
International Economic Law Clinic

CORPORATE MODELS FOR MAXIMISING BENEFITS FROM RESOURCE AND INFRASTRUCTURE PROJECTS IN DEVELOPING COMMUNITIES

21 March 2017, Geneva

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Executive Summary

The present report provides a comparative analysis of corporate models frequently used for social development purposes for the benefit of economically disadvantaged and marginalized communities. The objective of this analysis is to identify workable models through which economic and social benefits derived from resource and infrastructure development projects can be transparently held in perpetuity and equitably delivered to a specifically identified community in a developing country.

The report considers Sovereign Wealth Funds (“SWFs”), Trusts, Foundations and Community Interest Companies (“CICs”) as potential models that could be adopted or tailored to suit the above-stated objectives.

SWFs are established by states to hold vast public assets, invest them in foreign financial instruments and use the returns thereof for domestic financial and development purposes. The report examines the types, legal structure and governance regimes of SWFs and highlights the fact that private entities cannot set up an SWF, but may advocate for its establishment which would require legislative or administrative action. Nevertheless, the governance principles applied by SWFs for ensuring transparency and accountability may still serve as useful guidelines for any corporate model with the above objectives.

The report then considers trusts and foundations as suitable corporate structures, given that they are frequently set up to hold assets for the benefit of an identified community. Specific examples of trusts in New Zealand, South Africa and Canada are examined to determine how they have been constituted and used to create and distribute wealth within the communities concerned. Based on this examination, trusts and foundations appear to be flexible and adaptable vehicles for attaining community development objectives, particularly owing to the high level of community participation that they allow for and also to the fact that they may freely be established by private initiative.

Lastly, we review CICs, a unique type of company established under English law. CICs operate as regular limited liability companies engaging in standard commercial activities but with an additional legal requirement to pursue social purposes which are set out in their constitutive documents. The key attraction of CICs is the asset-lock feature, which ensures that a defined proportion of a company’s assets is safeguarded

and retained for carrying out its stated social objectives. This feature is generally set out in enabling legislation, but may also be incorporated into a company's constitutive documents, in the absence of such legal framework.

The conclusion that can be drawn from the overall analysis is that there is no 'one size fits all' model for projects of this nature. Any model to be applied will need to be tailored to the specific contextual elements of any given project. With this caveat in mind, the report seeks to enable any interested party to make an informed choice by presenting potential options and discussing their suitability for any project with such objectives.

1. Introduction

This report is intended to be a useful guide for development agencies and professionals who, in the course of their work, are required to establish or recommend corporate vehicles which are capable of being used to hold assets for and distribute wealth to local communities. It aims to provide a review of potential corporate models that will allow funds obtained from multiple natural resource and infrastructure development projects in a developing country to be held and used for the long-term benefit of a specific community.

Section 2 explores the suitability of Sovereign Wealth Funds (“SWFs”) as a special purpose vehicle to serve benefit-sharing and development objectives. We examine them on the basis of their structure and governance. We also include a comparative analysis of SWFs in a number of jurisdictions as practical illustrations, and conclude with a summary of the salient features of SWFs.

In Sections 3 and 4, we analyse a number of privately-owned structures that have been used to hold funds with the objective of empowering local communities, namely, trusts, foundations and community interest companies. We highlight the legal attributes and governance frameworks of each of these structures and examine how they have been used to achieve community development goals.

2. Sovereign Wealth Funds

2.1. Introduction

SWFs are special purpose investment vehicles, established, funded and owned by the government in order to achieve various national macroeconomic and financial purposes. In essence, SWFs are pools of public funds that are commonly funded out of surplus foreign currency reserves or receipts from commodity exports.¹ Through SWFs, these state funds are generally invested in foreign financial instruments for multiple reasons, such as the diversification of assets and stabilization of increased long term investment returns.²

Although they are not a novel phenomenon, SWFs have attracted increased attention in recent years, have expanded in number³ and are widely perceived as core players in global financial markets. The growing interest in SWFs as special purpose investment vehicles stems, to a great extent, from their impressive asset accumulation: it is estimated that the value of total assets managed by SWFs today is approximately USD 7.39 trillion⁴ and some analysts have predicted that, by the end of the decade, the total assets under their management will reach \$13.4 trillion.⁵ Countries as diverse as Norway, Timor-Leste, Kuwait and Singapore have long established their own funds and the fact that the assets held by just these four SWFs combined are valued at around USD 1.8 trillion may be taken to suggest a link between the establishment of a SWF and a state's financial success, irrespective of its level of development or form of government.

¹ IWG, Generally Accepted Principles and Practices (GAPP) - Santiago Principles, p.27

² Narjess Boubakri, Jean-Claude Cosset and Jocelyn Grira, 'Sovereign Wealth Funds Targets Selection: A Comparison with Pension Funds' (2016) 42 *Journal of International Financial Markets, Institutions and Money* 60, p.71; Guanglong Shi, *Sovereign Wealth Funds: Governance and Regulation* (Schulthess 2013), pp.22-25.

³ Twenty new SWFs have been established since 2000, with 12 of them after 2005. See Gerard Lyons, 'State Capitalism: The Rise of Sovereign Wealth Funds' (2008) 14 *Law and Business Review of the Americas* 179.

⁴ As estimated by the Sovereign Wealth Fund Institute, with figures quoted therein being from official or publicly available sources on SWFs and with the total figures rounded to the nearest tenth. See <<http://www.swfinstitute.org/sovereign-wealth-fund-rankings/>>, accessed 06 March 2017.

⁵ Lyons (n.3), p.5.

SWFs possess diverse characteristics in different countries: they differ in funding sources, legal and governance structures adopted, policy objectives, investment strategies, as well as in their levels of transparency and public accountability.⁶ Despite this diversity, SWFs generally share five hallmark features: SWFs (i) are owned by the government, (ii) are funded by sovereign assets, (iii) typically invest in foreign financial assets, (iv) are created to serve special national objectives and purposes and (v) are managed separately from the state's official reserves.

2.2. Understanding Sovereign Wealth Funds

SWFs are typically owned, established and controlled by the government or a government-related entity.⁷ Most SWFs are set up by the central government, while few are established by regional or sub-national governments. An example of the latter category is the Abu Dhabi Investment Authority, established and owned by the Emirate of Abu Dhabi.

The legal basis of SWFs and the form in which they are established varies significantly from country to country. SWFs are often set up by specific legislation and, in a few cases, by the country's constitution. In general, the relevant legislation clearly sets out the fund's economic and financial policy objectives, along with the specific legal form and structure of the SWF and its relationship with other state bodies (for example, the Ministry of Finance or the Central Bank).

Generally, an SWF can be established: (i) as a separate entity, with its own legal personality and enjoying full autonomy from the state regarding its capacity to act;⁸ (ii) as a state-owned corporation, which has a distinct legal personality, but whose control is exercised by the state or a state body, typically the Ministry of Finance;⁹ or (iii) as a pool of assets without a separate legal personality, owned and controlled by a country's Ministry of Finance and operationally managed by its Central Bank or a

⁶ Shi (n.2), p.12; Simone Mezzacapo, *The so-called 'Sovereign Wealth Funds': Regulatory Issues, Financial Stability and Prudential Supervision* (European Commission, Directorate-General for Economic and Financial Affairs 2009), p.8.

⁷ Shi (n.2), p.12.

⁸ The SWFs of Australia, Kuwait and New Zealand are examples of this type of entity.

⁹ Singapore's Temasek is an example of such a fund.

statutory management agency.¹⁰ It is common for the constitutive laws, company laws, and budget laws that set up SWFs to be publicly disclosed and available. In cases where the SWFs are established as pools of assets, the management agreement between the Ministry of Finance and the Central Bank is also publicly disclosed.¹¹

The Timor-Leste Petroleum Fund – Timor-Leste

The Timor-Leste Petroleum Fund (“TLPF”) is considered by international financial institutions to be a good example of an SWF set up to manage petroleum resources in a fragile or post-conflict setting. Established by a law in 2005, the objectives of the TLPF are to manage petroleum resources for the benefit of the current and future generations. The TLPF is not formed as a separate legal entity, but as an account of the Ministry of Finance designed to receive petroleum revenues and held in the Central Bank of Timor-Leste; the Central Bank then invests those resources abroad with the help of external investment managers.

In terms of governance, the law establishing the TLPF sets out the following governance arrangements: (i) the Central Bank has operational responsibility for the fund; (ii) the government has overall responsibility for the fund and sets out the overall policies; (iii) transfers from TLPF to the budget are approved by parliament; (iv) an investment advisory board appointed by parliament advises the government on investment strategies; (v) an advisory council consisting of former government leaders advises parliament on the performance and operation of TLPF; and (vi) regular auditing and reporting requirements are set out.

*Source: Overseas Development Institute*¹²

With regard to funding, both at their inception and throughout their operation, SWFs are commonly financed through governmental transfers of excess reserves, derived from balance of payments surpluses, funds accumulated by Central Banks during foreign currency operations, the proceeds of privatizations of state-owned enterprises, fiscal surpluses, and receipts from commodity exports.¹³ These surpluses are derived from commodity based revenues from the exports of natural resources (especially oil and gas), either taxed or owned by the government. Many of the world’s largest SWFs are of this type, with SWFs in Norway, Timor-Leste and the Middle East being the most typical examples. In contrast, non-commodity based funds are primarily funded

¹⁰ The SWFs of Botswana, Chile, Norway, and Timor-Leste are examples of this type of entity.

¹¹ Peter Kunzel, Cornelia Hammer and Iva Petrova, *Sovereign Wealth Funds: Current Institutional and Operational Practices* (International Monetary Fund 2008), p.5.

¹² Alastair McKechnie, *Managing Natural Resource Revenues: The Timor-Leste Petroleum Fund* (Overseas Development Institute 2013)

¹³ International Working Group (IWG) of Sovereign Wealth Funds, *Sovereign Wealth Funds: Generally Accepted Principles and Practices: ‘Santiago Principles’* (2008), p.27; *Ibid*, p.13; Simon Willson, "Wealth Funds Group Publishes 24-Point Voluntary Principles." IMF Survey Magazine, (2008) <<https://www.imf.org/external/pubs/ft/survey/so/2008/new101508b.htm>>, accessed 06 March 2017.

out of budget surpluses, in particular, government revenues originating from the proceeds of privatisation or foreign exchange reserves. Singapore's Temasek Holdings is an example of the former, while the China Investment Corporation, the Chinese State Administration of Foreign Exchange Investment Company and the Government of Singapore Investment Company ("GIC") are characteristic examples of the latter.

