



The International Academic Forum

# ABMC/ACPEL 2016

Art Center Kobe, Japan

iafor





“To Open Minds, To Educate Intelligence, To Inform Decisions”

The International Academic Forum provides new perspectives to the thought-leaders and decision-makers of today and tomorrow by offering constructive environments for dialogue and interchange at the intersections of nation, culture, and discipline. Headquartered in Nagoya, Japan, and registered as a Non-Profit Organization (一般社団法人), IAFOR is an independent think tank committed to the deeper understanding of contemporary geo-political transformation, particularly in the Asia Pacific Region.

INTERNATIONAL

INTERCULTURAL

INTERDISCIPLINARY

**iafor**



## The Executive Council of the International Advisory Board

### Mr Mitsumasa Aoyama

Director; The Yufuku Gallery, Tokyo, Japan

### Lord Charles Bruce

Lord Lieutenant of Fife  
Chairman of the Patrons of the National Galleries of Scotland  
Trustee of the Historic Scotland Foundation, UK

### Professor Donald E. Hall

Herbert J. and Ann L. Siegel Dean  
Lehigh University, USA  
Former Jackson Distinguished Professor of English and Chair of the Department of English

### Professor Arthur Stockwin

Founding Director of the Nissan Institute for Japanese Studies & Emeritus Professor  
The University of Oxford UK

### Professor Chung-Ying Cheng

Professor of Philosophy, University of Hawai'i at Manoa, USA  
Editor-in-Chief, The Journal of Chinese Philosophy

### Professor Steve Cornwell

Professor of English and Interdisciplinary Studies,  
Osaka Jogakuin University, Osaka, Japan  
Osaka Local Conference Chair

### Professor A. Robert Lee

Former Professor of English at Nihon University, Tokyo from 1997 to 2011, previously long taught at the University of Kent at Canterbury, UK

### Professor Dexter Da Silva

Professor of Educational Psychology, Keisen University, Tokyo, Japan

### Professor Georges Depeyrot

Professor and Director of Research & Member of the Board of Trustees  
French National Center for Scientific Research (CNRS) & L'Ecole Normale Supérieure, Paris, France

### Professor Johannes Moenius

William R. and S. Sue Johnson Endowed Chair of Spatial Economic Analysis and Regional Planning  
The University of Redlands School of Business, USA

### Professor June Henton

Dean, College of Human Sciences, Auburn University, USA

### Professor Michael Hudson

President of The Institute for the Study of Long-Term Economic Trends (ISLET)  
Distinguished Research Professor of Economics, The University of Missouri, Kansas City

### Professor Koichi Iwabuchi

Professor of Media and Cultural Studies & Director of the Monash Asia Institute, Monash University, Australia

### Professor Sue Jackson

Professor of Lifelong Learning and Gender & Pro-Vice Master of Teaching and Learning, Birkbeck, University of London, UK

### Professor Sir Geoffrey Lloyd

Senior Scholar in Residence, The Needham Research Institute, Cambridge, UK  
Fellow and Former Master, Darwin College, University of Cambridge  
Fellow of the British Academy

### Professor Keith Miller

Orthwein Endowed Professor for Lifelong Learning in the Science, University of Missouri-St. Louis, USA

### Professor Kuniko Miyanaga

Director, Human Potential Institute, Japan  
Fellow, Reischauer Institute, Harvard University, USA

### Professor Dennis McInerney

Chair Professor of Educational Psychology and Co-Director of the Assessment Research Centre  
The Hong Kong Institute of Education, Hong Kong SAR

### Professor Brian Daizen Victoria

Professor of English  
Fellow of the Oxford Centre for Buddhist Studies

### Professor Michiko Nakano

Professor of English & Director of the Distance Learning Center, Waseda University, Tokyo, Japan

### Professor Thomas Brian Mooney

Professor of Philosophy  
Head of School of Creative Arts and Humanities  
Professor of Philosophy and Head of School of Creative Arts and Humanities, Charles Darwin University, Australia

### Professor Baden Offord

Professor of Cultural Studies and Human Rights & Co-Director of the Centre for Peace and Social Justice  
Southern Cross University, Australia

### Professor Frank S. Ravitch

Professor of Law & Walter H. Stowers Chair in Law and Religion, Michigan State University College of Law

### Professor Richard Roth

Senior Associate Dean, Medill School of Journalism, Northwestern University, Qatar

### Professor Monty P. Satiadarma

Clinical Psychologist and Lecturer in Psychology & Former Dean of the Department of Psychology and Rector of the University, Tarumanagara University, Indonesia

### Mr Mohamed Salaheen

Director, The United Nations World Food Programme, Japan & Korea

### Mr Lowell Sheppard

Asia Pacific Director, HOPE International Development Agency, Canada/Japan

### His Excellency Dr Drago Stambuk

Croatian Ambassador to Brazil, Brazil

### Professor Mary Stuart

Vice-Chancellor, The University of Lincoln, UK

### Professor Gary Swanson

Distinguished Journalist-in-Residence & Mildred S. Hansen Endowed Chair, The University of Northern Colorado, USA

### Professor Jiro Takai

Secretary General of the Asian Association for Social Psychology & Professor of Social Psychology  
Graduate School of Education and Human Development, Nagoya University, Japan

### Professor Svetlana Ter Minasova

President of the Faculty of Foreign Languages and Area Studies, Lomonosov Moscow State University

### Professor Yozo Yokota

Director of the Center for Human Rights Affairs, Japan  
Former UN Special Rapporteur on Myanmar

### Professor Kensaku Yoshida

Professor of English & Director of the Center for the Teaching of Foreign Languages in General Education, Sophia University, Tokyo, Japan



The Asian Conference on Politics, Economics & Law 2016

Official Conference Proceedings

ISSN: 2188-2738

© The International Academic Forum 2016  
The International Academic Forum (IAFOR)  
Sakae 1-16-26-201  
Naka Ward, Nagoya, Aichi  
Japan 460-0008  
[www.iafor.org](http://www.iafor.org)





## Table of Contents

|  |               |
|--|---------------|
| <i>Access to Justice in International Investment Law through Integrative Legal Thinking</i><br>Fifi Junita   | pp. 1 - 11    |
| <i>From State Capture to Business Capture: Corruption or Maladministration?</i><br>Lily Evelina Sitorus  | pp. 13 - 26   |
| <i>The Impact of Farmers' Resistance to Trade Liberalization: A Comparative Study on Political Process around FTAs in Korea and Japan</i><br>Akio Nawakura | pp. 27 - 36   |
| <i>The Evidentiary Value of Big Data Analysis</i><br>Marco Pollanen<br>Bruce Cater   | pp. 37 - 46   |
| <i>Ineffectiveness of Enforcement of the Constitutional Court's Decision in Indonesia</i><br>Muhammad Tanziel Aziezi                                       | pp. 47 - 60   |
| <i>Historical Synopsis of the Change-of-Position Doctrine in Southern Africa, American and Continental European Laws</i><br>Aimite Jorge                   | pp. 61 - 72   |
| <i>Legislative Measures Related to Community Rights in Thailand and ASEAN Countries</i><br>Phasai Samart   | pp. 73 - 84   |
| <i>Determinants of Foreign Subsidiary Exploring Location-Specific Advantages: Capability Transfer and Experience Accumulation</i><br>Chin-I Chen           | pp. 85 - 106  |
| <i>Power-Dependence of British Central-Local Government Relations and Interdependence of International Relations in the EU</i><br>Yoshihiro Nagata         | pp. 107 - 117 |
| <i>The Exclusion of the Taliban from Afghanistan's State-Building and Its Human Security Vulnerabilities</i><br>Sajjad Ahmed                               | pp. 119 - 131 |



## ***Access to Justice in International Investment Law through Integrative Legal Thinking***

Fifi Junita, University of Airlangga, Indonesia

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

### **Abstract**

The principle of access to justice is very dominant in the enforcement of the protection of the public interests in International Investment Agreements (IIAs). Protection against fundamental rights of the local community is often ignored in the establishment of IIAs. It would be argued that the enforcement of access to justice principle needs an integrative legal thinking both in the substantive and procedural levels. Integrative legal thinking which is also known as non-compartmentalized legal thinking, as promoted by Prof. Pieter H.F. Bekker,<sup>1</sup> insists a balance protection of private and public interests in investment dispute settlement which involve multiple stakeholders. The fragmented approach may lead to pro investor bias and impede the enforcement of access to justice, especially for the civil communities which are also harmed as a result of the implementation of the investment. This article examines the concept of the integrative legal thinking and its relevant recent practices. It also argues that integrative or non-compartmentalized legal thinking is considered as a prominent factor to uphold the principle of access to justice in investment dispute settlement in order to protect not only the contracting parties, but also the local community or third party affected by the investment.

