

LEGAL AND ORGANIZATIONAL FRAMEWORKS OF MILLENNIUM CHALLENGE ACCOUNT INDONESIA: PROBLEMS AND CHALLENGES

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ABSTRACT

KEYWORDS:

Millennium challenge account, foreign aid, trust funds.

Millennium Challenge Account-Indonesia (MCA-I) is designated by Government of Indonesia to implement the US \$600 Million grants Compact, from the United States of America. The purposes of this research were to analyze: (1) the MCA-I's legal status and its consequences under international law perspective; and (2) legal and organizational problems of MCA-I during the operation of the program. This research concluded that the current legal status of MCA-I, as a quasi-legal entity, is not commonly used in the area of international law. Such legal status was led to some problems such as lack of ability to enter into agreement with other international organizations and might lose its access to potential development funds from some donors. Moreover, the establishment documents of MCA-I were also absent from some substantial provisions related to good governance and its funding mechanism might have potential conflict with state budget and national tax system.

1 Introduction

1.1 Background of Study

In 2007-2009, Indonesia had acquired US\$ 55 million of grant from Millennium Challenge Corporation (MCC) Threshold Program (Source: <http://mca-indonesia.go.id/en/about/latar-belakang/>). The Threshold Program is financial assistance contract between the United States and a country which designed to improve low indicators scores and making the country competitive for MCA Compact funding (Rebecca Stubbs, 2009: 636).

The MCC is a government corporation, part of the executive branch, that responsible for carrying a new initiatives from the US government to assist a few countries that have demonstrated a commitment to sound development policies and where U.S. support is believed to have the best opportunities for achieving the intended results (Congressional Research Service, 2003). It was proposed by President Bush during his administration (Gerald van Bilzen, 2015: 136). MCC was part of the US initiatives to the Global War on Terror after terrorist attack in September 2001. This new plan for foreign aid, the first one since Kennedy's proposal in the sixties, was proposed as Millennium Challenge Account (MCA) (Gerald van Bilzen, 2015: 573).

The development of a new foreign aid initiative has been influenced by a number of factors, including the widely perceived poor track record of past aid programs, recent evidence that the existence of certain policies by aid recipients may be more important for success than the amount of resources invested and the war on terrorism (Congressional Research Service, 2003: 3). Scholars and commentators has also concluded that international development assistance has largely failed and will continue to do so unless the donor community fundamentally shifts its focus to support real policy change (Congressional Research Service, 2003:4).

The concept of the MCC is based on the premise that economic development succeeds best where it is linked to sound economic and good governance policies, especially where these conditions exist prior to expanding resource transfers (Congressional Research Service, 2003:3). The MCC believed on the premise that economic development succeeds best where it is linked to free market economic and democratic principles and policies, and where governments are committed to implementing reform measures in order to achieve such goals (Andrew A. Balingier, 2006).

Participants would be selected based on a transparent evaluation of a country's performance on specific economic and political indicators, divided into three clusters corresponding to the three policy areas of governance, economic policy, and investment in people. In order to be eligible for MCA funding, a candidate country must (1) fall within per capita income limits; (2) score above the median relative to other potentially eligible countries on at least half the indicators in each category; (3) score above the median on the "control of corruption" indicator; and (4) not be barred from receiving U.S. aid (i.e., trade sanctions) (Daniel Kaufmann and Aart Kraay, 2002: 45).

MCC Compact Grant must be obtained through competition with other countries. Given Indonesia's sound policy performance and the success of the Threshold Program, in December 2008 MCC's Board of Directors selected Indonesia as eligible for a Millennium Challenge Compact (source: <http://www.whitehouse.gov/sites/default/files/factsheets/US-Indonesia MCC Fact Sheet>). Indonesia was considered successful in using the grant to finance immunization and anti-corruption programs. The success made Indonesia passed the qualification to participate in the competitive Compact grant program (Source: <http://mca-indonesia.go.id/en/about/latar-belakang/>).

A Compact is a multiyear agreement between the Millennium Challenge Corporation and an eligible country to fund specific programs targeted at reducing poverty and stimulating economic growth (Rebecca Stubbs, 2009: 636). In the fiscal year of 2009, three countries fulfilled MCC requirements to be Compact program grantee candidates: Indonesia, Zambia, and Colombia. Indonesia won the competition to get the five-year US \$600 Million grant.

MCC typically required the recipient country, by the time of compact signing, to establish an accountable-entity, better known as the MCA, as point of contact during program development. Its board usually composed of government and non-government officials, including representatives of civil society. The government representatives are usually ministers most closely associated with compact project sectors (Curt Tarnoff, 2015:25).

For example In Tanzania, it was a government parastatal established by presidential decree under the Ministry of Finance. In Namibia, it is a separate unit within the ministry-level government National Planning Commission. While in Georgia, the Government of Georgia formed a public corporation to act as MCA's AE (MCC US, 2008).

The most challenging part of the MCA's preparation in Indonesia probably was the process of establishing MCA's accountable entity (AE). The AE is a legal entity designated by the Government to implement the Program on behalf of the Government during the Compact term. The AE can take many legal forms, as long as satisfies the legal requirements and requirements such as must be independent legal entity that can ensure civil society and private sector participation in the decision-making process of the Program (MCC US, 2008).

At the time the GoI designed the AE, the contemporary aid architecture in the world is changing dramatically (Felicia Yuwono, 2010: 3). There is increasing awareness of the need for international financial system reform (Erik Thorbecke, 2000: 34) marked by the signing of the 2005 Paris Declaration on Aid Effectiveness by over a hundred donor agencies and recipient governments. In this declaration, ownership of aid is adopted as the key pillar of a new aid paradigm (Lindsay Whitfield, 2008: 1-2).

The declaration then also be followed by others high level forum on aid effectiveness, including through engaging with global mechanisms such as the Accra Agenda for Action (AAA) as well as the Monterrey Consensus, and the 2008 Doha Declaration on Financing for Development (Jakarta Commitment, 2009). Indonesia is a signatory to the Paris Declaration on Aid Effectiveness (Paris Declaration) and AAA (Jakarta Commitment, 2009). As a signing party to the Paris Declaration, Indonesia has committed to the aid effectiveness principles and commitments contained in the Declaration (Bappenas, 2010).

After its participation in High Level Forum on Aid Effectiveness, the GoI then continued their commitment to the principles of aid effectiveness by adopting exclusively a national action plan, through the signing of the Jakarta Commitment (Lindsay Whitfield, 2008: 1-2). The commitment highlighted three area of reforms in the field of national development policy: (1) Planning and budgeting reform based on the Law No. 17 Year 2003 on State Budget and Law No. 25/2004 on National Development Planning System; (2) Government Procurement Reform by enacted a new law regarding national procurement system and established a new agency well known as National Procurement Policy Agency (LKPP); and (3) Reform in the management of foreign loan and grant by ratified the Government Regulation No. 2/2006 on Procedure to Administer Foreign Loans and Grants (Aid for Development Effectiveness Secretariat, 2010: 236).

Following the signing of Jakarta Commitment, GoI has established the Aid for Development Effectiveness Secretariat (A4DES) as a means to implement the Jakarta Commitment (Aid for Development Effectiveness Secretariat, 2010: 240). One of a major task of the of A4DES is to create a nationally owned results-based cooperation process to work with the development partners for the targeted development results in an environment of mutual respect, trust and accountability (The Aid of Development Effectiveness Secretariat, 2011: 3-1). In order to do so, A4DES created Working Group on Public Financial Management (WG on PFM). This WG on PFM was the one that made a historical step in the establishment of Indonesian Development Trust Fund. The WG on PFM was successfully carry out its mission to setting-up a concept of national development trust fund, based on Indonesia's prior similar experiences in industrial efficiency pollution control, and Non-project grant aid from Japan (Felicia Yuwono, 2010: 27-28).

In order to catch the momentum of Jakarta Commitment and to meet the requirement of MCC AE, GoI established a task force to design an entirely new legal entity which could be operated as development trust fund as well as satisfy the technical requirement of the MCC's AE (Bappenas, 2011 and Wisnubroto Sarosa, 2011). As a result, in November 10, 2011, Perpres No. 80/2011 regarding Trust Fund was formally enacted along with the MCC's approval to assign the MCA-Indonesia (MCA-I) formed as a development trust fund (Bappenas, 2011). MCA-I is the first nationally owned trust fund institution designated by the GoI to implement the Compact, a US \$600 Million grants program, which is the largest commitment of the United States of America in the last three decades in Indonesia (Source: <http://mca-indonesia.go.id/en/about/latar-belakang/>).

Despite Indonesia's best effort to set up trust funds of MCA-I to maximize its financial capacity for development, the legal and organizational framework of the trust fund has uncertain conceptual foundation.