Given that the primary objective of SWFs is the diversification of assets and the stabilization of increased long term investment returns,¹⁴ SWFs typically allocate their resources to foreign financial assets. In fact, this is perceived to be an intrinsic characteristic of SWFs, to the point that numerous academic and institutional definitions exclude from the category of SWFs, those funds that solely invest in domestic assets and even those that do invest in foreign financial assets, but only to a relatively limited extent.¹⁵ Typical SWF investments consist of foreign financial assets such as stocks, bonds and other financial instruments, property and precious metals. As an example, the Abu Dhabi Investment Authority, one of the world's leading SWFs in terms of asset accumulation, holds a substantial global investment portfolio, which is highly diversified across more than twenty asset classes and sub-categories, including quoted equities, fixed income, real estate, private equity, alternatives and infrastructure. An example to the contrary would be the Government Pension Fund Norway¹⁶ or China's National Social Security Fund, both of which are mandated to invest almost exclusively in domestic companies or the domestic financial markets.¹⁷

¹⁴ Narjess Boubakri, Jean-Claude Cosset and Jocelyn Grira, 'Sovereign Wealth Funds Targets Selection: A Comparison with Pension Funds' (2016) 42 *Journal of International Financial Markets, Institutions and Money* 60, p.71; Shi (n.4) pp.22-25.

¹⁵ John Taylor, 'Sovereign Wealth Funds and Their Regulation' in Mario Giovanoli and Diego Devos (eds), *International Monetary and Financial Law: The Global Crisis* (OUP 2010), p.264. The International Working Group also explicitly excludes from the definition of SWFs certain categories of Funds which include those operating in domestic markets. See, International Working Group(IWG) of Sovereign Wealth Funds, *Sovereign Wealth Funds: Generally Accepted Principles and Practices: 'Santiago Principles'* (2008), Appendix I.

¹⁶ This fund should not be confused with Norway's *Government Pension Fund Global*, also referred to as "the Oil Fund", which is one of the most characteristic and financially successful examples of SWFs in the world, holding assets of approximately USD 885 billion and setting the standards for transparency and good governance that many other SWFs aspire to follow.

¹⁷ Shi (n.4), p.14.

The type of governance disciplines applicable to SWFs largely depends on their purpose, legal structure and institutional framework. Generally, in a bid to uphold good governance principles, SWFs seek to ensure that their operational management is conducted independently, in order to minimize potential political influence or interference that could hinder the achievement of their objectives.¹⁸ While governance models vary, there are certain common principles that are considered essential to any well-governed SWF. The starting point in establishing the governance structure of a SWF is a recognition that the bodies established to manage the assets of the SWF are essentially trustees of the fund. One fundamental requirement therefore is to establish a structure that reinforces the legitimacy of the SWF's operations and ensures that the decisions taken in the management of the SWF reflect the best interests of the people, as the recipients of the benefits accrued from its successful management.¹⁹

With SWFs becoming major players in global financial markets, concerns over their transparency and accountability have arisen both in their home countries and more significantly, in the countries receiving investments made by SWFs. On the one hand, while recipient countries welcome the additional financial resources, they express the concerns that “state involvement necessarily means more than just an interest in commercial profit”, fearing that the underlying motivation of sovereign investors could be a threat to the recipient state's political, economic and financial security.²⁰ On the other hand, the general public within the SWF's home countries have been concerned by the sizeable amounts of national wealth invested abroad with so little disclosure,²¹ often out of a sentiment that those financial resources would be better used domestically for their immediate benefit. In an effort to address these concerns, a group of 26 SWFs committed themselves to transparency, good governance and accountability standards by signing a voluntary code of principles, the “Generally

¹⁸ Abdullah Al-Hassan and others, ‘Sovereign Wealth Funds: Aspects of Governance Structures and Investment Management’ [2013] IMF Working Paper WP/13/ 231, p.10 <<https://www.imf.org/external/pubs/ft/wp/2013/wp13231.pdf>> accessed 06 March 2017.

¹⁹ *Ibid*, p.14.

²⁰ Allie E Bagnall, Edwin M Truman and others, ‘Progress on Sovereign Wealth Fund Transparency and Accountability: An Updated SWF Scoreboard’ [2013] Policy Brief 1, p.1; Saadia M Pekkanen and Kellee S Tsai, ‘The Politics of Ambiguity in Asia's Sovereign Wealth Funds’ (2011) 13 Business and Politics p.1 <<http://www.degruyter.com/view/j/bap.2011.13.2/bap.2011.13.2.1344/bap.2011.13.2.1344.xml>> accessed 06 March 2017.

²¹ Bagnall, Truman and others (n.19), p.1.

Accepted Principles and Practices” for SWFs (“GAAP”), also known as the “Santiago Principles”.²²

2.3. Types of Sovereign Wealth Funds

As is evident from the preceding section, SWFs are directly or indirectly managed by the government or a government-affiliated entity, with the aim of fulfilling certain macroeconomic purposes and financial objectives. These purposes are typically set out in the constitutive document of each SWF, meaning that they vary significantly, given that SWFs exist within country-specific circumstances. It is common, however, that in attaining these goals, SWFs are given a relatively wide margin to employ a variety of investment strategies with a medium to long-term timescale.²³

There are different types of SWFs, categorized according to the specific purpose for which they are set up. Of particular relevance in the context of the Project are savings funds and development funds²⁴. Savings funds are created with the intention of sharing wealth across generations. Acting as an “intergenerational transfer mechanism”, they transform revenue from the exploitation of non-renewable resources into a diversified portfolio of international financial assets, the returns from which are to be provided for the benefit of future generations.²⁵ Development funds, which are often also described as strategic development SWFs, are established with the goal of allocating resources to priority socio-economic projects. They typically help fund socio-economic projects and promote industrial policies that might raise a country’s potential output growth. A preference for this type of SWF is especially noticeable in Asia, with Vietnam and Malaysia maintaining development SWFs, while Singapore and China have funds that can be considered hybrid development funds.

²² Sven Behrendt, ‘Sovereign Wealth Funds and the Santiago Principles, Where Do They Stand?’ (The Carnegie Middle East Center 2010), pp.1-2.

²³ IWG, *Generally Accepted Principles and Practices: ‘Santiago Principles’* (2008), p. 27.

²⁴ Other types of SWFs are: stabilisation funds; pension reserve funds and reserve investment funds: See Al-Hassan and others (n.17), pp.5-6.IMF, *Global Financial Stability Report* (April 2012), p.46.

²⁵ Fall Ainina and Nancy Mohan, ‘Sovereign Wealth Funds: Investment and Governance Practices’ (2010) 11 *Journal of Asia-Pacific Business* 278, p.281; Al-Hassan and others (n.17), p.5; Shi (n.2), p.15.

Compared to typical SWFs, development funds tend to be more inward-looking, in that they are specifically targeted towards investments within the country, rather than as a tool for general macroeconomic policy implementation.²⁶ The common trait amongst these funds is that they seek to manage state-owned enterprises or government shares in private firms.²⁷ In addition to managing government assets, development funds utilize their resources to support national policy objectives, such as industry consolidation or resource acquisition. In light of pressing infrastructure needs, several resource-rich developing countries have established, or are in the process of establishing, SWFs with an expanded remit to invest within the country.²⁸ Angola, Mongolia, Nigeria and Papua New Guinea are among the most recent examples of this trend. According to an estimate, 20 SWFs have already been mandated by their respective governments to invest domestically.²⁹ Notwithstanding such categorisation, many funds in resource-rich economies pursue multiple objectives. A combination of the features of savings and development SWFs would appear best suited to the objective of promoting social and economic development of a given community.

²⁶ See Larry Catá Backer, 'International Financial Institutions (IFIs) and Sovereign Wealth Funds (SWFs) as Instruments to Combat Corruption and Enhance Fiscal Discipline in Developing States' (2015) 2015 *International Review of Law* 5, p.7; Ashby Monk, 'The Rise of Sovereign Development Funds' (*Institutionalinvestor.com*, 10 April 2013) <<http://www.institutionalinvestor.com/blogarticle/3189172/Blog/The-Rise-of-Sovereign-Development-Funds.html>>, accessed 06 March 2017.

²⁷ Nicholas Borst, 'The Rise of Asian Sovereign Wealth Funds', *Asia Focus Report for the Federal Reserve Bank of San Francisco* (2015), p.3.

²⁸ Backer (n.25), p.6.

²⁹ Alan Gelb, Silvana Tordo and Håvard Halland, 'Sovereign Wealth Funds and Domestic Investment in Resource-Rich Countries: Love Me, or Love Me Not?' pp.1-2 <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/01/16/000333037_20140116170921/Rendered/PDF/840160BRI0EP130Box0382124B00PUBLIC0.pdf>, accessed 06 March 2017, citing Monk (n.24).

The Singapore Government Investment Company – Singapore

The Singapore Government Investment Company (“GIC”) was established with the objective of creating long-term investment gains to enable the government to spend on infrastructure projects and social services to ensure that present and future members of the society share in the country’s gains. The source of its funding includes proceeds from government bonds, revenue surpluses and proceeds from government real estate sales.

The GIC is structured as a state-owned corporation. The government has outlined an investment mandate which sets out the objectives of and investment guidelines for managing the portfolio. The board of directors is responsible for implementing the GIC’s investment strategies. The portfolio managed by the GIC is subject to review and auditing by an auditor-general who is appointed by the president. The GIC is also required to provide reports to Singapore’s Ministry of Finance, setting out the financial transactions the GIC has entered into.

*Source: GIC Website*³⁰

2.4. Interim Conclusions

As stated above, SWFs are generally not privately established or managed; rather, they come into existence by virtue of a legislative instrument and are typically managed either by the government itself or sub-contracted to a third-party fund manager, often a government-affiliated entity. This means that the involvement of a central or regional government is by definition required in order to establish an SWF and thus that such initiatives cannot be privately undertaken.

We also note that, rather than acting as a recipient of foreign direct investment, SWFs typically are themselves the foreign direct investor, allocating the public assets that the government has entrusted them with to investments in overseas financial assets and instruments. Even though, as mentioned above,³¹ there is a growing tendency among certain resource-rich developing countries to mandate a more inward-focused investment approach of their SWFs, it is clear that none of these SWFs has been dependent upon the receipt of foreign direct investment for pursuing such objectives; rather, they have been funded by the proceeds of vast sovereign assets.

In view of these specific characteristics of SWFs, there are of course circumstances in which the establishment of such a fund may not be appropriate or even feasible; for example, in cases where a state lacks the political will or the excess public funds to devote to the establishment of a SWF, or in cases where preference is given to a more

³⁰ Singapore GIC Website, <<https://possibilities.gic.com.sg/gic-dreams-big>>, accessed 06 March 2017.

