

The reforms might address a series of issues which arise out of the operations of nonprofits, including endowments. The review should explore aspects of the current and desired relationship between nonprofits, including endowed foundations and other institutions, and the government. Most national governments will have definite, but not necessarily clearly declared, views on which types of activities and range of issues they find acceptable for nonprofits. An endowed foundation is a special type of nonprofit distinguished by the fact that it holds assets and is expected to manage those assets in such a fashion so as to be able to provide a steady and increasing amount of grant money to its target beneficiaries.

An important key to success is the development of laws and regulations which exempt the endowed foundation from paying taxes on its income from investment of its assets. Perhaps the most straightforward approach would be for governments to provide endowments, by a special agreement, with tax exemption on earned income in return for oversight by an agency of the host government.

Other possible tax exemptions might be of use. These include taxes on transactions, property, sales, and imported goods among others. The decision as to what kinds of tax exemptions would be given to the endowed foundation need to be determined on a case by case basis in each country. The recommendations section suggests options.

A second area of tax issues relates to laws which regulate gifts from local corporations and persons of wealth. In many countries, it may be feasible to establish tax deductions which encourage domestic corporations and individuals as well as foreign companies operating in the host country to make gifts to the endowment.

National governments and foundation organizers need to agree on explicit statements of activities which a foundation can support and which it cannot. Examples of likely prohibited activities include: political, commercial, and religious.

If it is determined that there is a need for reform, then AID should be prepared as either part of the natural resources NPA or via follow-on technical assistance to work with the host government to develop a reform agenda. This agenda needs to avoid simply copying U.S. or any other developed country tax and regulatory framework, but rather tailor recommendations to the specific conditions of each country.

## E.2 The role of donors

An endowed foundation has the potential to raise money for its purposes and for increasing its capital assets from a wide variety of sources. These include: other aid agencies; the multilateral development banks (MDBs); the Global Environment Facility (GEF); multinational corporations; local corporations; individuals of wealth; direct solicitation from concerned citizens of their own country as well as of First World countries; etc. The potential of such endowments to raise funds in such a wide variety of ways has several important implications. One change is to provide a vehicle, which is missing in many countries, to raise money from the local private sector. Another is to provide a broker-like service for matching funders from inside and outside a country. In all cases the value lies in that the endowed foundation does not carry out projects, but rather funds groups which do.

One example will illustrate how important having such a fund raising capability can become. If in a country with significant earnings from international tourism, an

endowed foundation were to develop over time lists of tourists, these lists might yield significant annual income from contributions in response to a direct mailing, much in same manner direct mail solicitations yield substantial income for U.S. non-profits. Further, such lists, which might be formalized as an organization of foreign "Friends of Nature of Country Y," could become a market outlet for a carefully chosen set of "green" products produced by cooperatives or NGO assisted local communities or even fledgling businesses.

### PART III—CHOICES: WHAT KIND OF ENDOWMENT

#### A. Introduction

This section offers recommendations for missions in choosing options, deciding on a structure for an endowment, and providing technical assistance for designing a new institution if that is the option of choice. In effect the act of choosing a design is a part of the creation process. Drawing a line between the process of settling on a design and the process of setting up the endowment is arbitrary. Especially if the goal is setting up a new institution as an endowed foundation, then participation in the discussion of options is key to the new institution's acquiring a mandate from the nongovernmental community, including both local NGOs and local community groups.

Any proposed approach to establishing an endowment will require that a number of groups be involved and become active supporters of the effort. An endowment cannot be designed in isolation from these groups and their interest in how the design is done, how the board is selected, and what the ultimate institution can and cannot do. These groups are: the host government, the local NGO community, the foreign donor community, and the local private sector.

Other groups may have roles depending on the option chosen. These others include: foreign NGOs, multinational corporations, and U.S. philanthropic foundations. The recommendations of this section are organized according to how the endowment (and a new institution) relates at all stages of its development to these groups.

Table II raises discussion points to guide the choice among option described in the previous part of these "Guidelines." Major groups participating in the design discussion are listed along the left side of the table, and the areas of concern are listed across the top of the table. Each box raises illustrative issues which should be considered as part of the design process. The following sections discuss briefly the questions and issues contained in each box of Table II.

#### B. Issues in selecting among options

The following subsections discuss major questions which will arise in discussing how AID goes about the process of setting up an endowment for an existing institution or an endowed foundation. The three areas under which concerns are collected are: people, money, and governance.

**People:** Human resource development and manpower allocation have been traditional concerns of AID and other donors. In most countries the lack of skilled persons limits the growth of new institutions. Even in situations where the number of skilled persons is sufficient, often the need for advanced training, whether degree or non-degree, limits the pace of development.

**Money:** Maintaining adequate accountability for project management presents constant worries. There is a tension between the need to have enough flexibility to pursue creative ideas and the need to have reliable systems for accountability. The discussion of this section emphasize innovations which have incentives built in to establish and maintain accountability.

**Governance:** Endowments are operated within a framework of rules which are set by donors or contributors of gifts, the host government and the charter of the endowed institution. The key feature which distinguishes an endowed foundation and allows, even requires, it to behave in ways which are unlike traditional NGOs or other

public sector institutions is its ability to change its own rules, negotiate restrictions with donors, and advocate reform of national policy.

TABLE II

## Issues to consider when designing an endowment

	People	Money	Governance
National Government	Will a new, endowed foundation drain skills from government?	Will an endowment need a special agreement with the government to avoid taxes on earnings of its investments?	What oversight does the government have on use of endowment funds?
Local NGOs & local community groups	How can local groups participate effectively in the formation of an endowment?	How can local groups participate in grant making, monitoring and evaluation?	How can the endowment set an example for transparency?
Donors	What are the best ways to provide technical assistance as free of bias as possible?	What are the requirements for documentation of the use of funds?	What policy should guide restrictions on gifts?

The issues raised in this table are arranged by groups (listed along the left side) which have important roles to play and by areas of concern (listed across the top).

### B.1. The endowment's relation to government

Missions should be careful to avoid draining off critical skills and talent from ongoing and critical government programs as well as already established NGO activities and projects. Design teams should be instructed to justify salary levels and number of professional staff in the context of prevailing rates and shortages of manpower. If an endowed foundation is set up as part of an NPA, then it is possible that the issue of civil service salaries would be a subject of analysis as part of the NPA reform agenda.

A critical aspect of the relationship between an endowed foundation and the host government is the tax status of earnings which an endowed foundation receives on investments. In some countries it may be possible to use the NPA policy reform process to create a more favorable tax climate for all types of endowed institutions.

National governments which are persuaded of the value of a strong and creative nonprofit sector should be willing to consider broad and clear guidelines for the income earning and other activities which they will allow endowed institutions to engage. In others the tax arrangement may have to be negotiated on a case by case basis.

### **B.2. An endowed institution's relation to local NGOs and communities**

The endowment needs to cement its good relations with the local communities in several ways. The first way is to seek to include a broad range of groups in the process of formation. As has been described earlier, an endowed foundation's credibility rests on its mandate from the community it serves. Preserving a mandate means that an endowed foundation will seek ways to increase opportunities to work with local communities.

One way to build working relationships is to create mechanisms for broad input into the grant making process. Such input could be in the form of peer review, with representatives of groups having an opportunity to evaluate and advise on proposals submitted to the foundation.

Another way would be having annual occasions for public commit on an endowed foundation's funding priorities. The model for this exercise in participatory governance might be a "town meeting," in which every person who attends has an opportunity to speak.

### **B.3. An endowed institution's relation to foreign donors**

Foreign donors will have an important role to play in the affairs of an endowed foundation from the beginning and continuing for some time. Most critically they should provide technical assistance (TA) to help establish an endowed foundation. The key point to consider in identifying appropriate consultants is to emphasize the institution building aspects of the work rather than particular environmental issues and the technical skills which those issues require. The purpose of the TA is to help set up an endowed foundation which serves the NGO community and local communities both as a source of funds as well as a mirror of their concerns and priorities.

Whichever route to endowment, missions need to be careful that personnel providing the TA are not strongly identified with one or another philosophical viewpoint on environmental issues. If the TA has a built-in bias, then a fear is raised unnecessarily in the minds of many local communities that an endowed foundation cannot easily serve to forge a local consensus on priorities.

After establishment, an endowed foundation must have procedures for management and accounting of funds which satisfy the requirements of potential donors. It may well be worth while during the early TA to explore options for satisfying these requirements in ways which do not overly burden an endowed foundation's administrative capability.

Another area of contention between potential donors and an endowed foundation is the desire of donors to put restrictions on gifts. The early TA should examine options for a clear policy on gift restrictions so that the potential for these conflicts is minimized. Among the policy options are: limiting the life of restrictions; limiting the percentage of a gift which can be restricted; limiting the types of restrictions; and, pushing donors to focus on the process of funding rather than the subject areas to be funded.

#### B.4. The endowment's relation to local private sector

An endowed foundation's relation to the local private for-profit sector offers a great deal of promise for innovation. To this point there has been little effort to bring local private businesses into a constructive role in dealing with environmental problems. There are several ways that an endowed foundation can help to build a bridge to the local private sector.

One approach to incorporation of the local private sector is to seek out local business persons who are manifestly dedicated to environmental issues and recruit them for the board of directors of an endowed foundation. Local businesses in countries with well developed private sectors can become contributors to an endowed foundation. However, if this is to become a major source of funding for an endowed foundation, then national tax law will need to be changed to provide an incentive for such charitable giving. Such review could be a part of the TA leading to the establishment of an endowed foundation.

No matter which option chosen for an endowment, the charter of an endowed institution can allow a variety of ways to help the private sector become more supportive of national environmental efforts. Many of these ways parallel how U.S. foundations work with the private sector, but many are also different. An effort to find or set up precise analogs should be avoided; however, because of complicated interactions between non-profit and for-profit private organizations in the U.S. Some examples are: support for research and development; feasibility study support; program related investment; no-interest loans; and, endorsements for marketing arrangements.

African countries vary greatly in the vibrancy and depth of private entrepreneurship. Thus a strategy to help local green business must be tailored to local conditions. In a country with a strong private sector, the provision of a limited amount of credit may begin to stimulate business interest. In countries with nascent private sectors, there may be justification for committing substantial resources to feasibility studies. In either situation an endowed foundation could provide more than token support for the private sectors.

The private sector can become an important vehicle for tackling environmental problems if an endowed foundation has programs which enable it to influence how local private capital investment flows. Without such influence an endowment would miss an important determinant of natural resource use which is defined by the collective business decisions of a wide variety of for-profit activities.

#### C. Choice of technical assistance for the design process

Whatever option chosen, missions will have to commit to a substantial amount of technical assistance at all stages. However, the sequence of the TA required differs with the option. In addition requirements for mission oversight, both management and administrative backstopping, vary in timing.

If missions make the initial decision to consider an endowment, then the choice of options is a crucial step which will set the process on fundamentally different paths which have implications for what kind of endowment is eventually set up. Therefore, missions may well seek help from consultants in making that choice. The consultants which missions select for this early exploratory work should be as free as possible from conflicts of interest. One conflict might come from retaining an NGO which is in the business of arranging debt-for-nature swaps for the initial work of characterizing and

choosing among options. Missions should also be careful to be certain that individuals not have an extensive history of work for an NGO which stands to gain from the choice of option. However, such NGOs can be valuable sources of expertise which missions can tap after a local process has yielded priorities which turn out to be appropriate to the U.S. NGO's area of interest and experience.

If missions can avoid the appearance of conflict of interest they will find that obtaining the support of the local NGO community will be much easier, because the local NGO community will more likely feel that they are on an equal footing with foreign NGOs at the beginning of the process of establishment. Maintaining this favorable climate must be one of the prime responsibilities of the consultants the mission hires for the second phase, which is helping to negotiate an agreement with the government. This step marks the beginning of the creation process, which is described in the following part.

## PART IV—STEPS: HOW TO START AN ENDOWED FOUNDATION

### A. A proposed sequence with technical assistance

This section discusses a sequence of activities or steps leading to the creation of a foundation board, the funding of an endowment for the foundation, and the hiring of staff for overseeing the assets and administering a grants program. This sequence varies only slightly from the recommendations of a report to USAID/Madagascar of 12 October 1992 by Weatherly and Gibson (see references). It takes as its starting point the original proposal of the KEPEM Nonproject Assistance Agreement for an endowed foundation by Weatherly (see references). At the moment, the interested parties, which include the Government of Madagascar (GOM), the Malagasy community of nongovernmental organizations (NGOs), and USAID/Madagascar are considering a similar sequence as a starting point for discussions leading to an agreement of timing, responsibilities, and goals.

The process of creating a foundation starts with an agreement among the interested parties on how to obtain the broadest possible participation. If an NGO consortia exists, then this organization might take the lead in promoting discussion among the NGO community and local community groups on the foundation concept and possible ways to go about its creation. The following sequence seeks to spur discussion within the NGO community, local community groups, the government, the mission, and other donors. In Madagascar several Malagasy NGO consortia, including Conseil Malgache des ONG pour le Developpement et l'Environnement (COMODE) and Association Nationale d'Actions Environnementales (ANAE), may possibly have a role in managing the creation process.

#### A.1. The sequence

##### STEP 1: Secure agreement on the NGO role

An initial agreement to explore creating a foundation should be between the national government and AID, or another donor. However, if a foundation seeks to claim a status as an indigenous nongovernmental institution, then the first concrete proposal for a way to create the foundation would more appropriately come from the local NGO community or jointly from a meeting of representatives of that community and USAID. Out of such a meeting should come an agreement on the sequence of steps to create a foundation. In other words, to have a valid claim of origin from within local society, this initiating proposal should have a strong identification with constituent and community based NGOs.

Such an agreement should cover either the following sequence or another comparable sequence. This agreement should cover the first two or three steps described below in detail with subsequent steps only characterized in broad terms. However, the participants should thoroughly work out the process for agreeing on these details. It is important to consider the following sequence as a "straw man" for the purposes of discussion.

##### STEP 2: Form organizing committee; select board

If local NGO consortia decide to play a leadership role in setting up the foundation creation process, then a group or groups of local NGOs might start by proposing a way to govern the process. Assuming that they propose some form of organizing committee, the question becomes how to set it up. One idea calls for local groups to propose six persons of stature as candidates for the organizing committee, possibly

chosen from members of various NGOs who have reputations as being dedicated to environmental concerns, broad social equity goals, community development, or some other worthy aim. USAID, in conjunction with the national government, could then select three of those proposed as members of the committee.

Overseeing the creation of the foundation board would be the final act of the organizing committee. The board would have the further responsibility of finishing the creation process. These last steps include: adopting the charter and bylaws; choosing options for asset management; seeking formal registration of the foundation from the national government; planning programs; establishing administrative procedures; and, when assets are transferred, of making the first grant(s).

The process of selecting an organizing committee could take two to six months. Once established, the organizing committee should immediately begin the process of finding and hiring an interim coordinator.

The organizing committee should have clearly defined duties, including: hiring the interim coordinator; overseeing the convening of regional forums for discussing the foundation concept; agreeing with the mission on the nature, extent, and timing of technical assistance needed; working with the mission to choose the technical assistance; ensuring broad participation in drafting the foundation's charter and bylaws; publishing a newsletter, and overseeing the process of selecting a board.

### **STEP 3: Retain interim coordinator**

The organizing committee would have the responsibility of finding an interim coordinator. Several considerations argue strongly that this person should be a local citizen. A foreign interim coordinator would project the image of foreign donor driven and created foundation. On the other hand, a local person would be more likely to understand local political currents, both inside and outside the NGO community.

The mission may or may not participate in the selection of the interim coordinator, depending on the terms of the initial agreement. If the mission funds the interim coordinator, then the mission may want a say in filling this position. On the other hand, should the organizing committee use other funds, then the mission may not have a say.

The organizing committee would need support for its expenses, the costs of the interim coordinator, and the costs of regional meetings, newsletters, media outreach, etc. The organizing effort would need grant support, which the organizing committee could seek from another donor, or a U.S. foundation, to cover its expenses, the cost of the interim coordinator, and perhaps the costs of broad participation in the foundation's creation. Having such a grant would give the local NGO community a small, but perhaps crucial measure of independence as it works with the mission during the creation process.

The interim coordinator area of responsibility would include: promoting participation in the creation process; staffing the work of the organizing committee; issuing newsletters; promoting public discussion of the foundation; and interfacing with AID—supplied technical assistance. In most African countries, radio, and to a lesser extent television, serve as the media of choice in reaching the widest possible audience.

The interim coordinator would likely cease his or her work before the organizing committee transfers management to the board. In this scenario, a technical assistance grant gradually assumes the costs of continuing activities of the interim coordinator. An alternative scenario could call for the interim coordinator to continue until the board is

formed. In this case, the technical assistance grant presumably could pay the costs of the interim coordinator.

Subsequent activity cannot begin until the interim coordinator is in place. Furthermore, the interim coordinator would need time to plan and initiate the activities for which he or she is responsible. For example, the first regional meeting could take approximately sixty days to plan.

The interim coordinator would need to create a data base of LCGs, NGOs, their leaders, and prominent members if such a base, possibly as part of a National Environmental Action Plan (NEAP), has not already been created. Such a data base would prove immediately useful for mailings, such as announcements and newsletters, but could later serve as a membership list, if the foundation decides that it will have a membership base (as the Foundation for the Philippine Environment). Still later, a data base could help build a community of NGO peers, which would be useful in the evaluation of grant proposals, the reviewing of grantee performance, etc.

#### **STEP 4: Hold regional meetings of NGOs**

During the first year of work, a key goal is broadening the participation in the creation process. The organizers could hold a series of regional meetings in which they present the foundation concept and solicit the ideas of local groups and communities. Issuing newsletters in local languages (plus either French, English, or Portuguese) as well as the publication of articles in newspapers would help this process. It seems most efficient if the interim coordinator, with oversight of the organizing committee, manages this participation process.

#### **STEP 5: Provide Technical Assistance**

The missions, either by itself or in partnership with other donors, should declare its willingness to provide both long term and short term technical assistance to support the process of foundation creation. This section discusses the timing of this technical assistance and its relationship to other elements of the foundation creation plan.

The technical assistance might supply one long term, eighteen months or more, person who should either serve as the interim coordinator or work closely with the interim coordinator. Under one option the technical assistance could pay the interim coordinator. Under another option, the interim coordinator would continue to be paid by whatever funding sources were used to hire the interim coordinator in the first place.

A third option exists. If the technical assistance includes the role of the interim coordinator, then the selection of the interim coordinator could occur via a process involving the participation of the organizing committee. In other words, the organizing committee could have an equal vote in evaluating the qualifications of proposals to the mission for supplying the technical assistance. Under this option the activities of the interim coordinator could not begin until the technical assistance is in place. This scenario argues for advancing the process of putting out the scope of work of the technical assistance for bids. To do so would delay the start of the efforts to build public participation and shorten the time available for a thorough review and discussion of the charter and bylaws.

#### **STEP 6: Prepare Charter and By-laws**

At a point approximately midway through step 3 (holding regional meetings) the process of drafting a charter and bylaws should begin. This process will require

skillfully interweaving two different sources of ideas and constraints. The first source represents technical expertise, which would come equally from outside as well as from inside the country. Such expertise includes financial advice and planning, legal advice, administrative structure and procedures, and the experience of other foundations. The second source represents the results of public discussions which involve as many different local groups and communities as possible. All sources of ideas need to be melded into a coherent whole.

The organizing committee should supervise the interim coordinator and the technical assistance in the drafting process. This process aims to write a charter and bylaws acceptable to all entities, including LCGs, the local community of NGOs, foreign donors, and the national government.

Organizers should allow one year for this process to be certain to tap all sources of ideas and technical knowledge and to allow for time for reflection. After reaching consensus, selecting a board, and adopting the charter, the organizers submit the charter and bylaws to the government to secure recognition of the foundation as a nonprofit entity under national law.