For example, the current legal structure of MCA-I is actually not commonly used in the area of international law, therefore, its status as a subject of international law is questioned. Several problems related to the operational such as inadequate governance procedure and lack of accountability of the organization's activity are also still occurred. In September 2015, Indonesian National Auditor Board (BPK) has formally stated that Minister of Finance Regulation No. 124/2012 regarding MCA-I Grant Mechanism was potentially conflicted with the national policy which has been stipulated in the Government Regulation No. 10/2011 (Source:<http://satker-mccbappenas.blogspot.com/2014/12/fgd-hasil-evaluasi-pengelolaan-hibah.html>). This preliminary finding should become an early warning for GoI to evaluate some operational aspects of MCA-I.

The study to identify some defect in the MCA-I legal and organizational framework is important since MCA-I is the first development trust fund in Indonesia which created under Perpres No. 80/2011. The operation of MCA-I definitely will become the ideal model for next Indonesian development trust funds. The problems as well as challenges during the operation of MCA-I also might reflect the general condition of Indonesian development trust funds' regulatory framework. Therefore this study becomes even more important to understand the big picture of Indonesian developmet trust fund's system from a small case study of MCA-I.

1.2 Research Questions

According to the background that has been presented, the research questions of this study are:

1. Under international law, what is the legal status of MCA-I and whether or not such status will bring legal consequences in the operation of MCA-I?
2. Under international best practices and Indonesian regulations, what are potential problems which had already and might be ocooured during the operation of MCA-I?

1.3 Purposes of Study

The purposes of this study are:

1. To understand the conseequenses of the MCA-I's legal status in the area of international law;
2. To identify some basics and operational problems during the operation of MCA-I.

2 THEORITICAL FRAMEWORK AND HYPOTHETICAL DEVELOPMENT

2.1. Development Trust Funds in Several Countries

Development trust funds are not programs, though they have often been labelled as such. Rather they are dedicated sources of funding for programs and activities agreed by the donors and the trustee. The activities they finance range from huge global programs with their own governance structures to conventional individual technical assistance (Independent Evaluation Group, 2011:1-2). It is also different from traditional multilateral aid, which

involves pooling of sovereign donor contributions and disbursement of funds at the discretion of multilateral governing bodies. Unlike multilateral aid, development trust funds finance specific development priorities and require separate accountability structures (Bernhard Reinsberg, 2015: 2).

Because they enable international organizations to react quickly to emerging needs, development trust funds are very attractive to donors. Channelling contributions through trust funds allows donors to create governance structures that differ from those of the organizations acting as trustee. Moreover, development trust funds also provide financing targeted for specific thematic areas or purposes (Gerd Drosse, 2011: 79).

Following on the successful operation of the development trust funds created by the international donor, some countries has been creating a development trust fund under their national system. This fund is designed as a nationally owned and administered for pooling external funding resources from various development partners in a manner that could improve alignment between external assistance and national system (Aid of Development Effectiveness Secretariat, 2011: 3-4).

2.2.1. The Mgahinga Bwindi Impenetrable Forest Conservation Trust (MBIFCT)

In 1994, the Mgahinga Bwindi Impenetrable Forest Conservation Trust (MBIFCT) was established by the Government of Uganda (GoU) to conserve Mgahinga Gorilla and Bwindi Impenetrable National Parks (MGNP & BINP), two critical forest habitats which provide a home to half of the world's remaining population of mountain gorillas in South Western Uganda (Source: <http://www.bwinditrust.ug/page/about-us/>). The MBIFCT was private, legally independent grant-making institutions (US Agency Int'l Dev, 2014) that incorporated under the Uganda Trustees Incorporation Act (Uganda Trustees Incorporation Act 1939).

Uganda is one of the most bio-diverse countries on the planet. This rich biodiversity provides the foundation for Uganda's economically important wildlife tourism sector that directly contributes \$805 million a year to the national economy (9.2% of total Ugandan GDP in 2012) as well as other sectors dependent upon water, agriculture, and forests (US Agency Int'l Dev, 2014:1). Despite the increase in tourism revenue over the years, the Uganda's national park system remains underfunded (US Agency Int'l Dev, 2014).

As a response for above situation, The MBIFCT was created by GoU and civil society stakeholders have explored the development of a range sustainable financing mechanisms for conservation (US Agency Int'l Dev, 2014). The MBIFCT became effective on July 12, 1995 with a Global Environment Fund (GEF) grant of US \$ 4.3 million invested in the Trust Fund under MBIFC Project (World Bank, 2007: 3). During its first seven years of operation, co-financing secured from

United States Agency of International Development (USAID) (US\$890,700) and the Government of the Netherlands (DGIS) (US\$ 2.7 million) enabled the initial investment in the Trust Fund to grow virtually unimpeded (World Bank, 2007: ix). The MBIFCT was assigned to oversee the management of the Fund and managing grant making operations for local community development, parks management and research projects (World Bank, 2007: 4).

The MBIFCT structure and operational modalities are spelled out in the Trust deed and Bylaws and in an accompanying Trust Administration Manual (TAM). The Trust has several major elements (World Bank, 2007: 4-6):

a. Trust Management Board (TMB) has overall responsibility for MBIFCT. Its voting members are the legal trustees of the capital fund, and have decision-making responsibility over the Trust's policies and operations. The TMB is responsible for approving the investment strategy of the asset manager, reviewing and approving grant proposals, oversight of the administration of the Trust program, and maintaining productive relationships with other organizations.

The voting members of the Trust included: (i) government agencies: Uganda Wildlife Authority, Forest Department; (ii) local communities: one representative from each of the three administrative districts bordering the parks. The Local Community Steering Committee selects these representatives; (iii) local and international NGO; and (iv) research institution. Non-voting members were generally representatives of GoU agencies and international donor organizations with an interest in the operations of the MBIFCT. These include GoU Ministries of Finance and Economic Planning; Justice; Tourism, Wildlife and Antiquities, and USAID. The Trust Administrator is a non-voting member of TMB.

b. Local Community Steering Committee (LCSC) is the representative body that screens all proposals for community development grants and the principal vehicle both to raise community awareness about the Trust and to communicate community concerns to the TMB. The LCSC helps mobilize support for conservation, and oversees the implementation of community projects to ensure their sustainability. The LCSC has authority to approve grants below US\$ 1000 without going to TMB. LCSC members serve for two-year terms although provisions were made at the start of the project to revise the selection process and the rotation of the members on the committee.

c. Technical Advisory Committee (TAC) was established to provide TMB with expert advice on program priorities and review the technical quality of proposals brought to the Board. TAC

also helps conduct environmental and social impact screening of project proposals referred to it by the Trust Administration Unit (TAU). Members of TAU are selected on the basis of their professional expertise in fields such as tropical forest ecology, economics, sociology, microfinance, agriculture or law that may be of relevance to the projects being considered for funding.

d. Trust Administration Unit (TAU) is the operational arm of MBIFCT. Working under the direction of a Trust Administrator, who reports to TMB, TAU staff is responsible for implementation of the trust program and management of its administrative and financial activities. TAU is responsible for regular monitoring and evaluation of trust operations, and receives and reviews proposals, monitors their implementation, maintains relations with community organizations, NGOs and GOU agencies, provides technical assistance, and conducts educational programs and training. TAU and the LCSC were to be the main interface between the community and the Trust.

The financial analysis underlying project design indicated the initial investment of US\$ 4 million would have to grow to approximately US\$ 7.5 million and produce a rate of return of 8.5 percent. With this level of capital at this rate of return, 3 percent of income could be reinvested to maintain the real value of the capital fund, leaving some 5.5 percent to be apportioned among asset management fees, administrative costs, and a minimum annual sum of US\$ 100,000 to be disbursed in grants (World Bank, 2007: 6).

2.2.2. Bhutan Trust Fund for Environmental Conservation (BTF)

Determined to prevent environmental degradation that has occurred elsewhere in the Himalayas, the Royal Government of Bhutan (RGOB) directed that 60 percent of its land remain under forest cover. However, in the early 1990s, RGOB faced serious financial constraints in implementing conservation activities (World Bank, 1998: 1).

To address these constraints, RGOB in association with World Wildlife Fund (WWF-US) and UNDP created the Bhutan Trust Fund (BTF) in March 1991 (World Bank, 1998). RGOB then sought financing from the Global Environment Facility (GEF) and other donors to capitalize the BTF (World Bank, 1998). The sponsors of BTF felt that, in order to be an effective instrument for sustainable financing, BTF should have a minimum capital of US\$ 20 million of which US\$ 10 million would be sought from the GET and US\$10 million from other donors (GEF, 1992: 1).