³¹ See *supra*, section 2.3.

genuinely inward-oriented investment and development vehicle. Even in such cases, however, certain elements relating to the legal and governance framework of SWFs could provide useful guidance in the establishment and functions of other types of corporate entities with community development objectives.

The establishment of a solid and transparent framework of governance principles is a crucial element for ensuring the efficient use of the funds devoted to community development initiatives and for building up the public's trust on them. In this vein, following the example of the Santiago Principles could prove very helpful, since this voluntary code of conduct already followed by numerous SWFs was designed to maximize public scrutiny over state entities managing vast public wealth and has already been internationally recognised as a successful benchmark for ensuring public accountability. To this effect, Annex 1 of this report sets out a summary of how these governance principles applicable to SWFs could also serve as guidelines of good governance for privately established corporate entities serving economic and social community development objectives.

3. Trusts and Foundations

Trusts and foundations are two other options worth exploring in cases where there is a mandate to set up a corporate structure designed to empower local communities and hold wealth and revenue in perpetuity for community benefit. Trusts find their origins in English law and are generally used in common law jurisdictions, while foundations are more common in countries with civil law traditions.³²

3.1. Trusts

Trusts can be defined as an equitable obligation binding a person (the “trustee”) to deal with property (the “trust property”) for the benefit of another person or group of persons (the “beneficiary”).³³ The assets are transferred to the trustees by the “settlor” who is considered to be the creator of the trust and is typically a private natural or legal person. A trust may have more than one settlor. Trustees can be either companies or individuals and it is in the trustee that legal ownership of the assets is vested. Trustees are separate legal persons and are required to deal with the assets in accordance with the settlor’s instruction, as set out in a trust deed.

Although trustees legally own the assets and may be entitled to remuneration for acting as trustees, they are not allowed to benefit from such assets themselves; they are instead duty bound to use the property for the benefit of other nominated persons, the beneficiaries. The latter are the only persons who are entitled to use or enjoy the income or assets of the trust and are nominated as such by the settlor in the trust deed. The trust deed or declaration of trust is the instrument that creates the trust and it is in this document that the trustee and beneficiaries are named. It is signed by the settlor and is intended to lay down the rules under which the trust assets are to be managed and distributed, in accordance with the settlor’s wishes.³⁴ Trusts represent a legal relationship between the settlor, the trustee and the beneficiaries; establishing a trust is a legal process that acquires absolute certainty after being validated by a court.³⁵

³² The World Bank, ‘Mining Foundations, Trust and Funds: A Sourcebook’ (The World Bank 2010) Report No.82856, p.19 <<http://documents.worldbank.org/curated/en/418481468158366874/Mining-foundations-trust-and-funds-a-sourcebook>>, accessed 06 March 2017.

³³ David J Hayton et al., *Law Relating to Trusts and Trustees* (2016).

³⁴ Under English law, declarations of trust are governed by the Trustee Act 2000.

³⁵ The World Bank (n.31), p.20.

As is evident, one of the core characteristics differentiating trusts from SWFs is that the establishment of a trust rests solely upon private initiative and does not require any governmental involvement, but for the existence of enabling legislation allowing for a trust's creation.

3.1.1. Case-studies of Trusts

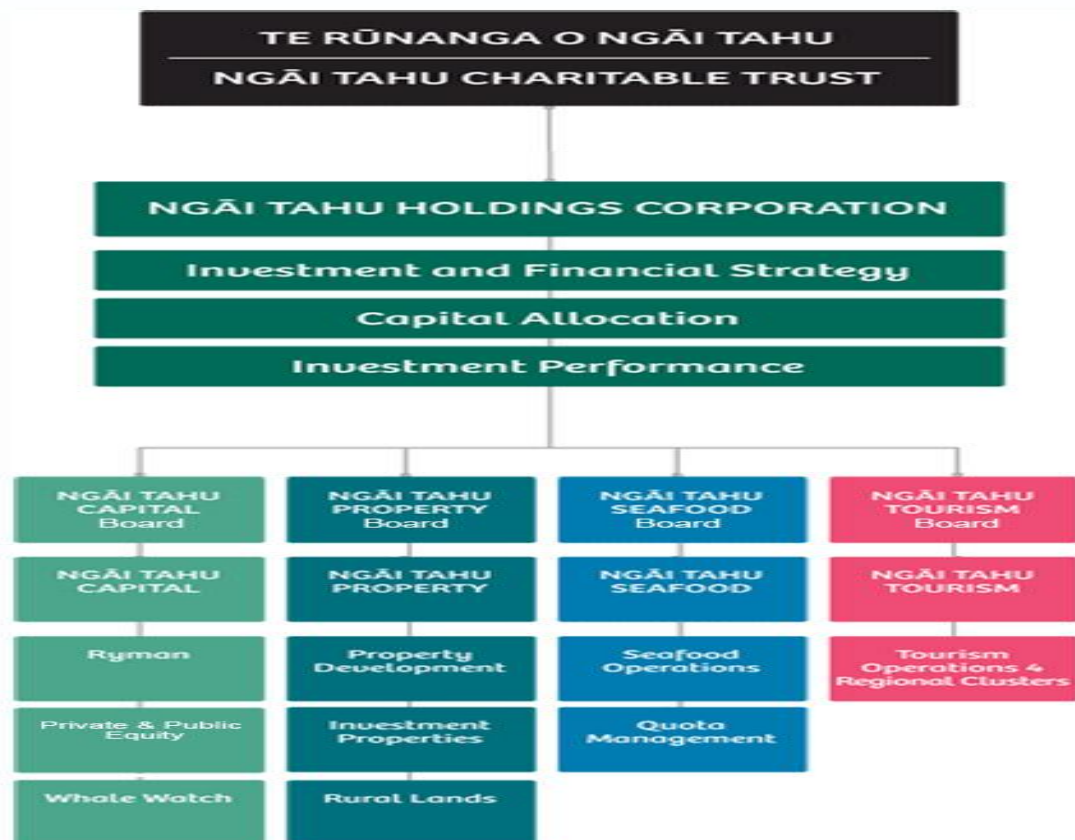
3.1.1.1. The Ngāi Tahu Charitable Trust in New Zealand

The Ngāi Tahu Charitable Trust ("NTCT") was established by a Deed of Trust in 1994, but the bulk of its original funds were funnelled to the NTCT in 1998. At that time, the Te Rūnanga o Ngāi Tahu ("TRoNT")³⁶ had reached a settlement agreement of its Treaty of Waitangi claims with the Government of New Zealand and decided to endow the settlement's USD 170 million cash component with the NTCT.

TRoNT is the sole Trustee of the NTCT, which in turn fully owns and operates the Ngāi Tahu Holdings Corporation Ltd ("NT Holdings"). The latter is essentially the NTCT's investment branch, with a mandate aimed at long-term, intergenerational and domestically focused financial investments and asset management. NT Holdings administers the assets allocated to it by the NTCT and has 42 registered charitable and commercial subsidiaries and related trusts.³⁷ The stated purpose of NT Holdings, is to efficiently manage and grow the NTCT's asset base, thus creating increased levels of revenue, to be distributed for charitable purposes benefiting the communities associated with the NTCT on an intergenerational basis. In this vein, the revenue from the activities of NT Holdings is funnelled back to the NTCT, which in turn makes annual distributions into educational, cultural and environmental programs aimed at advancing the wellbeing of the Ngāi Tahu community.

³⁶ Te Rūnanga o Ngāi Tahu is statutorily recognised as the representative tribal body of Ngāi Tahu Whānui and was established as a corporate body on 24 April 1996 under section 6 of Te Rūnanga o Ngāi Tahu Act 1996 of New Zealand.

³⁷ Information for the Charities services registry of New Zealand, <<https://www.register.charities.govt.nz/CharitiesRegister/ViewCharity?accountId=b021366c-4af6dc11-99cd-0015c5f3da29>>, accessed 06 March 2017.



Source: Ngāi Tahu Holdings³⁸

An analysis of the shareholding structure of the Ngāi Tahu-related entities reveals a complex web of interconnected legal persons, mainly in the form of subsidiary limited liability companies. As a general rule, these commercial companies do not directly carry out charitable activities, but rather profit-making activities, their main role being to generate income for distribution by the NTCT.

The institutional framework of the NTCT is set out in the Te Rūnanga o Ngāi Tahu Charter which lays down the duties, powers and obligations of the TRoNT when administering the assets of the NTCT.³⁹ In performing their duties, each representative of the TRoNT is required to act in good faith and in a manner that they believe on reasonable grounds is in the best interests of the NTCT as a whole. The Charter allocates separate roles in furtherance of the governance mandate.

The TRoNT is mandated under the Charter to prudently administer the assets allocated to NTCT by operating profitable and efficient businesses, and to pursue the

³⁸ Available at <<http://www.ngaitahuholdings.co.nz/group-profile/group-structure/>>, accessed 06 March 2017.

³⁹ Art. 16, Te Rūnanga o Ngāi Tahu Act 1996.

pre-approved social, cultural, development and environmental objectives.⁴⁰ Amongst other duties, the Office of the TRoNT is to assist the Trustee in using the assets of the NTCT prudently; to coordinate the development and execution of plans and policies which the Trustee adopts; and to monitor compliance with policies and the strategic documentation prescribed by the Trustee.⁴¹ The TRoNT in its own capacity, as well as in its capacity as Trustee is also required to set policies in consultation with the Office of the TRoNT for the allocation of assets owned by the NTCT; monitor the performance, profitability and efficiency of the NTCT against its strategic objectives; and ensure that its financial reports are prepared and reviewed.⁴²

The TRoNT is required to have regard to the following policies⁴³:

- (i) The investment policy framework which provides best practice guidelines to govern the management and investment of assets in the NTCT.
- (ii) The asset acquisition and disposal policy which restricts the acquisition or disposal of assets in the fund based on the value of the Ngāi Tahu Holdings Corporation Limited and creates threshold values for the acquisition and disposal of assets.

In addition to the Charter, the TRoNT is required, in carrying out its duties as the Trustee of the NTCT to comply with the provisions of the Trustee Act 1956 and the Charitable Trusts Act 1957, which set out the general powers and duties of Trustees out and the mechanics of trusts under New Zealand law, respectively.

3.1.1.2. The Royal Bafokeng Nation Development Trust in South Africa

The Royal Bafokeng Nation (“RBN”) is a relatively small ethnic community in South Africa’s North West province. In 2004, the Supreme Council of the RBN registered the Royal Bafokeng Nation Development Trust (“RBNDT”), entrusting to it the management of RBN’s commercial assets, mainly accrued from the exploitation of the region’s mineral resources. The beneficiaries of the RBNDT are the RBN and any

⁴⁰ Art.10, Charter of Te Rūnanga o Ngāi Tahu.