#### **STEP 7: Review options to manage assets**

The organizing committee needs to examine all options for managing the foundation's assets. A subsequent section of this report offers a series of options, describes their pros and cons and makes recommendations for their further evaluation. This analysis should continue after the board is in place to allow the new board the opportunity to exhaust all questions and alternatives. Once the new board chooses an asset management plan, a continuing need would exist for financial advice which the board can obtain via a retainer contract with a local firm backed up by an international firm.

#### **STEP 8: Register endowment; transfer assets**

Once in place, the new board would proceed to make a formal request to the government for registration as a nonprofit association. This registration may involve negotiating special privileges for the foundation, including, but not limited to, tax reductions on earnings and imports, tax incentives for donations from local private individuals and corporations, etc. This process may take as long as three or four months. If the organizers choose to register the foundation as an association of public interest, this process could take much longer. After a foundation completes the next step, the national government can transfer the first tranche of assets.

The transfer of funds cannot take place until all previous steps are either complete or in place. If during the early steps, it becomes apparent that delays would prevent meeting a target date for fund transfer, then organizers must revise plans and budgets to accommodate the extra time needed.

#### **STEP 9: Hire staff, plan program & make first grant**

In advance of the first grant, the board needs to begin to recruit staff and work with local groups to plan the first grants program. This process can take from six to eight months or longer. Staff activities would require funding for three to five months of staff work required in advance of the first tranche. A follow-on grant from the same source as the first grant could meet this need.

The process of determining the shape, approach and priorities of the first grant programs will present the foundation with the first test of its ability to function in accord with the lofty goals set for it. The grants program must be at the heart of the

rationale which started the whole process. From that point until now the subject of how, who and why grants are to be used for what benefit and purpose is at the core of all discussions. Hence, missions are best advised to facilitate these discussions with suggestions along the lines of the following:

- there should be explicit criteria for grant eligibility
- the process of arriving at criteria, quotas, etc., should be transparent
- there should be clear and simple guidelines for proposals, the review process, monitoring, reporting, etc.
- the board should review proposals rapidly
- there should be programs which assist illiterate and inexperienced LCGs and NGOs in writing proposals and administering grants
- there should be an aggressive media campaign to build awareness of the foundation's purpose and activities
- the foundation's staff should keep exemplary records and conduct all work in a transparent fashion
- there should be explicit procedures for identifying and addressing conflicts of interest

#### A.2. Supplying technical assistance for the establishment process

For the foundation to succeed, its form, programs and priorities all must grow out of a process substantially under local control. Thus an overall recommendation calls for paying careful attention to the type of organization, whether nonprofit or for profit, contracted to supply the technical assistance so that the principle of local control is not compromised.

While creating a functioning endowment serves as the overall goal of the technical assistance, a key strategy towards achieving this goal is assisting the local community of NGOs in *their* process of creation—rather than creating an institution and turning it over to local management at the end of the creation process. Thus the technical assistance needs to be provided in such a way as to minimize an "American" imprint. Providing technical assistance in a way which avoids branding the resulting endowment as a U.S. creation has two real benefits. Local society will feel a greater ownership of the resulting institution and other donors, both bilateral and multilateral, would be more likely to provide funds for further institutional and program development and/or the foundation's endowment.

A USAID mission, or any other donor, needs also to minimize, for the same set of reasons, allowing the technical assistance to put an imprint on the endowment. When drafting a Request for Proposal (RFP) for technical assistance, a donor should pay careful attention to not only the terms of reference for the specific types of technical assistance requested and the experience profile of the individuals sought, but also to the "character" of the institution or firm which would provide the technical assistance. For example, an international NGO with a specific agenda necessarily brings baggage of public perception.

One way to avoid a reputation of being overly influenced by developed country donors and international NGOs would be to build, from the start, a network of cooperative relationships between the endowment and similar institutions in other developing countries. For example the Interim Coordinator could be sent to the

Philippines to study the Philippine Foundation for the Environment, or to Mozambique to learn about the effort, supported by U.S. foundations, to build up a foundation oriented to community development.

An effective technical assistance plan requires a combination of local and foreign technical expertise. The technical assistance serves a dual purpose: to assist the creation of the endowment/foundation; and to build up local capacity to manage the foundation's affairs. This capacity must include both expertise within the foundation and available to it from other local consulting firms, accountants, lawyers, financial advisors, etc. Therefore the technical assistance strategy should pair local expertise and foreign expertise whenever possible.

As several endowments in different countries begin to take shape, there may be an opportunity to form a network for sharing experiences. Such a network could make available key persons from one country to another for the purpose of helping supply technical assistance. If the network idea grows, then it may be worth considering using the network as a vehicle for all types of technical expertise. In essence the network could function as a kind of secretariat for promoting cooperation among developing country foundation and for building up a body of experience and expertise needed by foundation pioneers.

A technical assistance secretariat, if it were under substantial control of the emerging community of foundations, could provide a buffer protecting foundation organizers from donor pressure and manipulation. It could also provide a channel for multidonor support of the creation process. Lastly, it could provide an agenda-neutral source of technical assistance.

## **B. Recommendations for asset management**

The following list, not necessarily in order of importance, summarizes key recommendations for an approach to asset management. These are drawn from a report to USAID/Madagascar by Weatherly and Gibson (see references).

### **B.1. Develop a realistic asset management plan.**

A plan should provide a level of financial support from endowment income adequate for the anticipated expenses of staff administration and programs. This plan must address a range of issues including: explicit strategies for managing the investment risks, ratios of liquidity needed to provide security for both staff and grantees, whether to permit invasion of the endowment and if so under what circumstances, and explicit fundraising targets to maintain the endowment's value. The plan should consider worst case scenarios.

### **B.2. Establish a core endowment free of donor restrictions.**

Despite the desire of many donors to restrict the use of their gifts to a foundation, a foundation will need to seek, and set apart in a separate account, irrevocable contributions. This account will provide the foundation with an unrestricted, internal funding source. These core funds will give the foundation significant leverage in negotiating with other donors on joint programs.

### **B.3. Establish "subaccounts" for restricted gifts.**

Many donors will limit the use of their gifts to such specific purposes as management of a particular national park, promotion of public awareness about soil conservation, or women's role in sustainable agriculture. In addition, some donors may specify certain

reporting requirements for their contribution. In these cases, a foundation should create subaccounts with explicit provisions to address the donors' restrictions. These provisions may include clauses allowing the donor to suspend or cancel the gift in cases of mismanagement or maleficence and receive the remaining balance.

#### **B.4. Raise funds from "in-country" sources.**

While the international donor community will probably contribute the majority of funds, a foundation will need to develop alternative funding sources should donors cut back their support. Moreover, such a strategy would help promote self-sufficiency. While some foundations may raise funds from private citizens and local businesses, a more likely source lies in partnership with government. For example, a government could dedicate user fees at a national park or special tourist taxes to the foundation. A government could also make an in-kind contribution of its civil servants or other resources to the foundation. If a foundation uses such sources, however, a government's influence on the foundation would expand—perhaps at the expense of NGOs and LCGs. Donors should also consider a country's opportunity cost in not fully exploiting its natural resources—on which the donor community may place a premium because of those resources' perceived value to the global community of nations.

#### **B.5. Adopt an asset management plan before establishment.**

A foundation's charter should describe the foundation's assets and their origin. Such a plan should project other sources of support, which could include: bilateral and multilateral contributions, charitable donations, bequests and legacies, government grants, foundation grants, tax revenue and user fees, membership fees, dues and assessments, and investment income. The plan should specify what percent of total support will come from various sources and the type of fundraising activities contemplated. The plan might, for example, set a specific limit on the portion of annual budget devoted to administrative expense or have a minimum devoted to training.

On the basis of this plan, anticipated staff expense and initial programs, the foundation organizers should determine the minimum endowment necessary to justify the expense and effort of creating a foundation. Experience, limited to the few efforts which have already begun grant making, indicates that \$4 million represents a minimum amount to commence operations with a short term goal of reaching approximately \$10 million so as to provide a sense of stability. Of course, for the foundation to be truly effective and to achieve a stature approaching that of established donors would require a much larger endowment.

#### **B.6. Establish a board finance committee.**

As an early act, a foundation's board should establish a finance committee. This committee would set investment policy, retain investment managers, oversee investment managers, hire outside auditors, review audit reports and prepare budgets, long range plans and annual fiscal reports. The investment policy should identify objectives, funding needs, and tolerable risk. Conventional wisdom suggests that the policy seek long term investments, strive for stable income which will support slowly growing funding needs, try to preserve the real value of capital, and emphasize conservative investments of lower risk. Highly unstable economies, however, may necessitate other policies. In any case, diversification of investments represents a good strategy. The finance committee will have to determine the best asset mixes that offer the highest return for the risk that the foundation can tolerate.

**B.7. Define an explicit conflict of interest policy.**

A foundation's board of directors should fully disclose their financial interest and refrain from discussing and voting on investment decisions which could affect their interests or the interests of their families and business associates. The directors should set similar policy for contracts and procurements.

**B.8. Retain outside investment managers.**

Choosing an investment manager will be an early important board decision. At the same time, the board needs to set clear procedure for oversight of the manager's work. For example, the board or the finance committee may want to reserve the right to approve any investment decision above a certain amount, but allow the outside manager to shift assets within clearly defined limits.

**C. Recommendations about governance of an endowment**

No matter how carefully crafted, an endowed foundation's prospects rest upon the character of the organizers and board members. Attracting these persons requires that the foundation not only offer the promise of creativity, but also the security of fair, realistic, and effective governance. The way the foundation governs its own affairs, how the national government exercises oversight, and how donors influence foundation activities all contribute to the framework of a governance. Together this framework of governance and the character of the foundation's staff and board members lay the foundation for the growth over time of a foundation ethos.

Over time funders will be able to see clearly if this ethos has matured. The indicators can be determined clearly. One sign of maturity is if the foundation's structure and procedures promote honest appraisal of priorities and proposals. Another is if the board members break out of their personal "web of obligation" to support agendas and programs which address interests beyond their own.

While the ultimate responsibility for fair and effective governance rests with the foundation organizers and administrators, missions may take steps to encourage, or at least not discourage, the growth of good governance. Missions should help strike a balance between the strictness of procedures on the one hand and the freedom of majority decision making on the other. The following suggestions are intended to raise issues which should be examined in the light of the need to find this balance. These suggestions are largely drawn from the legal section of "Review and Additions to the Guidelines" [see references]. Note that this document contains a detailed discussion of legal issues as well as draft model documents for a foundation charter and bylaws. Missions which wish to undertake a process to create a foundation should request a copy from the ARTS/FARA/NR office of the Africa Bureau.

- Avoid drafting new national laws, rather seek a special agreement with the national government (reflected in the charter and bylaws) to write down the rules by which the government oversees the foundation.
- Government power to regulate foundation affairs should be explicit, e.g. that the use of grant money conforms to national law.
- The foundation should maintain a transparent record of all actions, including agreements with governmental agencies and donors—there should be no secret files or reports.

- Agree in advance of funding the endowment by what process and by whom can questions be raised about foundation activities and by what process can the foundation be dissolved and how would its assets be redirected.
- Have explicit requirements for reporting—both to the foundation by grantees and by the foundation to the public.
- Retain local legal counsel to assist in drafting the charter and bylaws.

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## ANNEX I: POINTS RAISED AT THE 1 DECEMBER COLLOQUIUM

On 1 December 1992, fifty persons met in Washington to discuss the first draft (November 1991) of the "Guidelines." These persons represented a broad range of organizations interested in the idea of endowments and endowed foundations. Organizations represented included U.S. foundations, the U.S. Congress, U.S. environmental groups, development NGOs (PVOs), African governments, AID, EPA, the World Bank, international law firms, and African NGOs. This meeting broke into four smaller working groups to discuss four topics, which were: the creation process, legal issues, financial issues, and operation of grant programs. The following statements are paraphrases of points made during discussion:

**Discussion about the creation process:**

*(Foundation consultant):* "The key test of an endowment, like a democracy, comes when it is time to make a change in leadership [of the board]. US PVO representative before that test, the endowment needs to develop a track record during a US PVO representative pilot phase during which it is possible for AID to 'pull the plug'."

*(NGO consultant):* "AID needs to admit that it is not good at working in the field and getting to know the country. Therefore AID needs to start by considering carefully what [local] organization can work effectively to set up an endowment and how AID best can support this organization's work."

*(AID official):* "There should be a definite point, which is known to all, at which AID decides yes or no on an endowment."

*(Foundation consultant):* "Is AID's concept to 'wholesale' grants to local groups? Or is AID simply 'eternalizing' its PVO programs?"

*(Consultant):* "In fact the AID mission in Mali is considering 'eternalizing' its PVO project. AID in Indonesia is considering doing the same."

*(World Bank official):* "Money is not the need in Africa. The need is for institutions which can manage their own activities in an independent and accountable fashion. The danger with the endowment concept being discussed is that it may only substitute one dependency for another and make no progress on this paramount need. An endowment cannot become the kind of innovative, self-managing institution hoped for unless there is a change in the political and social atmosphere in Africa. Merely moving the creation process outside of governmental channels, does not ensure that there is a framework conducive to breaking the dependency trap. An early and major emphasis on training [across the board, but especially management and administrative skills] and transparency [to grassroots constituencies] would help to create the right framework."

*(Foundation representative):* "AID should factor in other interests [donors, local groups] before going ahead. AID should take time to develop a partnership effort before taking steps which commit the creation process to a limited range of designs."

*(NGO consultant):* "AID must face the fact that Africa is in a state of political flux and that creating a perpetual institution could skew the development of civil society into a particular direction. For example basing the endowment on the NEAP may constrain social and political development because the NEAP [whose priorities were arrived at with little local participation] in effect co-ops local NGOs."

*(Foundation consultant):* "On the good side, foundations could be a counterweight to governmental overreaching. Now governments often co-op local groups, for example women's groups. Thus foundations or endowments could help the progress of democracy by providing insulation for local groups."

*(Foundation consultant):* "The chronology of the development of a foundation given in the papers is a cause for concern because it seems that the last step, grantmaking, is too glibly appended as an afterthought. The process of developing a grant making capability is a US PVO representative haul, and the process of making grants is itself a US PVO representative and difficult effort. Early on during the development of the foundation, careful attention must be paid to a two tier grant program or at least to the need to create a grant-worthy collection of local groups by a pre-grant institutional strengthening program. All of these stages make consume a considerable length of time which cannot be shortened without danger to the effectiveness of the foundation."

*(US PVO representative):* "Although many U.S. PVOs [international NGOs] know how to run programs on the ground in Africa, it does not mean that the transition to local management is possible without a special effort. Many U.S. PVO which have attempted a transition have found it to be extremely difficult. One bright spot has been in the area of training; however, these good results have been indirect, i.e. they were not the explicit goal of any U.S. PVO program. Many former local hire employees of U.S. PVOs have founded their own groups and have made use of their experience of working for U.S. PVOs to set up administrative structures for their new local PVOs which were able to meet donor requirements for direct grants. In other words the training was in how to approach and satisfy donor requirements for accountability, proposal form and content, and project design and management."

*(Consultant):* "Still no U.S. PVO has decided to go out of business!"

*(NGO consultant):* "It is a mistake to assume that a local group, just because it is local, can do a better job than a foreign group."

*(World Bank official):* "The donors do not trust many local groups and with reason. However, the problem lies deep. Grants, whether from local or foreign groups are addictive for local communities. We need a non-grant mechanism. We need some way to inject money without fostering or perpetuating dependency."

*(Consultant):* "There are other methods besides grants. The endowment should explore these modalities as part of the design process."

*(Foundation representative):* "Part of the problem is that all of the [endowed] foundation's money originates in the government. The money needs to come from several sources, including local communities to the extent possible so that local communities have more of a stake in the endowment. Further, the consultative process leading to an endowment maybe should not confine itself to environmental priorities. Especially if local resources are involved, the priority setting exercise should consider all possible options."

*(AID consultant):* "if local society is to feel "ownership" of the endowment, then donors must be willing to live with the results of the creation process, including priorities which may differ with donor priorities."

#### Discussion about grants and programs:

*(AID official):* "Ideally an [endowed] foundation can create a permanent independent institution with a broad constituency. On the other hand such a long term commitment

of capital is risky in light of Africa's extreme political volatility, therefore the endowment's robustness is crucial. We need a conscious effort to isolate funds from normal political processes."

*(Foundation consultant):* "An endowment could lose its mission. For example it could become nepotistic. Its board could use all its money on itself."

*(Foundation representative):* "With the assumption that the necessary preparation has been done (e.g. a needs assessment), then what this new kind of institution could do which has not been so easy before, would be to provide a US PVO representative term sustaining source of funding dedicated to building the capacity of local community groups [and local NGOs]. Perhaps the endowment should have a two tier grants program as a way to get more grassroots organizations into the environmental game."

*(US PVO representative):* "Endowments need to be innovative, not just in structure, but in the activities they support."

*(Foundation consultant):* "AID needs to feel its way carefully to find its comparative advantage. Given that sustainable development is bound up with local communities, FORD felt that its most effective intervention was to work directly with local communities to strengthen their skills at self organization, self management, and interaction with other donors. Given Ford's limited resources, our comparative advantage lay with helping local communities gain more direct access to donor aid."

*(Financial consultant):* "Part of risk taking is cutting off bad risks as soon as they are recognized. Someone needs to try risky innovative ventures and do so with a full understanding of the responsible oversight necessary to be able to manage the risk."

*(US environmental organization representative):* "Policy research is a risky activity which an endowment would be in a good position to fund."

*(Foundation consultant):* "Most policy research in Africa is carried out by university professors who can always get funding. On the other hand local communities cannot access sources which professors can tap with ease. Is policy research the core rationale in AID's vision for endowments?"

*(US environmental organization representative):* "An endowment can insulate policy researchers and others so that they can consider and flesh out more radical options."

*(Foundation consultant):* "WARF, for example, has achieved insulation from government influence because it is a multi-country institution."

*(US environmental organization representative):* "Let us assume that we can agree on the goals of an endowment, which are: risk taking, independent, and flexible. Then the question to discuss in this working group becomes what kinds of program activity further these goals and how can they be carried out in such a way as to leave the endowment more able to realize its goals. In other words, how can the endowment's program activity serve to renew or refresh its mandate?"

*(US PVO representative):* "We need to base program design on a thorough understanding of anticipated beneficiaries' needs as analyzed from their point of view. For example the Dutch have mechanisms for participatory evaluation of needs and priorities."

*(Foundation consultant):* "WARF builds in such a participatory evaluation into every grant. WARF also does a "programmatic audit" into its grant making activities."

*(Foundation representative):* " One goal should be to make the activities of the endowment transparent and accessible to the grassroots, i.e. the intended beneficiaries."

*(US PVO representative):* " An essential element in the development of the kind of endowment we are talking about is to train the board and program officers."

*(US environmental organization representative):* " Another essential element is renewing the board to retain freshness of vision and boldness of approach to problems."

*(US environmental organization representative):* " To achieve independence, the endowment must ground its programs in an overarching goal which is widely shared within both governmental and nongovernmental circles. An appropriate and convenient starting point is the NEAP. The NEAP in each country provides an inclusive framework in which to place the goal of the endowment's programs."

*(US NGO representative):* "If concern over a "runaway" board is high, then endowment creators might consider alternative models such as an irrevocable trust (i.e. with grant making limited to a tightly defined purpose): "in perpetuity or for a sunset period such as 25 years."

*(US environmental organization representative):* "An endowment of the sort we have been considering can also explore a wider range of innovative ways to support improved natural resource management. It could take and manage greater risk. For example such an endowment could use a portion of its capital assets via program related investments to stimulate private sector activity which benefited the environment. An endowment might also become a vehicle to provide a "green subsidy" which made use of compensatory flow of money (e.g. from a tax on greenhouse gases): "to stimulate specific activities (e.g. tree planting)."