Keywords: integrative legal thinking, access to justice, investment dispute settlement.



**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

---

<sup>1</sup>Pieter H.F. Bekker, 'Recalibrating the Investment Treaty Arbitration System Through Non-Compartmentalized Legal Thinking', *Harvard International Law Journal*, Vol. 55, December 2013, [http://www.harvardilj.org/wp-content/uploads/2013/12/Bekker\\_to\\_Publish.pdf](http://www.harvardilj.org/wp-content/uploads/2013/12/Bekker_to_Publish.pdf), p. 2.

## Introduction

The principle of access to justice lies at the basic concept of International Investment Law (IIL) regime as a system of governance rather than purely economic notion. As a governance system, International Investment Law has no longer been considered as a pure private nature. It deals with both public and private concerns, impact upon both private and public actors.<sup>2</sup> In light of this overlap, this regime involves diverse stakeholders who adversely impacted on by foreign investment in a host state. This notion is inextricably linked to the state responsibility to ensure the protection of individual's legal right before a court as the exemplification of constitutional democracy and rule of law as basic attributes of the public law. The complexity of IIL is also caused by its international character which lies at prominent concept of transnational legal process.<sup>3</sup> These basic notions call for integrative legal thinking in order to ensure the minimum standard of justice in IIL. The principle of access to justice is an integral part of the minimum standard of treatment of aliens under the customary international law.<sup>4</sup> It promotes the protection of individual's rights who has suffered an injury caused by abusive power of public authorities or private entities to access to court.<sup>5</sup> The negation of this principle will lead to the 'denial of justice' since there is no guarantee of just, fair and adequate access to court and judicial outcome.

The implementation of the principle of access to justice is not without constraints. International investment cases are not always purely commercial in nature, but they might also have strong correlation with social issues.<sup>6</sup> The principle of access to justice as part of 'minimum standard of treatment of aliens' basically gives rights for third party to access to courts and administer justice in accordance with minimum standards of fairness and due process.<sup>7</sup> The binding arbitration clause under the International Investment Agreements (IIAs) leads to major issues of whether the access to justice principle can also be enforced since it basically refers to the access to domestic court of the host state. Other issue relates to how to resolve conflicts between private rights and public interests through Investor State Arbitration as a 'private' or 'commercial' dispute resolution mechanism.<sup>8</sup> Inconsistent decisions of the tribunal as regard to the societal dimension of investment disputes shows a little safeguard of access to justice for local communities who suffered by the investment.<sup>9</sup>

<sup>2</sup> Julie A Maupin, Public and Private in International Investment Law: An Integrated System Approach, Virginia Journal of International Law, Vol. 54: 2, p. 1.

<sup>3</sup> Pieter H.F. Bekker, *op.cit.*, p. 2.

<sup>4</sup> This minimum standard was essentially similar to standards of justice and treatment accepted by 'civilized states'. See Francesco Francioni, 'Access to Justice, Denial of Justice, and International Investment Law', available at <http://www.ejil.org/pdfs/20/3/1862.pdf>, accessed on 11 November 2016, p. 12.

<sup>5</sup> *Ibid.*

<sup>6</sup> The OECD report asserted that amongst 296 of IIAs which are signed by 30 member states and of 9 non member states do have incorporate societal dimension, in particular environment and labour issues. The similar trend is also adopted by 131 IIAs that are signed by 15 developing states including China and India.

<sup>7</sup> Francesco Francioni, *op.cit.*, p. 4.

<sup>8</sup> Jose E Alvarez, Is Investor State Arbitration Public?, available at [http://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016\\_6-GAL.pdf](http://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016_6-GAL.pdf), accessed on 11 November 2016, pp.1-5.

<sup>9</sup> Leyla Davarnejad, 'Strengthening Social Dimensions of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises', available at <http://www.oecd.org/investment/globalforum/40352144.pdf>, accessed on 11 November 2016, pp. 7-8.

Therefore, the procedural rights to access to justice through integrative legal thinking need to be secured.

The challenge of accommodating the conflicting claims/interests of various stakeholders within international investment law regime is best met through an integrative legal thinking, given the advantages offered by the inherent non compartmentalized nature of this method.<sup>10</sup> The integrative legal thinking cuts off the complexities of investor state arbitration from the perspective of conflicting interests between investor rights and broader government regulatory concerns. This approach can resolve the debate whether international investment law has shifted to public governance system or it is just a private regime.<sup>11</sup> This is mainly because the integrative legal thinking in IIL detaches from the strict traditional division of public private interests, national, private and public transnational law.

This article proceeds as follows. Part I analyses what is the concept of access to justice in IIL. This part will focus on the promotion of substantive and procedural justice and fairness. Secondly, the major constraints of the enforcement of access to justice principle in ISA will be examined. These challenges involve the issue of jurisdiction, the lack of public participation and transparency. Thirdly, it introduces the integrative legal thinking as an alternative measure to uphold the right of access to justice and address those challenges. In this context, the integrative legal thinking will focus on whether investment arbitration tribunals can consider non disputing party and non economic objective, in particular, the protection of public interests - e.g. human rights, sustainable development – taking into account in the limited scope of the jurisdiction of arbitral tribunals.

### **Basic Concept of The Principle of Access to Justice in International Investment Regime**

Access to justice has become an important issue in ISA due to the public nature of both the respondent and the measures at issue. The public nature of investment disputes are also based on the fact that the disputes both arises out of treaties and alleged violations of international legal obligations undertaken between two or more states to other state.<sup>12</sup> This should be differentiated from a claim based upon a contractual promise between the private parties.<sup>13</sup> Investment disputes based on treaty commonly relates to public values, often involving scrutiny of actions of public authorities in the execution of public duties or to advance policies stated in the law.<sup>14</sup>

The principle of access to justice is considered as a fundamental principle of the rule of law embodying transparency, accountability and good governance as an effective means for the achievement of eco social justice. It comprises not only the individual's access to court/arbitration, or guaranteeing legal representation, but it also insures just

---

<sup>10</sup>Pieter H.F. Bekker, *op.cit.*, p. 4.

<sup>11</sup>Stephan W Schill, 'Reforming Investor State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward', available at <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>, accessed on 1 November 2016, pp. 8-9.