On May 21, 1992, grants in the amount of US\$ 10 million was approved by the GEF and made effective on November 2, 1992 as part of GEF Pilot Phase (World Bank, 1998: i). The remaining capital was co-financing WWF-US, Government of Norway, Government of Netherlands, Government of Finland,

Government of Switzerland, and Government of Denmark (World Bank, 1998).

The Trust Fund is governed by the Royal Charter of 1996 and a high-level Management Board that was fully Bhutanese. The day to day business is conducted by the secretariat headed by the Director as the Chief Executive Officer (Source: <http://www.bhutantrustfund.bt/about-bhutan-trust-fund/the-organisation/>). The details of the BTF's organization are as follows:

- a. All powers of the management of the Trust Fund is vested in the Management Board (MB). The MB consists of six members (Bhutan Royal Charter, 1998: Article V). Project activities, including the budget covering the estimated expenditures for their implementation, shall be approved on an annual basis by the Board at the regularly scheduled annual Board Meeting (Bhutan Royal Charter, 1998: Article VII). The RGOB appoints five members, WWF appoints one member and UNDP will participate in the Board as an ex-officio member without voting power. All voting members of the MB is Bhutanese representatives from different agencies including the private sector and nongovernmental organizations (Bhutan Royal Charter, 1998: Article V).
- b. The day to day management of the Trust Fund is carried out by the Director in accordance with the powers and duties established by the Board (Bhutan Royal Charter, 1998: Article VIII).
- c. The investment will be carried out by the Investment Manager/Managers, selected by the Board, in accordance with the investment guidelines provided by the Board (Bhutan Royal Charter, 1998: Article VIII).

The grant was formally closed on December 31, 1997, and was fully disbursed, with the last disbursement taking place on December 16, 1996 (World Bank, 1998).

2.2.3. Amazon Fund

The Amazon Fund aims at contributing to reducing Greenhouse Gas (GHG) emissions from deforestation and forest degradation in the Amazon area. The Amazon is one of the largest gene banks on the planet; a natural heritage of unique proportions, with vast rivers and diverse ecosystems along its plains, plateaus and mountains. It has natural gas and oil reserves, and it is also one of the biggest mineral deposits in the world (Brazilian Development Bank, 2011:15). The Fund is a fundraising tool involving voluntary donations for non-reimbursable application to prevent, monitor and combat deforestation and to foster the conservation and sustainable use of the Amazon Biome (Brazilian Development Bank, 2011:10).

Amazon Fund was established in 2011 with Presidential Decree No. 6,527 under the management of the Brazilian Development Bank (BNDES), a federally-owned company founded in 1952 (Brazilian Development Bank, 2014: 33). The BNDES is

authorized to allocate the amounts of donations received in cash, acquired through a specific account called the Amazon Fund, to conduct non-reimbursable investments in efforts to prevent, monitor, and combat deforestation and to foster conservation and sustainable use in the Amazon Biome (Brazilian Presidential Decree No. 6,527, 2008: Art 1).

Beside the BNDES as trustee, the Amazon Fund governance structure comprises two formal committees; Technical Committee of the Amazon Fund (TCFA) and Guidance Committee of the Amazon Fund (GCAF) (Brazilian Development Bank, 2014: 17). The GCAF was established under the same Decree with the Amazon Fund, Presidential Decree No. 6,527, which charged of establishing the guidelines and criteria to apply resources, as well as approving information to apply the resources and the Annual Report of the Amazon Fund (Brazilian Development Bank, 2014:19). The members include representatives from the Federal Government, state governments in the Brazilian Legal Amazon, civil society (NGOs, social movements, indigenous people and the business sector) as well as the scientific community (Brazilian Presidential Decree N^o. 6,527, 2008: Art 5). The member are nominated by heads of agencies and entities for a term of two years, renewable once for the same period (Brazilian Presidential Decree N^o. 6,527, 2008: Art 5).

The TCFA was established by Minister of Environment Order MMA N^o. 345, of October 22, 2008, with the mission of attesting carbon emissions derived from deforestation calculated by the Ministry of the Environment. The TCFA usually meets once a year and consists of leading specialists with renowned technical/scientific knowledge, appointed by the Ministry of the Environment, after consulting the Brazilian Forum on Climate Change (Brazilian Development Bank, 2014: 18).

The government of the Norway was the first and, so far, the largest donator of resources to the Amazon Fund, committing in donation agreements with BNDES the amount of NOK 5,450,000,000.00 and effectively donating, up to December 31, 2014, some NOK 5,330,000,000.00, corresponding to US\$ 867,429,088.58, or R\$ 1,942,936,213.30 (Brazilian Development Bank, 2014: 28). On December 7, 2010, a contract between KfW Entwicklungsbank (part of Germany Government) and the BNDES was signed for financial contribution to the Amazon Fund. The total value of the contract is up to EUR 21,000,000.00 (US\$ 28,323,207.40 or R\$ 60,697,500.00) (Brazilian Development Bank, 2014: 29). Another donation comes from local Brazilian company, Petrobras, who has donated R\$ 10,412,935.46 (US\$ 5,631,200.85) to the Amazon Fund (Brazilian Development Bank, 2014: 29-30).

2.2.4. Sudan Multi-Donor Trust Fund

The historic Comprehensive Peace Agreement (CPA) signed on January 9, 2005, between the Government of Sudan (GoS) and the Sudanese People's Liberation Movement (SPLM), signaling the

end of decades of civil war, includes a set of protocols covering, inter alia, power and wealth sharing agreements (National Technical Secretariat of the World Bank, 2005:1).

The Sudan Multi-Donor Trust Funds (MDTFs) were established after the Oslo donor conference in April 2005 and in May 2008 with an initial pledged amount of \$508 million to fund supports the reconstruction and development of war-affected, also to support recovery and development programs (National Technical Secretariat of the World Bank, 2005). The donors were included the World Bank, Netherland, Canada, UK, Norway, Spain and some others countries (ICF GHK, 2012: 7-8).

Sudan MDTFs was established under Legal Administration Agreements between GoS and the World Bank as administrator of the Funds (National Technical Secretariat of the World Bank, 2006: vi). The organization of Sudan MDTFs divided into three tiers. The World Bank would be the Administrator of the MDTFs managing a Technical Secretariat (TS) which would receive and review proposals and make recommendations to the Oversight Committee regarding allocation of resources. An Oversight Committee (OC) would exercise the programmatic and allocation responsibility for MDTF operations. Finally, a Sudan Consortium (SC) would meet once or twice a year during which past performance as well as future priorities and funding needs would be discussed. The Consortium would comprise all donors, the GoS and representatives of civil society and the private sector (International Bank for Reconstruction and Development, 2005: 7).

2.2. Indonesian Development Trust Funds

Indonesian development trust funds have been acknowledged by Government Regulation (PP) No. 10/2011 concerning Procedure and Mechanism on Administered Foreign Loan and Grants as a revision to PP No. 2/2006. However, it is worth noting that PP No. 10/2011 does not explain in detail about Trust Fund arrangement in Indonesia; while implying that a Presidential Regulation will further regulate the mechanism for Trust Fund (The Aid of Development Effectiveness Secretariat, 2009: 3-9).

In order to carry out an obligation from PP No. 10/2011, President of Indonesia enacted Presidential Regulation (Perpres) No. 80/2011 regarding Trust Fund. The regulation is fully dedicated to govern development trust funds in Indonesia. Considering a clear hierarchical path from PP No. 10/2011 and also Perpres No. 80/2011, it is convincing that Indonesian development trust funds has been regulated solidly.

2.3. Some Substantial Provisions of Presidential Regulation No. 80/2011 regarding Trust Fund.

2.3.1. The Basic Concept of Development Trust Funds

Perpres No. 80/2011 defined a trust fund or development trust fund is a grant provided by one or several Donors which is managed by a trustee institution for a specific use. The grant which is

pooled into development trust fund may be sourced domestically as well as internationally.

The trust fund is technically an “independent” institution that represents the GoI in the implementation of activities and manages the program that has been set-up. The development trust fund acts as the primary agent to implement the targeted program and to perform the right and obligation of the GoI to oversee manage and implement the Program.

The management of the development trust fund shall be managed by a trustee institution. A trustee institution is an organization established by ministries/agencies to manage a development trust fund with authorities that has been agreed in the grant agreement.

Initiate minister/head of agency may only establish a trustee institution after obtained consideration from the Head of Bappenas and the Minister of Finance. This is done to ensure that the development trust fund will be created to finance activities in accordance with the national development priorities.

In order to manage grants trough a development trust fund, the ministries/agencies must satisfy several criteria: (1) there is commitment from the donor to provide funds in order to achieve the thematic target of the national development priority; (2) there is a need to support the achievement of thematic targets; and/or (3) the donor and government agreed to create a trust fund to achieve certain development priorities.