⁴¹ *Ibid.*

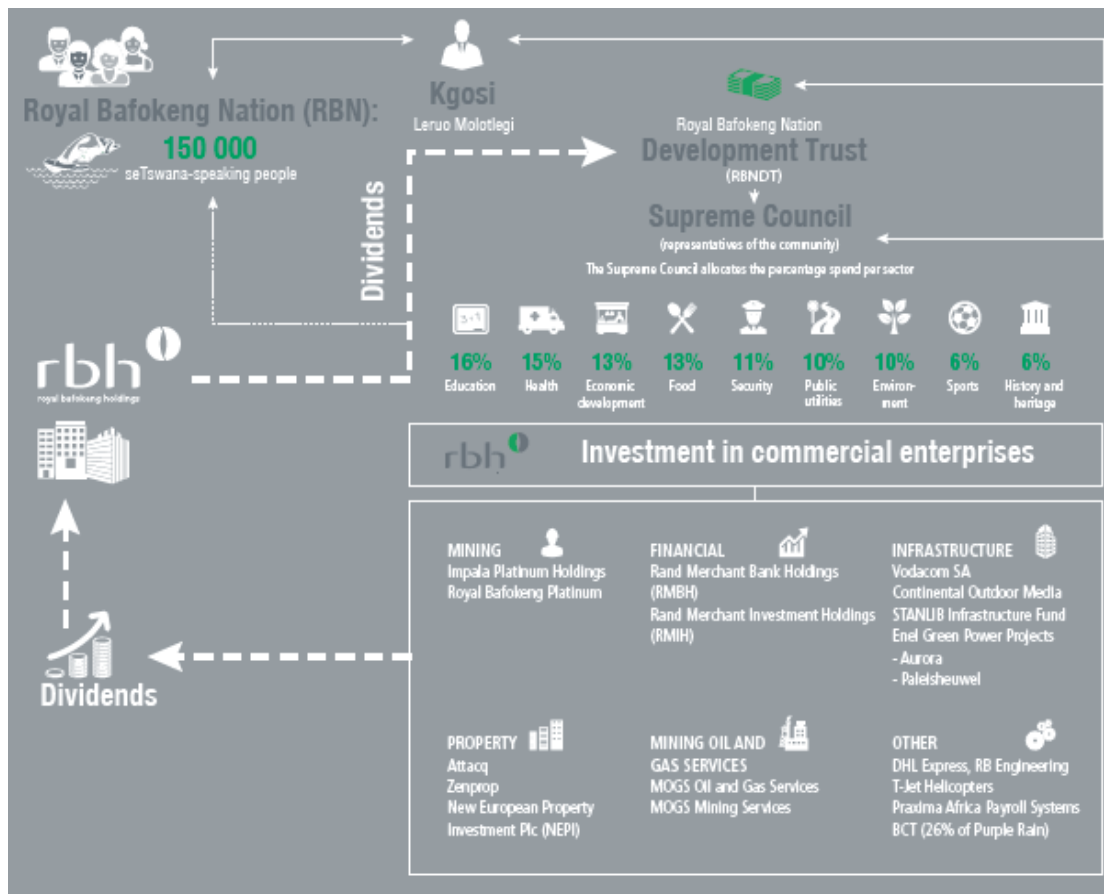
⁴² *Ibid.*

⁴³ *Ibid.*

voluntary association with Bafokeng members or any company controlled by the Trust.

In order to achieve the community's aims of economic development and of creating intergenerational wealth for the Bafokeng people, the RBN established the Royal Bafokeng Holdings Company ("RB Holdings"), a private, limited liability holding company to act as the RBN's investment arm. After its establishment, the RBN donated the totality of its shares in RB Holdings to the RBNDT. This means that the ultimate recipients of the revenues accrued by the activities of RB Holdings are the members of the RBN, since the shareholders of RB Holdings are the RBNDT's named trustees, who act in this capacity for the ultimate benefit of the Trust's sole beneficiary, the RBN.

As in the case of the NTCT in New Zealand, the RB Holdings Group also has an elaborate corporate structure: RB Holdings is the holding company at the top of the overall structure, below which are several intermediate direct and indirect subsidiaries focused on investments in specific market sectors, and also a number of special purpose vehicles participating through joint ventures in projects that the RB Holdings Group is involved in. All the members of the RBH Group are private companies registered in South Africa and can be generally characterised as passive investment holding companies. The following diagram depicts this highly sophisticated corporate structure.



Source: Royal Bafokeng Holdings⁴⁴

According to its stated objectives, RB Holdings strives to continually improve the economic well-being and quality of life of all stakeholders by investing in businesses that generate exceptional returns over the long term, thus enabling the Trust to act as an intergenerational wealth transfer mechanism for the benefit of the RBN associated communities. In this regard, dividends received from investee companies are funnelled towards the funding of the developmental needs of the RBN, in line with what the RBN Supreme Council outlines as areas of strategic focus.

Governance of the RB Holdings is aligned with the King Code of Governance Principles (“King III”). King III contains guidelines for the governance and operation of public, private and non-profit entities in South Africa and represents an effective summary of the best international practices in corporate governance.

King III sets out three key elements to which entities should adhere – leadership, sustainability and good corporate citizenship. It espouses the key belief that

⁴⁴ Available at <<http://www.bafokengholdings.com/about-rbh/corporate-structure>>, accessed 06 March 2017.

sustainability is the primary moral and economic imperative of our time and so leaders should lead companies to achieve sustainable economic, social and environmental performance.⁴⁵

The Board Charter of the RB Holdings provides that the board and its committees oversee all significant aspects and transactions of this entity. Each of the committees operates under terms of reference approved by the Board. The Board has established statutory committees for audit as well as social and ethics in accordance with the Companies Act 2008, and as recommended by King III.

The officers and committees work together to ensure that RB Holdings remains in compliance with its statutory and governance obligations. The chairman is responsible for ensuring that the Board and each committee operate effectively, maintains ethical standards, and that the strategies adopted by RB Holdings are developed and implemented with a view to achieving sustainable economic, social and environmental welfare.⁴⁶ RB Holding's memorandum of incorporation mandates the board of directors to participate in strategic decision-making, monitor the execution of agreed strategies, set ethical standards of conduct and oversee significant aspects and transactions of RB Holdings.⁴⁷ The audit and risk committee is responsible for reviewing RB Holding's financial statements and integrated reporting, overseeing the governance of risk and the system of internal controls together with the social and ethics committee.⁴⁸ The mandate of the social and ethics committee is to support and provide guidance on the management's efforts with regard to matters involving social, ethics and sustainable development such as the protection of RB Holding's assets, ethics management and corporate social responsibility.⁴⁹

⁴⁵ Corporate Governance–Executive guide to King III, p.2.

⁴⁶ Royal Bafokeng Holdings: Reshaping our Future – Integrated Review 2015.

⁴⁷ *Ibid*, p.70.

⁴⁸ *Ibid*, p.70.

⁴⁹ *Ibid*, p.70.

3.1.1.3. First Nations Settlement Trusts - The Canadian Experience

Aboriginal peoples across Canada have been able to accumulate large amounts of money as part of comprehensive settlement agreements regarding land claims⁵⁰ or treaty land entitlement claims with the government of Canada (both at the federal and provincial levels).⁵¹ They have also been able to secure revenue through the negotiation of Impacts and Benefits Agreements (“IBA”) with resource corporations. An IBA, also referred to as a participation agreement or benefit plan, is “a formal contract outlining the impact of a project, the commitment and responsibilities of both parties, and how the associated Aboriginal community will share in the benefits of the operation through employment and economic development”.⁵²

Impact Benefit Agreements in Canada’s mining sector

In Canada’s mining sector, IBAs are an essential part of corporate-Aboriginal relations. They are often a final, legally binding agreement developed through consultation and negotiation between the miner and Chief and Council of the band. While there is no law that requires IBAs in every case, the Supreme Court of Canada has confirmed that there is a duty to consult with Aboriginals who may be affected by projects occurring on or near their traditional land. Although IBAs necessarily vary from case to case, they tend to include similar provisions. These include:

Labour provisions: Aboriginal peoples may be preferentially hired, fulfilling an agreed upon number of Aboriginal employees.

Economic development provisions: Recognition and support of relevant local Aboriginal businesses through preferential contracting.

Financial provisions: Monetary compensation arrangements; fixed or variable cash payouts; funding agreements with an established monitoring committee.

Environmental provisions: Establishment of environmental planning and monitoring committees; reclamation commitments.

*Source: Miningfacts.org*⁵³

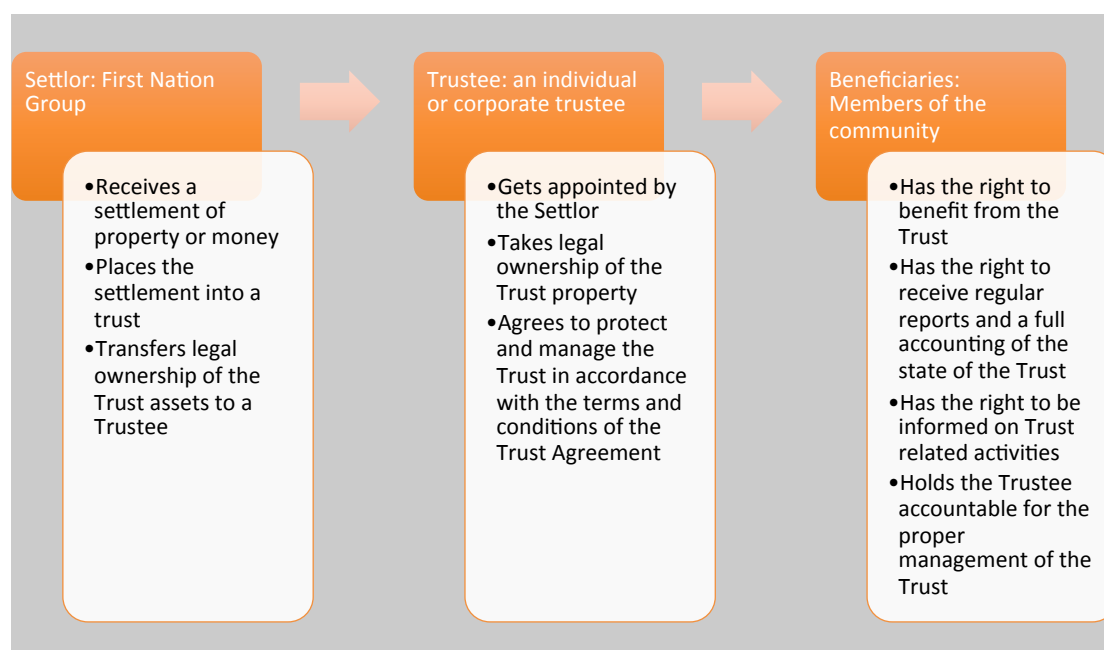
⁵⁰ Land claims arise in areas of Canada where Aboriginal land rights have not been dealt with by past treaties or through other legal means. In these areas, forward-looking modern treaties are negotiated between the Aboriginal groups, Canada and the province or territory. See “Indigenous and Northern Affairs Canada, Land Claims” <<https://www.aadnc-aandc.gc.ca/eng/1100100030285/1100100030289>>, accessed 06 March 2017.