ENDOWED NATIONAL COMMUNITY DEVELOPMENT FOUNDATIONS:

A NEW APPROACH TO FINANCING THE NON-PROFIT SECTOR

IN AFRICAN COUNTRIES<sup>1</sup>

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The Context

As countries in South America, Africa and Asia look for more effective ways to advance their economic and social progress, many are giving new emphasis to democratic institutions and private voluntary action as critical components of their development strategies.

In Africa, there is widespread disillusionment with the failure of conventional development efforts and widespread frustration over the inability of the public sector to find more innovative and effective solutions. In a number of countries, economies are declining rather than growing, and social indicators are worsening rather than improving. People both in and out of government see the need and benefit of strengthening

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civil society in these nations in a manner that will enable the private voluntary sector to play a stronger catalytic role in efforts to address poverty and underdevelopment.

Efforts are being made to widen the "civil" space in societies, and ways are being sought to stimulate local citizen participation in efforts to alleviate poverty. Independent non-profit organizations -- the non-governmental organizations or NGOs -- are being called on to perform an increasing array of functions related to national development efforts.

This expanding role of the voluntary sector in Africa is being supported by both governments and multi- and bilateral donor agencies. In Togo, Burkino Faso, Gambia, Ghana, Kenya, Lesotho, Senegal, Zambia and Zimbabwe, for example, NGO umbrella organizations are being supported with the local government's concurrence by the United Nations Development Program, and in some instances the World Bank. In Mozambique and Uganda as well as other countries, NGO visibility and activity is on the rise. In South Africa, civil society and the NGOs and people's organizations within it have taken on new vitality with the new political situation.

Yet, until very recently, little action has been taken by the donor community, government policymakers, and NGOs to address a critical issue: how the emerging voluntary sector activities

will be financed on an ongoing basis. The large and vibrant independent sector in the United States is financed by three principal sources, all of them private, non-governmental in nature. The biggest source is the public at large, which contributed well over \$100 billion to voluntary and religious organizations in 1990. Private foundations are the second largest, followed by corporations and businesses, estimated at about \$7 billion and \$6 billion, respectively.

But at present, very few privately endowed grantmaking foundations exist in Southern Hemisphere countries and philanthropic giving by private individuals or corporations and businesses takes place only on a very small scale. While individual giving exists, it is very limited. Hence, almost all the resources to support voluntary sector activity come from local national governments or from foreign governments, via bilateral or multilateral aid agencies. What little private funds are available usually are controlled by foreign groups, rather than indigenous ones.

While government and multi- and bilateral support for African NGOs will no doubt be a major source of financing in the future, many observers believe that if the sector is to be fully capable of generating independent action and solutions regarding national development problems, some significant core of funding must come from independent sources. Without private financing

independent of partisan politics and the powerful dominant interests of government and external agencies, the potential will be limited for local communities and societies to become more creative, participatory, self-reliant actors in their own development.

### New Approaches

Within the past several years, Northern foundations and a number of multi- and bilateral development agencies have begun to respond to the interests of Southern countries to strengthen autonomy in their voluntary sectors. Currently, efforts are underway to establish independent, endowed foundations in a number of African and Latin American countries. Other new types of funding facilities for non-profit groups are also being developed and tested, among them various types of trust funds, social investment pools, credit facilities, and community banks. Much more attention is being given to strengthening the capacities of Southern NGOs to conduct their own fundraising, and a variety of initiatives are seeking to stimulate and build local philanthropy.

The endowed foundation approach has special appeal to Southern groups because it permits a long-term approach to development problems, as well as autonomous, national level development of programmatic strategies and interventions. To

Northern groups, especially donor agencies, it offers the appeal of stimulating indigenous philanthropy in Southern countries.

In recent years, a number of the largest private U.S. foundations have shown interest in providing support for such endowments. Among them are the Ford Foundation, the Carnegie Corporation, the Charles Stewart Mott Foundation, the Rockefeller Foundation, the John D. and Catherine T. MacArthur Foundation, the William T. Kellogg Foundation, and the Rockefeller Brothers Fund. These foundations individually, and in some instances jointly, have been supporting the development of a number of new endowed foundation initiatives in the South, including those that are described in more detail below.

But, until now, private U.S. foundations and corporations have provided only relatively modest levels of financial support to groups in foreign countries -- in 1990 total overseas grants for all purposes were estimated at \$142 million. These current levels are too small to sustain the voluntary sector in African countries, or even to be the principal source of financing for substantial numbers of endowed foundations in the region. A number of groups are seeking to stimulate an increase in these levels of giving over the years ahead, but strong domestic demands are likely to keep the increase below the level of need. Private foundation and corporate giving will be essential as a catalyst and mobilizer as well as a critical core component. But

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other sources of support for voluntary sector activities will also need to be found.

Conversions of either purchased or donated debt and donations of blocked funds or counterpart funds have begun to play a significant role in these new initiatives. The idea of utilizing these sources of financing to establish endowments for Southern foundations has been put into practice most extensively in the area of debt-for-nature swaps. But in the last several years, educational programs and other long-term development programs have been seeking to use these sources as well. This trend has been encouraged by a number of bilateral foreign aid agencies, including the U.S. Agency for International Development and the Scandinavian development assistance agencies.

Some examples of national groups that are exploring debt for development initiatives are Fundacion Grupo Esquel in Ecuador, Fundacion Mexicana Para El Desarrollo Rural and Fundacion Mexicana Para La Juventud in Mexico, Fundacion Quipus in Bolivia, Fundacion Gran Mariscal de Ayacucho in Venezuela, the Green Coalition in the Philippines, the Integrated Tourism Development Project in Ghana, Opportunities Industrialization Centers in several African countries, and Associacao Para O Desenvolvimento Da Comunidade (Association for the Development of Communities) in Mozambique. Among the U.S. groups supporting these initiatives are the Debt for Development Coalition, PAID, the

Synergos Institute, PACT, the South/North Development Initiative, and the variety of sectorally-focused private development agencies such as CARE, OICI, and the Episcopal Conference.

It is still not clear how important a source of financing the conversion of debt, blocked funds, or counterpart funds might be in the long run. Though experience to date suggests that such arrangements require intensive, often unsuccessful negotiations over extended periods of time, the potential is great and the frequency of transactions appears on the rise. Clearly, the utility of these sources will vary according to the particular economic circumstances of different countries, and even in the most favorable cases they will need to be complemented with other sources of financing.

To supplement private foundation and corporate grants and the use of blocked funds, counterpart funds or debt conversions, most Southern NGO fundraising efforts -- and especially the new foundation initiatives -- see catalyzing indigenous philanthropy as essential to their success. Their hope is that they will be able to "grow" their own internal sources of financing for independent non-profit activities.

Three sources of local giving have been targeted: wealthy individuals, corporations and businesses, and communities in the form of people's contributions of funds, time, energy,

commitment, and other in-kind resources. The first source is new territory in most Southern Hemisphere countries. The second source is already an important, involved contributor in some countries (Zimbabwe, for instance) for such programs as education, exchanges, and health. But in other countries, little philanthropy of this kind yet exists. The third is based on the traditions of harambee and other forms of communal and kinship cooperation and mutual support that are prevalent in most cultures of the region. Whether it will be possible to design new philanthropic structures that can draw upon and, indeed, be founded upon these indigenous strengths and characteristics is the great challenge.

#### Endowed National Foundations for Community Development

Everyone agrees that development requires the vital spark of people working hard at the community level to improve their lives and the community they live in. No matter how sound the national development plan, the economic restructuring process, or the large scale development project may be, development can't happen unless people are vigorously engaged.

National foundations for community development as they have evolved thus far in a handful of countries offer a new approach for fostering people's engagement in development at the community level. These foundations utilize a major share of their disposable resources to sustain long-term, participatory development efforts at the community level. And they seek to

actively involve the community in the allocation of these resources and in defining how the foundation operates vis-a-vis the community.

Rather than seeking to establish a separate foundation for each city or community in a country, these foundations have been conceived as national in scope. Endowments, therefore, need to be sufficiently large to permit a national program, as well as to provide ongoing, sustainable income streams for the community-level programs.

National community development foundations are well on their way to being launched in both Mozambique and Ecuador, with initial financial assistance being provided by the MacArthur Foundation and The Rockefeller Foundation, respectively. Feasibility and planning studies are underway in Argentina and Uruguay, with funding from the Rockefeller Brothers Fund. And exploratory discussions are being conducted in Brazil, Chile, Peru, Ghana and Zimbabwe. The Synergos Institute, Grupo Esquel, PARTNERS, and the South/North Development Initiative are supporting these efforts.

All these initiatives combine three elements: an effort to assemble a substantial endowment that will be controlled by an indigenous, independent board of trustees; a program of national scope that directly engages poor communities in participatory

long-term development efforts; and a commitment to building local in-country philanthropy.

In Mozambique, an Association for the Development of Communities has been founded by a group of citizens committed to community efforts to solve their problems and achieve their community goals. The Association is in the process of establishing a Mozambique Community Development Foundation that will support actions initiated and implemented by poor communities to build their own capacities and institutions.

The founding group, drawn from all the provinces of the country and from a wide spectrum of social and political actors, met in an inaugural session in August, 1990 in Maputo. They discussed what the new foundation should be, how it would operate, its legal requirements, its governance structure, and implementation plans.

Led by Graça Machel, former First Lady and government minister, a team was assembled to conduct in-depth planning in each of these areas. By the spring of 1991, the basic outlines of the new foundation were clear:

- o It will work directly with poor communities in jointly identifying, formulating, implementing, and evaluating self-reliant development programs for the community, and it will fund such programs.

- o Since Mozambique currently lacks indigenous NGOs that work directly with grassroots communities, the foundation will seek to establish and support such groups.
- o And it will provide a creative, independent center for thinking, analysis, discussion, criticism, experimentation and innovation concerning development activities and efforts in Mozambique.

The new foundation eventually hopes to establish a \$60 million endowment, drawn from local contributions, debt purchase and conversion, contributions of counterpart funds, and private foundation grants. The founders are committed to linking the campaign for the endowment to contributions from local Mozambican people and businesses. This internal philanthropic effort has begun with initial support from local communities, business groups, and religious leaders and organizations in the country.

As the year-long feasibility and planning phase comes to completion, the new foundation has gained widespread support. The Government of Mozambique, local communities in the country, the business sector, and other groups are strongly behind the effort. The founding Board of Trustees is committed to independence and autonomy from government, and to a participatory grassroots program. Visits to multilateral and bilateral donors in Europe and North America have yielded expressions of support

from all of the major development assistance agencies. And private U.S. foundations have been impressed with the undertaking, and some appear prepared to consider endowment grants.

In both Zimbabwe and Ghana, a series of exploratory discussions have begun with government agencies, donors, a wide variety of NGOs, people's organizations, and other concerned groups about the possibility of establishing an endowed national foundation. Initially, these discussions have focused on eliciting the reactions, views, and interests of these diverse groups on the possible applicability of the Mozambique and Ecuador experiences to their countries and on building a process for all of these groups to come together to jointly discuss their views. In Zimbabwe, as a result of these initial rounds of dialogue which have taken place over the course of the past year, a broad spectrum of groups have decided to work together to establish a foundation appropriate to their country. A participatory, collaborative working process currently is being designed for the next phase of the discussions. In Ghana, the initial rounds of discussion are still underway.

### Conclusions

No one, least of all the citizens of African nations, thinks it will be easy for these countries to establish and guarantee the kind of pluralistic, democratic, and tolerant environment

that permits groups with competing, sometimes even opposing views and goals to flourish in an open civil society. Yet this is precisely what so much struggle has been lived through to achieve, what so many have suffered and even perished for.

The issue today is not if or why or how. The central questions now are who and what to move forward.

A tremendous historical process of change has been begun in Africa as well as in the USSR, Central Europe, and Latin America. While no one can foresee where this change will lead, the events of the last decade have demonstrated that it often moves forward with amazing speed and force.

These events have also demonstrated (if such demonstration were ever needed) who will move forward this change. Only the people in each country who have lived this long struggle firsthand and who know the strengths as well as the weaknesses and complexities of their own nation possess the knowledge, power, vision, and perseverance to take this daunting agenda ahead.

What to move forward needs to be their decision, made in light of the political spaces, national commitment, and opposing forces they see in each case. No outside group, however well-meaning and positive their motives may be, can chart these waters

-- nor should they, since to do so inevitably takes away from local actors the very power and responsibility for their own and future that constitutes the heart of a participatory, democratic society.

The new approaches discussed in this paper come with the great danger of being the latest good idea from external donors and foreign NGOs. For such approaches to have real value, they need to become rooted in African countries, they need to be taken on as African approaches, owned and developed in each case according to the perspectives and decisions of national groups. This means, of course, that the models offered by Mozambique and Ecuador might very well not be the forms that emerge in Zimbabwe, Ghana, or other countries -- indeed, that they may not be useful models at all. It means that what will emerge from these new approaches is likely to be highly diverse in different places and modified from the initial experiences.

It also means that who moves these new approaches forward in each African country will be critical to the outcome. If the objective is to strengthen and expand civil society and citizen participation within it, it seems essential that the who incorporates a very wide range of social actors, including those with potentially conflicting views, and especially that the who encompasses the participation of those almost always left out of decisionmaking and resource allocation -- that is, the poor,

women, ethnic minorities and other disempowered sectors within each country.

This kind of pluralistic, collaborative, and participatory approach to establishing endowed national foundations (and other new financing structures) is costly, messy, and uncertain in its outcomes. But it is also indigenously-rooted, empowering, and ultimately the course most likely to produce viable democratic structures that will contribute to, rather than retard, the changes towards greater participation, equity, and voice for the people in these countries.

# THE CHARITABLE ENDOWMENTS ACT, 1890

ACT No. VI OF 1890

[7th March, 1890]

An Act to provide for the Vesting and Administration of Property held in trust for charitable purposes.

WHEREAS it is expedient to provide for the vesting and administration of property held in trust for charitable purposes; It is hereby enacted as follows:—

Title, extent and commencement.

1.—(1) This Act may be called the Charitable Endowments Act, 1890.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1889, Pt. V, p. 137; for Report of the Select Committee, see *ibid.*, 1890, p. 65; and for Proceedings in Council, see *ibid.*, 1889, Pt. VI, pp. 117 and 190, and *ibid.*, 1890, Pt. VI, p. 37.

It has been applied to Phulera in the Excluded Area of Upper Tanawal to the extent the Act is applicable in the N.-W.F.P., subject to certain modifications; and also extended to the Excluded Area of Upper Tanawal (N.-W.F.P.) other than Phulera with effect from such date and subject to such modifications as may be notified, see N.-W.F.P. (Upper Tanawal) (Excluded Area) Laws Regulation, 1950.

This Act has been repealed in so far as it relates to charitable endowments the objects of which do not extend beyond the N.-W.F.P. See the North-West Frontier Province Muslim Waqf Act, 1947 (22 of 1947), s. 31 and Sch.

This Act has been amended in its application to Bengal by the Bengal Wakf Act, 1934 (Ben. 13 of 1934).

It has been extended to the Leased Areas of Baluchistan, see the Leased Areas (Laws) Order, 1950 (G. G. O. 3 of 1950); and applied in the Federated Areas of Baluchistan, see Gazette of India, 1937, Pt. I, p. 1499.

See also s. 8 of the Charitable Funds (Regulation of Collections) Act, 1953 (31 of 1953).

<sup>1</sup>[(2) It extends to the whole of Pakistan]; and

(3) It shall come into force on the first day of October, 1890.

2.—In this Act, "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship<sup>2</sup>.

Definition.

3.—<sup>3</sup>[(1) The Central Government may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for <sup>4</sup>[Pakistan], and the Government of any Province may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for the Province.]

Appointment and incorporation of Treasurer of Charitable Endowments.

(2) Such Treasurer shall, for the purposes of taking, holding and transferring moveable or immovable property under the authority of this Act, be a corporation sole by the name of the Treasurer of Charitable Endowments for <sup>5</sup>[Pakistan] or, as the case may be, the Province], and, as such treasurer, shall have perpetual succession and a corporate seal, and may sue and be sued in his corporate name.

<sup>6</sup>[3A. In the subsequent provisions of this Act "the appropriate Government" means, as respects a charitable endowment, the objects of which do not extend beyond a single Province and are not objects to which the executive authority of the Central Government extends, the Government of the Province, and as respects any other charitable endowment the Central Government.]

Definition of "appropriate Government", etc.

4.—(1) Where any property is held or is to be applied in trust for a charitable purpose, the <sup>7</sup>[appropriate Government], if it thinks fit, may, on application made as hereinafter mentioned, and subject to the other provisions of this section, order, by <sup>8</sup>notification in the official Gazette, that the property be

Orders vesting property in Treasurer.

<sup>1</sup> The existing sub-section (2) as amended by A. O., 1949, Arts. 3(2) and 4, the Burma Laws Act, 1898 (13 of 1898), s. 18 and Sch. V and Act (26 of 1951) s. 8, has been subs. by Ordinance (21 of 1960, s. 3 and 2nd Sch., (with effect from the 14th October, 1955).

<sup>2</sup> See also s. 8 of the Charitable Funds (Regulation of Collections) Act, 1953 (31 of 1953).

<sup>3</sup> Subs. by A. O., 1937, for the original sub-section (i).

<sup>4</sup> Subs. by A. O., 1949, Sch., for "India".

<sup>5</sup> Subs. by A. O., 1937, for "the territories subject to the L. G.".

<sup>6</sup> Ins., *ibid.*

<sup>7</sup> Subs. *ibid.*, for "L. G.".

<sup>8</sup> For notifications issued under this section in conjunction with s. 5, see different local R. & O.

vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the <sup>1</sup>[appropriate Government] and the person or persons making the application, and the property shall thereupon so vest accordingly.

(2) When any property has vested under this section in a Treasurer of Charitable Endowments, he is entitled to all documents of title relating thereto.

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(4) An order under this section vesting property in a Treasurer of Charitable Endowments shall not require or be deemed to require him to administer the property, or impose or be deemed to impose upon him the duty of a trustee with respect to the administration thereof.

Schemes for  
administration of  
property vested  
in the Treasurer.

5.—(1) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the <sup>1</sup>[appropriate Government], if it thinks fit, may settle a <sup>2</sup>scheme for the administration of any property which has been or is to be vested in the Treasurer of Charitable endowments, and may in such scheme appoint, by name or office, a person or persons, not being or including such Treasurer, to administer the property.

(2) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the <sup>1</sup>[appropriate Government] may, if it thinks fit, modify any scheme settled under this section or substitute another scheme in its stead.

(3) A scheme settled, modified or substituted under this section shall, subject to the other provisions of this section, come into operation on a day to be appointed by the <sup>1</sup>[appropriate Government] in this behalf, and shall remain in force so long as the property to which it relates continues to be vested in the Treasurer of Charitable Endowments or until it has been modified or another such scheme has been substituted in its stead.

(4) Such a scheme, when it comes into operation, shall supersede any decree or direction relating to the subject-matter

<sup>1</sup> Subs. by A. O., 1937, for "L. G."

<sup>2</sup> Sub-section (3) rep. *ibid.*

<sup>3</sup> For notification setting a scheme for the Administration of the Pakistan Army Endowment Fund Trust Fund, see Gazette of Pakistan, 1958, Pt. I, pp. 18 and 20.

thereof in so far as such decree or direction is in any way repugnant thereto, and its validity shall not be questioned in any Court, nor shall any Court give, in contravention of the provisions of the scheme or in any way contrary or in addition thereto, a decree or direction regarding the administration of the property to which the scheme relates:

<sup>1</sup>[Provided that nothing in this sub-section shall be construed as precluding a Court from inquiring whether the Government by which a scheme was made was the appropriate Government.]

(5) In the settlement of such a scheme effect shall be given to the wishes of the author of the trust so far as they can be ascertained, and, in the opinion of the <sup>2</sup>[appropriate Government], effect can reasonably be given to them.

(6) Where a scheme has been settled under this section for the administration of property not already vested in the Treasurer of Charitable Endowments, it shall not come into operation until the property has become so vested<sup>3</sup>.