Generally, a trustee institution’s structure shall consist of a board of trustee and a trust fund manager. The trustee institution will be directed by the Board of Trustees. The Board of Trustees will have a conditional independent decision making authority. The Board of Trustees is to be independent and the final decision maker with respect to the trust fund programs. The board of trustee shall carry out the following duties (i) appointing a trust fund manager; (ii) setting-up trust fund management programme; (iii) authorizing withdrawal of funds from the donors; (iv) issuing a payment order to relevant parties; and (v) conducting a procurement of goods/services.

Organisational structure of the board of trustee shall consist of a chairperson, secretary and board members. The ministry which established the trust fund will chair the board of trustee. This provision may be waived if the grant agreement clearly stipulated that certain minister should be chaired the Board of Trustee. Secretary and Members of the Board of Trustee may come from relevant sector ministries, other parties related to the use of the Fund, and/or parties appointed by the donor. Representatives from (Bappenas) and Ministry of Finance are becoming a permanent member in every trust fund which governed by the GoI. Board members who come from government agency are nominated by heads of agencies and entities. The government representatives are appointed based on their current

position in their office or ex-officio. Therefore, the term of the office is as long as they hold their current office position.

The board of trustee then will elect a trust fund manager to manage trust fund properties. Trust fund manager is not necessarily forms as financial corporation but can also a government agency, a multilateral agency, a non-governmental organisation or a state own corporation. The appointment of the trust fund manager can be proceed by open and competitive bidding or by the appointment as stipulated in the grant agreement.

A trust fund manager shall have the following duties (1) managing financial administration of the Trust Fund; (2) Reporting administrative and financial management to The board of trustee; and (3) as a payment agent to relevant parties upon the request of the board of trustee.

2.3.2. The Operations of the Development Trust Funds

Every Ministry, government agency, local government, Non-Governmental Organisation, or Private Institution may propose their prospective activity to be funded by development trust fund directly to the Board of Trustee. However, the activity shall be with reference to the national Medium Term Development Plan; the objective of the grant and the ethics principles; and the thematic targets of the Trust Fund.

The Board of Trustee will conduct assessments for every proposed activity. Proposed activities shall be approved or rejected by the Board of Trustee based on the result of the assessment. The Board of Trustee required maintaining the assessment record. The Presidential Regulation delegate an authority to the Board of Trustee to develop their own assessment method.

In the events if the line ministries intent to channel the fund to local government, to a non-Governmental Organisation or Private Institution, the process shall be performed by using the State Budget mechanism.

2.3.3. Reporting, Monitoring and Evaluation

Ministry, Local Government, Non-Governmental Organisation and Private Institution as implementing agents, shall submit quarterly reports which consist of implementation and financial report to the Board of Trustee.

The Board of Trustee then shall submit a semester progress report on the implementation of activities and management of trust fund to Head of Bappenas, Minister of Finance and other relating minister. The host minister/head of agency who established the trust fund require development to continuously monitor and evaluate the implementation and management of the development trust fund.

2.4. MCA-Indonesia as the First Indonesian Development Trust Fund

2.4.1. Legal Basis

Because the core of the MCC's program is poverty reductions and its consider as a cross cutting development issues, therefore, pursuant to Article 5 (3) of Presidential Regulation Number 80/2011, the establishment of the trustee institution, shall be conducted based on the appointment of the Head of Bappenas, after obtaining consideration from Minister of Finance.

In order to fulfil such requirement, the trustee institution of the Millennium Challenge Account-Indonesia has been established under the Bappenas by virtue of Head of Bappenas Regulation Number 2 Year 2012 (MCA-I's Implementing, Chapter I A).

2.4.2. Goals and Objectives

The goal of the Compact grants is to reduce poverty in Indonesia through economic growth in Indonesia (MCC Compact Agreement, 2011). The objectives will be achieved through the implementation of the following three projects (Source: <http://mca-indonesia.go.id/en/about/tujuan-sasaran/>):

(1) Green Prosperity

The majority of Indonesia's poor live in rural areas that are rich in natural resources, but over-extraction and inadequate management of these resources threaten Indonesia's ability to sustain high rates of economic growth and reduce poverty. The compact's \$332.5 million Green Prosperity Project is designed to increase productivity and reduce reliance on fossil fuels by expanding renewable energy, and to increase productivity and reduce land-based greenhouse gas emissions by improving land use practices and management of natural resources (Source: <https://www.mcc.gov/where-we-work/program/indonesia-compact/>).

(2) Community-Based Health and Nutrition to Reduce Stunting

The compact's allocated \$131.5 million for this project to reduce and prevent low birth weight, childhood stunting, and malnourishment of children in project areas. The project will target approximately 7,000 villages in provinces where rates of stunting and low birth weight in infants and children up to two years old are higher than national averages (Source: <https://www.mcc.gov/where-we-work/program/indonesia-compact/>).

(3) Procurement Modernization

The procurement modernization project is designed to be implemented by the National Procurement Policy Agency to increase efficiency and achieve significant government expenditure savings on procured goods and services. Through efficiency and saving, there will be more quantity and better quality of procured goods and services, therefore giving positive impact to the economic growth (<http://mca-indonesia.go.id/en/about/latar-belakang/>).

The \$50 million Procurement Modernization Project includes activities to build a career path for procurement civil servants, create an institutionalized role and structure for procurement professionals that

provides sufficient authority to implement good practice, and strengthen controls of the government procurement and financial audits (<http://mca-indonesia.go.id/en/about/latar-belakang/>).

2.4.3. Governing Documents

The MCA-I implements its projects and activities in line with the national regulations, both central and local. Additionally, the MCA-I also bounded by the grant agreement with MCC, implementation agreement and other documents which reflected MCC's policies. The legal documents which are governed MCA-I can be divided into two big categorize. First is the grants agreement and its supplemental agreement which is operated under international law. Secondly is the establishment documents and governing documents which are fall under Indonesian national regulation.

The grants agreement which is stipulated in the Millennium Challenge Compact between The United States of America Acting through the Millennium Challenge Corporation and The Republic of Indonesia can be placed at the higher hierarchy of MCA-I governing documents. This agreement created an obligation for the GoI as a recipient country to establish accountable entity to manage the fund which is finally become the embryo of the MCA-I. In addition, a supplemental agreement is any other agreement between the Government (or any Government affiliate) and MCC such as a Program Implementation Agreement (PIA) and technical agreement in order to implement the Compact. The Compact and its supplemental agreement are international agreement that is governed by the principles of international law (MCC PIA, 2012: Sec. 5.0).

Moreover, MCA-I is also governed by Indonesian national regulations. The national regulation can be divided into two groups namely the establishment regulation and the governing documents. Establishment Regulations is a legal instrument in the form of regulations and decrees which consists of PP No. 10/2011, Prepress No. 80/2011 and Head of the Bappenas Regulation Number 2/2012.

Meanwhile, the governing documents are consists of Minister of Finance Regulation Number 124/PMK.05/2012 regarding the Mechanism for the Management of the Millennium Challenge Corporation; Head of Bappenas Decree No. KEP. 82/M.PPN/HK/2012 regarding the Establishment of MCA Board of Trustee; and MCA-I's Implementing Bylaws Regulation.

2.4.4. Governance Structure

The governing structure of MCA-I is a hybrid-institution combining the trust fund structure which required by the Perpres No. 80/2011 and accountable entity required by the MCC Guidelines (MCC Guidelines for AE and Implementation Structures, 2008).

Under the national regulation, a trust fund institution is simply required to have a board of trustee and a trust fund manager.

However, the MCC's guideline demands more complex structure. The guideline required every accountable-entity to have a decision-making body, an advisory council, a stakeholder committee, and management unit. More than that, other independent unit such as fiscal agent and procurement agent also should be attached at the accountable-entity structure (MCC PIA).

The structure of MCA-I has been placed by Head of Bappenas No. 22/2012. Further, the MCA-I Implementing Bylaws Regulation then breakdown the MCA-I structure into more details. The detail of MCA-I structure is as follow:

(1) **A board of trustee.** The Board of Trustees will have ultimate authority and responsibility for the oversight, direction, decisions maker and for the overall implementation of the Program Compact in accordance with the Compact, the PIA and all Supplemental Agreements.

The Board of Trustees is comprised of seven voting members, and two nonvoting members. The member of the Board of Trustee is consist of two representatives of the Bappenas; one representative of the Ministry of Finance; one representative of the Ministry of Home Affairs, one representative from civil community organizations, one representative from the private sector, one representative from academia as a voting member. The MCC's Country Director and The Executive Director are served in board as a nonvoting member.