<sup>12</sup>Mark A Clodfelte, 'Why Aren't More Investor-State Treaty Disputes Settled Amicably?', available at [http://unctad.org/en/Docs/webdiaeia20108\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20108_en.pdf), accessed on 1 November, p. 40.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



and equitable judicial outcomes.<sup>15</sup> The concept of access to justice must target on two fundamental goals of a legal system: (1) that it accessible to people from all levels of society; and (2) that it is able to provide fair decisions and rules for people from all levels of society, either individual or collectively.<sup>16</sup> Sussinctly, the principle of access to justice covers both the procedural justice and substantive justice.<sup>17</sup> The UNDP prescribes access to justice as the ability of people to seek and obtain remedy through formal or informal institutions of justice, and in conformity with human rights standards.<sup>18</sup> In the absence of access to justice, people are unable to exercise their rights. The right of equal access to justice for all including members of vulnerable groups has been reaffirmed in the United Nations Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Level.<sup>19</sup> The equality of justice is the basic value of the principle of access to justice.<sup>20</sup> This comprises the equality before the court and tribunal as the main characteristic of constitutional democracy in order to protect the constitutional/fundamental rights of the people. The notion of access to justice has also surfaced in international legal framework as incorporated in the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union. These conventions encompass expansive concept of access to justice, comprising of the following elements: due process of law, right to a fair trial and right to an effective remedy.<sup>21</sup> As one of the attributes of rule of law, it pertains to both procedural and substantive justice and fairness.

### **Major Constraints of Access to Justice in Investor State Arbitration (ISA)**

The global backlash and legitimacy crisis against ISA due to its inherent systemic challenges have become the major sources of challenges to the access to justice in international investment regime. This includes inconsistent and contradictory decisions issued by the tribunals, increasing number of dissenting opinions and potential conflict of interests of arbitrators.<sup>22</sup> The complexities of ISA involve diverse participants and stakeholders such as private and public actors i.e. the host state as well as non disputing party (local communities) who suffers from adverse impacts of investment. This character may constitute the greatest threat potential to the enforcement of access to justice in ISA. The public nature of ISA provides legal

<sup>15</sup> Desmond Mudala Kaunda, 'Expanding Access to Justice for the Poor Malawi's Search For Solutions, A Comparative Analysis with other Select Informal Justice System', available at [http://menneskeret.dk/files/media/dokumenter/udgivelser/desmond\\_report\\_ok.pdf](http://menneskeret.dk/files/media/dokumenter/udgivelser/desmond_report_ok.pdf), accessed on 4 September 2016, p. 19.

<sup>16</sup> *Ibid.*

<sup>17</sup> Matthias Kötter, 'Better Access To Justice By Public Recognition of Non-State Justice Systems?', available at <http://ssrn.com/abstract=2613408>, accessed on 4 September 2016, pp. 3-4.

<sup>18</sup> *Ibid.*

<sup>19</sup> "We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid." See United Nations General Assembly, Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Available at <http://www.ipu.org/splz-e/unbrief12/dr-declaration.pdf>, accessed on 4 November 2016, p. 3.

<sup>20</sup> See Article 14 of the International Covenant on Civil and Political Rights.

<sup>21</sup> See Article 2 (3) of the International Covenant on Civil and Political Rights.

<sup>22</sup> Pieter Bekker, *op.cit.*, p. 6.

competence for investment tribunal to award damages to foreign investors, thus the confidentiality in the arbitral procedure is basically inadequate.<sup>23</sup>

The jurisdictional issue of investor state arbitration has become another major constraint to access to justice. The limited jurisdiction of international investment tribunals can restraint the investment tribunal to resolve non investment or non-economic issues. Based on the principle of party autonomy and arbitrability, the legal authority of the arbitration confines to investment disputes or claims arising out or related to the investment treaty and it cannot apply any laws that had not been defined as the applicable law. Therefore, the legal competence of ISA is basically only concerned with claims directly arise out or related to the investment and the governing law/applicable law that had been chosen by the contracting parties. Thus, it cannot be always extended to any types of conflicts between the investor and the host state and any applicable laws cannot be applied extensively.<sup>24</sup> These issues may hamper the implementation of access to justice principle in ISA.

The lack of public participation and transparency in investment arbitration also create major constraints for non disputing party access to ISA. The adoption of public participation provides a legal basis for non disputing party who suffered from adverse impact of investment to access to justice in investment arbitration. The notion of public participation encompasses the public's right to participate in decision making processs that impinge their lives. The investment dispute that have societal dimension also possibly induce public's living reality.<sup>25</sup> The absence of public participation raises a query of legitimacy and accountability of the arbitral tribunal. The principle of access to justice closely interlinked with the public participation.

### **Addressing Constraints of Access to Justice through Integrative Legal Thinking**

Integrative legal thinking in this context is meant to integrate, not to isolate, substantive and procedural elements of the concept of access to justice principle in international investment law. Given that the previous methods only address concerns about the interpretive stage, the integrative legal thinking highlights the value of a holistic/integrative approach to access to justice that includes multiple integrated procedural and substantive strategies to address the diverse legal needs of the diverse stakeholders in ISA. It underscores the importance of a holistic/integrative approach that integrates procedural and substantive issues for upholding the right of access to justice in ISA. An integrative legal thinking to promote access to justice requires overcoming the fragmentation across procedural and substantive issues and across conflicting principles of public and private law regimes. The integrative legal thinking comprises of recognition, systemic integration at the interpretation stage and institutionalization of ISA mechanism at the adjudicative level.

<sup>23</sup> Eric De Brabandere, *Investment Treaty Arbitration as Public International Law*, Cambridge, UK, 2014, p. 151.

<sup>24</sup> *Ibid.*, p. 131.

<sup>25</sup> Markus W Gehring&Avidan Kent, 'International Investment Agreements and the Emerging Green Economy: Rising to the Challenge', in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspective*, Cambridge, UK, 2013, p. 199.

### a. Recognition Stage

The recognition stage involves the establishment of explicit provisions as regard to access to justice for non-disputing party, amicus curiae briefs and the substantive protection of public interests both in the body text and the preamble of the treaty. The three former provisions must be expressly incorporated in the arbitration rule of procedures. All of these provisions may specify the manner in which arbitrators should take into investor's obligations toward non-disputing party who suffered from investment when interpreting the treaty. Express provisions as regard to the possibility of non-disputing party to access to ISA in the arbitration rule of procedures will guarantee their rights.

The integrative legal thinking should approach the procedural and substantive threats to access to justice holistically. At the procedural level, this approach takes into account all of those inherent challenges within the ISDS mechanism.<sup>26</sup> The incorporation of specific rules regarding public participation in the form of non-disputing party and non-governmental organization (NGO) participation as *amici curiae* in the ICSID Arbitration Rules demonstrates the adoption of the integrative legal thinking. At the substantive level, the integrative legal thinking more likely confines to the interpretation of treaty provisions based on the principle of systemic integration as stipulated in VCLT. It is argued that the arbitral tribunal tends to interpret vague provisions of IIAs too generously, and thus deteriorate proportional protection between investment and the right to regulate of the sovereign state (host state).<sup>27</sup>

The issue of non-disputing party access to ISA is closely interconnected with the procedural justice e.g. public participation and transparency. The absence of modification reform of the existing ISDS can obstruct the implementation of access to justice principle. This can be noted from the case of *Agua del Tunari SA v. The Republic of Bolivia*<sup>28</sup> (also known as Bechtel case), in which case the arbitrator refused to allow third party participation on the ground that it was inconsistent with arbitration proceedings and unwillingness of the parties to consent their participation. This case demonstrates the interconnectedness of ICSID arbitration procedures, the BIT and the private nature of arbitration which left the decision as regard amicus participation in the hands of the parties to the arbitration.<sup>29</sup> The arbitral tribunal refused to allow the third parties' participation since the parties did not consent, thus the arbitral tribunal has no legal authority to allow any form of third party intervention.<sup>30</sup> The negation of third party participation in this case more likely

<sup>26</sup> The ICSID Arbitration Rules and several investment agreements has designed specific rules for non-disputing party access to Investment Treaty Arbitration. This rule constitutes one of the most important means to ensure public access to the proceedings which can also generate a fair outcome.

<sup>27</sup> Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty?', in Wenhua Shan, Penelope Simons & Dalvinder Singh, *Redefining Sovereignty in International Economic Law*, Hart Publishing, USA, p. 234.