6.—(1) The application referred to in the two last foregoing sections must be made,—

Mode of applying  
for vesting orders  
and schemes.

(a) if the property is already held in trust for a charitable purpose, then by the person acting in the administration of the trust, or, where there are more persons than one so acting, then by those persons or a majority of them; and

(b) if the property is to be applied in trust for such a purpose, then by the person or persons proposing so to apply it.

(2) For the purposes of this section the executor or administrator of a deceased trustee of property held in trust for a charitable purpose shall be deemed to be a person acting in the administration of the trust<sup>4</sup>.

7. [Exercise by Governor General in Council of powers of Local Government.] *Rep. by A. O., 1937.*

8.—(1) Subject to the provisions of this Act, a Treasurer of Charitable Endowments shall not, as such Treasurer, act in the administration of any trust whereof any of the property is for the time being vested in him under this Act.

Bare trusteeship  
of Treasurer.

<sup>1</sup> Proviso ins. by A. O., 1937.

<sup>2</sup> Subs. *ibid.*, for "L. G."

<sup>3</sup> A proviso to s. 5, applicable only to Bengal, has been added by the Bengal Wakf Act, 1934 (Ben. 13 of 1934), s. 79.

<sup>4</sup> A new sub-section (3), applicable only to Bengal, has been added by section 80., *ibid.*

(2) Such Treasurer shall keep a separate account of each property for the time being so vested in so far as the property consists of securities for money, and shall apply the property or the income thereof in accordance with the provision made in that behalf in the vesting order under section 4 or in the scheme, if any, under section 5, or in both those documents.

(3) In the case of any property so vested other than securities for money, such Treasurer shall, subject to any special order which he may receive from the authority by whose order the property became vested in him, permit the persons acting in the administration of the trust to have the possession, management and control of the property, and the application of the income thereof, as if the property had been vested in them.

Annual  
publication of  
list of properties  
vested in  
Treasurer.

9. A Treasurer of Charitable Endowments shall cause to be published annually in the <sup>1</sup>[official Gazette], at such time as the <sup>2</sup>[appropriate Government] may direct, a list of all properties for the time being vested in him under this Act and an abstract of all accounts kept by him under sub-section (2) of the last foregoing section.

Limitation of  
functions and  
powers of  
Treasurer.

10.—(1) A Treasurer of Charitable Endowments shall always be a sole trustee, and shall not, as such Treasurer, take or hold any property otherwise than under the provisions of this Act, or subject to those provisions, transfer any property vested in him except in obedience to a decree divesting him of the property, or in compliance with a direction in that behalf issuing from the authority by whose order the property became vested in him.

(2) Such a direction may require the Treasurer to sell or otherwise dispose of any property vested in him, and, with the sanction of the authority issuing the direction, to invest the proceeds of the sale or other disposal of the property in any such security for money as is <sup>3</sup>[specified in the direction], or in the purchase of immoveable property.

(3) When a Treasurer of Charitable Endowments is divested, by a direction of <sup>4</sup>[the appropriate Government] under this section, of any property, it shall vest in the person or persons acting in the administration thereof and be held by him or them on the same trusts as those on which it was held by such Treasurer.

<sup>1</sup> Subs. by A. O., 1937, for "local official Gazette".

<sup>2</sup> Subs. *ibid.*, for "L. G.".

<sup>3</sup> Subs. *ibid.*, for "mentioned in section 4, sub-section (3), clause (b), (c), (d) or (e)".

<sup>4</sup> Subs. *ibid.*, for "the L. G. or the G. G. in C.".

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11. If the office held by an officer of the Government who has been appointed to be a Treasurer of Charitable Endowments is abolished or its name is changed, the <sup>1</sup>[appropriate Government] may appoint the same or another officer of the Government by the name of his office to be such Treasurer, and thereupon the holder of the latter office shall be deemed for the purposes of this Act to be the successor in office of the holder of the former office.

Provisions for continuance of office of Treasurer in certain contingencies.

<sup>2</sup>[12. If by reason of any alteration of areas or by reason of the appointment of a Treasurer of Charitable Endowments for <sup>3</sup>[Pakistan] or for any Province for which such a Treasurer has not previously been appointed or for any other reason it appears to the Central Government that any property vested in a Treasurer of Charitable Endowments should be vested in another such Treasurer that Government may direct that the property shall be so vested and thereupon it shall vest in that other Treasurer and his successors as fully and effectually for the purposes of this Act as if it had been originally vested in him under this Act.]

Transfer of property from one Treasurer to another.

<sup>4</sup>[13. <sup>5</sup>\* \* \* \* \*

Power to frame forms and make rules.

(2) The <sup>6</sup>[appropriate Government] may make rules consistent with this Act for—

- (a) prescribing the fees to be paid to the Government in respect of any property vested under this Act in a Treasurer of Charitable Endowments;
- (b) regulating the cases and the mode in which schemes or any modification thereof are to be published before they are settled or made under section 5;
- (c) prescribing the forms in which accounts are to be kept by Treasurers of Charitable Endowments and the mode in which such accounts are to be audited; and
- (d) generally carrying into effect the purposes of this Act.]

<sup>1</sup> Subs. by A. O., 1937, for "L. G." which had been subs., for "G. G. in C." by the Devolution Act, 1920 (38 of 1920), s. 2 and Sch. I.

<sup>2</sup> Subs. by A. O., 1937, for the original s. 12.

<sup>3</sup> Subs. by A. O., 1949, Sch., for "India".

<sup>4</sup> Subs. by the Devolution Act, 1920 (38 of 1920), s. 2 and Sch. I, for the original section 13.

<sup>5</sup> Sub-section (1) rep. by A. O., 1937.

<sup>6</sup> Subs. *ibid.*, for "L. G.".

~~Indemnity of~~  
Government and  
Treasurer.

14. No suit shall be instituted against the [Government] in respect of anything done or purporting to be done under this act, or in respect of any alleged neglect or omission to perform any duty devolving on the Government under this Act, or in respect of the exercise of, or the failure to exercise, any power conferred by this Act on the Government, nor shall any suit be instituted against a Treasurer of Charitable Endowments except for divesting him of property on the ground of its not being subject to a trust for a charitable purpose, or for making him chargeable with or accountable for the loss or misapplication of any property vested in him, or the income thereof, where the loss or misapplication has been occasioned by or through his wilful neglect or default.

Saving with  
respect to  
Advocate  
General and  
Official Trustee.

15. Nothing in this Act shall be construed to impair the operation <sup>2</sup>\* \* \* of sections, 8, 9, 10 and 11 of Act <sup>3</sup>No. XVII of 1864 (*an Act to constitute an Office of Official Trustee*) respecting the vesting of property in trust for a charitable purpose in an Official Trustee.

15. [*General controlling authority of Governor General in Council.*] *Rep. by the Devolution Act, 1920 (XXXVIII of 1920), s. 2 and Schedule I, Pt. I.*

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NOT FOR CITATION

**A SURVEY OF  
THE LEGAL AND INSTITUTIONAL MECHANISMS  
NECESSARY TO ESTABLISH FOUNDATIONS  
IN DEVELOPING COUNTRIES**

Prepared for:

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## 1. INTRODUCTION

This paper discusses the legal and institutional issues involved in establishing foundation-like mechanisms in developing countries. The paper builds on the discussion presented in a paper titled "Trust Funds and Endowments as a Biodiversity Conservation Tool," written by Michael Wells for the Environment Department's Policy and Research Division at the World Bank.<sup>1</sup> Wells argued that self-sustaining endowments, to which various funding sources could channel funds, could provide a steady income flow to initiatives oriented toward natural resource management and biodiversity protection. The Wells' paper did not fully discuss the legal and operational issues surrounding such financial mechanisms and recommended more analysis of these issues. This paper addresses these issues.

The term "foundation" is used as a generic term to describe a wide variety of legal entities. For purposes of this paper, the term connotes an endowed nongovernmental, nonprofit organization managed by its own directors and officers. A foundation would support projects by awarding grants to individuals and organizations to undertake projects, or by carrying out operational activities on its own. The term foundation, however, carries some ambiguity because in some countries it may designate pension plans for the employees of small factories, semi-governmental agencies, profit-making enterprises, sports clubs, charities, and semi-specialized groups devoted to a specific cause.

Questions arise as to the appropriate legal and institutional structures for a foundation. Whether to go with a trust, nonprofit/nonstock corporation, partnership, association, institute or some other legal entity will depend on the local laws, practices and participants in a country. For instance, trust funds, while frequently used in common law countries, are not as popular in civil law countries. Regardless of the type of legal mechanisms chosen, they usually share provisions addressing such issues as: reporting requirements, financial statements, record maintenance, audits, fiduciary responsibilities, raising and managing funds, determining grant recipients and eligible projects, and procedures for selecting directors or trustees. The organizers of a foundation, however, must ensure that the aforementioned provisions are not repugnant to the laws of the host country.

A foundation established in a host country should integrate inputs from government agencies, local community groups (LCGs), non-governmental organizations (NGOs), resource users, the private sector and multilateral institutions. A foundation could serve as a mechanism to help the public and private sectors within a country and the donor community coordinate their actions so as to advance a country's environmental agenda. In particular, LCGs and NGOs could play an important role in designing and implementing programs and projects since they are often at the cutting edge in formulating innovative measures to conserve biodiversity and manage natural resources. Moreover, if national environmental plans are to

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<sup>1</sup> Wells, Michael, "Trust Funds and Endowments as a Biodiversity Conservation Tool," The World Bank Environment Department Divisional Working Paper No. 1991-26, November 8, 1991.

succeed, they must vigorously engage local populations. A foundation could thus serve as a mechanism to help empower local groups.

A recurring problem in financing conservation measures is disbursing money to grassroots programs which lack the infrastructure to absorb the funds. LCGs and NGOs typically are not set up to handle large sums of money. By disbursing small grants of less than \$50,000, a foundation could avoid this problem. A foundation could be designed to attract contributions from a variety of donors – such as the Global Environment Facility (GEF). Furthermore, a foundation could absorb excess donor contributions, which could be spread out over a long period.

For natural resource management programs and, in particular, biodiversity protection efforts to succeed, a long term sustained effort of at least ten to twenty years is required. Too often private donors and bilateral and multilateral aid institutions focus on short term projects, which fail to have a lasting impact. Mechanisms that guarantee a long term commitment and overcome unpredictable budget and political fluctuations must be developed. Reliable funding improves program stability, long-range planning, training and recruitment of personnel, and the overall impact of a program. Moreover, practically all environmental and developmental programs could use a foundation-like mechanism to provide long term funding to ensure a programs' sustainability. The issues discussed herein are not limited to conserving biodiversity. On the other hand, not all programs should be designed for the long term. A foundation must be able to respond to changing circumstances. The sustainability of financing and the sustainability of activities are not necessarily the same.

This paper examines the legal and institutional issues surrounding the establishment and operation of a foundation. Section 2 discusses the role a foundation can play in society. Section 3 reviews the various provisions that should be in a foundation's charter and bylaws, possible provisions in agreements between a foundation and a donor, and the issues these provisions raise. In this regard, some of the most crucial issues involve the selection of directors and their duties; section 3 pays particular attention to these issues. Sections 4, 5, 6, and 7 review foundation-like mechanisms established in Bhutan, Bolivia and the Philippines. Lessons can be learned from these mechanisms, which offer a variety of models. The case studies examine the most significant issues identified in section 3, especially those provisions from which lessons can be drawn. Many of the footnotes in section 3 provide specific examples of how entities discussed in the case studies treated the provisions that are generically discussed in section 3.

Instead of surveying the range of known foundation-like mechanisms, this paper concentrates on analyzing a few mechanisms. This format permits dealing with complex legal and technical issues. The particular mechanisms for the case studies were chosen because they offer a diversity of structures and represent state-of-the-art mechanisms.<sup>2</sup>

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<sup>2</sup> The author acknowledges his debt to the people intimately involved with these mechanisms and the

(continued...)

## 2.0 A FOUNDATION'S ROLE IN SOCIETY

A foundation can potentially play a unique role in society by using limited funds to encourage, test, and experiment with new solutions to present and future problems. Successful projects could later be adopted as part of an improved government program. Furthermore, a foundation could serve as a clearing-house for information on LCGs' and NGOs' programs and projects, help LCGs and NGOs develop associations with international NGOs and technical agencies, and facilitate communications by LCGs and NGOs with governments and potential donors.

A foundation could empower LCGs and NGOs by providing them with access to an institution capable of effecting change in their society. A local independent foundation will have first hand knowledge of the problems in a country and the people and organizations able to address these problems. This requires a participatory institution, through which LCGs and NGOs can identify, evaluate, manage and monitor projects. These projects should respond to broadly recognized priorities – such as those identified in national environmental action plans, and encourage and optimize the number and capacity of a broad array of people and institutions. In this regard, biological diversity conservation efforts require a strong base of support within a country in order for the society to participate in setting national conservation priorities in the context of national environmental and developmental objectives.

While a foundation should be participatory and responsive, it also needs to maintain a degree of independence to avoid short sighted policies and to survive economic or political crises. Government planning tends to respond to election cycles and seldom takes a long term view of environmental issues. If a foundation's raison d'être is to ensure long term financing to achieve long term goals, it should resist government pressure towards short term objectives.

Many NGOs have historically taken anti-government attitudes; often they have been more effective at forming coalitions to work against government actions than working for something. NGOs, however, are revising and redefining their relationships with governments and are now more open to collaborative relationships. Nevertheless, NGOs who refuse to work with governments may seek to intimidate other NGOs and LCGs who are receptive to participation with donors and governments.

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<sup>2</sup>(...continued)

documents they provided. Personnel from the Bolivian National Environmental Fund, Conservation International, the Foundation for the Philippine Environment, the Philippine Development Forum, The Nature Conservancy and the World Wildlife Fund were very helpful in providing documents and information. Also, while this paper has an extensive bibliography, one source proved especially useful and warrants particular reference: a draft paper prepared by Dr. Paul Weatherly titled, "Guidelines for the Africa Bureau of the Agency for International Development for Programming Local Currency Endowments," October 28, 1991. The findings, interpretations, and conclusions expressed in this paper are entirely those of the author and should not be attributed in any manner to the aforementioned institutions, their staffs or the Global Environment Facility.

A LCG/NGO driven foundation will face conflicting demands in working with a government while maintaining its independence. Several risks exist for such a foundation. If a foundation fails to act autonomously, it can lose credibility among LCGs and NGOs. LCGs and NGOs are wary of being used by governments to carry out political patronage or of being burdened with too much red tape. Moreover, a vindictive government could retaliate against a foundation.

Governments must also reconsider their relationships with LCGs and NGOs. Governments have been willing to work with LCGs and NGOs as long as they were compliant and did not oppose government decisions. Governments and donors have been less forthcoming in permitting LCGs and NGOs to actually work on programming as opposed to working on discreet projects. The foundation concept moves LCGs and NGOs into new roles in assuming responsibility for programming and being held accountable.

A foundation can take a long term approach to environmental planning and natural resource management, assuring that recurrent finance needs are covered. On the other hand, once organized, a foundation could operate flexibly, responding to new needs and adjusting to shortcomings as they appear. A LCG/NGO foundation can potentially have several comparative advantages over traditional government/donor mechanisms. LCGs and NGOs may be able to provide services cheaper and more effectively, reach the poorest people and the most vulnerable groups, and be in better positions to establish grassroots organizations and promote solid popular participation. Many developing country governments lack sufficient funds to improve and expand infrastructure and services. Furthermore, these governments are often too centralized to manage decentralized services effectively, whereas LCGs and NGOs have a local presence which fosters more efficient management. A broad-based LCG/NGO foundation offers a mechanism for decentralization.

Governments have an incentive to work with LCGs and NGOs. By increasing a country's absorptive capacity, LCGs and NGOs can help governments make effective use of donor funding. While governmental absorptive capacity usually refers to the extent public agencies can handle additional projects and programs, the real issue concerns how effectively local communities can organize for action. Local community organizations play the decisive role in the success or failure of most natural resource management projects. Grass-roots NGOs have emerged throughout the developing countries over the past decade as a spontaneous response to deepening economic and environmental problems. NGOs have helped communities organize to design, implement, and monitor natural resource-based development projects.

Community participation in resource conservation cannot be sporadic and requires secure uninterrupted financing. Smaller and steadier flows of funding to LCG and NGOs are more effective than larger, one-time investments. Supervising multiple small grants, however, presents an impossible task for multilateral and bilateral donors. Furthermore, LCGs and NGOs complain that they have to spend considerable time on administrative and reporting procedures that the donors require. Only a few large NGOs, usually with offices in a host

country's capital city, have the staff and resources to comply with such requirements. A more efficient option would be for donors to make a large grant to endow a foundation, which would manage and award small grants and respond to donor reporting requirements. A foundation may enable limited financial resources to be invested, leveraged and sustained for the long term.

In regards to a foundation's activities, a critical issue concerns whether the foundation should be a grant making or operational foundation or a combination of both. If a foundation assumes an operational role it could be perceived as replacing local government institutions or establishing a super NGO. Because of a foundation's access to funding it could overwhelm local NGOs, community groups and even government institutions.

A foundation, however, is not intended to replace local institutions or local and international initiatives, but to strengthen and complement them, and to provide a stable, alternative avenue for donor aid. Special efforts will have to be taken to ensure that a foundation complements and strengthens a government's program and does not weaken its effectiveness by substituting external assistance for internal responsibilities. The organizers should also determine if a similar institution already exists in the country. The existing institution could provide valuable insights. Moreover, rather than establish a new foundation the organizers may decide to join with the existing institution.

### **3.0 STRUCTURING AND ADMINISTERING A FOUNDATION**

The legal and institutional arrangements for a foundation will vary from country to country and depend on local laws, practices and participants. Nevertheless, all non-profit organizations possess certain generic characteristics. This section provides a review of the provisions and the issues they raise. The organizers must consider them when structuring and administering a foundation. A tendency exists to dismiss such provisions as standard legalistic boilerplate and not pay adequate attention to them. However, the manner in which these provisions are resolved determines a foundation's structure and operation.

Resolving these provisions may prove a complicated and contentious process, involving tradeoffs and compromises. Donors and international NGOs should exercise sensitivity and restrain from imposing their views. Moreover, international NGOs must have local partners with whom they work. Each country must find its own solutions based on its own needs and aspirations and the various views within that country. Without local acceptance and participation in the process of structuring and operating a foundation, the effort is doomed to fail.

The donor community, in addition to providing funds, can initially play an important role by providing technical and administrative support as needed. The donors will need to feel confident that legal and institutional mechanisms are in place for a foundation to operate effectively and provide accountability to local society, the host government and present and

future donors. The donors should also strive to coordinate their actions. Many times the donors criticize governments, LCGs and NGOs for a lack of coordination, while the donors themselves send conflicting and mixed messages. By serving as a mechanism through which the donors channel funds, a foundation could facilitate donor coordination.<sup>3</sup>

Establishing a LCG/NGO driven foundation represents a very time consuming and labor intensive process -- at a minimum probably two years. Consequently, this process will be more expensive initially than traditional programs. The donor community will have to modify its negotiating methods and structures to ensure LCG and NGO participation. Involving LCGs and NGOs gives these groups a forum to articulate positions that before have seldom been effectively voiced. This format will prompt a more open debate during the negotiation stage that, in turn, will slow down the process. Nevertheless, this process offers several advantages. The end result should be better designed projects and more genuine participation at all levels, and therefore improved chances for success in reaching the projects' long term objectives.

A memorandum of understanding (MOU) between donors and the host country government could prescribe a consultative process involving a broad array of actors who would address the legal and institutional issues surrounding the establishment of a foundation. Pursuant to the MOU, donors could provide seed money for this process.<sup>4</sup> This step is imperative because of the considerable costs to LCGs and NGOs in participating in a long negotiation process. This process will take time and money away from other LCG and NGO projects, and these groups are not geared up for prolonged negotiations. Furthermore, since the type of entity proposed herein is relatively novel, a vigorous initiative will be needed to educate the organizers and potential participants and seek input from them on a foundation's structure and administration.