Board members who come from government agency are nominated by heads of agencies/the Minister. Non-government representatives are transparently and democratically elected based on their own election system. Indonesian Chamber of Commerce (KADIN), Indonesian Economist Association (ISEI) and NGO's networking called the Partnership formed a task force to elect their representation to seat in the MCA-I's Board of Director.

The current MCA-I's Board of Trustee are Secretary of Coordinating Ministry of Economic Affairs, Development Funding Deputy of Bappenas, Funding and Risk Management of Director General of Ministry of Finance, Board member of Indonesian Forum for Budget Transparency-Representative of Civil Society/NGO), Indonesian Economist Association-Representative of Academia, and Indonesian Chamber of Commerce-Representative of Private Sector (Source: <http://mca-indonesia.go.id/en/about/majelis-wali-amanat/>).

(2) **A Trust Fund Manager.** A Trust Fund Manager means the financial institution appointed by the Board of Trustees, to administer the use of the trust fund held in MCC's accounts pursuant to Compact.

- (3) **An Implementing Team.** The MCA-I Implementing Team consists of a Program Implementation Unit which is assisted by the Fiscal Agent and Procurement Agent, and a Government's state budget (KPA) Supporting Unit.

The Program Implementation Unit is a management level unit, led by the Executive Director who will manage the day to-day activities of MCA-I. The Officers will be supported by appropriate administrative and other personnel as needed and in accordance with the staffing plan and such other key officers as may be agreed upon by the Government and MCC.

Even though the Executive Director should be treated as a corporate officer like in a private corporation who have delegated actual authority and apparent authority to sign a contract with third party (Thomas Lee Hazen, 2009: 238), the national regulations hinder the MCA-I's Executive Director's power. Under Indonesian regulation, such as Law No. 1/2003 on State Treasury, Law No. 28 Year 2009 concerning Local Taxes and Charges, PP No. 42/1995 on Taxes and Charges of Foreign Government Project and Perpres No. 5/2015 on Government Procurement, every activity which engages with the government project may only be administered by a government's project director (PPK) who has a status of a government employee. One of the main reasons for this requirement is because the Indonesian tax office will only approve tax relief for projects, if the transactions are made by government's project director. In the opposite, the MCC guideline has mentioned that only MCA-I's key staff who authorized to sign a contract under MCC's program (MCC Guidelines for AE and Implementation Structures, 2008: Sec. 3.2 E). In order to deal with this problem, the GoI and MCC then reach an agreement that every contract document under the MCA-I project will co-signed both by MCA-I Executive Director and PPK on behalf MCA-I (Permen Bappenas No. 2/2012).

- (4) **KPA supporting unit.** The KPA Supporting Unit has responsibility for management of the Rupiah Fund relating to the tax relief mechanisms. The idea of this procedure is the GoI will refund all of the tax which has been paid under the MCC's program.
- (5) **Fiscal Agent.** Fiscal Agent is a professional institution in the financial management field which is appointed by the Board of Trustees through open selection to support the duties of the Implementing Team.
- (6) **Procurement agent.** Procurement Agent is a professional institution which is appointed by the Board of Trustees through open selection to support the duties of the Implementing Team in

the implementation of the procurement of goods and services.

- (7) **Stakeholders Groups.** The Stakeholders Groups will be assigned primarily to inform the various constituent groups about Compact Program implementation and provide advice and input to MCA-I concerning the Program Compact, with the goal of promoting transparency of the programs.

2.4.5. Funding Mechanism

The MCA-I has two separate units for controlling USD Compact funding vs. Rupiah funding. The Program Implementation Unit, headed by the Executive Director of the MCA- Indonesia is responsible for managing the budgeting, committing, expending, and reporting of Compact funds. The KPA Supporting Unit, headed by the KPA, manages the Rupiah funding. The Rupiah funding is used for operational costs of the KPA Supporting Unit and for reimbursements of taxes paid by the MCA- Indonesia and its contractors. Funds from MCC must not be commingled with any other funds from any source whatsoever, except as prescribed by MCC.

MCA- Indonesia disburses funds using two payment systems: Common Payment System (CPS) and Local Bank Account (LBA). In CPS method, electronic disbursements are directly made to vendors for goods, works, or services received by the MCC US. These disbursements can be made in US dollars or in rupiah. While, in the Local Bank Accounts system MCA- Indonesia maintains accounts at PT Bank Rakyat Indonesia (BRI) for local payments. In this method, funds are disbursed through CPS into the local bank account then "re-disbursed" by or at the direction of the FA to pay vendors and MCA-I salaries, etc.

The Board of Trustee is responsible for Program implementation and oversight and is the sole authority for authorizing expenditures. It prepares and submits all documents required in connection with payments and as outlined in the MCA-I's policy. Specifically, the MCA- Indonesia is responsible for expenditures authorization.

Contracts of MCA-I must be acknowledged and signed by the PPK and the Executive Director of MCA-I or his/her designee. A Purchase Order (PO), however, is considered committed and valid upon being signed by the Executive Director of MCA-I or his/her Designee. However, for the purposes of tax reimbursement, the PO must then be signed and acknowledged by the PPK before any payments are made by MCA-I.

The Project Director of MCA-I must estimate, on a rolling quarterly basis for the life of the Compact, both the level of commitments and the cash requirements needed to liquidate the commitments and meet other expenses that are not obligated for each project. They should consider the time required to complete the procurement process, the length of time for contract execution and supplier/provider delivery in estimating when commitments and cash disbursements will occur.

The FA will monitor the amount of funding available in the Permitted Accounts and the amount of funding budgeted for Project and Activities during the current and subsequent quarterly disbursement periods to ensure that sufficient cash balances are available.

Technically, the MCC's grant also has different characteristics compare with other grants which have been received by Indonesian government. Normally, there are two ways for the GoI to administer its foreign grants.

First is through national planning mechanism. According to PP No. 10/2011, the Indonesian Nat'l Dev Planning Agency formulates midterm planning of foreign funded activities known as 'Blue Book'. The regulation demands that all foreign funded activities have to be on the "Blue Book list". The first funding mechanism, administered grants trough planning mechanism, is usually applied for big amounts of grants which have a long term commitment from the donor. So the idea is to put the whole money into national budget system and then disbursed it in accordance with national development planning system.

The second mechanism is directly executed by donors. It's commonly applied for small amount of grants which is used to fund research, training, identification studies, feasibility studies, capacity building, and technical assistance. The money from the donors is doesn't actually pooled to the national budget. It is directly used by the recipients but the state treasury will register the grant's amount as a part of national revenue (Minister of Finance Regulation No. 40/2008).

MCC funding should comply with the first mechanism. However, since the US Government did not agree to put the money into Indonesian national budget system, therefore the GoI created other regulation to formalize the MCC's grant mechanism. Under Minister of Finance Regulation No. 124/2012 the MCC's grants will be treated as a planned grant but the funds will be executed directly by the US Treasury (Ministry of Finance, 2012).

3 RESEARCH METHODOLOGY

3.1 Legal Research

A legal research will be used to answer the research questions which has been presented. Myron Jacobstein mentioned that "legal research is really legal problem solving." Successful legal research largely depends upon developing a research approach that combines (1) factual analysis based on legal categories with (2) deductive and inductive reasoning in the use of primary and secondary authority and finding tools (Osborn, 2014: 9). Moreover, Erwin Pllack outline "three discrete steps in the research process: (1) factual analysis, (2) issue identification and (3) location of legal authority" (Osborn, 2014: 8).

Legal authorities are documents that contain either law or comentary about law (Chew, 2014: 6). It also may be understood as a source, cited in support of a legal argument (Black Laws Dictionary, 2006).

Legal authorities can be devided into two main categories: primary authorities and secondary authorities. Primary authorities are created by the government and have the force of law because they are the law. In contrast, secondary authorities wich can be created by acholars, practicing lawyers, or other experts do not have the force of law (Chew, 2014: 6).

3.2 Data Collections

3.2.1 Legal Authorities

Primary authorities that will be used in this research includes government regulations, presidential regulations, ministerial regualtions; decrees, Bylaws and other government legal documents regarding state budget mechanism, trust funds and tax regulations.

Secondary resources also used to support the analysis. The resources include books, law review, law journal, published and unpublished papers and law scholars works.

3.2.2 Others Resources

The topic of development trust funds in general as well as MCA-I in particular is still relatively new in indonesia. Therefore, in order to give a clear picture regarding MCA-I and development trust funds this reaserch also used non-legal authorities such as:

- a. project's report from international financial institutions such as World Bank, ADB, USAID, and etc;
- b. national development plan documents i.e. annual development plan, medium-term development plan, and long-term development plan;
- c. internal memorandum, official letter, and other government documents;
- d. newspaper, amagazines and other online sources.

3.2.3 Interviews

Interview with key players and stakeholders are also used to understand the current problems and proposed future recomendations.