<sup>28</sup> ICSID case No. ARB/02/3

<sup>29</sup> Based on the party autonomy principle, the disputing parties in a commercial arbitration play a pivotal role.

<sup>30</sup> See the ammendmend if ICSID Arbtration Rules 37 and Article 41` of the Additional Facility Arbitration Rules regarding evidence, that arbitral tribunals would have the authority, after consulting both parties as far as possible, to accept and consider submission from third parties. 'See OECD,

confines to the procedural issues which relates to the absence of parties' consents. The decision demonstrated the interplay of access to justice and the ICSID mechanism.

The consensual nature of arbitration has inhibited the access to justice of third parties in the arbitral proceedings of ISA. Despite the fact that basically the national court of the host state has a jurisdiction to adjudicate the investment disputes in its territory, the concept of 'arbitration without privity' as incorporated in many IIAs has assigned the host state to ISDS mechanism as regard to any investment disputes within its territory. This condition can undercut the rights of the public or non-disputing parties to ask for remedial proceedings through domestic court. As a matter of fact, the private nature of Investor State Arbitration is basically in conflict with the rule of law principle as promoted in the public law regime. In order to safeguard access to justice for third parties in ISA, it requires modification to the existing ICSID mechanism. For this reason, the recognition and promotion stage plays a pivotal role in order to give a legal basis of arbitrator's discretionary power to give leeway for the public participation of non-disputing parties in ISA. This is mainly due to the dominancy of private law regime rather than public law nature in ISA. This involves the adoption of public participation in Arbitration Rules and International Investment Agreements leading to the tailoring of the existing ICSID mechanism.<sup>31</sup> The adoption of transparency and public participation in UNCTRAL Arbitration Rules and ICSID Arbitration Rules can be a starting point to set a system and manner of arbitrators to justify the promotion of access to justice in ISA.

#### **b. Interpretive Stage: The adoption of Systemic Integration**

At this stage, the systemic integration as provided in Article 31 (3)(c) of VCLT must be adopted in order to uphold access to justice. The Article obliges a treaty interpreter when interpreting primary treaty text to take into account 'any relevant rules of international law applicable in the relations between the parties'. Its purpose has been described as to enable 'systemic integration within the international law legal system'. It has to be noted that the major problem of access to justice of non-disputing party is the conflict of interests between public and private regime. The systemic integration may resolve the

At the substantive level, the integrative legal thinking promotes non-compartmentalized and transnational law approach to the interpretation of the vague terms of IIAs by cutting across domestic and international dichotomies, private and public, that taking account all diverse stakeholders in International Investment Law. This approach is also prominently advocated in VCLT which is known as the principle of 'systemic integration'.<sup>32</sup> At this interpretive stage, the the right of access to justice is intended to achieve an integrative mutual gain by reconciling parties' underlying interests. The absence of integrative approach to both procedural and

---

'Transparency and Third Party Participation in Investor State Dispute Settlement Procedures', available at <http://www.oecd.org/daf>, accessed on 19 September 2016, p. 10.

<sup>31</sup> Rule 32 (2) of ICSID Arbitration Rule provides : Unless either party object, the Tribunal, after consultation with the Secretary General, may allow other persons, besides the parties, their agents, counsel and advocates, witness, and experts during their testimony, and officers of tribunals, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements.

<sup>32</sup> See Article 31 (3) (c) of VCLT.

substantive issues, the enhancement of access to justice will consistently pose challenges and serious threat in ISA.

Through the integrative legal thinking, the interpretation of the protection of substantive rights of the foreign investors must also accommodate the interests of diverse stakeholder involved in ISA.<sup>33</sup> This will safeguard the right of access to justice for non disputing parties in ISA. This can be noted from the case of *Methanex Corporation v. United States of America*,<sup>34</sup> in which case the arbitral tribunal granted public participation of non disputing parties. In this case, the arbitrator attempts to recalibrate the conflicting interests of the disputing parties through integrative legal thinking by considering both public and private issues. This integrative legal thinking cut across the differentiation between public and private law regimes. Instead of establishing public and private law as a conflicting regimes, the integrative thinking can reconcile those two concepts through considering the interests of the diverse stakeholders. This integrative approach prominently advocates the interest based approach by bringing together and operates at the intersection of public and private law regimes.

### c. Adjudicative stage: Institutional Reform of ISA Mechanism

Institutional reform plays a pivotal role in order to uphold the principle of access to justice in ISA. As noted, although ISA is a specialized forum for the resolution of investment disputes, it remains a system of arbitration with closely link to private adjudication instead of public adjudication. The major legal basis of<sup>54</sup> arbitration is the principle of party autonomy, confidentiality, and finality of the award. Access to justice as an exemplification of public participation principle in public law regime cannot seem to be recognized in ISA. Therefore, it is also unrealistic to expect arbitrators to discover and invoke the complex techniques of systemic integration under the Article 31 (3) of the VCLT without promoting institutional reform in ISA.<sup>35</sup>

In this context, there must be a reform in ISDS mechanism e.g. ISA in order to ensure that it develops in ways that are democratic, respectful of human rights and in line with fundamental demands of the rule of law.<sup>36</sup> At the adjudicative stage, there must be a fundamental reform of the existing arbitral system in order to be more democratic which is based on the principle of rule of law.<sup>37</sup> The institutionalization of ISDS mechanism can be done through the establishment of appellate mechanism for the revision of error as mandated by the principle of rule of law and governance. The adoption of principle of transparency in Arbitration rule of procedures can also be promoted in order to maintain accountability of decision makers in ISDS mechanism. In addition, the possibility of amicus curiae brief and non-disputing party access to justice should also be expressly incorporated in the arbitration rule of procedures in order to promote public participation. This reform can be noted from the ICSID Rules

<sup>33</sup> See Pieter Bekker, *op.cit.*, p. 5.

<sup>34</sup> OECD, 'Transparency and Third Party Participation in Investor State Dispute Settlement Procedures', available at [https://www.oecd.org/daf/inv/investment-policy/WP-2005\\_1.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf), accessed on 11 November 2016, p. 6.

<sup>35</sup> Jurgen Kurtz, 'Access Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni', *The European Journal of International Law*, Vol. 20 no. 4, 2010, available at : <http://www.ejil.org/pdfs/20/4/1947.pdf>, accessed on 13 November 2016, p. 1085.

<sup>36</sup> Stephan W Schill, *op.cit.*, p. 3.

<sup>37</sup> *Ibid.*



in 2006, The UNCTIRAL Rule on Transparency in Treaty-based Investor State Arbitration in 2014.

The negation of investment arbitration tribunal to allow third-party participation or access to ISA was due to the inherent systemic different between arbitration proceedings and those before international or domestic court. In other words, there has been a strict distinction between private law and public law regimes. The consensual nature of arbitration has put the access to justice under the hands of the contracting parties. An integrated system and interplay of the institutionalization of ISDS mechanism, a systemic integration and recognition may support the enhancement of the principle of access to justice in ISA. Since the ISDS mechanism is mainly based on the principle of party autonomy, the absence of institutional reform, a systemic integration may deprive the public reasonable expectations which can be noted from the case of *Aguas del Tunari SA v. The Republic of Bolivia*.<sup>38</sup> In the case of *Methanex Corporations v. United States of America*,<sup>39</sup> however, the tribunal admitted the privilege of third parties to participate as *amicus curiae* in investment arbitration proceedings. This decision demonstrates the adoption of integrative approach to recognition, interpretation i.e. systemic integration and institutional reform.