⁵¹ Nancy Kleer, ‘Key Considerations in Developing Trust Agreements for Aboriginal Beneficiaries’ (2008), p.2 <<http://www.oktlaw.com/wp-content/uploads/2014/02/njkNatoa.pdf>>, accessed 06 March 2017.

⁵² ‘What Are Impact and Benefit Agreements (IBAs) | Miningfacts.Org’ (*Miningfacts.org*, 2016) <[⁵³ *Ibid.*](http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/>, accessed 06 March 2017.</p></div><div data-bbox=)

Many First Nations organisations, in anticipation of receiving such large sums of money have sought ways of ensuring that those monies are well invested and well managed for the long term. To this end, trusts have become the vehicle of choice for many organizations,⁵⁴ as they seek to turn those monies into a monetary legacy that will benefit current and future generations of aboriginal peoples.

First Nations’ settlement trusts also follow the typical trust scheme, which involves a settlor, a trustee and a beneficiary or group of beneficiaries.



Source: Deloitte⁵⁵

Similar to any trust, when formulating a settlement trust agreement, a number of issues need to be considered carefully, among which the most important are as follows:⁵⁶

- The trustees: As the beneficiaries are the members of the aboriginal communities, there is a desire that some or all of the trustees be members of the community, given their understanding of their communities. Settlement trusts often include provisions for a corporate trustee position whose role

⁵⁴ Nancy Kleer, ‘Key Considerations in Developing Trust Agreements for Aboriginal Beneficiaries’ (2008), p.2 <<http://www.oktlaw.com/wp-content/uploads/2014/02/njkNatoa.pdf>>.

⁵⁵ Lisa Ethans, Guillaume Vadeboncoeur and Patricia Francis, ‘Aboriginal Trusts’ (Deloitte LLP 2016), p.4.

⁵⁶ Other important issues to consider are: the type, number, and modalities of selecting trustees; trust’ operations (investment clauses); reporting by the trust to the beneficiaries; an engagement of community members. See Kleer (n.54), p.3.

might include banking functions (custodial functions) and devising an investment policy strategy.⁵⁷

- Objectives/purposes of funds: It is for the settlor to decide what the objectives will be. Typical objectives include social, cultural and economic development objectives. Settlers may also want to expressly formulate purposes that are excluded.
- Trust's timespan: Some communities may consider (as in the case of revenues from IBAs) that because it is the future generations who will suffer the long-lasting impacts of a development that leaves its footprint on their traditional territory and forever removes resources, the trust should last for as long as possible. In other cases, the beneficiaries may consider that the existing generations deserve to be compensated so that the trust life need not be extended to the maximum extent.⁵⁸
- Disbursement modalities: It may be important to determine whether the capital, or a proportion thereof, will be available for disbursement or whether it will solely be the income or interest made on the capital that will be disbursed. It is equally important to fix the proportion, if any, of the annual income that should be reinvested each year.

First Nations' trusts usually follow two models: the financial trust model and the operating model.⁵⁹ When the fund is set up as a financial vehicle, its role is limited to receiving the monies, investing the trust property and making annual payments to the Nation. The income generated by the capital, not the capital itself, is used to make the annual payment. At no point is the trustee involved in determining how to spend the annual payment; this is a decision left to the communities. In contrast, under the operating model, the trustees, in addition to receiving and investing the monies and making the payment, are involved in the decision-making process of how funds are allocated in the community within the rules set out in the trust agreement.⁶⁰ However,

⁵⁷ *Ibid*, p.9.

⁵⁸ *Ibid*, p.5.

⁵⁹ See Annex 2 for a list of examples of First Nations Trusts with an overview of their main features.

⁶⁰ Georgina Villeneuve, 'Introduction to Trusts' (National Aboriginal Trust Officers Association 2013) <<http://www.edo.ca/downloads/natoa-aboriginal-trusts-and-investments.pdf>>, accessed 06 March 2017.

it is not unusual for a trust to be concurrently vested with those dual functions. The Peguis First Nation's trust, analysed in the box below, provides a good illustration.

The Peguis First Nation Surrender Claim Trust

The Peguis First Nation is the largest First Nation community in Manitoba, Canada, with a population of approximately 10,000 people. On June 29, 1998, "after 91 years of struggle by Peguis First Nation," Canada confirmed its agreement with the Peguis that the 1907 surrender of the St. Peter's Reserve was void and legally invalid due to Canada's failure to comply with requirements of the Indian Act of 1906. Canada and Peguis entered into negotiations to compensate Peguis for its loss of land and economic loss as a result of this illegal surrender. On June 13, 2009, Peguis members voted in favour of the proposed settlement claim and the agreement was ratified by the parties on October 4, 2010. The total settlement amount was \$126,094,903. Upon payment of settlement costs and legal fees Canada deposited \$118,750,000 in to the Peguis First Nation Surrender Claim Trust. Of this amount \$10,500,000 was set aside for a per-capita payment to the beneficiaries.

The Trust is vested with two trustee functions: financial management and community purposes funding. To this end, the trust consists of seven financial trustees of which 5 must be Peguis members (from on and off reserve) and 2 that must consist of an accountant, a lawyer or a corporate trustee. The trust also comprises five community fund trustees, all of whom must be Peguis members. The financial administration of the Trust Property is the sole responsibility of the financial trustees. All legal right, title and interest in the trust property is vested exclusively in the Financial Trustees. The Financial Trustees shall also, among other things: determine investment philosophy; make investment decisions; apply or distribute the Trust Property in accordance with funding directions issued by the community fund trustees; maintain records and prepare financial statements and reports.

The Community Fund Trustees shall have no responsibility for the financial administration of the Trust Property. The Community Fund Trustees shall, among other thing, identify and define community purposes projects; approve proposed applications of the Trust Property for projects that are less than \$82,315 dollars; recommend for approval to Council proposed applications of the Trust Property that are \$82,315 dollars or more but less than \$274,385; recommend for approval to Council proposed applications of the Trust Property that are \$82,315 dollars or more but less than \$274,385.

Trust Funds are not available for individual use and are intended to benefit the Beneficiary for community purposes. Community Fund Projects should sustain and improve community infrastructure and/or address the community's social, economic needs and benefit the beneficiaries in areas such as health care, education opportunities, housing, business or commercial operations.

*Source: Peguis First Nation*⁶¹

⁶¹ 'Surrender Claim Trust - Peguis First Nation' (*Peguis First Nation*, 2016) <<http://www.peguisfirstnation.ca/about/surrender-claim-trust/>>, accessed 06 March 2017.

3.2. Foundations

Although foundations differ depending on the legal systems under which they are established, they are generally defined as non-governmental entities set up as non-profit corporations with the principal purpose of making grants to unrelated organizations, institutions, or individuals for scientific, educational, cultural, religious, or other charitable purposes.⁶² They also, in some instances, directly carry out wide-ranging development programs aimed at empowering local communities. In most jurisdictions, foundations have attributes similar to those of a typical corporation: they are legal entities in their own right and are usually required to register at the public registry of legal persons to acquire legal personality.⁶³

3.2.1. General overview

Foundations, having a distinct legal personality in most jurisdictions, have features closely resembling those of a typical corporation, albeit with some differences. In respect of their organisational structure, foundations have a management board or other form of committee tasked with governing its activities, similar to a corporation's board of directors. Whereas a business corporation is typically owned by its shareholders who have an interest in obtaining dividends, foundations have no monetary obligation towards their founders, due to their charitable purpose. At the executive level, depending on their size and the type of activities they undertake, foundations might have executive directors, management teams, department heads and staff members.⁶⁴

In view of their growing importance in terms of the value of their assets,⁶⁵ their numbers, and their expanding activities, foundations are increasingly becoming the

⁶² 'What Is A Foundation?' (*GrantSpace*, 2016) <<http://grantspace.org/tools/knowledge-base/Funding-Resources/Foundations/what-is-a-foundation>>, accessed 06 March 2017.

⁶³ This contrasts with trusts, which owing to their legal nature do not technically require a legal personality to come into existence.

⁶⁴ 'The Organizational Structure for a Charity' (*Smallbusiness.chron.com*, 2016) <<http://smallbusiness.chron.com/organizational-structure-charity-58988.html>>, accessed 06 March 2017.

⁶⁵ In 2012, the U.S. alone was home to 86,192 foundations with \$715 billion in assets and \$52 billion in giving. See Foundation Center, <http://foundationcenter.org/gainknowledge/research/keyfacts2014/pdfs/Key_Facts_on_US_Foundations_2014.pdf>, accessed 06 March 2017.

subject of detailed regulation, particularly with regard to their governance. In this respect, several good governance principles and practices have been implemented at domestic levels, in addition to the usual legislative framework governing foundations. Among those most noteworthy is the Swiss Foundation Code, which, though not binding, is deemed to be the most extensive and comprehensive governance code for grant-making foundations in Europe.⁶⁶ The Swiss Foundation Code revolves around a set of three principles designed to ensure good governance:⁶⁷

- i. Effective implementation of the foundation's purpose: a foundation is obligated to achieve its purpose, as established by its founder, in the most efficient and manner possible;
- ii. Checks and balances: using appropriate organizational procedures, a foundation should ensure sound leadership and monitoring of that leadership in all its main operations and decisions;
- iii. Transparency: in keeping with its purpose, a foundation should foster the highest degree of transparency possible regarding its principles, goals, structures and activities.

Similar principles espousing the Swiss Code have been developed in other countries such as Germany⁶⁸ and England.⁶⁹

The legal framework on which foundations rest are usually provided for in specific and detailed laws depending on the jurisdiction. As an example, in many developed countries, the legislative provisions governing foundations are set out in their respective tax laws by reason of their tax exemption privileges.⁷⁰ The special tax

⁶⁶ Steffen Bethmann and Georg von Schnurbein, 'Effective Governance of Corporate Foundations' (2015), p.6.