The strength of using interview are "the method can elicits in-depth responses, with nuances and contradictions and it can gets at interpretative perspective of the connections and relationships a person sees between particular phenomena and events" (Mack et al., 2011). Interview were conducted with individuals from government and non-government organization that are knowledgeable about the current situation of MCA-I and past situation since early development of Indonesian development trust funds. The informan of this reaseach are as follows:

- a. Indonesian National Planning Development Agency (1 person: current Head of Legal Department/Bureau of Legal Affairs);
- b. Indonesian Coordinating Ministry of Economic Affairs (1 person: current PPK of Satker MCA-I and Head of Office of General Affairs);
- c. MCA-I officer (2 personels: current Senior Advisor and institutional expert);
- d. 1 person: current National Director and former CEO of MCA-I); and

- e. 1 person from donor representative (USAID Indonesia).

3.3 Data Analysis

The data and information that has been gathered will be analysed by using comparative law approach and interpreting the content of law.

A major motivation for conducting comparative law research is to find good, if not the best possible law. The idea is that information about rules in foreign systems tells us something about the quality of these rules and about the possibility and the desirability of adopting these rules in one's own legal system (Jaap Hage, 2014).

As for interpretation of law, this approach will be used to understand unclear provisions in a particular statute or regulations. In the practice of law, some statutory terminologies are typically ambiguous. To unlock the statutory analysis this research will use legislative's or framers intent. Some resources that may help the interpretation are dictionary, legislative history, cases, scholarly commentary and documentation which can describe the reasons behind the law (Jellum and Hricik, 2009: 5-6).

4 FINDINGS AND ANALYSIS

4.1 Legal Status of MCA-Indonesia

As it has been mentioned before that MCA-Indonesia is the first development trust fund which created under Indonesian law.

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

4.1.1. Without Independent Legal Personality

From international institutional law perspective, trust fund is technically a financial vehicle without independent legal personality, created by an administrative agreement between donor(s) and multilateral trustee (Bernhard Reinsberg, 2015:3). Donors maintain effective control over trust funds, which are not commingled with the general resources of multilateral agencies (Henry G. Schemers, 19980).

The legal person of the trust is distinct from that of the donor, as well as from the other assets of the trustee, even though the assets of the trust pass to the ownership of the trustee for the duration of the trust relationship (Ilias Bantekas, 2011). Due to this constrain, they generally cannot enter into contracts or to be subject of privileges and immunities (Gerd Drosse, 2011: 61). For that purpose, the international organization acting as trustee, or another organization or entity having legal personality under international or local law, must act on contractual matters (Gerd Drosse, 2011).

Some example of non-legal personality trust funds are various trust funds administered by the United Nations, the Food and Agriculture Organization, the World Health Organization, the

International Labor Organization, and the Inter-American Development Bank (Joseph Gold, 1978: 859).

4.1.2. Independent Legal Personality

In the area of conservation trust fund, a study conducted by the Global Environment Facility found that in order to be successful, trust funds must be more than just financial mechanisms. They should be self-governing institutions and play key roles in the development of national conservation strategies (Global Environment Facility, 1998:11).

Under this approach, donors create a new collective financing effort as an independent legal entity under the national law of a country whose location and legal provisions for non-profit entities meet donors' needs (Sophie Smyth, 2011: 998). They may be created by Deeds of Trust, chartered by the government (Emeka Duruigbo, 2004 and Marianne Guerin-McManus, 2001), by article of incorporation or by a statute (Barry Spergel & Kathleen Mikitin, 2014: 12). The establishing document not only will create a legal right for the board of trustees to initiate suits on behalf of the trust, it also forms the basis for removing the board when there is any wrong-doing or dissolving the trust when the objectives are not being carried out (Guerin-McManus, 2001: 14),

The independent legal status will effectively ensure the trust fund independence from government that has clear and well enforced laws concerning private non-governmental organizations (including foundations or trusts) (Barry Spergel & Kathleen Mikitin, 2014: 24). Most international donors will only contribute to a Fund that is legally independent and not controlled by government (Barry Spergel & Kathleen Mikitin, 2014). For example, in the interest of promoting and building civil societies, the United States Agency for International Development (USAID) and the Global Environmental Funds (GEF) refuse to contribute to the capital of a fund whose board has more than 50 percent government representation (Sophie Smyth, 2011:1001).

Trust fund with independent legal personality is emerged as a widely accepted option when the G8 countries set up the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) in 2001. The alternative the Global Fund's donors selected was to set the Fund up as a non-profit foundation under Swiss law (Source: <http://www.theglobalfund.org/documents/board/05/gfb57annex6.pdf>).

4.1.3. MCA-I as a quasi-independent legal Institution

Perpres No.80/2011 on Trust Funds provides that development trust fund is established within the initiate ministerial/agency. Moreover, the trust fund will be treated as a state budget working unit (Satker). Under this provision, trust fund clearly becomes part of the ministerial/agency who created it. The ministry who host the trust fund maintains effective control over trust funds. This model is identical with non-legal personality trust funds under international

institutional law. Thus, Indonesian development trust funds also should not have an independent legal personality. Consequently, the governing body of the trust do not have legal capacity to enter into agreement on behalf of the trust funds.

However, the status as a Satker will bring another consequence. In this case, an understanding regarding the concept of Satker is vital. PP regarding Preparation of Ministry/Agency's Working and Budget Planning provided that the Satker is part of the ministerial working unit that conducting some activities as part of the organization programs. Furthermore, others regulation mentioned that the head of state budget working unit (KPA) is authorized to sign a contract with a third party, in this case, are good and services provider (PP No. 21/2004).

Based on the interpretation above, when Perpres No. 80/2011 mentions that the trust fund institution is treated as a Satker, means that the chairperson of the Satker (KPA) is authorized to enter into agreement with a third party on behalf the ministry/agency (MCC Guidelines for AE and Implementation Structures, 2008: Sec. 2.1 A).

In sum, we might say that Indonesian development trust funds as well as MCA-I is technically a quasi-independent legal personality. As it is part of working unit at the institution who owns the trust fund, they don't have separate legal personality. But, as a state budget working unit, they are authorized to act independently and to enter into contract with the third party.

4.2 Consequenses with the Current Legal Status

4.1.1. Illusory Independence

MCA-I eventually contain a promise between the two extremes of creating a fully independent institution and making the organization subservient to the government agency. Under international law perspective, it is unclear whether or not MCA-I has its own legal personality or not.

Indeed that MCC as the sole donor of MCA-I has acknowledged Indonesian development trust fund model as MCC's AE. However under general theory of international law, this legal status is still problematic.

The main issue that arises is whether or not Indonesian development trust funds has a legal capacity to enter into agreement with foreign donors or other international law subject? In the international level, an organization such as Global Environment Facility (GEF) which created under the World Bank is endowed with neither international legal personality nor legal personality under national law. The proposal for the full legal independence of the GEF did not gain approval from the World Bank. For that reason it cannot enter into legally binding contracts or agreements (Gerd Drosses, 2011: 87).

4.1.2. The Ability to Access International Resources

Legal status in the area of international may affect an entity's access to resources. International organizations may be written directly into international organizations' funding arrangements for

particular activities. In addition, international organization status enables an entity to enter into international agreements, such as Headquarters Agreements with host states (Sophie Smyth, 2011: 1047)

It also has been said that most international donors will only contribute to a Fund that is legally independent and not controlled by government (Barry Spergel & Kathleen Mikitin, 2014). This might not become a problem for MCA-I because it already has a full support from MCC US. However, since development trust funds in general are designed for pooling external funding resources from various development partners, it then becomes important to clarify the legal status of Indonesian development trust funds.

4.3 Some Problems with Current Organizational Frameworks

4.3.1 Unclear Governing Bodies' Powers

In addition of the origination or establishment document, such as ministerial regulation or decree, most trust fund also have a Bylaws or internal regulations which set forth more detailed governing rules for the trust funds and operations Manual(s), which set forth the internal rules and procedures for the day to-day operations and administration (Barry Spergel & Kathleen Mikitin, 2014: 12). Governing documents clearly define the composition, powers and responsibilities of the governing body (or bodies). A governing body's composition is designed so that its members will have a high level of independence and stakeholder representation (Barry Spergel & Kathleen Mikitin, 2014: 14). The number of different stakeholders that must be given a right to appoint governing body members for various political reasons (Barry Spergel & Kathleen Mikitin, 2014: 13).

Regarding the governing documents of the trust fund, Perpres No. 80/2011 provides two requirements. First, the trust fund should be established by the initiate Minister/Head of Agency after having consideration from Head of Bappenas and the Minister of Finance. Secondly, the member of the Board of trustee should be assigned by the decree of the host minister.