### 3.1 Legal Entity

Many people commonly specify endowments and trusts as the type of entities appropriate for conservation financing. From a legal perspective, these terms raise problems. An endowment is not a legal entity, but a corpus of funds that generates revenue. A trust, nonprofit corporation or some other legal entity can have an endowment. Trusts are a legal

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<sup>3</sup> Bolivia's National Fund for the Environment (FONAMA) uses Bolivia's National Environmental Action Plan to help donors select a project that the donors would like to fund. This puts FONAMA in a proactive, rather than a reactive position when working with the donor community, see *infra* text at 30-31.

<sup>4</sup> The World Wildlife Fund (WWF) and the Philippine Business for Social Progress (PBSP) received a grant from the U.S. Agency for International Development (USAID) to provide technical assistance for the establishment of the Foundation for the Philippine Environment (FPE), see *infra* text at 23-24. FONAMA received a grant from the World Resources Institute to organize the Enterprise for the Americas Initiative (EAI) Administrative Council, see *infra* text at 35, 39.

concept found primarily in common law countries and not civil law countries.<sup>5</sup> Even in many common law countries, trust law is not very well developed. Trusts can prove difficult to administer since a single beneficiary or party can initiate protracted legal proceedings. Such proceedings freeze the trust and can delay disbursements. Furthermore, amending trust agreements represents a potentially complicated process and may require judicial approval.

A corporate format has more formal requirements, documents and record-keeping and can be more difficult to establish than a trust, but offers greater flexibility and adaptability to changing circumstances.<sup>6</sup> In light of concerns about fiduciary responsibilities and accountability, the additional record-keeping and reporting probably proves advantageous. Establishing a nonprofit corporation or similar entity usually requires government approval and in some countries this represents a very time consuming process. Government participation in a foundation and significant interest by the donor community and groups within the country may expedite the registration process. Registration, moreover, would allow for a more open and transparent organization.

Many civil and common law countries recognize foundation-like entities, comporting with the definition used herein. Such entities can be nonprofit/nonstock corporations, associations, institutes, trusts or other legal entities. Legal advisers and other experts in a host country will have to advise on the appropriate legal form for a foundation. While many countries have foundation laws, the type of foundation proposed herein raises unique issues because of the diverse group of actors involved.

### 3.2 Charter, Bylaws and Resolutions

A foundation's activities should be governed by a charter, or articles of incorporation or other constituent document (hereinafter referred to as the charter) in a form agreed to by the organizers. Charters can address such issues as a foundation's name and purpose, the names and addresses of the organizers and the initial directors, dissolution procedures and distribution of assets, and a process to amend the charter. Bylaws should provide clear and specific guidelines for a foundation's day-to-day operations. Bylaws usually specify the major actions or functions of a foundation. Resolutions of the board of directors can provide more specific instructions if needed. Generally, bylaws will specify how the directors will be selected, removed and succeeded; terms for the directors; indemnification of officers and directors; the time and place for meetings; notice requirements; a description of the officers and their duties; provisions for the indemnification of officers and directors; conflict of interest provisions; and procedures to amend the bylaws.

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<sup>5</sup> The Bhutan Trust Fund (BTF), however, provides an example of how a trust can be utilized by having the trust established offshore and using United Nations Development Programme trust law.

<sup>6</sup> The FPE registered as a private, nonstock/nonprofit corporation.

### 3.3 Duration

Usually foundations are of perpetual duration, rather than a limited time period.<sup>7</sup> This is a different issue than whether the endowment should be for perpetuity. A foundation could have perpetual existence, but with an endowment that is gradually drawn down.

### 3.4 Purpose

The charter should state what purposes a foundation will seek to fulfill and what activities a foundation will engage in to accomplish these purposes. This represents one of the most difficult tasks the organizers will face. In specifying the purposes, the charter could broadly or restrictively define activities. A broad statement of purpose enables the directors and officers to maintain programming flexibility, an essential consideration in light of rapidly changing environmental and social needs and technological and scientific improvements.<sup>8</sup> The directors and officers would thus have the responsibility of translating fairly broad terms into terms of activity.

On the other hand, limited, clear, and specific purposes -- understood and appreciated by all the parties -- could avoid potential disputes.<sup>9</sup> Applicants could prepare grant proposals more easily and the grant review process would flow better. Moreover, less opportunities for abuse would exist by eliminating much of the discretionary decision-making from the grant awards process.

An additional issue concerns whether a foundation should make loans to small businesses and LCGs to promote conservation related products and services. If a foundation pursues a concessionary loan-making operation, it may wish to establish a separate legal entity for profit making activities. A business facet to a foundation raises a multitude of questions, especially pertaining to tax issues, which are beyond the scope of this paper.

### 3.5 Dissolution/Termination

Provision should be made for what events will trigger dissolution, the dissolution procedures, the parties that can evoke such procedures, and the distribution of the assets. Events such as incompetent and irresponsible foundation management, or acts of the host country government invalidating a foundation's charter or its activities could trigger dissolution. In

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<sup>7</sup> The BTF, however, will be dissolved upon completion of the program, and the FPE has a fifty year lifespan.

<sup>8</sup> Both the FPE and the EAI Administrative Council have very broad agendas, see infra text at 25, 37.

<sup>9</sup> The BTF has a more limited statement of purpose than the FPE and the EAI Administrative Council. Furthermore, the BTF has narrowed its program activities for the first five years.

regards to distributing a foundation's assets, the charter should specify whether another foundation similar to the dissolved foundation should receive the assets, or whether the assets should somehow be used for the purposes for which the foundation was established. Contractual agreements with the donors may provide that foundation assets will be distributed to the donors in proportion to their payments.<sup>10</sup> A related issue concerns what procedures to follow in the event a foundation merges with another foundation. In addition to the charter dissolution provisions, the host country may have laws to discipline or dissolve an errant foundation.

### 3.6 Powers

A foundation should have all the powers necessary to carry out its mission, including the right to acquire, hold and dispose of property; to sue and be sued; to receive and disburse funds from a variety of sources; to borrow and to pledge its assets; to have bank accounts; and to enter into contracts. While a foundation will want to maintain the value of its endowment and engage in transactions to enlarge the endowment, a foundation should carefully consider what type of commercial activities it engages in and to what extent.

### 3.7 Grant Recipients

The organizers must consider who will be eligible to receive grants and the eligibility requirements for grant recipients. Potential recipients could include: public agencies, LCGs, NGOs, private individuals, businesses or academic institutions.<sup>11</sup> Grant awards could seek to promote partnerships or informal collaborations between these groups, which heretofore may have had little contact with each other. The organizers should consider whether they want a specified percentage of the grant awards to go to certain sectors (i.e. LCGs, NGOs, government agencies) or types of programs (i.e. integrated conservation and development projects, forestry initiatives, environmental training and education).

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<sup>10</sup> The EAI Council's income will go to a U.S. Government account in the event of problems with the Council, see *infra* text at 38. The assets in the BTF will be distributed to the donors in proportion to their payments, see *infra* text at 42. The FPE will turn over its assets to the Government of the Philippines or any qualified foundation in the Philippines engaged in activities substantially similar to those of the FPE.

<sup>11</sup> The EAI Council will award grants to local NGOs, including environmental, conservation, development, educational, indigenous peoples organizations, and other appropriate local and regional entities. Only, in "exceptional circumstances" can the government receive a grant, see *infra* text at 37- 38. The Royal Government of Bhutan (RGOB) has responsibility for project implementation, but may entrust implementation to one or more qualified and competent governmental or non-governmental agencies or institutions, see *infra* text at 40.

### 3.8 Grant Applications, Awards and Monitoring

The criteria used in selecting grant recipients will usually revolve around the abilities and experience of the individuals or groups involved in the proposed projects, and the projects' relevance to furthering a foundation's objectives.<sup>12</sup> A foundation should establish clear criteria and guidelines for grant decision-making that could be laid out in a users manual for grant applicants. In this regard a grant application could include: an applicant's name, address, telephone and fax numbers; total amount requested and in what currency; duration of project; organizational information such as history, mission, structure, staff, budget, principal activities and accomplishments; background and justification for the proposal; work plan; staff for key positions; references; and future activities. In order to reach grassroots organizations in rural areas, a foundation's staff will likely have to help such organizations prepare grant proposals.

A foundation will need to establish written terms and procedures for its grant awards and monitoring, covering: (1) the amount of the grant and the currency to be used; (2) a description of the project; (3) the budget for the project; (4) the schedule for completion of the project; (5) the timing of disbursement of the grant and whether it will be a lump sum or multiple payments; (6) procedures for disbursement, such as certification of progress and compliance with the terms of the agreement; (7) who will have custody of the grant funds following disbursement to the grantee, such as a special project account to be drawn on by approved signatories; (8) regular progress and expenditure reports; (9) provisions for audits and inspections and other procedures necessary for a foundation's management responsibilities; and, (10) termination provisions for failure to comply with the agreement.

A foundation's officers should follow a project's progress through correspondence and personal visits so as to have ample opportunity for evaluation. In a grant-making foundation, the officers should refrain from exercising control over the conduct of the project itself.

### 3.9 Board of Directors

Obtaining the right mix of actors to serve as directors represents a critical issue. Candidates could come from government and private sector institutions, LCGs, local and international NGOs, academic institutions and bilateral and multilateral donors. One should be cautioned that choosing particular candidates can set up a bias favoring either a continued control or dominant influence from outside the country, or control from within the country.

The organizers could structure the board of directors in a variety of ways. Directors could be chosen by different interest groups, organizations, or members (representative directors), or seats could be reserved for directors with particular expertise or experience (restricted directors), or sitting directors could select their own replacements or the remaining directors

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<sup>12</sup> The FPE has formulated guidelines for reviewing proposals and awarding grants, see *infra* text at 28-29. For a discussion of the EAI Council's grant procedures, see *infra* text at 37-38.

could select new directors (self-perpetuating directors), or there could be various combinations of the different types of directors.

Representative directors will likely advocate the views of the LCGs or NGOs that they represent. If a foundation chooses to establish a membership base, the members could elect directors. Responsive representative directors would introduce a participatory process into a board's operation and help ensure that a foundation's activities are demand driven. While it is important to have LCG/NGO consortia that can represent their members, concerns arise as to whether they would exclude nonmembers from participating and receiving grants. Only the coalitions and large LCGs and NGOs will likely have the organizational skill and experience, staff, and financial resources to participate in a foundation's organization.

Conflict of interest provisions would enable a foundation to avoid self-dealing abuses by the directors. Moreover, public participation, public access to information and public accountability afford a means to ensure the programmatic and financial integrity of a foundation's activities.

Self-perpetuating and restricted directors would be more independent and less subject to political pressure. Restricted directors could have specific expertise and experience or could be drawn from luminary personalities of a society. Self-perpetuating and restricted directors, however, could appoint friendly successors and over time the board could drift to extreme positions. While a run-away board would probably not receive new contributions, a large endowment would enable a foundation to continue in operation. In such cases the only check would be if the donors had made their contributions conditional on certain procedures and operations and if the dissolution procedures could be triggered.

If bilateral and multilateral donors or international NGOs serve as directors, they could serve for an interim period so as to foster the local capacity to manage the foundation and its activities.<sup>13</sup> Alternatively, the foundation could have a bifurcated board, with advisory and managing directors. Managing directors would make grant awards and programming decisions. Representatives from LCGs and NGOs could serve as managing directors, whereas representatives from the donor community and the government could serve as advisory directors. The advisory directors would exercise a monitoring role and vote on matters requiring a super majority. A disadvantage to having a bilateral donor serve on the board is that this could discourage other bilateral donors from contributing to the foundation. Other donors may see the foundation as closely tied with a particular donor – especially if that donor's name is reflected in the foundation's name. This problem could be avoided by having a rotating bilateral seat.

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<sup>13</sup> USAID serves on the FPE interim board, but will not serve on the regular board. The United Nations Development Programme and the World Wildlife Fund serve on the BTF's Management Board. Representatives from the Bolivian and U.S. Governments serve on the EAI Council at the pleasure of their respective governments.

Obtaining directors from LCGs and NGOs raises complicated issues. While not every interested LCG and NGO could serve, the different types of LCGs and NGOs should be represented. The process of choosing such representatives, however, can be just as important as having the "proper mix." If LCGs and NGOs lack confidence in the methods of choosing the directors, they will not see themselves as participating and being represented.<sup>14</sup> All the LCGs and NGOs should be well informed of the process for selecting the directors. Regional meetings, newsletters and media announcements can help keep LCGs and NGOs apprised of developments.

LCGs and NGOs could engage in a self-selection process and may wish to consider forming coalitions or variations thereof to choose representatives to serve as directors. For instance, the coalitions could represent different regions or sectors.<sup>15</sup> Furthermore, these directors could serve for limited terms to allow greater representation.<sup>16</sup> While this will make for a complicated, time consuming process initially -- in the long run, this will prove far more effective. Another issue to consider is whether a foundation's president and other officers should serve as directors. If so, should the officers serve the same terms as the directors. In addition to having a broad range of LCGs and NGOs serve as directors, a foundation's administrative procedures and practices should be designed so as to ensure participation and input from these organizations. This could involve participation in advisory panels and regular consultations.

While a foundation seeks to empower LCGs and NGOs and to involve them in the decision-making process, having influential people from the government, academic institutions, the donor community, the business community, and international NGOs serve as directors could also be important for a foundation's success. A foundation could serve a catalytic role in bringing all the potential actors together to discuss conservation and financing issues. Too often these groups view each other as either adversaries or irrelevant. LCGs and NGOs would thus have access to people to which they would otherwise not have access. A foundation would thus promote democratic institution building and political pluralism.

The directors could breach their fiduciary duties to the foundation through mismanagement, nonmanagement or self dealing. Failing to follow the charter and bylaws would constitute a breach of their fiduciary duties. The directors should acquire the information necessary to supervise the foundation's finances and operations, and regularly attend the meetings where

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<sup>14</sup> NGOs in the Philippines and Bolivia have gone to great lengths to promote participation by a broad range of LCGs and NGOs in selecting directors for their respective foundations; for a discussion of these efforts see infra text at 24, 26, 35, 39-40.

<sup>15</sup> The FPE will have two representatives from each of the three major regions in the country.

<sup>16</sup> The first FPE trustees will serve two or three year terms and NGO representatives on the EAI Council will serve three year terms.

these matters are discussed. Directors could file with the foundation a statement disclosing their personal, business and organizational interests and affiliations.

Potential problems could occur if the directors fail to exercise their oversight role and become captured by the foundation's staff. In this regard, a weak board would most likely occur with a self-perpetuating board that did not have to answer to the groups that put them on the board.

Potential directors should be aware of the commitment of time and effort this position requires. People interested only in the prestige of serving as a director should be avoided. There should be a strong orientation program to familiarize the directors with their responsibilities. This would include a thorough review of the foundation's ongoing activities and its charter, bylaws and any other documents and pamphlets which would provide a thorough understanding of the foundation's history and purpose. Without this information, a director could not participate intelligently in the management of foundation policy. Furthermore, the directors should be knowledgeable about the foundation, in order to spread the word about the foundation's activities. Such advocacy work could entail fund raising.

The charter should specify the number of directors and list the names and addresses of the initial directors and the organizers. There should be an odd number of directors so as to avoid impasses. The organizers may want to specify a range of directors, say seven to eleven, but not have the maximum number serve initially. The bylaws could provide that the foundation could pass resolutions increasing or decreasing the number of directors and determine when the new directors leave office.

The directors should probably not receive compensation for serving on the board, but the board could authorize reimbursement for travel expenses and a reasonable per diem for attending board meetings and for service in connection with other foundation activities.

### 3.10 Directors' Powers

Usually directors have all the powers necessary or convenient to effect any or all the purposes for which a foundation has been organized. Specifically the board selects the President and other officers, makes or amends the charter and bylaws, and manages all of the affairs and property of a foundation.

### 3.11 Directors' Terms

The bylaws should provide for specified terms. In some cases, however, there could be some permanent directors. Those directors with specified terms should serve staggered terms. While staggered terms are a good idea, this represents a novel idea in many countries where directors all exit a board at the same time and are replaced by a slate of all new directors. Directors with staggered terms and some permanent directors would provide

stability and continuity for a foundation. A related issue concerns the eligibility of directors for reappointment.

The bylaws should state the procedures to be invoked for removing a director and for a director resigning. The directors could vote to remove a director for unapproved absences from meetings or neglect of other responsibilities as provided in the charter, bylaws or local law. Directors could submit their resignations orally or in writing or both, with the resignations submitted to a designated person.

Director vacancies could be treated several ways. A majority of the remaining directors could appoint a new director, or the organizations that the departed director represented could select a new director. Additional issues are whether the new director should serve for a full term or for the duration of the unexpired term, and whether there should be alternate directors who would not only serve in a director's temporary absence but fill out his or her term in the event of resignation or removal.

### 3.12 Meetings, Voting and Quorum Rules

The directors should hold regular meetings at stated intervals as specified in the bylaws.<sup>17</sup> Special meetings could be held whenever called by a specified percentage, such as twenty-five percent of the directors, or the foundation president. Notice of the meetings should be in writing and a specified number of days in advance of the meeting. Provisions could provide for waiving the notice in the event of an emergency meeting. The written notice of meetings should provide a brief description of the matters to be acted upon, and the time, date and place for the meeting. The bylaws could specify that no other matters shall be considered at the meeting, except with the consent of all members present.

Regular meetings should be held often enough to enable directors to deal with grant applications and other business in a timely manner. The directors will need sufficient time to consult with the entities they represent, especially the directors who represent LCGs and NGOs, before voting. Thus, certain matters could be brought up and discussed at an initial meeting and then voted upon at a subsequent meeting.

The organizers need to consider whether to require the directors to vote in person or if proxies will be permitted. Related issues are whether directors should be allowed to designate an alternate or if directors may participate in a meeting through a conference telephone or similar communications equipment. A quorum at a meeting could consist of a majority of all directors. The organizers should consider whether telephonic presence, proxies or alternates should be counted to determine a quorum. Another consideration is whether there should be an alternative mechanism for taking action when a quorum cannot be

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<sup>17</sup> The FPE Board will hold monthly meetings, and the EAI Administrative Council will meet at least every four months.

reached, such as requiring that a majority of directors consent to the proposed action in writing.

Each director should have one vote on all matters, with the vote of a majority of those present required for approval of any matter. Whether any one director, in particular a director representing a foreign donor, should have a veto power over board decisions will prove a highly contentious issue.<sup>18</sup> This raises a related issue of whether a donor, even if not a director, should have a veto over board decisions.

Certain matters could require a greater than majority vote, such as: the removal of directors, transactions of a particular magnitude, amendments to the charter and bylaws, and invading a foundation's endowment. If a foundation has a membership base, amendments to the charter and bylaws should be submitted to the membership -- perhaps for a super-majority vote. Super-majority votes can help eliminate abuses of power and prevent a run-away board. Without such checks, a small group or an individual could gain control of the board and through board-approved amendments to the charter and bylaws easily manipulate the size and composition of the board to preserve control.

Directors should be disqualified from voting on any matter in which they or any members of their families or any organizations in which they or their families are affiliated, have an interest. Directors should also be prohibited from participating in the discussion of any proposed grant which, if approved, would result in a financial benefit for the directors, their organizations, their families, or organizations with which their families are affiliated. An interest could be defined in the bylaws as a direct personal or financial involvement.<sup>19</sup> An additional restriction could specify that the organization from which a representative director comes can not receive a grant while the director serves on the board. A related issue is whether to permit a director to vote on a grant that would go to a member of the coalition which the director represents. Where a conflict exists, provision could also be made for technical review and recommendations by an independent expert or expert advisory committee.

The directors should approve the minutes of the previous meeting so as to ensure that they indicate the names of the directors present, the genuine discussion, questions asked, a description of each motion or proposal, a record of the votes, and any action taken. The more detailed the records, the better they will reflect the true decision making process.