⁶⁷ *Ibid*, p.7.

⁶⁸ The Federal Association of Foundations in Germany, representing the interests of more than 3,800 members, has also set the standards for good governance of foundations, with a particular focus on corporate foundations. *Ibid*, p.5.

⁶⁹ In England and Wales, the Charity Commission, the independent regulator of all charities has published a document titled "A Guide to Corporate Foundations" outlining the legal requirements in the United Kingdom as well as good practice recommendations. The guide, which is an attempt to ensure that corporate foundations are not exploited, emphasizes the need to avoid conflict of interests and to uphold the foundation's independence. *Ibid*, p.8.

⁷⁰ In the US, it is the Internal Revenue Code; in Canada the Income Tax Act. In both countries, foundations are considered as charitable organisations. In Canada, for example, foundations –both

status afforded to foundations because of their charitable nature may be one of the reasons why they are heavily regulated in capital rich countries. In contrast, in numerous developing countries, the legislation pertaining to foundations and other charitable organisations remains broadly unsophisticated or is established on an *ad hoc* basis, possibly owing to the fact that few charitable organisations depend primarily on domestic donations for carrying out their functions.

Foundations generally use two main programmatic approaches in conducting their activities: grant making and operational approaches.⁷¹ Grant making foundations provide funds to other development initiatives already in place or support new initiatives to development and are particularly applicable when there are other development actors already working, or able to work, with beneficiary communities.⁷² Operational foundations on the other hand directly implement projects themselves using their funding. They are preferable in regions with few development actors and where the foundation intends to have an extended presence.⁷³

3.2.2. Types of foundations

Depending on specific criteria that vary from country to country, foundations come in different forms. This notwithstanding, foundations can generally be divided into two categories: public foundations and private foundations. The differentiating factor between these two categories lies mainly in the source of their funding. Public foundations typically derive their funding or support primarily from the general public, receiving grants from individuals, government, and private foundations.⁷⁴ Private foundations on the other hand are usually created by a single benefactor from

public and private foundations– are required to be registered as charitable organizations with the Canadian Revenue Authority.

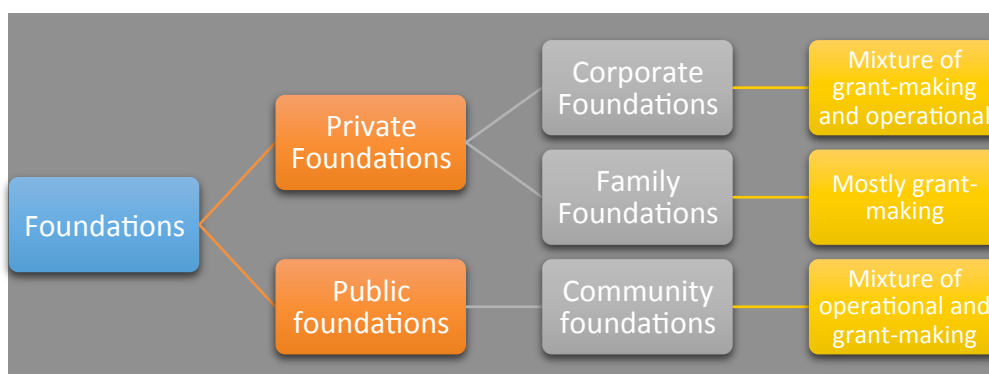
⁷¹ The World Bank (n.31), p.28.

⁷² *Ibid.*

⁷³ *Ibid*, pp.29-30.

⁷⁴ Under US law, public foundations must obtain no less than 1/3 of their funding from the public, either individuals or other public foundations as opposed to private foundations, corporations, or major donors. This is known as the “public support test”, wherein individuals or public charities comprise no less than 1/3 of the annual operating budget. Another qualification of a public foundation concerns the governing board of directors. In a public foundation, individuals related by blood, marriage or business co-ownership must comprise less than 50% of board seats. Greg McRay, 'Nonprofit Structure: Public Charity, Private Foundation, Or Private Operating Foundation?' (*Foundation Group*, 2016) <<https://www.501c3.org/nonprofit-structure-public-charity-private-foundation-private-operating-foundation/>>, accessed 06 March 2017.

whom they derive their funding. Based on the nature of the benefactor, there are commonly two types of private foundations: corporate foundations where the funds are provided by a business corporation and family foundations where funding originates from a particular family. As regards public foundations, given the requirement to have recourse mainly to the general public for funding, community foundations are the most common type of public foundation. Indeed, within a community foundation, support is derived from the individual donations from the members of a given community.



Corporate foundations have, in the recent past, frequently been used by business corporations as vehicles for sharing wealth through community investment in areas where they operate or where their activities have an impact. In the following sections, we consider the extent to which corporate foundations and/or community foundations can be used to hold wealth for the benefit of the public.

3.2.2.1. Corporate foundations

Corporate foundations are created by companies as separate legal entities with the purpose of delivering social development projects.⁷⁵ Although they are separate legal entities, they maintain close ties with the parent company and their giving strategies tend to reflect the company's interests.⁷⁶ This connection between the foundation and the company can be seen by the presence of company representatives in the

⁷⁵ Instead of having to create separate legal entities, corporations may also set up, for the purposes of delivering social development project, corporate direct giving programs whereby they work directly with communities to design and implement projects using their own staff. Those programs are established and administered within the company and the expense is part of the company's annual operating budget.

⁷⁶ 'What is the Difference Between a Company-Sponsored Foundation and a Corporate Direct Giving Program?' (GrantSpace, 2016) <<http://grantspace.org/tools/knowledge-base/Funding-Resources/Corporations/corporate-foundations-vs-giving-programs>>, accessed 06 March 2017.

foundation's Board of Directors.⁷⁷ The composition of the latter is evidence of the level of participation of the community: it varies from representation from the founding company only to multi-stakeholder bodies representing beneficiaries, civil society and technical experts.⁷⁸ Greater diversity within a foundation's governance structure is highly encouraged as it translates into a system of checks and balances with complementary roles played by different partners.⁷⁹ In contrast, governing bodies which consist of representatives from the founder alone (*i.e.* the company) allow little or no room for stakeholder (*i.e.* primarily the beneficiaries) input into governance.

As indicated earlier, the main source of funding for corporate foundations, which are private foundations, is the company itself. There are two main approaches to funding a corporate foundation:⁸⁰ endowment and annual budget allocation (regular donations). Endowment may be seen as a better approach as it protects the foundation's anticipated funding against external influences (for example, price fluctuations in the mining sector and political changes), which can lead annual budget allocations to vary considerably.⁸¹ Financing through annual budget allocations is preferable from the perspective of the funding company as it provides room to manoeuvre in case of unfavourable external factors.⁸² Using this approach, a company

⁷⁷ Bethmann and von Schnurbein (n.69), p.4.

⁷⁸ The World Bank (n.31), p.44.

⁷⁹ *Ibid*, p.45.

⁸⁰ A foundation's income may also come from a gift of shares from the funding company; money raised by the company's customers or employees; investment income on assets originally given by the company, see The Charity Commission, 'A Guide to Corporate Foundations' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351134/corporate-foundations-guide.pdf>, accessed 06 March 2017.

⁸¹ The World Bank (n.31), p.31.

⁸² The *Mozal Community Development Trust* (MCDT) provides an example of a foundation funded on an annual budget basis. It is the community development arm of the Mozal aluminium smelter, located 17km south of Maputo, in Mozambique. BHP Billiton has a 47.1 per cent interest in the joint venture. The other partners are: Mitsubishi Corporation (25 per cent), Industrial Development Corporation of South Africa Limited (24 per cent), and the Government of Mozambique (3.9 per cent). Upon establishment of the MCDT, BHP Billiton contributed USD 2.5million to the Trust. There is no endowed fund within the MCDT and the trust is reliant upon the success of the smelter for its annual 1% of pre-tax profits contribution. Typically, this equated to an operating budget of approximately USD 5 million, although in 2009 this was reduced by 40% due to the global financial crisis. See *ibid*, p.138.

may have the flexibility of adjusting its contribution to development projects in the face of changing circumstances.⁸³

Endowment - *The Palabora Foundation, South Africa*

The Palabora Foundation is the sustainable development arm of Rio Tinto Palabora Mining Company Ltd, a Rio Tinto Group copper extraction operation located in the Limpopo Province in the North East of South Africa. Established in 1986, the Palabora Foundation was designed to work for the upliftment, development and welfare of communities, doing so in partnership with the communities and other stakeholders. The decision to establish the Foundation was driven both by altruism and a response to the politically motivated criticism surrounding the company's continued operation in apartheid South Africa. The Company provided a launching grant of R2.5 million and the commitment of an annual donation equal to 3% of net profits or a minimum of R2 million (USD 270,000). In December 1989 a decision was taken to establish an Administrative Reserve Fund (now known as the Endowment Fund) to protect the foundation's financial future. This was a consequence of periods of financial difficulty within the mining company leading it to cease payments to the foundation. The endowment fund was instituted to increase the foundation's protection from market's instabilities. Palabora Foundation co-funds and partners with other groups for a number of their projects, however financing for the Foundation itself is now sourced solely from the interest from the endowment Fund. The foundation is considered sustainable to the extent that the investment fund remains endowed.

*Source: World Bank*⁸⁴

In determining the appropriate amount to allocate to their foundations, companies may apply a formula based on a set percentage of revenue payment or percentage of annual profit.⁸⁵ Alternatively, *in lieu* of a percentage calculation, the amount of the donation can also be determined by way of negotiation; a fixed yearly sum is agreed upon as a contribution. Foundations may also derive their funds from profit generating activities where they are permitted to engage in such activities. This is usually conditional on the profits being reinvested in the foundations' programmes or sustaining their operating and administrative costs.