In practice, MCA-I at least have four level of governing documents: 1) Ministerial regulation as a charter of the trust fund; 2) Ministerial decree for the appointment of the Board of Trustee; and 3) A set of governing guideline as the Bylaws of the trust funds and 4) a set of standard operating procedures for the day to-day operations and administration of the trust fund institution. For example, the MCA-I has been enacted under Head of Bappenas Regulation No. 2/2012. Head of Bappenas then issued a Ministerial Decree No. 62/M.PPN/HK/04/2015 for the appointment of the MCA-I's Board of Trustee.

One problem that currently exists is regarding a potential violation of the delegation power for the trustee institution to self-governed its own organization. As for general rule, the lower documents must not provide an exceed authority to the Board of

Trustee rather than what the higher document's has given to them. This is actually analogue also with the hierarchy of sources of law (John B. Thornton, 2014: 40-41). For example, the Bylaws should not raise their own authority more than has been given by the charter or establishing documents.

The governing documents of current Indonesian trust funds still contain a problem of delegation of authority. In the case of the MCA-I, it's supposed to be there is nothing in the Perpres No. 80/2011 or in the establishing documents which mentioned that the MCA-I have independent legal personality. However, the MCA-I's Bylaws mentioned that the MCA-I is having legal capacity to sue and be sued in before the court. Moreover, the Bylaws also stated that The Board of Trustees' decisions will not be subject to review and reversal by any other Government entity or official other than a judicial authority exercising proper jurisdiction (MCA-I Implementing Bylaws: Chap. II C-3e).

By mentioning such provisions the MCA-I technically act as independent legal entity that separate from the Bappenas. The Board of Trustee is also potentially acting beyond their authority by saying that their decisions will not be subject to review and reversal by any other Government entity or official other than a judicial authority exercising proper jurisdiction. This characteristic may only be exercised if the trust funds satisfy a legally-independent model like the Global Fund under Swiss law. However, MCA-I is only a hybrid institution which created under auspicious of Bappenas. Therefore, every aspects of MCA-I's operation is still under Bappenas' control.

4.3.2 Inadequate Provisions Regarding Housekeeping Requirements

Good governance is the implementation of certain principles or policies that should protect the organization from misconduct. Some aspects of good governance are obvious: regular board meetings with agenda, annual elections of directors, minutes of meetings, directors' access to book and records, the delegation of responsibility to board committees or delegation in appropriate situation to outside experts (James J. Fishmen, 2011: 110). In practice, a governing body has at least two face-to-face meetings per year, and maintains accurate written records of all meetings and decisions. A governing body meets regularly in order to ensure that it is able to make informed decisions and to carry out its fiduciary responsibilities to govern the trust fund (James J. Fishmen, 2011).

A trust fund's chief executive or a Fund's manager is present and allowed to speak at meetings of the governing body (except when his/her own performance or compensation is being discussed or if the governing body meets in closed session), but is not a voting member of the governing body, and normally should not be the person who records the minutes (James J. Fishmen, 2011: 18).

It should also have an internal check and balance system to prevent domination by one constituency. To accomplish this, the board can rotate its members to encourage the introduction of new ideas and to broaden ownership in the fund. It can also employ special voting systems; for instance, giving certain members veto power on certain issues, or requiring super-majorities on certain issues, to keep one group from gaining power at the expense of the objectives of the fund (Kathleen Mikitin, 1995: 28).

Unfortunately, neither Perpres No. 80/2011 nor the establishment documents of the development trust funds of MCA-I (Permen Head of Bappenas Regulation No. 2/2012) does not even mentioned about good governance and housekeeping requirements such as the boards special meeting, how should the meeting are conducted or details of the voting right at the board meetings.

However, the Implementing Bylaws of each development trust funds has covered such provision. The MCA-I's Bylaws has provided provisions regarding a minimum requirement for the Board of Trusts to conduct a regular meeting (once in a quarter) (MCA-I's Bylaws Regulation, at Chap. III G-2), an obligation to the Board to maintain a minutes of meetings, delegation authority for the executive and others committee, meetings and adopting decision/resolution (MCA-I's Bylaws Regulation, at Chap. III G-2).

Despite the facts that the good governance principles has been covered by MCA-I Bylaws, it is important, as a practical matter, to stipulate the requirements both in Perpres No. 80/2011 and in the establishing documents.

4.3.3 Lack of Provisions Regarding Fiduciary Responsibilities

The fiduciary responsibilities of members of a board of directors or board of trustees of a charitable institution as well as trust funds are defined by both the English "common law" (which applies in the UK, US, and British Commonwealth countries) and by the statutory laws of most "civil law" countries (Barry Spergel & Kathleen Mikitin, 2014: 284).

The fiduciaries are, in many different ways, obliged to act unselfishly and to give other persons or institutions the advantage of their knowledge and skill. The fiduciary concept arises in the study of corporations and torts, and it also is a fundamental principle in agency relationship in non-profit organizations (James J. Fishmen, 2015: 120). Governing body members understand their fiduciary responsibilities and ensure they have (or acquire) the competence necessary to carry them out (Barry Spergel & Kathleen Mikitin, 2014: 20). Fiduciary arrangements will facilitate relationships between the Board and different actors in the trust fund structure. Sound fiduciary management provides the foundation for the efficient movement and tracking of funds flowing to and from the trust fund (Cassie Flynn, 2011: 25).

International best practices has given some example of a fiduciary obligations which arise from the relationship between trust funds and its board member, such as being familiar with Fund's activities, and fully informed of the financial status of the fund; ensuring that the the Fund complies with its purpose; ensuring that the the Fund operates in a transparent, accountable manner, as required by its legal documents and operation manual(s) (Barry Spergel & Kathleen Mikitin, 2014: 285).

Unfortunately, as we examine either in Perpres 80/2011 or in the establishment documents (Permen Bappenas No. 2/2012), a statutory provision of fiduciary obligations are cannot be found.

In opposite with its higher documents, the MCA-I's Implementing Bylaws provides details information about the fiduciary duty of the board to the trust funds. The MCA-I's board has several fiduciary duty such as to exercise objective and independent judgment and discharge their duties in a manner that is in the best interests of the Program Compact and MCA-I and also by staying informed and providing appropriate oversight and holding regular meetings to consider and approve activities of MCA-I as necessary. The ICCTF's Bylaws also have this provision, even though it's not as comprehensive as the MCA-I.

Every members of development trust fund's governing body should understand their fiduciary responsibilities and ensure they have (or acquire) the competence necessary to carry them out. Therefore, the GoI should give more attention to adopt such duties in the development trust fund's establishment regulation.

4.3.4 Manager of Fiduciary Arrangements: The Call for National Fund Manager

Usually a trustee or administrative agent manages trust fund transactions and ensures that funds are collected and distributed in a coordinated and effective manner. To do this, the trustee provides a number of fund management services, including receiving contributions from various sources, disbursing funds to each participating entity on behalf of the steering committee (or other decision-making body). A national or an international body can serve as fund manager. For some trust funds, the fund manager is a national development entity (Cassie Flynn, 2011: 26). The use of national development entity is in line with the spirit of national ownership. While an international entities are usually selected because it is known for their great experience in managing money in trust funds system.

For instance, the trustee for the Amazon Fund of Brazil is the Brazil National Development Bank (BNDES). BNDES coordinates donations and distributes funds. Other funds, such as Guyana's REDD+ Investment Fund, use the World Bank as their trustee. Still others, such as the Ecuador Yasuni ITT Trust Fund, use the United Nations (UN) system (Cassie Flynn, 2011).

Under Perpres No. 80/2011 the fund manager of development trust funds can be a funds

corporation, a government agency, a multilateral agency, a non-governmental organisation or a state own corporation. The appointment of the development trust fund manager can be proceed by open and competitive bidding or by the appointment as stipulated in the grant agreement (Perpres No. 80/2011: Art 11)

In order to implement the goals of Jakarta Commitment, the government should be preparing a national development trust fund manager to serve as a nationally owned and administered the national development trust funds (The Aid of Development Effectiveness Secretariat, 2011: 3-4). Unfortunately, in the case of MCA-I, an American-based corporation have been appointed to serve as a trust fund manager for the Compact Program (Source: <http://www.cardno.com/en-us/Projects/Pages/Fiscal-Agent-Services---Millennium-Challenge-Account.aspx>). This might become a signal for the Government of Indonesia to improve and leverage the quality of national banks or financial institutions in order to be able to compete with foreign funds institution for managing the next Indonesian development trust funds other than MCA-I.

4.3.5 The Power of Head of Management Unit: A Pragmatic Compromized

The governing body recruits a full-time chief executive or Fund manager to manage the trust fund's daily operations, and oversees his/her performance, which is evaluated annually. The trust fund's chief executive or the Fund manager is responsible for hiring other staff, based on budgets and (in the case of important positions) written job descriptions that have been approved by the governing body (Barry Spergel & Kathleen Mikitin, 2014: 22).