## Conclusion

The restraint of the enforcement of access to justice in ISA is mainly caused by the strict dichotomy between public and private law regimes. The basic concept of ISA mechanism as a private dispute resolution hampers the enforcement of access to justice which has a characteristic of public law regime. This challenge can be solved by considering both procedural and substantive justice and fairness through integrative legal thinking. At the substantive level, there must be recognition of the protection of public interests as well as the principle of transparency, public participation, accountability, democracy and rule of law. This needs a review of the existing treaties, in particular BIT (Bilateral Investment Treaties). At the procedural level, there must adopt the systemic integration as the method of interpretation and reform/institutionalism of ISA mechanism. Those elements are integrated system that can be used to uphold the principle of access to justice in International Investment Law.

---

<sup>38</sup> ICSID Case No. ARB/02/3, Jurisdiction, ICSID REV: Foreign Investment Law Journal 450 (2005).

<sup>39</sup> Decision of the Tribunal on Petitions from Third Person to intervene as Amicus Curiae, in the matter of an arbitration under Chapter 11 of the North American Free Trade Agreement, UNCITRAL Arbitration Rules, available at: [http://www.italaw.com/sites/default/files/case-documents/ita0517\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf), accessed on 14 November 2016.

## References

Desmond Mudala Kaunda, 'Expanding Access to Justice for the Poor Malawi's Search For Solutions, A Comparative Analysis with other Select Informal Justice System', available at

[http://menneskeret.dk/files/media/dokumenter/udgivelser/desmond\\_report\\_ok.pdf](http://menneskeret.dk/files/media/dokumenter/udgivelser/desmond_report_ok.pdf), accessed on 4 September 2016.

Eric De Brabandere, *Investment Treaty Arbitration as Public International Law*, Cambridge, UK, 2014.

Francesco Francioni, 'Access to Justice, Denial of Justice, and International Investment Law', available at <http://www.ejil.org/pdfs/20/3/1862.pdf>, accessed on 11 November 2016.

ICSID Case No. ARB/02/3, Jurisdiction, ICSID REV: Foreign Investment Law Journal 450 (2005).

International Covenant on Civil and Political Rights.

Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty?', in Wenhua Shan, Penelope Simons & Dalvinder Singh, *Redefining Sovereignty in International Economic Law*, Hart Publishing, USA.

Julie A Maupin, 'Public and Private in International Investment Law: An Integrated System Approach', *Virginia Journal of International Law*, Vol. 54: 2.

Jurgen Kurtz, 'Access Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni', *The European Journal of International Law*, Vol. 20 no. 4, 2010, available at : <http://www.ejil.org/pdfs/20/4/1947.pdf>, accessed on 13 November 2016.

Jose E Alvarez, 'Is Investor State Arbitration Public?', available at [http://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016\\_6-GAL.pdf](http://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016_6-GAL.pdf), accessed on 11 November 2016.

Leyla Davarnejad, 'Strengthening Social Dimensions of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises', available at <http://www.oecd.org/investment/globalforum/40352144.pdf>, accessed on 11 November 2016.

Markus W Gehring&Avidan Kent, 'International Investment Agreements and the Emerging Green Economy: Rising to the Challenge', in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspective*, Cambridge, UK, 2013.

Mark A Clodfelte, 'Why Aren't More Investor-State Treaty Disputes Settled Amicably?', available at [http://unctad.org/en/Docs/webdiaeia20108\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20108_en.pdf), accessed on 1 November.

Matthias Kötter, 'Better Access To Justice By Public Recognition of Non-State Justice Systems?', available at <http://ssrn.com/abstract=2613408>, accessed on 4 September 2016.

OECD, 'Transparency and Third Party Participation in Investor State Dispute Settlement Procedures', available at <http://www.oecd.org/daf>, accessed on 19 September 2016.

OECD, 'Transparency and Third Party Participation in Investor State Dispute Settlement Procedures', available at [https://www.oecd.org/daf/inv/investment-policy/WP-2005\\_1.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf), accessed on 11 November 2016.

Pieter H.F. Bekker, 'Recalibrating the Investment Treaty Arbitration System Through Non-Compartmentalized Legal Thinking', *Harvard International Law Journal*, Vol. 55, December 2013, [http://www.harvardilj.org/wp-content/uploads/2013/12/Bekker\\_to\\_Publish.pdf](http://www.harvardilj.org/wp-content/uploads/2013/12/Bekker_to_Publish.pdf).

Stephan W Schill, 'Reforming Investor State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward', available at <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>, accessed on 1 November 2016..

United Nations General Assembly, Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Available at <http://www.ipu.org/splz-e/unbrief12/dr-declaration.pdf>, accessed on 4 November 2016.

Vienna Convention on Law of Treaty.

**Contact email:** [fifjunita@yahoo.com](mailto:fifjunita@yahoo.com)



***From State Capture to Business Capture: Corruption or Maladministration?***

Lily Evelina Sitorus, University of Indonesia, Indonesia

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

Accountability is the key to good governance. In global administrative law, every policy made should be accountable. The given law should be accessible for public. When global financial crisis happened, many countries didn't have the necessary rules to solve problems arose. In Indonesia, the decision from government to bailout century bank is controversial as of right now. The need of comprehensive law in related to economic, political and social factor should be considered. Unfortunately, bailout policy can be seen in two ways: state capture or business capture. State capture for some countries is a form of corruption: less known but still very pervasive, found often but not exclusively in transition countries. Others called it business capture: the state unlawfully taking control and exercising undue influence over businesses. By comparing both, there's another characteristics emerge: maladministration. Administrative failure which hard to define but one always can find it exist in the exercise of good governance.

Keywords: state capture, business capture, corruption, maladministration

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

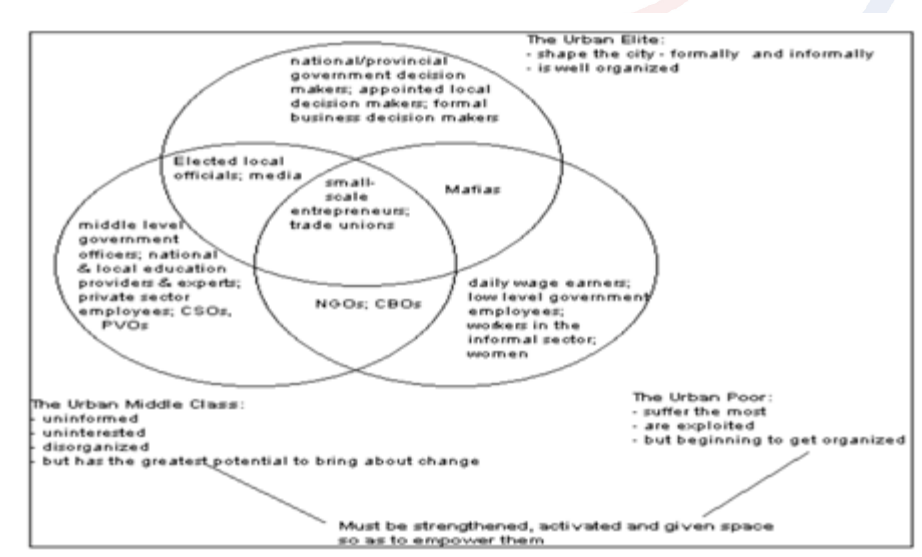


## Introduction

Joel Hellman and Daniel Kaufmann said that in transition economies, corruption has taken on a new image—that of so-called oligarchs manipulating policy formation and even shaping the emerging rules of the game to their own very substantial advantage. They refer to this behaviour as state capture. Another definitions of ‘State capture’ is defined by Vesna Pesic as any group or social strata, external to the state, that seizes decisive influence over state institutions and policies for its own interests and against the public good. Teten Masduki, also have similar understanding that state capture is a policy that have been made to the advantage of entrepreneurs.