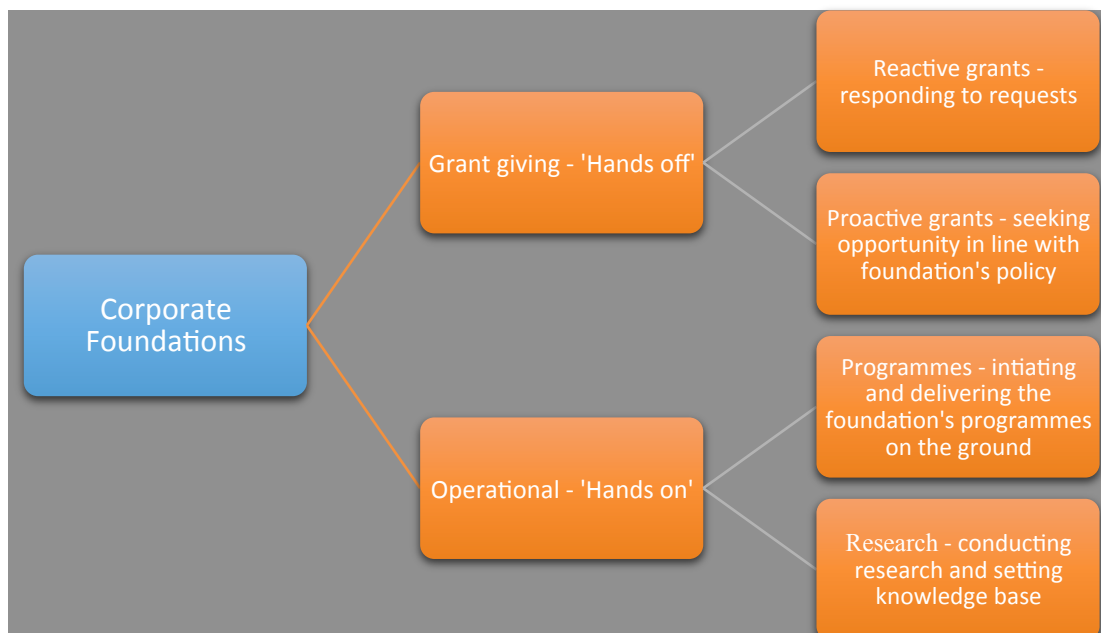
As already noted, foundations in general may adopt two main programmatic approaches: a grant-making approach or an operational approach. Although each case is very context-specific, corporate foundations traditionally have relied on a grant

⁸³ *Ibid*, p.32.

⁸⁴ *Ibid*, p.132.

⁸⁵ The main advantage of the percentage of revenue formula is that financial contributions are guaranteed, regardless of the company's profits. On the contrary, following a percentage based on profit formula would mean that, if there is no annual profit recorded for the company, then there is also no contribution by it. See *Ibid*, p.35.

giving ‘hands-off’ approach. This trend has been shifting with foundations frequently adopting a more ‘hands-on’ stance.⁸⁶ Moreover, both approaches are not mutually exclusive and corporate foundations increasingly resort to a combination of the two.



Source: Corporate Citizenship⁸⁷

3.2.2.2. Community foundations

Community foundations can be seen as an alternative, or supplement, to corporate foundations. They are defined as independent, non-profit, philanthropic entities set up by specific communities and designed to serve defined geographic areas which make up the community by making grants to local charitable organizations and building capacity to address local needs and opportunities. They rely on endowed funds made up primarily of donations by members of the community; they are “vehicles for local donors who wish to contribute their cash, trust bequests, or real property to create permanent endowments that will benefit the community in perpetuity”.⁸⁸

Community foundations generally have several characteristics that distinguish them

⁸⁶ The Palabora Foundation discussed earlier was from its inception established as an operational foundation. It works in the fields of education, skills development, local economic development and community health and HIV/Aids. One of the highly successful projects carried out by the foundation itself was a training centre, the Reef Training Centre, providing accredited training in construction and motor maintenance industries. *Ibid* p.127.

⁸⁷ Corporate Citizenship, ‘Corporate Foundations - a Global Perspective’ (2014), p.6 <http://corporate-citizenship.com/wp-content/uploads/Corporate-Citizenship_Corporate-Foundations-a-global-perspective.pdf>, accessed 06 March 2017.

⁸⁸ The World Bank (n.31), p.21.

from other types of foundations. First, whereas other foundations are created from the wealth of a single donor, family, or corporation, the endowments of community foundations are made up of funds received from multiple donors. Second, unlike other types of foundations that may have a wide geographic reach,⁸⁹ community foundations serve specific geographic communities or localities. Third, in some jurisdictions,⁹⁰ community foundations are public charities, and in order to maintain their tax privileges as such, they must meet the public support test; i.e. they must demonstrate that they receive continuous financial support from multiple donors.⁹¹

With regards to governance, community foundations tend to follow the broad pattern of other foundations as outlined earlier: a governing body (usually a board of directors, but also commonly referred to as board of trustees) is tasked with steering the activities of the foundation. In comparison with corporate foundations, however, community foundations allow for a greater participation of the community given that the governing body usually exclusively made up of community members, represents broad interests of the public rather than the private interests of donors. The practice of community foundations regarding their programmatic approach varies greatly: whereas some community foundations focus primarily on awarding grants for the benefit of the communities they serve, others adopt a more hands-on position by conceiving and implementing community development projects themselves. As observed in the case of company foundations, a combination of the two is also possible.⁹² The Greater Rustenburg Community Foundation analysed below provides a suitable illustration.

The Greater Rustenburg Community Foundation (GRCF) – South Africa

The GRCF is a community foundation serving the North West Province of South Africa, a platinum mining dominated region. It was established in 2000 –the oldest community foundation in Africa– to mobilize resources for community development. It acts as a local, independent philanthropic with a predominantly grant making role using an “asset based

⁸⁹ An example of a wide reaching would be a foundation created by a multinational company to serve the local communities where it has its operations, or communities impacted by its operations.

⁹⁰ As seen earlier, the public support test is a legal requirement in the USA and in Canada.

⁹¹ Joanne G Carman, ‘Community Foundations: A Growing Resource for Community Development’ (2001) 12 Nonprofit Management and Leadership, p.7.

⁹² The World Bank (n.31), p.28.

community development” approach. GRCF governance is provided through a Board of Trustees, comprising 6 members. The Trustees are representative of the communities served by the foundation and include local traditional leaders.

As regards its financing, GRCF searches for donors on a continuous basis, although initially it was supported by two corporate foundations (Ford and Mott Foundations) through the endowing of funds for project and a grant for operational costs. Upon launching the foundation, each of the trustees also contributed donations from their own personal resources. The GRCF receives considerable pass-through financing from family investments, often with designated beneficiaries. In 2009, the GRC estimates it brought an additional R52million into the community. However, the biggest challenge facing the GRCF remains the sourcing of new funds. To address this issue, GRCF is actively seeking support from mining companies in South Africa, particularly those operating in the Rustenburg region.

*Source: World Bank*⁹³

3.3. Interim Conclusions

This section has set out the key features of trusts and foundations by considering their main attributes in detail, including their purpose, governance model, legislative framework, and funding options. On this basis, it can be concluded that, save for some purely technical aspects contingent upon specific legal systems,⁹⁴ and as can be gleaned from the table below, foundations and trusts may be considered analogous on many accounts. Therefore, trusts and foundations may, to a large extent, be used interchangeably to achieve the same goals, and even more so when the objectives are of a charitable nature.

As becomes apparent from the case studies discussed above, both foundations and trusts appear to be suitable vehicles that can be used to deliver community development objectives. While the ultimate choice of one or the other corporate model may be affected by the domestic legal requirements or constraints applicable at the place of establishment, both foundations and trusts have two important advantages in common, namely their adaptability and flexibility in reaching the goals for which they are set up. This is achieved by formulating a precise, clear-cut founding or governing instrument that reflects in the closest manner possible the desired purposes,

⁹³ *Ibid*, p.125.

⁹⁴ For example, in many jurisdictions (mainly of common law traditions) trusts are technically defined as merely the legal relationship between the settlor, the trustee, and the beneficiaries, whereas foundations are full legal persons in their own rights. For this reason, foundations are arguably said to be relatively more flexible with respect to the latitude they enjoy in carrying out their activities and fulfilling their objectives. See *Ibid* p.20.

and devises the specific ways for achieving them.

Foundations and trusts can also be designed so as to allow for a high degree of community involvement which can be vital for ensuring that the collective needs and priorities of the people are accurately identified and adequately addressed. This constitutes an essential element to be taken into consideration in order to establish a community-responsive structure.

Attributes	Trusts	Foundations
Legal personality	Trusts have no separate legal personality, and hence cannot sue or be sued. Such right rests with the trustees.	Foundations have separate legal personality and as such can sue and be sued.
Registration	There is generally no legal requirement to register a trust.	In most jurisdictions, foundations are required to be inscribed on a public register.
Establishment	The settlor with the trustees. The settlor can be a physical person or a legal person (corporation).	The founder establishes the foundation. A legal person or a physical person can establish a foundation.
Funding	Assets are furnished by the settlor and accepted into the trust by the trustees.	Foundations rely on endowment by the founder. Other persons may also donate.
Permissible purposes	Trusts exist for the benefit of the beneficiaries. Trusts have charitable goals or a profit-oriented purpose.	Foundations may be established for any lawful purpose. This includes charitable purposes or profit-making.
Entity management	The trust is run by the trustees.	A council or some other type of committee manages the foundation.

<p>Duties of trustees or council</p>	<p>Trustees are to exercise reasonable care in dealing with the trust. Duties include preserving the trust assets and acting in good faith.</p>	<p>Duties of the council resemble those owed to a company by its executive. Council members are to act in accordance with the foundation regulations and the law and in the best interest of the foundation.</p>
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4. Community Interest Companies

4.1. Introduction

Similar to trusts, CICs are a type of corporate structure under English law. Introduced by the UK Government in 2005, CIC's are a special kind of limited liability company established with the specific aim of engaging in standard commercial activities for a social purpose. They operate to provide a benefit to the specific communities that they serve.⁹⁵ CICs can take the form of a company limited by shares (in which case the company is owned by its shareholders) or by guarantee (in which case the company has no share capital or shareholders, but is owned by members who act as guarantors). If limited by shares, those shares can be held privately or publicly in the form of public limited companies.⁹⁶ Companies already established in a different form are permitted to convert to CICs. A similar structure has been adopted in Canada, based on the UK model, known as the Community Contribution Company and set out as a hybrid corporate model, bridging the gap between for-profit businesses and non-profit enterprises.