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<sup>18</sup> The Governments of Bolivia and the U.S. have a veto over any EAI Council grant with life-of-project total in excess of \$100,000.

<sup>19</sup> The EAI Council member "may not participate in the discussion or approval of any proposed grant which, if approved, would result in a financial benefit for the member, any member of his family, or an organization in which the member or any member of his family has a direct financial interest. Further, a Council member may not participate in the discussion or approval of any proposed grant to an organization which the member represents.

### 3.13 Committees

The directors may decide to provide for an executive committee, finance committee, expert advisory committee, nominating committee and other committees to deal with particular matters, as authorized by the charter or by the vote of the directors as a whole. A foundation, however, should avoid excessive delegation of board powers to committees. An executive committee usually has authority to bind the organization on routine matters. A finance committee usually supervises the investment portfolio and receives the auditors' reports. An expert advisory committee would not have directors on it and could be composed of scientists, economists, lawyers and other experts.<sup>20</sup> Such a committee may not be necessary if a foundation's staff has sufficient technical expertise. A nominating committee could be comprised of directors and impartial community leaders from a broad range of backgrounds, who would each be responsible for nominating and/or appointing a director from the luminary personalities in a society. The organizers should consider whether there should be a minimum number of directors on each committee and whether it should be mandatory for a director representing particular organizations or groups to serve on each committee. Also, the organizers should consider whether committee assignments should have term limits.

### 3.14 Officers and Staff

The charter or bylaws should specify a foundation's offices and the duties of each office. Foundations usually have a president, vice-president, treasurer and secretary. The president should serve as the chief executive officer and be responsible for: day to day management and administration; preparing periodic lists of grant proposals for the board; overseeing project implementation, reporting, and evaluation; and reporting to the board. The vice-president usually undertakes whatever duties the board or the president assigns and assumes the president's position if the president can no longer perform his or her duties. The treasurer supervises a foundation's funds and keeps the books. The secretary keeps the minutes and resolutions adopted by the directors and gives notice of regular or special meetings.

The directors hire the president, and the directors in consultation with the president could hire the remaining officers. A foundation should avoid relying on government personnel for staff. Drawing on people from the private sector, particularly LCGs and NGOs, will help a foundation survive political transitions and help depoliticize the decision-making process.

The officers and a small but efficient staff can review grant applications and handle other functions needing continuous attention. The actual size of a foundation's staff will depend on

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<sup>20</sup> The FPE will establish an expert advisory panel comprised of scientists and others with expertise relevant to the FPE's programmatic focus to advise the staff as necessary on proposals requiring technical review.

the nature and scope of its program activities, rather than on the amount of its endowment.<sup>21</sup> A foundation with a fairly substantial endowment could operate with a minimum of staff. However, if a foundation engages in operational activities it would require larger numbers of administrative and technical personnel. Staff members should be independent, and appointed and removed by a foundation's chief executive officer. The officers and staff should receive reasonable, but not excessive, compensation.

The bylaws could prohibit a donor or a person on a donor's staff from receiving any compensation from a foundation. This would eliminate any potential conflict of interest a donor may have as being both a donor and provider of technical assistance. A donor could still provide technical assistance, as needed in a low profile manner, but the funds for this assistance should not come from the foundation.

Qualifications for office lack easy definition. The bylaws could specify that officers must be citizens and residents of the host country. To be effective, the officers will have to reside in the host country and devote full time to this endeavor. The officers should have a combination of administrative and technical expertise. In addition to such expertise, they should be aware of current social and political developments and be politically savvy. Officers must inspire confidence not only at the institutional level, but at the personal level.

An honest broker who commands the respect of and has access to government, donors, LCGs and NGOs will have to champion the foundation concept and organize the foundation by assembling all the parties and promoting a process which permits broad participation. This person could ultimately serve as the foundation's first president. The president should probably not come from the government or be a professional politician, but rather come from a LCG or NGO -- if not from a LCG or NGO then from the academic or business community.

The organizers could decide to permit the foundation officers, in conjunction with an expert advisory committee, to make grant award decisions. The officers, however, would need explicit instructions on the type of eligible projects to fund. Under this arrangement, the directors would focus on policy making and overall governance.

### 3.15 Finances, Audits, Records and Reports

A foundation should maintain proper and sufficient financial accounts, records and documentation and have annual financial and operational audits by independent auditors

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<sup>21</sup> FONAMA has formulated an innovative solution to staffing problems. FONAMA's staff will be made available to administer various environmental accounts -- such as the EAI Administrative Council, see infra text at 31-32.

approved by the directors.<sup>22</sup> Directors, donors and possibly the public should have access to a foundation's records and proceedings. A foundation should publish an annual report of its activities and financial condition within a specified time period, say sixty days, after the end of its fiscal year. A foundation should be prepared at any time to produce evidence that the funds in its custody have been expended in accordance with its charter purpose and the programs authorized by the directors. This would entail having up-to-date records listing the names and addresses of all grantees, the amount of the grant and the purpose of each grant. A designated officer should have responsibility for records and reports.

A LCG/NGO driven foundation may initially have problems with administrative and control capacity and require assistance to develop more professional systems. Many LCGs and NGOs operate with informal and oversimplified accounting and administrative systems which do not meet the standards of multilateral and bilateral donors. The donors should realize that there will be a learning curve and that while the first year's report may be lacking, the reports will likely improve with experience.

If the donors do not serve as directors, financial and operational reports take on increased importance in keeping them apprised of a foundation's activities. The donors comfort level could be further enhanced by having the contribution agreement with a foundation include suspension and cancellation provisions, which the donors could invoke in cases of maleficence or inadequate management.

### 3.16 Choice of Law

The organizers should consider organizing the foundation and subjecting it to the host country's laws.<sup>23</sup> The organizers will need to ensure that the provisions discussed herein, and the manner in which they are treated, are not repugnant to the laws of the host country.

### 3.17 Domicile and Area of Operation

The organizers should designate the foundation's domicile and principle office and decide if the foundation will conduct its operations, either directly or indirectly, in all parts of the host country or beyond the country's borders.

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<sup>22</sup> The FPE will have an inside auditor examine the financial records and have an annual audit by an independent auditor, which will be verified by the Commissioner of Internal Revenue. The EAI Administrative Council, with FONAMA's assistance, has the responsibility of annually submitting to the Bolivian and U.S. government's a proposed annual program, an annual report on the previous year's activities and an annual financial audit. The BTF is subject to the internal and external auditing procedures provided for in the financial regulations, rules and directives of the UNDP. The UNDP shall periodically provide to the Board statements of investment income, charges and withdrawals from the BTF.

<sup>23</sup> The FPE is organized under Philippine law and the BTF is organized under UNDP trust law.

### 3.18 Financial Information and Management

The charter should describe the foundation's assets and from whence they came. The organizers should formulate a plan that details the projected sources of financial support, which could include: bilateral and multilateral contributions; charitable donations, bequests, and legacies; government and foundation grants; tax revenue and user fees; membership fees, dues and assessments; and investment income. This plan should specify what percent of total support will come from various sources and the type of fundraising activities contemplated.

While the donor community will likely be the primary funding source, foundations should strive to raise some funds in-country.<sup>24</sup> Donor financing does not represent a long term solution, mechanisms to promote internal financing and self-sufficiency should be promoted. The donors and the host country, however, should take into consideration the type of contribution the host country could make. For instance, the parties should consider the opportunity costs to the host country in not fully exploiting its natural resources or the use of government staff and/or resources to work with a foundation. On the other hand, if government resources, tax revenue or user fees are utilized, a host country government can be expected to play a major role in a foundation's operations -- perhaps at the expense of LCGs and NGOs.

A foundation could solicit funds from the donor community for the type of activities it intends to fund. By doing so, the foundation would identify its funding priorities and be in a pro-active rather than reactive position when dealing with the donors. The financial plan should consider to what extent contributions will be spent or used to build up the endowment and whether the endowment can be invaded.<sup>25</sup> If the plan permits invasion, it should specify under what circumstances and to what extent, and make provisions for its replenishment. The directors will need to ensure that any conditions or contingencies to any donations do not run counter to or conflict with the foundation's purpose or its bylaws.

A foundation may wish to limit its administrative expenses to a specified percent of its income.<sup>26</sup> A foundation will need to give careful consideration to managing its funds. Over

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<sup>24</sup> The RGOB will contribute matching funds in local currency or in kind equivalent to ten percent of the BTF's disbursements that year.

<sup>25</sup> The FPE's endowment may be invaded upon mutual agreement of the Central Bank and World Wildlife Fund. The BTF endowment may not be invaded until it has reached a minimum value unanimously agreed upon by the full Board. Furthermore, the endowment may not be invaded if its value would fall below \$10 million. If invaded, the Board shall reduce projected spending in subsequent years so as to prioritize the rapid replenishment of the endowment to pre-invasion levels.

<sup>26</sup> The FPE's bylaws limit its administrative expenses to not more than twenty percent of the total contributions and twenty-five percent of the income from existing FPE assets for the taxable year. Unless otherwise agreed upon by the Governments of Bolivia and the United States, the EAI Council's administrative expenses shall not exceed ten percent of its annual income.

funding could threaten a foundation's viability if it is unable to handle large sums of money. If a foundation acts rapidly to award grants to hastily assembled programs and projects, this could produce early skepticism that could not be overcome easily. A foundation should not feel compelled to spend all its income as it comes in, because in the early years appropriate projects and programs may not be formulated. In the event the funds are not rapidly disbursed, they should be invested so as to maintain their value in those countries with high inflation rates.

A foundation should have a written investment policy, approved by the directors, specifying appropriate investment managers, currencies and instruments. Furthermore, the directors should define and approve contract and procurement procedures. A foundation should probably limit itself to conservative investments. Possible investment managers are the central bank or the ministry charged with financial responsibility, a private bank or investment firm, or a multilateral financial institution.<sup>27</sup> The directors should make full disclosure of any pecuniary interest they may have that would be affected by the foundation's investment decisions and refrain from participating in such decisions.

In countries with great economic and political instability, the organizers may decide to establish offshore accounts. This could enhance the possibilities of securing the endowment's capital against inflation erosion. Alternatively, a donor might retain funds in a special escrow account pending direct project disbursement of the funds. Furthermore, many developing countries do not have adequate capital markets, and investment diversification and preservation of capital become critical concerns. If an account is established offshore, it may be easier to designate the law of a country other than the host country as the controlling law. The problem with offshore accounts is that in many countries, particularly those that have experienced significant capital flight, offshore bank accounts carry very negative connotations. However, if an offshore account is established and maintained in an open and transparent manner, this may address many of the criticisms. Securing the financial integrity of the capital offshore, while deciding on its use onshore, may not in the end be inconsistent with concerns of national sovereignty and pride. LCGs and NGOs may decide it is in their interest to have the foundation maintain an offshore account, since a government in desperate political or financial straits could be tempted to improperly use the funds.

Potential donors may be reluctant to contribute to an endowment if they believe that a foundation's priorities may change over time and not reflect the purposes for which the contribution was made. In such cases, it may be feasible to negotiate time-limited program restrictions on contributions, which would give the donor assurance, yet not negate the principle of local control. In the event the contribution is improperly used, the undisbursed funds would be returned to the donor. Such terms would be especially important to donors if they are not serving as directors, with direct input into the foundation's activities.

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<sup>27</sup> The UNDP provides investment management services for the BTF.

### 3.19 Tax Exemption

The organizers should consider seeking tax exempt status for the foundation.<sup>28</sup> Also, if appropriate under local law, gifts made to the foundation could be tax-deductible. The host government should expedite its procedures for granting tax exempt status. In some countries the percent of funding that a charitable organization receives from government sources as opposed to private sources affects its charitable status. Furthermore, a foundation will have to ensure that its grants support exempt purposes. Even though established for exempt purposes, the foundation could run afoul of tax law if its subsequent activities fail to comply with the law. If grants go to small businesses, this may effect the tax exempt status. While registration as a charity would carry some advantages, the disadvantage entails subjecting a foundation's activities to further government control.

A foundation could also seek charitable contributions from foreign sources. If the host country negotiates a tax treaty with another country, a treaty provision could provide that any contributions by the second country's taxpayers to the foundation could qualify for a deduction for tax purposes in the second country.

### 3.20 Dispute Resolution

A detailed charter and bylaws that address the issues discussed herein offers one of the best methods to avoid problems. Resolving these issues will likely prove time consuming and difficult. The organizers will face pressure to act quickly because of critical problems requiring immediate funding. The hard issues, however, should be resolved before proceeding. Given the diverse group of actors coming from different legal systems with conflicting customs, procedures and codes of conduct, the charter and bylaws take on increased significance as the mechanism to guide the foundation. Moreover, local law on nonprofit entities may not be well developed, further necessitating reliance on the charter and bylaws.

To prevent or minimize disputes between the foundation and the donors, a contribution agreement could provide for comprehensive pre-court procedures or mediation that the parties would have to exhaust before resorting to courts of law.<sup>29</sup> Furthermore, the agreement could call for binding arbitration as an alternative to the court system. Such provisions, however, may be repugnant to local law. The agreement, in addition to

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<sup>28</sup> The FPE organizers intend to register the FPE with the Bureau of Internal Revenue as a certified donee and tax exempt institution.

<sup>29</sup> The environmental framework agreement establishing the EAI Council prescribes extensive consultation procedures between the Governments of Bolivia and the United States in the event of disputes, see *infra* text at 38. The BTF first provides for conciliation and, failing that, arbitration. Arbitration would be pursuant to UNCITRAL Arbitration Rules conducted under the auspices of the International Chamber of Commerce.

providing a choice of law provision, should also have a choice of forum provision for dispute resolution. While arbitration can be expensive, it would likely prove less expensive than litigation in a court system. Providing for dispute resolution provisions, while essential, can prove politically difficult. Some parties may consider it an act of bad faith to provide for contingencies if matters go astray.

### 3.21 Start of Operations

The organizers may wish to specify that the foundation will not commence operations until the bylaws have been approved or until a minimum endowment is established.<sup>30</sup> If there is a target date by which a foundation must reach a minimum endowment and the foundation fails to meet that deadline, the MOU could provide that the donors' contributions will be returned.

## **4.0 FOUNDATION FOR THE PHILIPPINE ENVIRONMENT**

The Foundation for the Philippine Environment (FPE) has a detailed and well thought out charter and bylaws that contain many of the provisions previously discussed. Appendix A includes copies of the charter and bylaws and merits close scrutiny. The board of trustees, however, will soon amend various provisions of the charter and bylaws, so the attached documents do not represent the final structure and operational procedures. This case study will review the main provisions. In particular, the genesis of how the FPE came into existence warrants discussion because of the participatory process it represents.

### 4.1 Background

Various groups had been pursuing different environmental/development tracks, which for a variety of reasons converged and produced the FPE. Many Philippine groups wanted to establish new and innovative relationships with the donor community and NGOs in the developed countries, which would involve channeling funds directly to the growing number of NGOs working at the grassroots level. The donor community, while receptive to this idea, did not always know who and where the grassroots groups were, as evidenced by an unfortunate incident where large agro-business interests formed a front NGO and received foreign assistance funds. This incident highlighted the need to develop participatory, transparent mechanisms to identify appropriate and legitimate groups and projects.

While the above events transpired, another group of actors established a debt-for-nature program. In June 1988, the Philippine Department of Environment and Natural Resources (DENR), the Haribon Foundation -- a Philippine conservation NGO, and the World Wildlife Fund (WWF) signed a debt-for-nature swap agreement covering up to \$2 million of commercial bank debt. WWF acquired the debt, and Haribon and DENR received the local

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<sup>30</sup> The BTF will require \$20 million to achieve the level of financing required and will become operational when the endowment's initial \$10 million is raised.

currency arising from the exchange. This swap received some criticisms, since some LCGs believed that they had not been adequately consulted about projects funded by the swap that impacted on them.

During this period the donor community, led by the United States Government (USG) and the Government of Japan (GOJ), was putting together a development assistance program to help revive the post-revolution economy of the Philippines. This effort produced the \$125 million Multilateral Assistance Initiative (MAI), which began in 1991.

Philippine and U.S. NGOs vigorously stressed the need to involve Philippine LCGs and NGOs in planning and implementing MAI projects. The NGOs advocated that a significant portion of U.S. MAI funds should be devoted to the programs of LCGs and NGOs through direct grants from the United States Agency for International Development (USAID), as called for in the U.S. congressional appropriation for the MAI. The role that the Philippine and U.S. NGOs played came to be known as the quadrilateral process, since it involved the GOP, the USG, and Philippine and U.S. NGOs. The Philippine Development Forum, with offices in Washington and Manila, has come to serve as a clearing house for information and enables the NGO communities to coordinate their actions. The Philippine/U.S. NGO relationship may be somewhat unique, since many U.S. NGO personnel have worked in the Philippines and strong personal and professional ties exist.

The \$125 million MAI package ultimately included \$75 million for GOP budgetary support, \$25 million for policy studies, and \$25 million for USAID's Natural Resource Management Program (NRMP). The NRMP funds are earmarked for a debt-for-nature swap with the converted funds to establish an endowment fund for a LCG/NGO driven foundation.<sup>31</sup>

WWF signed a cooperative agreement with USAID on April 22, 1991, whereby USAID awarded WWF a \$6,133,884 grant to provide support for the establishment and endowment of an environmental foundation in the Philippines. This support entails a multi-phased program over approximately three years to: 1) execute a debt swap which will provide funds for sustainable natural resource activities 2) manage the interim grant-making program, and 3) provide technical assistance in the establishment and management of a sustainable natural resources management foundation. The grant includes \$5,000,000 for the first debt swap and \$1,133,884 for the technical assistance component.

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<sup>31</sup> Debt conversions are time consuming, complex and in many cases controversial transactions. The problems involved in executing the debt-for-nature swaps led to significant bureaucratic delay, in establishing the endowment with the converted funds. In particular, USAID's insistence that the GOP redeem the debt notes at full face value was a sticking point. However, by February 1992, the parties completed the first \$5 million tranche. In addition, the Bank of Tokyo donated \$200,000 face-value debt paper to WWF for the use of the FPE.

The USAID/WWF cooperative agreement specifies that USAID approval will be required for: 1) members of the Interim Board, 2) members of the Board of Trustees, 3) the foundation's charter, articles of incorporation and bylaws, 4) three year work/financial plan for the foundation, 5) long-term financial plan for the foundation, 6) all financial arrangements for the debt swap and the monetary proceeds, 7) any documents or agreements which transfer funds, responsibilities or authorities to the foundation. Furthermore, WWF will ensure that USAID's approval rights are preserved in any documents issued or agreements entered into under the program.

WWF subsequently signed a cooperative agreement with the Philippine NGO, the Philippine Business for Social Progress (PBSP), in December of 1991 to provide technical assistance for the establishment of the foundation. WWF and PBSP comprise the technical assistance group. WWF's collaboration with the PBSP represented an important step in forging Philippine/U.S. NGO ties. It is essential that an international NGO have a partnership arrangement with a local NGO.

Months of intense negotiations ensued among the large NGO coalitions and independent organizations, including Green Forum-Philippines (a consortium of indigenous Philippine NGOs with interests in sustainable development and environmental issues), the Caucus of Development NGOs Network (a broad consortium of community development NGOs known as CODE-NGO), church-based groups, academic institutions, DENR and USAID. These negotiations led to the establishment of the FPE interim board. The two NGO consortia represent a wide spectrum of Philippine NGO interests and were able to reach agreements acceptable to that community. Leaders from the NGO community, the Secretary of DENR, and a representative from USAID comprise the interim board. Any member of the interim board can exercise veto power. The interim board was charged with developing the charter, bylaws and grants program for the FPE, with the assistance of the technical assistance group.