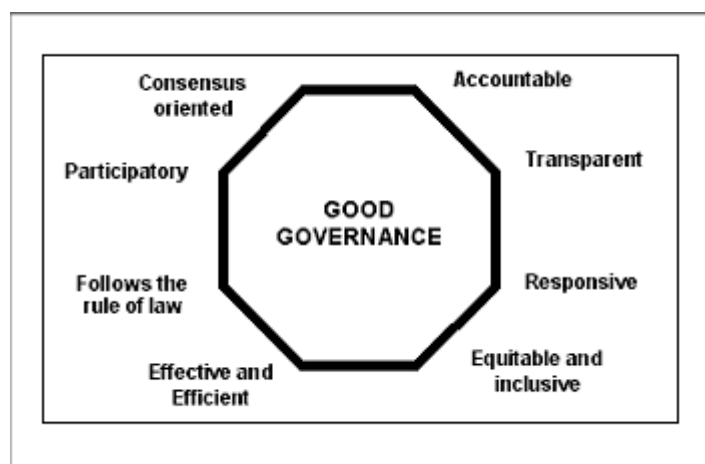
Anne Lugon-Moulin in understanding state capture said that it occurs when the ruling elite and/or powerful businessmen manipulate policy formation and influence the emerging rules of the game (including laws and economic regulations) to their own advantage. In recognizing the problem of state capture, Helmann and Kaufmann put their effort on the complex interactions between firms and the state. Particularly, they emphasize the importance of mechanisms through which firms seek to shape decisions taken by the state to gain specific advantages, often through the imposition of anticompetitive barriers that generate highly concentrated gains to selected powerful firms at a significant social cost. Accordingly, state capture has become not merely a symptom but also a fundamental cause of poor governance.

Since governance is the process of decision-making and the process by which decisions are implemented, government is only one of the actors in governance. All actors other than government and the military are grouped together as part of ‘civil society’. At the national level, informal decision-making structures such as ‘kitchen cabinets’ or informal advisors may exist. Such informal decision-making is often the result of corrupt practices or leads to corrupt practices. Figure 1 provides the interconnections between actors involved in urban governance:



Bad governance is being increasingly regarded as one of the root causes of all evil whereas major donors and international financial institutions are basing their aids and loans on the condition that reform ensure ‘good governance’ undertaken. Good governance has 8 major characteristics. It assures that corruption is minimized, the

view of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. Figure 2 specify the characteristics of good governance:



In the absence of access to government decision making through collective representatives, firms are compelled to seek informal, one-on-one relationships with individual state officials to represent their interests. A number of key writings on the topic suggest the roots of state capture extend from partial civil liberties, lack of transparency, competition and insecurity of property rights. The lack of transparency tends to go hand in hand with insufficient competition among firms and other constituencies to influence the state's deliberative processes. Fostering competition in the economy and in the marketplace for political influence is the main challenge in preventing and combating state capture.

## Corruption

Montinola and Jackman conducted cross-country study to find sources of corruption. Two arguments were initially advanced to explain the incidence of corruption in the newly sovereign states. The first took a cultural approach, suggesting that corruption stems from social norms that emphasize gift-giving and loyalty to family or clan, rather than the rule of law. The second explanation of corruption stimulated by events in the new states, a revisionist approach, attributed the phenomenon to a country's particular stage of development. Within the revisionist school, some scholars argued that corruption is efficiency-enhancing; it helps alleviate problems of capital formation and administrative inflexibility characteristic of modernizing economies.

With the popularity during the 1970s of neo-Marxist approaches to development issues, the debate on causes of corruption became irrelevant. Corruption was no longer a puzzle, but simply an inevitable by-product of capitalist democracy and an intrinsically corrupt international capitalist system in which lower-class groups are routinely and systematically exploited. By the 1980s, however, neo-Marxist analyses began to lose favour, as the gap between their predictions and observed patterns became increasingly conspicuous. An expanding number of so-called peripheral countries in Asia and Latin America, for example, were developing rapidly (instead of under developing), while socialist countries were performing much more poorly than expected.

| Systematic Change   | Major Political Effect |              |
|---------------------|------------------------|--------------|
| East Germany        | Argentina              | Bangladesh   |
| Liberia             | Brazil                 | Burkina Faso |
| Mauritania          | China                  | Colombia     |
| Nicaragua           | Gabon                  | Greece       |
| Niger               | India                  | Indonesia    |
| Nigeria             | Italy                  | Ivory Coast  |
| Panama              | Japan                  | Kenya        |
| Philippines         | Malaysia               | Mali         |
| Former Soviet Union | Mexico                 | Pakistan     |
| Sierra Leone        | Paraguay               | Peru         |
| Sudan               | South Korea            | Spain        |
| Uganda              | Tanzania               | Thailand     |
|                     | Venezuela              | Zaire        |
|                     | Zambia                 |              |

Figure 3. Linkages of corruption to systemic change and major political effect by country's since the mid-1970s

The argument that state intervention in the economy and weak political competition facilitate corruption appears to fit well with the experience of a number of developing countries. Moreover, Montinola and Jackman offer a fresh analysis of the sources of corruption. First, they hypothesize that more competitive political structures inhibit corruption. Second, their hypothesis focuses on the possible effects of government size. Specifically, they examine the proposition that larger governments generate more corruption. Finally, they examine the proposition that the incidence of corruption is lower in countries with higher levels of economic development.

Daron Acemoglu and Thierry Verdier in their research about the choice between market failures and corruption had developed a simple framework to analyze the links between government interventions and government failures. There are three basic assumptions:

1. Government intervention requires the use of agents ("bureaucrats" for short) to collect information, make decisions, and implement policies;
2. These bureaucrats are self-interested, and by virtue of their superior information, hard to monitor perfectly;
3. There is some heterogeneity among bureaucrats.

These three assumptions imply that when the market failure in question is important, the optimal allocation of resources will involve a certain degree of government intervention, accompanied by a large government bureaucracy, rents for public employees, misallocation of resources, and possibly, corruption. Acemoglu and Verdier used the above reasoning to produce result such as: because government intervention designed to correct, market failures requires the use of bureaucrats to make decisions, it will create opportunities for these employees to be corrupt and demand bribes.

Another result is that corruption should be observed as part of an optimal allocation when the market failure in question is important, and the fraction of "dishonest"

bureaucrats (those who are harder to detect when taking bribes) is relatively low. This result may suggest that situations where the majority of bureaucrats are corrupt, as in some less developed countries (LDCs) are harder to rationalize as "optimal" government intervention than instances of more occasional corruption in the country member of Organization for Economic Cooperation and Development (OECD).

The established link between government intervention and market failure have raised questions about the economic of corruption. Toke S. Aidt had made a distinction between four different analytic approaches to corruption. The categories are:

1. Efficient corruption: corruption arises to facilitate beneficial trade between agents that would not otherwise have been possible. It promotes allocate efficiency by allowing agents in the private sector to correct pre-existing government failures;
2. Corruption with a benevolent principal: corruption arises when a benevolent principal delegates decision making power to a non-benevolent agent. The level of corruption depends on the costs and benefits of designing optimal institutions;
3. Corruption with a non-benevolent principal: corruption arises because non benevolent government officials introduce inefficient policies in order to extract rents from the private sector. The level of corruption depends on the incentives embodied in existing institutions;
4. Self-reinforcing corruption: the reward to corruption depends on the incidence of corruption due to strategic complementarities. The level of corruption depends, for given institutions, on history.

Michael Johnston said that any assessment of the role of corruption in the world's economies must also address its political dimension. Parallel to Johnston findings that corruption tends to accompany rapid political and economy change, he also said that corruption raised important political question about the relationship between state and society and between wealth and power.

### **Maladministration**

Maladministration as Kenneth Wheare said is a very large subject; it occurs wherever social organisation exists. It is not confined to the operations of the government or state alone. It may be difficult to define but most believe that one could recognise an example of it, if one saw it. In a sense it all comes back to the meaning of 'administration' itself. If it includes within it a measure of rule-making and of adjudication, the notion of administration widen and in so doing the area in which maladministration can occur. If on the other hand the word have a narrower meaning, the meaning of maladministration is correspondingly confined.