Prior to registering to become a CIC, the specific community that the CIC is to serve must be clearly identified. The community for the purposes of a CIC must be a sector or group with its own unique characteristics - it could be a sub-section of a society or a whole population of a country. It should be noted that within this definition of community, charities, political or pressure groups, including companies who work for them, cannot become CICs.⁹⁷

CICs are required to prepare a community interest statement, setting out the activities they will undertake and identifying the community or communities that will benefit from their work.⁹⁸ They must also satisfy a community interest test which is a two-fold analysis designed to test the motivation or underlying purpose of a company's activities. It checks the range of activities the CIC will engage in, and how they reflect the company's objectives. It also ensures that the beneficiaries of those activities are

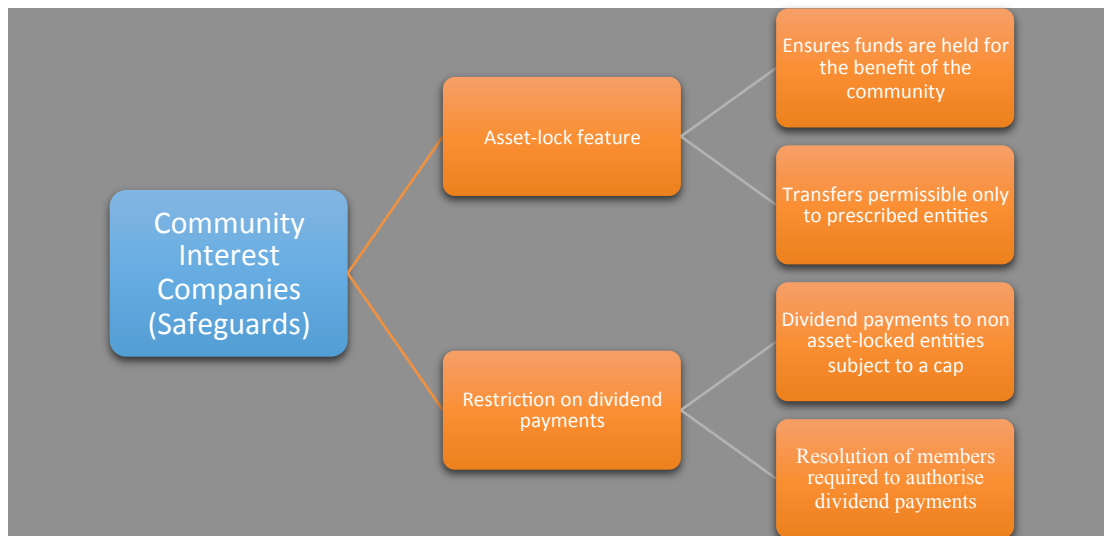
⁹⁵ Office of the Regulator of Community Interest Companies: Information and Guidance Notes, p.3.

⁹⁶ Companies Act 2006, ch.6(1).

⁹⁷ Cultural Enterprise Office: Setting up a Community Interest Company, p.2.

⁹⁸ See Annex 3 for a sample CIC Statement.

the members of the community which the CIC has identified as the “community” which it will serve.⁹⁹



4.2. Key Features

Given the specific purpose for which CICs are set up, they contain a number of inherent features which ensure that the desired objective is achieved. One of the core safeguards in CICs that make them different from ordinary companies is the “asset-lock” feature. This feature ensures that assets owned by the company are held securely and used for the benefit of the identified community of a CIC. Transfers are only permitted to other asset-locked entities specified in the CIC’s Articles of Association, or to entities subsequently approved by the Regulator for CICs.¹⁰⁰ It is noteworthy that notwithstanding the asset-lock feature, CICs are still incorporated companies and this feature does not operate as a bar to them fulfilling their financial and contractual obligations in the ordinary course of business.

The other safeguard measure used in CICs is a limitation on dividend payments.¹⁰¹ A CIC can typically pay out dividends only to other asset-locked entities without a cap. If it wants to pay dividends to shareholders who are not asset-locked entities, including private investors, a CIC would need to have completed a prescribed

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* -defines an asset-locked entity as a community interest company, charity or Scottish charity; or a body established outside Great Britain that is equivalent to any of those persons.

¹⁰¹ See Annex 4 for a flowchart showing the process for paying dividends in CICs.

schedule at the time of registration, and, in any event, such payment will be subject to a dividend cap.¹⁰² In addition, CICs may only declare dividend payments by a resolution of their members, subject to a maximum aggregate dividend cap. The maximum cap is set such that only 35 per cent of a CICs distributable profits may be paid out as dividends, this ensures that 65 per cent of the CICs profits are either reinvested back into the company or used for the benefit of the community it was set up to serve.¹⁰³ The dividend cap feature enables CICs to strike a balance between being able to attract investment and ensuring that their assets and profits are used for the benefit of the community.

Given their status as limited liability companies, CICs are able to raise finance in the same way as ordinary companies can. For instance, they can borrow from banks at commercial rates and also receive investment into the company through a sale of their shares. In addition, because of the community benefit mandate that they have, CICs are also able to raise funding by way of grants, which means that in addition to the finance raised from their business activities, CICs can also receive funding from charitable entities.

Another key feature of CICs is that they are subject to strict statutory obligations. CICs are required to produce an annual CIC Report which must record their activities for the year, how they involved stakeholders during the year, and also financial information such as payments to directors and payments of dividends.¹⁰⁴ The purpose of the report is to show that the CIC is still satisfying the community interest test, which is an ongoing obligation, and that it is engaging appropriately with its stakeholders in carrying out activities which benefit the community.¹⁰⁵ The report also has to set out what the CIC has done to benefit its community, details of dividends declared or proposed and their compliance with capping rules, and any other information on the transfer of assets out of the CIC.¹⁰⁶

¹⁰² Office of the Regulator of Community Interest Companies: Information and Guidance Notes, Chapter 6.2.3, p.5

¹⁰³ *Ibid*, p.7

¹⁰⁴ *Ibid*, p.10. See Annex 5 for a sample CIC Report.

¹⁰⁵ *Ibid*, p.3

¹⁰⁶ Art. 26(1), CIC Regulations 2005.

The Wellbeing Project now known as Wellbeing Enterprises – United Kingdom

Wellbeing Enterprises is a social enterprise based in the United Kingdom. It provides a broad array of interventions that connect people with low levels of mental wellbeing to creative activities that help to build confidence, form friendships and learn new skills. The main strand of its work is directly supporting the mental health needs of individuals and communities whilst the second strand sees the company acting as a health and wellbeing consultancy for companies, practitioners and organisations.

The company was born out of a pilot project in 2005. Aiming to become self-sufficient, the steering committee decided to adopt the Community Interest Company model in 2006. As a CIC, the organisation has secured funding from various donors, but also secured and performed paid contracts with various entities.

The CIC business model was chosen because of its flexibility and its user-friendly format, by doing away with unnecessary administration and jargon. It also, allows for the company to combine its various strands of voluntary and private work. The asset -lock was also an important factor in deciding to become a CIC. It means that were the CIC ever to fold, the team could nominate another Community Interest Company that will benefit from any funds or assets it has left.

Source: UK Government Department for Business, Innovation and Skills¹⁰⁷

4.3. Interim Conclusions

The CIC model is worth considering in cases where pursuing community development goals is of paramount importance. In particular, the asset-lock feature ensures that any profits from any commercial activities undertaken are held for the benefit of the community.

The main consideration for investors is usually how to realise a return on their investment. The dividend cap inherent in the CIC structure will need to be considered in light of the extent to which an investor can receive dividend payments. As noted above, in the UK, the amount of dividend payable is capped at 35 per cent of a CIC's distributable profits. This restriction may have an impact on the type and quantity of investors that may be attracted. It may be the case that such a structure will be more attractive to investors who have an interest in the socio-economic development objectives of companies in which they invest, or equity financiers who are looking for long-term, modest rates of return. Arguably, this feature may make the company less attractive to investors such as hedge funds, who seek higher rates of return in the short-term.

¹⁰⁷ See <<https://www.gov.uk/government/case-studies/the-wellbeing-project>>, accessed 06 March 2017.

As discussed above, the CIC model is a very specific structure established under English law and entrenched in the UK company legislation. In light of this, a key consideration is whether similar legislative provisions exist in the relevant country so as to give effect to the CIC structure. Alternatively, in order to benefit from this structure without requiring legislative changes, the key features of the CIC could be contractually entrenched in the constitutive documents of any potential company. However, this approach would mean the loss of an important feature of the CIC as it operates in the UK, which is that the inclusion of statutory clauses provides assurance to stakeholders that the funds in a CIC will be used for the benefit of the local communities for which it has been established.

5. Conclusion

This report set out to identify and analyse existing models, corporate or otherwise, that have been used for empowering local communities, with the ultimate goal of providing a range of possible options in light of the stated objectives.

The report explored multiple structures that have been used to hold wealth generated mainly from the exploitation of natural resources and infrastructure for the benefit of specifically identified communities. It then proceeded to examine the mechanisms set in place within some of those structures for investing and sharing wealth, and the revenue generated therefrom, with the end goal of community development. In so doing, the report highlighted the advantages and potential limitations of each structure with the view to equipping the reader with sufficient in-depth knowledge to make an informed choice as to which model, or combination of models, could be fit for their specific project.

Having analysed different case studies from various countries in this report, what becomes apparent is that there is no ‘one size fits all’ model. Each structure is case-specific and highly dependent upon particular contextual – legal, political, historical – factors. With this in mind, this report does not ultimately advocate for the adoption of one of the corporate models here examined; rather, it aims to present and analyse the array of potential options available to persons and entities wishing to engage in benefit-sharing community projects with socio-economic development objectives. Armed with the comparative analysis carried out, the task of determining the most feasible or realistic model(s) to those engaged in the project.

Sovereign Wealth Funds, the first model analysed, have often been used as reservoirs for depositing proceeds from the exploitation of natural resources, mostly in resource-rich countries. As entities entrusted with the management of national wealth, they are always government-established and owned. Equally, owing to their functions as custodians of public wealth and the magnitude of the assets under their supervision, SWFs are generally required to abide by strict standards in terms of governance and accountability. Although they are devised by and for SWFs, these governance norms, epitomized in the Santiago Principles, can be adjusted to the specific characteristics of any entity with a similar mandate, with the aim of achieving equally high levels of transparency and accountability.

Apart from SWFs, foundations and trusts are other vehicles commonly used for the purpose of holding and distributing wealth for the benefit of a particular community. Being private initiatives, both trusts and foundations are relatively easy to establish, although it should be noted that in some jurisdictions there may be initial asset or capital requirements applicable to and possibly restricting their establishment. The main advantage that trusts and foundations offer is that, depending on their objectives, they can be tailored to maximize efficiency and ensure the degree of adaptability that is needed in order to successfully implement and deliver a resource-sharing scheme that is both community-driven and community-oriented. Securing optimal community involvement is an often overlooked but crucial feature in ensuring the effectiveness and overall success of any community empowerment programme.

The final model considered, the CIC, offers a ‘two-in-one’ option, in that the same corporate entity can conduct profit-making activities, but also fulfil the objective of holding and distributing funds for the benefit of a community. Its asset-lock feature guarantees the ability to conduct commercial activities, whilst also ensuring that any income it receives is effectively used for the benefit of the community. Due to the novelty of this type of corporate model, specific legislation may be required for its implementation.

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