The interim board first met in September 1991, and had held seven meetings as of February 1992. The primary items on the agenda were the debt swap<sup>32</sup>, drafting the charter and bylaws, developing a process for selecting the board of trustees, and developing the grants program. During November and December 1991, the first phase of a regional outreach process was conducted by the interim board and the technical assistance group to seek input on the charter and bylaws and discuss programmatic priorities and the technical details of the debt-for-nature swap. This process entailed a series of 8 nationwide consultations involving 512 representatives from 334 NGOs and 24 academic institutions based in Luzon, Visayas and Mindanao. The technical assistance group also puts out a newsletter to apprise LCGs and NGOs of FPE developments.

On January 15, 1992, the Philippine Security and Exchange Commission formally registered the FPE as a private, nonstock/nonprofit corporation. Furthermore, the FPE will be

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<sup>32</sup> The NGOs insisted that debt notes associated with the Bataan nuclear power plant not be used in the debt conversion, since they believe fraudulent practices were associated with this project.

registered with the Bureau of Internal Revenue as a certified donee and tax exempt institution. Such status will facilitate fund raising in the Philippines. The second phase of the regional outreach will entail an information campaign for project proposal solicitation and organization of regional nominating/advisory committees.

To gain a broader perspective of foundation governance, programming and management, the interim board conducted a study tour of philanthropic organizations in Washington D.C., New York City, and Chicago. The board examined such issues as: international foundation management, development of an appropriate organizational and administrative board structure, and a process for the selection of trustees which will minimize conflict of interest and susceptibility to political pressures.

#### 4.2 Purpose

In defining the purposes of the FPE there was some tension between the Philippine NGOs and the GOP and USAID. While the Philippine NGOs realized USAID could direct that the USG's \$25 million contribution could go towards natural resource management, they did not believe that USAID should dictate the FPE's overall purposes. For instance, if the FPE thought it appropriate, it should be able to make grants for urban environmental issues as long as it does not use NRMP funds. Moreover, the Philippine NGOs view the FPE as the outgrowth of a democratic process. They see the endowment as a means to empower LCGs and NGOs to understand and address all environmentally related development problems. The Philippine NGOs, nevertheless, do see biodiversity conservation as an important component of broad based environmentally sustainable development. The GOP and USAID appear to view the process as a means to enlist local NGOs in conserving biodiversity. Ultimately, the charter states the FPE's purpose in the following broad terms:

— contribute, encourage, assist, and provide technical, managerial, and financial support to non-governmental organizations, people's organizations, communities and others for environmental protection, natural resources conservation and management, and sustainable development. This will include support for wildlife and plant species management, biological diversity protection, research, sustaining and enhancing Filipino cultural practices related to sustainable resource management, and other community based sustainable development activities with the end in view of preserving and/or enhancing the natural and cultural heritage of the country.

The objectives of the FPE represent a significant expansion from the type of activities that the first debt-for-nature swap funded. The first swap provided funds to stabilize El Nido and St. Paul, two areas of unique natural significance on the island of Palawan. The activities entailed: surveying the natural area, developing a conservation plan, upgrading and increasing park administration and protection staff, educational efforts, and establishing programs to create livelihood for the local people — such as ecotourism.

### 4.3 Members, Trustees and Officers

While the charter and bylaws currently prescribe a membership structure for the FPE, this will likely be changed. This change will help maintain the FPE's autonomy and ensure that political groups or parties do not come to dominate the FPE. The type of trustees and the process for selecting trustees will also be changed. There will be a total of eleven trustees, with two trustees coming from each of the three major regions of the Philippines (Luzon, Visayas and Mindanao), one international trustee and four at-large trustees.

The LCGs and NGOs that have been active in organizing the FPE are scheduled to vote in June 1992 for regular trustees to replace the interim trustees. The new trustees will serve staggered terms of either two or three years. One of the at-large trustees will likely come from the Philippine business community. Another at-large trustee will likely come from either the Philippine Finance Ministry or the Central Bank. The Finance Ministry and the Central Bank believe that since the GOP is providing the local currency for the endowment, GOP finance representatives should have a seat on the Board. Many debt-for-nature advocates believe that involving a host country's finance representatives in the process can be beneficial since this brings these people and the environmental community together to discuss environmental financing. Furthermore, having GOP finance representatives on the board could expedite future debt conversions and facilitate fund raising with the donor community. On the other hand, extensive government involvement in the FPE could negate the objective of establishing an independent foundation.

The FPE will conduct future trustee elections differently. One of the first acts of the new trustees will be to establish nominating committees, comprised of LCGs and NGOs, in each of the three regions. Each committee will nominate four people to serve as trustees from that region. The sitting trustees will select two of the four nominees. The committees will also nominate two people for the international trustee position and eight people for the four at-large positions. The sitting trustees, however, do not have to follow the nominating committees recommendations for the international and at-large positions. After reviewing the composition and expertise of the six regional trustees, the sitting trustees will select international and at-large trustees who complement and add sectoral balance to the board.

The nominating committees will also serve as advisory committees. This will provide a participatory mechanism for LCGs and NGOs to have input into the FPE's operation.

The FPE officers shall consist of a President, such numbers of Vice-Presidents as deemed necessary, a Secretary, a Treasurer, and an Auditor. The trustees shall choose the President from among themselves and shall choose the other officers who may or may not be trustees. The President shall serve as the chief executive officer and chair the Board meetings. The bylaws specify the following duties for the President:

He/she shall execute all resolutions and/or decisions of the Board of Trustees. He/she shall be charged with directing and overseeing the activities of the (FPE). He/she

shall appoint and have control over all employees of the (FPE), and review and approve vouchers. Together with the Treasurer of the (FPE), he/she shall present to the Board of Trustees and members an annual budget and, as may be necessary, supplemental budgets. He/she shall submit to the Board as soon as possible after the close of each year, and to the members at each annual meeting, a complete report of the activities and operations of the (FPE) for the fiscal year under his/her term.

Since the President will likely have other professional responsibilities, he or she will not be able to devote full time to managing the FPE. Consequently, the Board will appoint an Executive Director to assist the President in the conduct of the FPE's daily business affairs. The Executive Director will likely prove to be key to the FPE's viability. The trustees are spending a great deal of time and effort to find the right person for this position.

#### 4.4 Accountability

An inside auditor shall examine the FPE's financial records and audit its monies. The trustees shall also designate an independent auditor to do an annual audit, which may be verified annually by the Commissioner of Internal Revenue or his duly assigned representative to ascertain if the FPE continues to qualify as a donee and tax-exempt organization.

USAID indicates that it will not require its usual accounting requirements for each grant the FPE awards. This will greatly facilitate disbursing funds at the grassroots level. In many countries small NGOs and LCGs do not work with USAID and other donors, because registration and reporting requirements are too cumbersome. As a consequence, the donors end up working with the large NGOs headquartered in the capital cities. Nevertheless, the FPE will register with USAID as a private voluntary organization in accordance with the rules and regulations governing this process.

#### 4.5 Financial Management

The bylaws limit the FPE's administrative expenses to not more than twenty percent of the total donations and twenty-five percent of the income from existing FPE assets for the taxable year. The Treasurer and President must sign every check or other instrument withdrawing money from the FPE. The bylaws provide further checks on potential abuse with provisions prohibiting certain transactions and the sharing of FPE earnings, specifically:

No member, Trustee, officer or employee, member of a committee, or a person connected with the (FPE), or any other private individual shall receive at any time any of the net earnings or pecuniary profit from the operation of the (FPE); provided, however, that this shall not prevent the payment to any person of such reasonable compensation for services actually rendered to or for the (FPE) as shall be fixed by the Board of Trustees. No person or persons shall be entitled to share in the

distribution of any corporate assets upon the dissolution or winding up of the affairs of the (FPE).

In the event that the (FPE) transacts any business with an enterprise where any member of the Board of Trustees has, directly or indirectly, a substantial interest, the Trustee concerned shall abstain from voting on any matter relating to such transaction.<sup>33</sup>

Special series Central Bank notes, with interest similar to Philippine Treasury Bills at market rates (currently around twenty percent), form the endowment. The Central Bank required investment in this particular instrument as a swap condition. Consequently, few financial management decisions will likely arise. The FPE will use the interest for grant awards and administrative expenses; however, the principal may be used upon mutual agreement of the Central Bank and WWF. The Central Bank issued the notes in WWF's name, which has fiduciary responsibility for the funds. Once the FPE establishes a track record acceptable to USAID, WWF will transfer the endowment fund notes to the FPE.

#### 4.6 Grant Recipients and Eligible Projects

The Program Development Committee developed the grants program. A maximum of \$3,000,000 pesos per year per proposal has been set for grant awards. This program will enable the FPE to establish a track record so as to gain financial independence from USAID and WWF. What a track record entails is not clear, but at a minimum the FPE must demonstrate the ability to manage a grants program.

The board prepared an operations manual specifying a detailed process for reviewing proposals and making grants. The pertinent features include:

1. The staff must accept and log-in the proposals. The staff will contact grant applicants as necessary for additional information regarding their proposals. A database will be developed to track proposals.
2. An expert advisory panel (EAP) comprised of scientists, NGO leaders, and others with expertise relevant to the FPE programmatic focus will advise the program staff as necessary on proposals requiring technical review.
3. Based on the staff/EAP review, the board will make grant decisions. The staff will screen the proposals and reject those that do not meet FPE guidelines; however, the board will receive a list of the rejected proposals.

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<sup>33</sup> This provision will be amended to state that a Trustee must also abstain from the deliberations on any matter in which the Trustee has an interest.

4. Grant eligibility will fall into two categories:
  - a. The proposal must fall within the following broad programmatic areas: conservation of biological diversity, community-based resource management, and institution building and training.<sup>34</sup>
  - b. Only bonafide organizations registered with the SEC, with a continuous track record of at least two years and some experience implementing similar or related projects will qualify for grants. Grass roots organizations, however, can qualify, even if they do not meet these criteria, if they work through an intermediary institution that does. Organizations other than FPE member organizations can have access to grants.
  
5. Program staff will make site visits to proposals greater than \$1,000,000 pesos prior to the grant award. The FPE will implement an evaluation and monitoring system wherein grants are made from July to December and follow-up/field visits are made from January to June with at least annual financial and narrative reports required.
  
6. A small action grants program, with a maximum of \$5,000 per grant, will operate continuously and award grants to attend or conduct conferences or seminars.

Before the grant proposal guidelines were even formulated the FPE received approximately 38 proposals. To date the FPE has awarded two grants totaling \$50,000, which comply with the newly formulated guidelines. One grant will fund a study on logging and the other will assist a community based natural resource management project on Mindanao involving a marine sanctuary. These grants were awarded one month after the FPE received the converted funds. The FPE has been criticized for the long time lag in becoming operational. The delay, however, results from complications with the debt conversion which were beyond the FPE's control.

#### 4.7 Analysis

The FPE offers the best example of a LCG/NGO driven foundation in the case studies. Such a foundation raises some concern over possible conflict of interests since many of the LCGs and NGOs involved with the FPE are potential grant recipients. The decision not to have a membership structure may help address this issue by enabling the FPE to act more independently. Having the FPE operate in an open and transparent manner will help avoid abusive practices. The grant award procedures should also be designed to avoid self-dealing. Furthermore, the proposal to strengthen the conflict of interests provisions in the bylaws by prohibiting a director from participating in the deliberations of a matter in which the director has an interest should be adopted.

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<sup>34</sup> While this is a criteria for projects funded by the NRMP, the FPE may adopt broader criteria for other FPE funds.

USAID insists that the FPE will have to establish a track record before releasing the endowment to the FPE. While there are merits to this policy, USAID should specify the criteria with which the FPE must comply in order to establish a track record.

The process of organizing the FPE has been a long and at times contentious process. Nevertheless, this foundation demonstrates that LCGs and NGOs can constructively work together among themselves and with government and donors. Moreover, this collaborative process can serve as an impetus for promoting democratic values and political pluralism in Philippine society. The FPE has already served to bring high level representatives from the donor community and the GOP together to meet with representatives from LCGs and NGOs who otherwise probably would not have met – let alone work together. The FPE warrants tracking as its structure and operations evolve and mature.

## **5.0 BOLIVIA'S NATIONAL FUND FOR THE ENVIRONMENT**

The Government of Bolivia (GOB) faced two critical problems in advancing its environmental agenda: the absence of mechanisms and institutions to coordinate and manage environmental programs, and inadequate internal financial resources. In regards to financing, bilateral and multilateral funds now provide an important funding source. To address coordination and management problems, the GOB established the Fondo Nacional para el Medio Ambiente (FONAMA) or National Fund for the Environment, pursuant to Supreme Decree No. 22674 of December 12, 1990. FONAMA will raise and manage funds, and coordinate the activities of the implementing agencies. The Ministry of Planning and Coordination and USAID supplied the initial funds to establish FONAMA.

FONAMA works closely with the General Secretariat of the Environment (SEGMA)<sup>35</sup>. In January 1991, SEGMA initiated the Bolivian Environmental Action Plan (PAAB)<sup>36</sup>, with financial assistance from the USG's P.L. 480 program<sup>37</sup>, the World Resources Institute, the German Government, and pledges from the Dutch Government. The PAAB will establish a permanent planning process that incorporates the participation of all sectors of the population through regional workshops. The PAAB will define policies and priorities and produce a constantly reviewed environmental action plan independent of whether resources are available to fund programs and projects.

FONAMA will use the PAAB to identify select projects, then raise and manage funds for these projects. This puts FONAMA in a proactive, rather than reactive position when

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<sup>35</sup> Secretaria General del Medio Ambiente (SEGMA)

<sup>36</sup> Plan de Accion Ambiental de Bolivia (PAAB)

<sup>37</sup> The P.L. 480 program provides for long-term concessional financing of export sales of agricultural commodities with repayment in local currency.

working with the donor community. FONAMA can use the PAAB, which responds to Bolivia's national priorities and objectives, to help donors select a project that the donors would like to fund. Thus, the GOB's environmental activities are not donor driven.

As a precursor to the PAAB, FONAMA and SEGMA produced a document titled, "Policies and Actions," which defines a national environmental agenda. The environmental priorities fall in two broad categories: environmental management and support areas for the development of an environmental agenda. The environmental management category identifies the following programmatic areas: land use planning, natural resource management, conservation of biodiversity, and environmental quality. The support area category aims at developing the capacity of government and private organizations to advance an environmental agenda through the following actions: establishing social participation mechanisms, promoting the institutional development of the State, strengthening the legal and regulatory framework, designing and implementing formal and non-formal education programs, increasing the technical and scientific capacity of all organizations involved in environmental activities, and formulating and advancing international policies.

### 5.1 Structure and Operating Procedures

FONAMA will provide technical, administrative and fundraising functions. The administrative function will entail tracking the progress of each project and reporting to the donors. The technical function will entail providing assistance in the design, implementation, evaluation and financial management of a project. Small teams of professionals, supported by consultants as needed, will carry out these functions. These teams ensure programmatic coherence to the projects and activities.

FONAMA provides an umbrella structure comprised of various accounts, each with different characteristics and objectives. This structure is designed to enable FONAMA to operate in a flexible manner. For each contribution, FONAMA will establish an account with its own administrative council. The structure for an administrative council consists of FONAMA as the fiduciary agent, SEGMA as the agency responsible for advancing a national environmental agenda, the donor, and the implementing organizations (both government and nongovernment). An administrative council's duties are as follows:

1. formulating annual operating plans for each of the projects financed by that account,
2. formulating disbursement schedules for each of the projects,
3. performing technical and financial follow-up for each of the projects,
4. performing internal evaluations of each of the projects,
5. submitting technical and financial reports to FONAMA's directors.

The account structure will assure the donors that the programs they fund will advance in a coordinated fashion and that the different accounts will be managed separately, with the participation of the donors and the implementing organizations. The Enterprise for the Americas Initiative account, established by the GOB and the USG, provides one example of how this account structure will operate. This account will be examined in detail in a subsequent case study.

FONAMA will provide a ready pool of talent on which the various accounts can draw. This avoids the necessity of establishing a new institution to account for and manage the funds if a donor makes a large contribution. The FONAMA staff is not expected to exceed twenty people. In order to attract quality people FONAMA will pay salaries competitive with the private sector. No cap has been set to limit FONAMA's administrative expenses to a specified percent of its revenue.

FONAMA's current board of directors consists of: the Minister of Agriculture and Rural Affairs, as its chairman; the Secretary of the Environment; the Minister of Planning and Coordination; the Minister of Finance; the Executive Director of the League for the Defense of the Environment (LIDEMA)<sup>38</sup>; the Executive Director of the Friends of Nature Foundation (FAN)<sup>39</sup>; the President of the Indigenous Confederation of the Eastern Lowlands (CIDOB)<sup>40</sup>; and the Executive Director of FONAMA.

A new environmental law, however, will change the board's composition to seven members. The national government will have three representatives and the Secretary General of the Environment will chair the board. Three regional representatives will serve on the board to facilitate greater access to regional organizations in the decision-making process. The environmental councils will supply the regional representatives. Each of Bolivia's nine departments has an environmental council, comprised of representatives from government, the business community, LCGs and NGOs. FONAMA's three regional representative

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<sup>38</sup> Liga de Defensa del Medio Ambiente (LIDEMA) is an umbrella organization with the following members: Institute for Ecological Studies, National Museum of Natural History, Beni Biological Station, Bolivian Wildlife Association (PRODNA), Conservation Data Bank (CDC), Interdisciplinary Community Studies Center (CIEC), Center for Ecological and Integrated Development Studies (CEEDI), Bolivian Andean Club, Bolivian Ecological Society (SOBE), Bolivian Society of Landscape Architects (SAPBOL), Institute for Research on the Greater Capacity in the Use of Soil (CUMAT), Appropriate Technologies Multiple Services (SEMTA), Eastern Region's Ecological Association (ASED), Friends of Nature (FAN), Noel Kempff Mercado Natural History Museum, Conservationists Association of Toronto.

<sup>39</sup> Fundacion Amigos de la Naturaleza (FAN) is the principal implementing organization of the USAID funded Parks in Peril Program and a partner organization of the U.S. based NGO, The Nature Conservancy.

<sup>40</sup> Confederacion Indigena del Oriente Boliviano (CIDOB) is a confederation of indigenous organizations of the eastern lowlands.

positions will likely be rotated among the nine departments. An NGO representative will serve as the seventh member.

The board will refrain from managing specific accounts, which is the responsibility of each administrative council. The board's functions are to: ensure that FONAMA's programs meet national priorities and objectives, approve the establishment of new accounts, and approve FONAMA's operating budget.

## 5.2 Analysis

FONAMA's use of the PAAB as a blueprint for activities to be funded insures that the environmental activities of many organizations are consistent with national policies -- a valid government concern. An issue warranting further study is the mechanisms and procedures that the PAAB follows to ensure public participation. A process providing for meaningful consultation can address many concerns that LCGs and NGOs may have. While providing regional representatives on FONAMA's Board represents a positive step, the elimination of two of the NGO positions raises some concern.

FONAMA cannot act completely autonomously from the government, since FONAMA is a quasi-government agency. The question thus arises as to whether FONAMA will be able to take a long term, independent approach to environmental issues. Since FONAMA raises funds and is not dependant on the GOB for funds, FONAMA does not have to worry about GOB budget austerity measures. However, if future governments lack a strong commitment to environmental protection and natural resource management, FONAMA may not survive political transitions.

The funds FONAMA raises appear to be targeted primarily toward government programs or projected programs, since FONAMA follows the PAAB. Certainly a legitimate objective, but the funds might not go for innovative activities. A tension could exist in the FONAMA structure between funding existing government programs and funding new and innovative programs. FONAMA appears to have the flexibility to address this concern, as demonstrated by the Enterprise for the Americas Initiative (EAI) account. This account should be tracked to determine the extent to which the EAI administrative council can act independently from the GOB, and to what extent the GOB tries to control NGOs and give the state some measure of input in the distribution of external resources to NGOs.

FONAMA has yet to establish bylaws, so the instant case study is not able to provide specific details on FONAMA's operating procedures. Moreover, since FONAMA is not fully operational, there is no track record to examine. This highlights a problem that FONAMA and similar institutions face in an effort to become operational -- they have to do everything at once.