The chief executive led a management unit, which should be responsible for numerous functions, including the preparation of annual work plans and budgets, the development of implementing systems for the processing of grant proposals and the implementation of project activities, the development of strategies for capacity-building, and the institution of systems for financial accountability (Emeka Duruigbo, 2004: 187). In order to successfully operate the trust fund, the chief executive should have some qualities such as a professional competence in the substantive program of the trust fund, has a clear vision, initiative, proficiency, productivity, good communication skills, openness and responsiveness (Fisher Howe, 2004: 3-6). Here, the position of professional chief executive is important to manage the trust fund organizations as well as its assets.

Based on Perpres No. 80/2011, the management of Indonesian development trust funds shall be undertaken by trustee institution which shall consist of board of trustee; and trust fund manager. In practice, what the board of trustee really need is not merely a trust fund manager but a set of implementing body or a secretariat to implement the strategic policy which has been provided by the

board. Because based on current experience, the fund manager is actually functioned as a cashier rather than a chief executive or head of secretariat who conducted the office in day to day basis (Hari Krstidjo and Amin Budihardjo, 2015).

Moreover, the position of MCA-I as a Satker is also problematic. The effect of this provision is created two competing organs under the MCA-I who conducts an implementation of the programs: the management unit (CEO) and KPA supporting unit (PPK). In some cases these two organs are required to co-sign the contract with the third party.

The PPK, or Commitment Executor Official, is a key member of the KPA Supporting Unit. The PPK and the Executive Director have similar roles with respect to the funding they are each responsible for managing. Contracts of MCA-I must be acknowledged and signed by the PPK and the Executive Director of MCA-I or his/her designee. A Purchase Order (PO), however, is considered committed and valid upon being signed by the Executive Director of MCA-I or his/her Designee. However, for the purposes of tax reimbursement, the PO must then be signed and acknowledged by the PPK before any payments are made by MCA-I (KPA Decree No. 12/KPA.MCC/03/2013).

This twin leader has already created critical problem such as potential confuse of leadership (Jw Saputro, 2015). Another problem that occurs because of this situation is the delay of the product delivery because every counterpart or work provider has to wait the contracts has been signed by both the management unit and KPA supporting unit (Emmy Suparmiatun and Hari Kristijo, 2015).

This mechanism, in some cases, becomes a bottleneck for MCA-I itself. Once the executive director has a dispute with government's project director, the contract the trust fund cannot be perfectly signed. Therefore, the actual victim of this problem is the beneficiary of the programs.

4.3.6 Problems with the Funding Mechanism

In a majority of funds, resources flow from the sources to the trustee, which holds them on behalf of the trust fund. When the governing bodies make decisions about how the funds should be allocated, the Board will direct the trustee to distribute the funds to the implementing entities. The implementers conduct the projects and the recipients receive the benefits. The implementers then report on their activities to the Board (Cassie Flynn, 2011: 321).

Almost all the trust funds legal instrument such as Perpres No. 80/2011, the establishment documents and the governing documents has stipulated a provision regarding the fund mechanism. As for the general rule, the fund will flow from the donor to the trustee institution or directly flow to the beneficiary. When the trustee institutions make decisions about how the funds should be allocated, the Board will direct the trustee to distribute the funds to the implementing entities (Cassie Flynn, 2011).

However, some problems are still remaining in the operational level. Since the US Government as the

donor for MCC refuse to put the money into Indonesian national budget system; the GoI must manage the MCC's grant differently with current state budget system. Under Minister of Finance Regulation No. 124/2012 the MCC's grants will be executed directly by the US Treasury (Ministry of Finance, 2012).

The privilege for the MCC grants will probably lead to accountability problems for the GoI. The Indonesian National Auditor Board (BPK) has formally stated that PMK No. 124/2012 was potentially conflicted with the national policy which has been stipulated in PP No. 10/2011. The government of Indonesia should immediately find a better way to design new mechanism in order to avoid such incident happen in the next future (Satker Pengelola Hibah MCA-I, 2015).

The channeling mechanism of the funds also remains problematic. Even though Perpres No. 80/2011 mentioned that the funds will be channeled by the Board of Trustee to the line ministry, local government, non-governmental organization; and/or private institution, in practice, there is no clear guidance how the development trust funds may channel their fund to the beneficiary. In fact, the fund channelling process to the beneficiary just simply follows a regular state budget mechanism. For example project funding for local NGOs are used a social assistance mechanism (Bantuan Sosial), or project funding to the local governments are followed a block grants and special funding through the government's treasury office (Gamar Ariyanto and Amin Bidhardjo, 2015).

Another problem with regard to the funding mechanism is the potential conflict between MCA-I and state budget mechanism. As it mentioned earlier that the development trust funds are created as a new funding scheme, therefore, the Indonesian development trust funds should have their own administrative funds mechanism in order to achieve its goal (Syahrial Loetan and Amin Budihardjo, 2015).

One of the weaknesses of Indonesian state budget mechanism can be described as government-based rigid line-item annual funding system. Current Indonesian fiscal law and regulations discourage multiyear projects or programs, although they allow year by year renewal. And they offer no flexibility in the use of funds. Furthermore, bureaucratic procedures effectively limit some projects work to only six months of the year (May-October). Allocations are announced in January, but funds are not disbursed until April or May, and highly detailed final reports, which may take a month to prepare, are due in November (Satryo Sumantri Brojonegoro, 2014: 14).

4.3.7 Problems with the Tax System: A Partial Approach

Perpres No. 80/2011 simply provides that tax and import duty facilities for activities funded by a trust fund shall be provided by Minister of Finance. For some people this provision is not sufficient to provide guidelines in the operations of Indonesian

development trust funds (Syahrial Loetan, 2015). In fact, there is no specific guidance such as administrative regulations which is provided by the Ministry of finance that clearly regulate in this matter (Amin Budihardjo, 2015). The regulation is technically partial and issued on the case by case basis. Instead of creating a new tax mechanism dedicated to for development trust funds, currently Ministry of Finance has issued a special tax regulation for the MCA-I. Some practioners suggested that GoI should amend Perpres No. 80/2011 or to enact a new government regulation to allow Indonesian development trust funds to get special tax exemption like non-profit organizations. This approach will not only beneficial for MCA-I in particular, but for next development trust funds since it will attract more donor to donate their money into development trust funds (Amin Budihardjo and JW Saputro, 2015).

Another problem also occur when the donors demand to get a special treatment for their fund, such as they want to exempt status from the local taxation which is part of local government authorities rather than the Ministry of Finance (Hari Kristijo, 2015). This case is actually happened with the MCC grants that demand a tax exempt status from various kinds of taxes in Indonesia included local taxation. The problem even becomes more complex because in order to get tax exempt status local authorities are required to amend their local regulation. This means that they also need to obtain permission from local legislative body. Therefore, it takes a huge amount of time in order to solve a small particular problem which is also will be effected to the overall projects completion schedules (Gamar Ariyanto, 2015).

5 CONCLUSSIONS

This study has explore some problems during the operation of MCA-I as well as Indonesian development trust funds administrative frameworks. The most important conclusion is to review the legal status of MCA-I as well as the the next Indonesian development trust funds. It is also important to set of guidelines or regulations that should be added in the establishment documents of MCA-I such as regulation in the area of state budget that specially governed for development trust funds and tax regulation for development trust funds activity. A clear and reliable guideline and regulation will protect both the trust funds institution and donors, also to encourage efficient and fair use of development money.

Moreover, MCA-I's establishment regulation also still absent from some substantial provisions related to good and accountable governance. The lack of such provisions has created some problems in the operational level such as inadequate governance procedure, lack of efficiency and accountability of the organization's activity.

6 IMPLICATIONS AND LIMITATIONS

From the legal perspective, this work has made clear that GoI should amend the establishment documents of MCA-I as well as current trust fund regulations in order to make the development trust

fund operated more accountable, effective, and efficient in the future.

However, this research also has limitations in some different areas. Firstly, a study of law of development trust funds such as MCA-I is still relatively new in Indonesia. The resources and experts in this are is so limited. Further, international development trust fund's expert has also identified that the form of development trust funds is not "one-size-fits-all". Therefore, the works comparing MCA-I organizational framework with international best practices in other countries become challenging.

Secondly, this reaserch were took place in the USA when the author attended a graduate school, while most of the informan were based in Indonesia. Time differences between Jakarta and North Carolina (USA) as well as geograpichal burden give considerable difficulties in the phase of information gathering. The information from some informan were not easily flowed to the author in the process of finishing up this research.

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