Wheare argue that 'administration' as in wider sense. In the pursuit of maladministration, concepts of misconduct and negligence have been introduced. Misconduct has many shades of meaning as a deliberate dereliction of duty on the part of a person who knows that he is acting wrongfully and in the breach of duty. The relevance concept of negligence is a departure from the required standard of competence, whether it be by action or by failure to take action, though not every departure is necessarily negligence.

It is sometimes assumed that in identifying maladministration, one cannot question the rules, only the actions of those who are applying the rules. As a result, if an official is carrying out the rules or is acting strictly in accordance with them, then, no matter how unjust the results are for the citizen, no question of maladministration can arise. Wheare argue this point of view, such complaints are, in many cases, complaints both against bad administration and bad laws and it is the bad laws which have made possible and sometimes made obligatory the bad administration.

In defining public maladministration, Caiden said that the breakdowns of individual policies, programs and organizations do not constitute an indictment of a whole administrative systems. Studies of postcolonial administrations in several newly independent states had indicated that systemically sick administrations did exist, which caused the societies so badly to fail to develop and even deteriorate. Although individual administrative maladies have been identified for many centuries, no one has ever tried to combine it systemically.

The study of public administration as such has to await the spread of the institution of ombudsman from its native Scandinavia. Based on actual complaints investigated by the British version of the ombudsman, Geoffrey Marshall concluded that maladministration was both a matter of instinct and an acquired technique. A novel experiment was tried in the early 1970s at the Institute of Administration at the University of Ife, Nigeria. Factor analysis pointed to six leading causes of preventing initiative: corruption and lack of integrity; community conflict and aggression; inefficiency; sectarian conflict; misconduct and indiscipline; and bad authority relationships.

Although a formal definition of "maladministration" did not exist at the time the powers of the Ombudsman were first established, however, one has evolved through practice. The Ombudsman provided a preliminary definition in its 1995 Report to the European Parliament: "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." Based on this definition, the Ombudsman considers it an instance of maladministration whenever an institution or a Community body does not respect the Treaty rules as they are contained in binding Community legislation, the rules and principles of law derived from decisions of the Court of Justice and the Court of First Instance, or fundamental human rights law.

This broad definition leads to significant overlap between investigations by the Ombudsman and investigations by the European Courts. The Treaty does not contain provisions detailing the activities that may be subject to investigation by the Ombudsman and the means of formulating complaints. This absence is significant, as it suggests that, contrary to the activities of judges under Article 230 of the Treaty, the Ombudsman is not limited in his examination of specific activities and wrongdoings. In other words, the Ombudsman does not render decisions that remedy the legal injury to the complainant, but formulates opinions aimed at encouraging amendments to the practices and rules applied by Community institutions.

In Indonesia, maladministration is a behaviour or illegal action, abuse of power, using authority contrary to the purpose of the authority given, including negligence or omission in doing public service by official and government which resulted in



material loss and/or immaterial to the individual and society. The wider definition of maladministration in Indonesia gave ombudsman the chance to take part in every maladministration cases including criminal, human rights, ethics and administrative cases. Accordingly, this resulted in the need to cooperate with other government bodies based on Memorandum Of Understanding (MOU).

### **Case Study**

The practices of state capture had invoked the party involved to find the solutions. Kaufmann is one of the leading researchers in these matters. His research basically made the basic ground for other research to be held. World Bank and the European Bank for Reconstruction and Development (EBRD) conducted joint initiative to form The Business Environment Survey (BEEPS). The results of the Business Environment and Enterprise Performance Survey 2002 do indeed show that there has been a decline in state capture -- a significant decline in some cases -- across the transition countries.

The countries where capture was most pronounced -- Russia, Ukraine, Azerbaijan, Moldova -- have seen the sharpest decline, while countries with more modest capture levels, for example in some south-eastern European countries, have remained more or less constant or experienced an increase in levels of capture. Meanwhile, the recently conducted research, has found that Putin paved the way for a new phenomenon of 'business capture' by state officials. Business capture constituted of dramatic increase in the formal state share ownership in certain strategically important sectors, such as petroleum, energy and media outlets.

Practitioners in Russia consistently highlight that there are two parallel processes taking place in Russia: state capture and business capture, as described by some, these two processes have been turned into the fusion of state + business by the elite, with former bureaucrats running businesses and business leaders holding or controlling political office. Amongst the key measures to address the situation are the introduction of conflict of interest, regulations, codes of conduct and wide-ranging transparency reforms. In addition, it has now been acknowledged by many that to galvanize Russia's public debate over corruption, it is vital to remove the sole responsibility for reform from government.

President Putin publicly challenged the leaders of the Union of Industrialists and Entrepreneurs (RSPP) to help "destroy the breeding ground for corruption". The association responded by creating a working group that will recommend administrative reform measures to the president, which will include reducing obstacles to business that provide the opportunity and incentive to engage in various forms of corruption, including state capture.

### **Practices**

In Indonesia, Susilo Bambang Yudhoyono, when elected as the sixth president of Indonesia, introduced the integrity pact for his cabinet. The candidate for ministry office must sign their signature that explained their commitment to avoid corruption according to code of conduct. This action might relate to history of Indonesia under regime Soeharto. Soeharto may never intend to give grief for Indonesia but alas after

ruling for almost 32 years, it had established as a corrupt regime. After that, Indonesia forced to embark on a comprehensive and unprecedented process of decentralisation, devolving almost overnight enormous responsibilities to regional, provincial and local governments. In spite of considerable achievements, the Indonesian decentralisation process continues to face major challenges of state capture by the local elites, a deeply entrenched patronage system and widespread petty and bureaucratic corruption.

Transparency International in accordance with Anti Corruption Resource Centre tries to fully understand the nature of corruption challenges at the local level. In query, they said that it is important to analyze the successes and failures of Indonesia's unprecedented decentralization process that transferred rapidly complete responsibility for most public services to the sub national level. The fast transition from a highly centralized to a largely decentralized system has created specific accountability challenges that significantly affect corruption risks at the local level.

Todung Mulya Lubis, senior advocate practising in Indonesia said that Lapindo's mud case in Sidoarjo is an example of state capture corruption. Activist for Indonesia International Transparency, Lubis surely know enough about corruption practices. Furthermore, he explained that state capture corruption happened if there's some party who gained benefits from government policy. Indication to the fact can be seen in this case when the party involved never taken the responsibility for the disaster. The policy endorsed by Indonesian government to take responsibility for Lapindo mud flow victims has illustrated how businesses may shift policy against public interests.

What makes state capture possible according to David Kupferschmidt from International IDEA is the existence of a well-organized and a well-funded interest, in the case of Indonesia is powerful business groups. Their control of large media groups, combined with weak law enforcement, contributes to establish a conducive environment to state capture. The Corruption Eradication Commission (KPK), who has been under constant attack from the police, attorney general office, and parliament members for the last couple of years, remains one of the last rampant against the impunity sought by state capturers.

The Indonesian political party system is characterized by a growing individualization of weak leadership, by the inability of political parties to identify the champion core of constituent groups and to articulate policy programs. In their press release, transparency international Indonesia concluded that the financing of local elections is the root of political corruption and state capture at the regional level. Besides its direct impact on state resources, it raises more fundamental issues related to political leadership, the strengthening of Indonesia's political party system, and public trust towards democracy.