## **6.0 BOLIVIA'S ENTERPRISE FOR THE AMERICAS INITIATIVE ADMINISTRATIVE COUNCIL**

The environmental component of the Enterprise for the Americas Initiative (EAI) represents an attempt by the USG to promote government/NGO foundations. This case study will review the EAI legislation and the Environmental Framework Agreement (EFA) signed by the USG and the GOB. The USG/GOB EFA provides examples of the implementation of the EAI environmental component and a FONAMA Administrative Council account. Appendix B includes a copy of the USG/GOB EFA.

### **6.1 Funding**

The EAI legislation, which the U.S. Congress passed in the Fall of 1990, authorizes the USG to restructure the P.L. 480 Food for Peace debt for eligible Latin American and Caribbean countries (host countries). These debts will be reduced and the interest on the new obligations may be paid in local currency into an environmental fund managed by government/NGO consortia.

The GOB and the USG entered into an EAI bilateral debt reduction agreement on August 22, 1991, which reduced Bolivia's P.L. 480 debt by 80 percent from approximately \$38.4 million to about \$7.7 million. The restructured debt will be paid over 15 years and will bear interest at 3 percent per annum. The GOB will make local currency interest payments to FONAMA.

Simultaneously with the P.L. 480 debt agreement, the GOB and the USG agreed on the complete cancellation of approximately \$341 million in Foreign Assistance Act debt that Bolivia owed. This debt reduction was carried out pursuant to 22 U.S.C. Sec. 2151v, which gives the U.S. President authority to forgive debt owed to the USG by any "relatively least developed country." Although the Act does not require an environmental component, the GOB agreed to issue an environmental bond in the local currency equivalent of \$17.2 million. FONAMA will receive principal and interest in semiannual installments equivalent to \$1 million for ten years. The two transactions eliminated 10.22 percent of Bolivia's total external debt and 83 percent of its debt to the USG.

### **6.2 Economic Conditionality**

The EAI legislation specifies that a country will qualify for debt relief if it complies with four stringent requirements. These requirements include having in effect or having received approval for, or, as appropriate in exceptional circumstances, be making significant progress toward the establishment of International Monetary Fund and World Bank macroeconomic reform programs. A country must also have placed in effect major investment reforms in conjunction with an Inter-American Development Bank loan or, otherwise, be implementing, or making significant progress towards an open investment regime. Finally, a country must,

if appropriate, have agreed with its commercial bank lenders on a satisfactory financing program, including, as appropriate, debt or debt service reduction.

Based on ideological grounds and concern over the social and environmental impact of International Monetary Fund and World Bank macroeconomic reform programs, many Latin American NGOs oppose the EAI because of the link with these reforms. Despite these objections, many Bolivian NGOs decided to participate in the EAI program since Bolivia already qualified for debt reduction and did not have to undertake any new economic reforms. Furthermore, they preferred to see interest payments used in Bolivia rather than paid to the USG.

### 6.3 Members

The EAI legislation gives specific and important roles to NGOs in the host countries. The EFAs, which the USG and the host countries will enter into pursuant to the EAI legislation, require that the host country make prompt disbursements from the Environmental Fund to an Administering Body (Body). The Body must be composed of representatives from the USG, the host country government, and representatives from a broad range of environmental and local community development nongovernmental organizations of the host country. A majority of all the members of a Body must be "local representatives from nongovernmental organizations, and scientific or academic bodies." Governments are thus prevented from dominating the EAI programs.

The GOB/USG EFA provides that the EAI Administrative Council (Council) shall consist of seven members. The Secretary General of the Environment and the Executive Director of FONAMA represent the GOB. The director of the USAID mission in Bolivia represents the USG. The EFA specifies that the private sector members will be "four representatives from a broad range of Bolivian environmental and local community development nongovernmental organizations, and scientific and academic bodies, proposed by the (GOB) in consultation with these groups. These representatives shall be approved jointly by the (GOB and USG), appointed by the (GOB), and shall constitute a majority of the Council." While the GOB and USG members serve at the discretion of their respective governments, the private sector members shall serve three year terms and may serve consecutive terms.

The selection process for the private sector members warrants particular attention. FONAMA and the Bolivian NGO Liga de Defensa del Medio Ambient (LIDEMA) were instrumental in convening a conference of Bolivian NGOs to discuss the EAI and select representatives. Approximately 230 NGOs were invited and 68 attendees who ultimately selected four representatives to serve on the EAI Council. This meeting provided an opportunity for the NGOs to not only elect representatives, but to work through their reservations about working with the GOB and participating in the EAI. In future meetings the NGOs will need to define their representatives' functions.

#### 6.4 Oversight, Monitoring and Reporting Requirements

The EAI legislation specifies that a Body will manage and oversee activities supported by the environmental fund, be subject to annual independent audits, and report annually on its activities. The EFA contains several provisions, which implement this directive.

The EFA provides that the Council shall review grant assistance proposals to determine compliance with the objectives of the EFA and approve work plans and disbursement schedules for funded projects. Grant agreements shall provide for at least annual progress reports from the grantees to the Council and FONAMA. Such reports will review all project components essential to the successful achievement of the goals of the project. The Council will receive and certify FONAMA's programmatic and financial evaluations of each project and decide if independent evaluations and audits of individual projects are needed. Furthermore, the Council, with FONAMA's assistance, will present to the GOB and the USG annually:

1. a proposed annual program, by October 1, covering the following Bolivian fiscal year (January 1 - December 31);
2. an annual report on the activities funded by the (EAI) account during the previous Bolivian fiscal year, which shall include on-going multi-year projects, by April 1;
3. an annual financial audit by an independent auditor covering the previous Bolivian fiscal year, by April 1.

#### 6.5 Administration

Unless the GOB and the USG decide otherwise, the expenses associated with administering the EAI account shall not exceed ten percent per annum of the GOB's annual payments. FONAMA has the responsibility for preparing a budget for these administrative expenses, which the Council and the representatives of the GOB and USG must approve. During the fiscal year, FONAMA will manage these funds to cover all its expenses (staff, equipment, and operations) and those of the Council associated with the operation of the EAI account. FONAMA shall retain the Council's organizing statutes, written policies, operating procedures, minutes of meetings, and reports. In addition, a permanent record of the Council's decision criteria used to award grants shall be maintained. FONAMA will keep the above records current and open for public inspection.

The EFA provides that FONAMA shall promptly review grant disbursement requests from the grantees and make timely disbursements pursuant to respective grant agreements. FONAMA's review is intended to insure the technical viability of the project.

## 6.6 Purposes and Activities

The EAI legislation specifies that a wide range of environmental and sustainable development activities are eligible for local currency grant awards. The eligible activities, which are adopted verbatim in the EFA, are:

1. restoration, protection, or sustainable use of the world's oceans and atmosphere;
2. restoration, protection, or sustainable use of diverse animal and plant species;
3. establishment, restoration, protection, and maintenance of parks and reserves;
4. development and implementation of sound systems of natural resource management;
5. development and support of local conservation programs;
6. training programs to strengthen conservation institutions and increase scientific, technical and managerial capabilities of individuals and organizations involved in conservation efforts;
7. efforts to generate knowledge, increase understanding and enhance public commitment to conservation;
8. design and implementation of sound programs of land and ecosystem management;
9. promotion of regenerative approaches in farming, forestry, fishing and watershed management;
10. agriculture-related activities, including those that provide for the biological prevention and control of animal and plant pests and diseases, to benefit the environment;
11. local community initiatives that promote conservation and sustainable use of the environment.

## 6.7 Grant Awards

Grants from the Environmental Fund are primarily for local NGOs, including environmental, conservation, development, educational, indigenous peoples organizations, and other appropriate local and regional entities. Only in "exceptional circumstances" can the host government receive a grant award. The U.S. House of Representatives Report accompanying the EAI legislation elaborates on this provision by explaining that the host

government can receive funding for a project where new or small local NGO capacities are too limited for the purpose. The EFA reflects this language and specifically directs the Council to give priority to projects that are managed by NGOs and that involve local communities in their planning and execution.

Pursuant to the EAI legislation, the EFA directs that the GOB and the USG have veto power over any grant with life-of-project total in excess of \$100,000. This veto power should not lead to significant government interference if the grants are relatively small — as envisioned.

The EFA addresses the NGO conflict of interest issue that could arise in the grant awards process by stating that:

A Council member may not participate in the discussion or approval of any proposed grant which, if approved, would result in a financial benefit for the member, any member of his family, or an organization in which the member or any member of his family has a direct financial interest. Further, a Council member may not participate in the discussion or approval of any proposed grant to an organization which the member represents.

Grants shall be awarded to organizations on the merits of proposals presented to the Council, without regard to whether the proposing organization is represented on the Council.

#### 6.8 Dispute Resolution and Termination

Either the GOB or the USG may invoke consultation procedures concerning the Council's reports and audits, or the implementation or interpretation of the EFA. Consultations shall take place sixty days after the second party receives the written consultation request. Furthermore, the GOB and the USG may amend the EFA by an exchange of diplomatic notes.

If either party determines that consultation failed to resolve an issue, that party will notify its Council representatives and the other party in writing. The GOB, upon sending or receiving such written notification, shall notify FONAMA to suspend disbursements. If the GOB fails to suspend disbursements within ten working days of receiving written notification from the USG, the USG may require that interest payments on the debt be made in dollars to a USG account.

Either party may terminate the EFA upon six months written notice to the other party. The GOB and the USG will then determine the disposition of the amounts. At the discretion of the USG, this disposition will entail making interest payments in dollars to a USG account.

## **6.9 Analysis**

The NGO recruitment process for the FONAMA EAI Council provides valuable lessons. FONAMA and LIDEMA experienced a number of problems in convening the meeting to select the private sector representatives. Initially, a lack of money to notify the Bolivian NGO community of the EAI meeting and to host the meeting presented a problem. Although the EAI will eventually provide funds, these funds were unavailable at this critical time and FONAMA lacked other funds. The World Resources Institute, a Washington based NGO, ultimately provided a grant to initiate the process. Consequently, foundation organizers need to consider from whence the seed money will come to begin the organization process.

FONAMA felt pressured to establish rapidly the EAI Council. Consulting with LCGs and NGOs represents a time consuming, labor intensive process and foundation organizers should not have to work under unrealistic time deadlines.

For a variety of reasons many NGOs did not receive notice of the meetings. While there were some radio and television announcements, more would have been helpful so as to reach all parts of the country. Furthermore, FONAMA and LIDEMA lacked accurate, current mailing lists for the NGOs. FONAMA asked those NGOs that attended the meeting to supply names and addresses for other NGOs who should be contacted in the future. Governments, LCGs and NGOs must work together to compile mailing lists and update them constantly. A final problem was that many NGOs were prevented from coming because of the distance and lack of funds.

As was mentioned in the FONAMA case study, the EAI account warrants tracking to determine the extent to which the EAI Council can act independently from the GOB. In addition to implementing select projects, the EAI presents an opportunity for LCGs and NGOs to be involved in the design and execution of programs, and to be held accountable for their actions.

## **7.0 BHUTAN TRUST FUND FOR ENVIRONMENTAL CONSERVATION**

The Royal Government of Bhutan (RGOB) in collaboration with the World Wildlife Fund (WWF) and the United Nations Development Programme (UNDP) established the Bhutan Trust Fund for Environmental Conservation (BTF) pursuant to a Memorandum of Agreement (MOA) signed in March 1991. Appendix C contains a copy of the MOU.

### **7.1 Management**

A five-member Management Board composed of three representatives from the RGOB, one from WWF, and one from UNDP manages the BTF. The Board members must vote unanimously to expand the Board. The RGOB selects the Chairperson from among its appointed members. The Bhutanese representatives are drawn from the National Planning

Commission, the Ministry of Finance and the Royal Society for the Protection of Nature. The latter organization is the only conservation NGO in Bhutan and is closely associated with the government.

All decisions require a vote of four-fifths of the Board members. The RGOB's three votes effectively gives it veto power over all decisions, but also means that nothing can be decided unless at least one of the two other board members – UNDP and WWF – also agree. The UNDP Board member represents the interests of all the bilateral and multilateral donors. The Board meets at least once a year to decide on project activities, hire and discharge the Programme Manager and other personnel, review the BTF's financial condition, approve a budget, and prepare an annual report.

Existing RGOB institutions provide project management and administration. Responsibility for project execution rests with the RGOB, with a minimal number of short-term expatriate consultants. WWF and a Technical Advisory Board of suitably qualified technical specialists provide technical support. The RGOB may entrust the implementation of individual project activities to one or more suitable, qualified and competent governmental or non-governmental agencies or institutions. However, the RGOB has yet to designate any LCGs or NGOs to help implement activities.

## 7.2 Purposes and Activities

The MOA outlines a program for environmental conservation, which consists of the following types of activities:

- (a) training of foresters, ecologists, natural resource managers and other environmental professionals and managers;
- (b) surveys of Bhutan's biological resources and development of an ecological information base;
- (c) review of the protected area system, establishment of new protected areas and development and implementation of management plans;
- (d) institutional support for the National Environmental Committee, Department of Forestry, the Royal Society for the Protection of Nature, and the Research and Nature Study Center;
- (e) environmental education in the schools and public awareness campaigns; and
- (f) projects integrating conservation and development.

While all of the above listed activities could have a positive impact on conserving biological diversity, the BTF's income is too limited to support all these activities. The Board

consequently decided that over the next five years the primary focus of proposed program activities will be:

- (a) upgrading and strengthening the Wildlife Division's capacity to plan and manage a national protected areas system and associated wildlife resources, and to establish a means for monitoring changes in biological diversity;
- (b) establishing a national system of protected areas including classification of protected areas into different protection categories, prioritizing of protected areas for management, and issuing official notification concerning the establishment of priority protected areas;
- (c) strengthening the management of two existing priority protected areas including additional staff, training, infrastructure development, and developing a management plan;
- (d) developing and implementing a model management plan for a priority protected area.

### 7.3 Financial Management

The BTF is a separate legal entity under the administration of the UNDP's Trust Fund Department in New York and enjoys all the privileges of exemption from taxation that the UNDP itself enjoys. The BTF operates under the UNDP financial rules, regulations and procedures.

The Global Environment Facility has committed to make two tranches totalling \$10 million, the Government of the Netherlands and WWF have each contributed \$1 million, and a number of other donors are expected to contribute to the BTF. The BTF will require \$20 million to achieve the level of financing required, which, conservatively invested, should yield at least \$1 million a year. The BTF will become operational when the initial \$10 million of donor commitments are available.

Donors can make their BTF contributions to the UNDP. Contributions can be made either in cash or by an irrevocable standby letter of credit, payable in fully convertible currency or in any other currency which the UNDP determines can be readily utilized. Contributions may only be accepted in amounts of or in excess of the equivalent of \$1 million until the initial \$10 million target is reached.

Each year, the RGOB will contribute matching funds in local currency or in kind equivalent to ten percent of the BTF's disbursements that year, over and above its current level of funding for environmental programs. The BTF will thus complement and strengthen the RGOB's commitment and capacity for conservation and not weaken its effectiveness by substituting external assistance for internal responsibilities.

The MOA includes a noteworthy covenant, which states that the RGOB will permanently maintain Bhutan's forest cover at its current percentage of the country's area and to preserve approximately twenty percent of the country as national parks or reserves. If forest cover falls more than two percent below the existing amount, the RGOB agrees to spend whatever additional sums of money are required to bring Bhutan's forested area up to the agreed percentage. While such a covenant may appear to infringe Bhutan's sovereignty, the Bhutanese requested the covenant in order to bind future Bhutanese Governments. This covenant poses tremendous compliance and monitoring difficulties. The Board, consequently, has indicated that failing to comply fully with this covenant would not be a basis for dissolving the BTF — unless changes in policy or practice seriously threaten forest cover and the protection of biological diversity.

The RGOB will keep detailed records of all transactions and make direct payment to contractors on behalf of the BTF, and the UNDP will advance funds on a regular basis based on the approved annual budget established by the Board. The RGOB will provide the UNDP with proper accounts, records, and documentation as to the use of the funds advanced by the UNDP. The BTF is subject to the internal and external auditing procedures provided for in the financial regulations, rules and directives of the UNDP.

The UNDP will provide accounting services priced at 3 percent of expenditures up to \$500,000 a year and 2.5 percent of expenditures for amounts in excess of \$500,000. The UNDP also will provide investment management services for a fee of 0.3 percent of the first \$10 million principal, and 0.2 percent of the next \$10 million, and 0.1 percent of amounts over \$20 million, based on average portfolio holdings, on an annual basis, and charged directly to the BTF. For instance, if the BTF's assets total \$20 million and the annual expenditures total \$1 million, the UNDP would charge \$77,500 a year for accounting and financial management services. The UNDP, however, will waive such charges for the first three years.

A portion of the annual income earned by investment of the BTF principal will fund project activities, with the other portion reinvested in order to hedge against inflation and to maintain or increase the real value of the principal. The Board must vote unanimously in order to invade the principal and at no time may the value of the principal be reduced to less than \$10 million.

Any of the parties may terminate the BTF by withdrawing from the MOA. If terminated, the UNDP has the responsibility for wrapping up the BTF's affairs. The assets remaining in the BTF will be distributed to the donors in proportion to the payments made by them pursuant to the MOA. The MOA also provides for dispute resolution procedures. The parties will first pursue specified conciliation procedures and failing that, the parties shall proceed to binding arbitration.

## 7.4 Analysis

The BTF provides a very simple structure, since it will work with existing institutions and have a very small administrative staff. Also, the BTF has the most narrowly focused objectives of any of the mechanisms examined. While one indigenous NGO does sit on the Board, the BTF does not provide an explicit role for indigenous LCGs and NGOs. The Board and the RGOB could seek to provide opportunities for LCGs and NGOs to not only implement projects but also design and evaluate projects. Bhutan, however, may be a unique case since the country may not have as extensive an NGO community as found in other countries.

Requiring unanimous consent to expand the Board, and only accepting contributions of \$1 million initially, serves to restrict the number of parties that can be involved in the BTF. While other donors could conceivably serve on the Board, the concept of having the UNDP represent the interests of other potential donors is noteworthy. Just as LCGs and NGOs need to coordinate their policies and actions – so should the donors.

The BTF addresses several legal issues in a novel manner. The termination and dispute resolution provisions address possible donor concerns regarding inadequate management. The BTF also offers an example of how a trust can be effectively utilized, since the trust is established off-shore and uses UNDP trust law. In other countries, however, potential foundation participants may be unwilling to adopt UNDP trust law.<sup>41</sup> The provision mandating the forest cover maintenance demonstrates how a country's environmental and natural resource management policy can be coordinated with a foundation's programs. Such conditionality is more palatable when the public participates in formulating the country's environmental and natural resource policies. Nevertheless, the novel provisions in the BTF may not be appropriate in other countries.

## 8.0 CONCLUSION

This paper examines many of the legal and institutional issues that should be addressed in establishing a foundation. The generic discussion of charter and bylaw provisions and issues in section 3 and the case studies demonstrate how creatively and flexibly foundation mechanisms can be designed. Nevertheless, even brilliantly drafted charters and bylaws will prove ineffectual if the people in a country do not want such a foundation and if they are not prepared to work together. This must be a demand driven initiative.

Foundations potentially provide an effective mechanism for managing natural resources and protecting biodiversity, by incorporating diverse interests into the design and implementation of innovative and experimental projects. Foundation-like mechanisms are operating or being

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<sup>41</sup> The author did not examine UNDP trust law and cannot comment on its adequacy.

developed in Belize, Bolivia, Bh utan, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Jamaica, Madagascar, Mozambique, Panama, Papua New Guinea, Peru, the Philippines, Puerto Rico and Tuvalu. However, there is still a substantial learning curve as adjustments and innovations are formulated. To enhance the understanding of the issues, foundations should be tracked and assisted as needed, as they evolve and mature.

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