When civil participation in local government is low, as it seems to be the case in most Indonesian provinces, there is a greater chance of interest groups and local elite capturing and directing resources towards their own priorities rather than towards poverty alleviation and improved service delivery. There are several types of state capture in Indonesia:

- Local Networks of Patronage
- Red Tape and Bribe Extortion

- Lack of Local Capacity
- Misuse of Local Public Resources
- Public Procurement
- Facilitation and Other Informal Payments
- Lack of Efficient Controls and Oversight Mechanisms
- Culture of Impunity

### **Lesson Learned**

The standard advice for combating corruption has traditionally focused on measures to address administrative corruption by reforming public administration and public finance management. Unfortunately, with the increasing recognition that the roots of corruption extend far beyond weaknesses in the capacity of government, the repertoire has been gradually expanding to target broader structural relationships, including the internal organization of the political system, relationships among core state institutions, the interactions between the state and firms, and the relationship between the state and civil society.

While there exists rampant corruption in the countries of the FSU and oligarchs in many countries have seized the lion's shares of State assets, the question arises as to who is capturing who. Is it a case of the State being captured by the private sector or a fusion of the State and the private sector? Putin already put it in quite a definite statement, "I only want to draw your attention straightaway to the fact that you have yourselves formed this very state, to a large extent through political and quasi-political structures under your control. So perhaps what one should do least of all is blame the mirror."

In East Asia, one key issue that emerged out of active state intervention in the economy to generate growth was extensive corruption. The main-stream view of the political economy of development is that corruption is an integral part of the political process, since the close links between state and capital are central to achieving rapid economic growth. Politicians in power provided business with a pro-growth regulatory regime and cheap capital. In return, business supplied politicians with monetary resources to preserve their grip on power. This barter of state-generated economic rents for funds created a tight alliance between ruling parties and business that transformed these nations into newly industrialised countries (NICs). Since much of the flow of money between business and politicians was either illegal or skirted the letter of the law, corruption was seen as a structural problem, that is an inevitable aspect of the developmental state.

The nature of the links between the state and big business in these East Asian countries indicates that the influence of capital over politics has increased appreciably following democratisation. The changing pattern in the balance of power between capital and the state in democratised countries is having a bearing on the flow of funds from business into politics. Political funding by business has contributed to a significant rise in the phenomenon of money politics, involving the use of funds in the political arena to secure control over the state so as to influence the form of distribution of state-generated rents. Since the links between politicians and capitalists heavily influence political contests, this brings into question the quality of democracy emerging in East Asia.

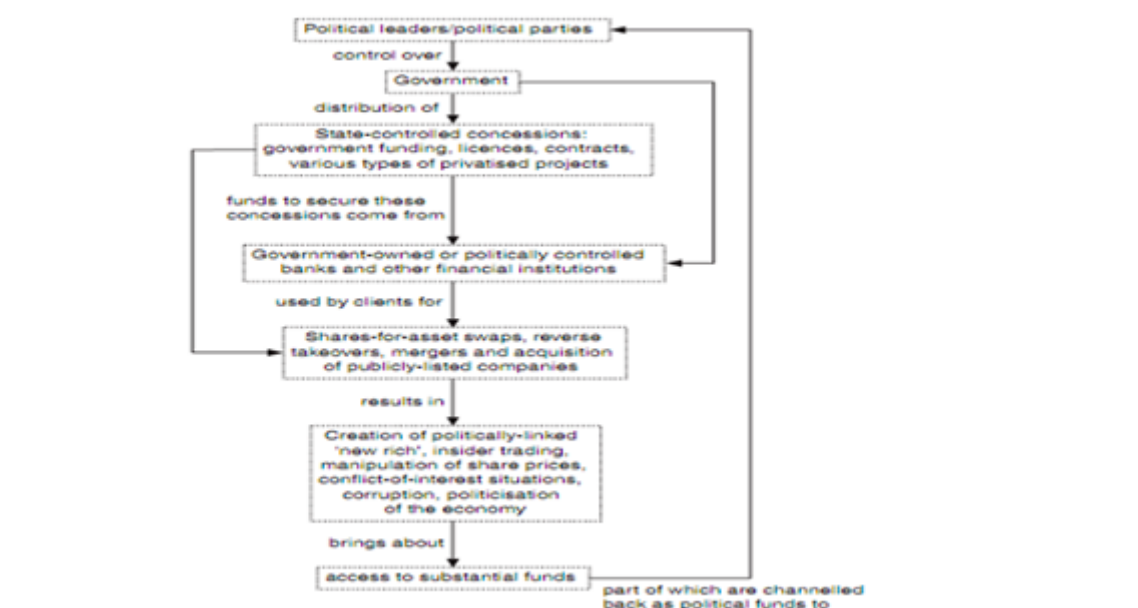


Figure 4: a model of the practice of the political business and the impact of the nexus between state and capital on the corporate and financial sectors as well as the political system.

In Indonesia, according to the anti-corruption act, any conduct by an individual or corporation which is either against the law and or abuse the power which may inflict losses to economy or national budget is considered as a corruption. The definition of corruption in the anti-corruption act is limited to misallocation of public money. Indeed, the coverage of offences in Indonesia anti-corruption act is narrower in comparison to that of the UN convention against corruption in 2003, though Indonesia is one of countries, which ratified it. The anti-corruption act does not cover corruption by private sector, moreover it does not taken into consideration that money politic is part of corruption. The latter is quite ironic since in Indonesian Criminal Code (KUHP) it is stated clearly that money politic is a criminal offence.

The main indicator of corruption in Indonesia is that whether or not such activity may inflict losses to the economy or the national budget. Ideally the estimation of losses in economy and national budget uses the economic approach by estimating both the explicit and the implicit costs of corruption. The common practice in Indonesia's judicial system is that the estimation of losses in economy or national budget due to corruption is limited to the explicit cost of corruption. The estimation of the losses has been conducted by prosecutors, who are obviously well versed in the area of law but they have limited knowledge in Economics. The estimation of explicit and implicit costs cannot be separated in every economic activity. In many cases, the explicit costs of a decision are overwhelmed by its implicit costs or implicit benefits.

Corruption can be seen as maladministration according to Ombudsman Indonesia. Where would also regard as falling within the scope of maladministration actions which were influenced by what is loosely described as bribery and corruption. In most cases this would amount to a form of illegality, but there can be examples where influence may be used to persuade officials either to act or not to act in an area where

they have discretion but where, though it might not be clear that illegality was involved, it could be urged that maladministration had occurred.



## References

- Acemoglu, Daron. and Thierry Verdier. 2000. The Choice between Market Failures and Corruption. *The American Economic Review*, Vol. 90, No. 1.
- Aidt, Toke. S. 2003. Economic Analysis of Corruption: A Survey. *The Economic Journal*, 113 (November), F632–F652. Royal Economic Society.
- Burhani, Ruslan. 2009. Todung: Kasus Lapindo adalah “state capture corruption. *Antaranews.com*
- Buscaglia, Edgardo and Jan van Dijk. 2003. Controlling Organized Crime and Corruption in the Public Sector. *Forum on Crime and Society*. Vol 3 No. 1 and 2.
- Bowser, Donald. 2003. Measures Addressing State Capture in Russia/Ukraine/Central Asia. *Transparency International Policy Research*.
- Cadeddu, Simone. 2004. Part II: The European Commission: The Proceedings of The European Ombudsman, *Law and Contemporary Problems*. Vol. 68. 161-180.
- Caiden, Gerald. E. 1991. What Really is Public Maladministration?. *Public Administrative Review*. November/Desember. Vol. 51. No. 6. Blackwell Publishing.
- Chene, Marie. 2009. Corruption Challenges at Sub-National Level in Indonesia. U4 Expert Answer
- Elliott, Kimbely Ann. 1997. Corruption as An International Policy Problem: Overview and Recommendations. In Elliott, Kimberly Ann. (Ed). *Corruption and The Global Economy*. Institute for International Economics. 175-236
- Graycar, Adam. 2014. When Is It Really Corruption?. *Voices of The Governing Institute*, December, 1.
- Gomez, Edmund Terence. 2005. ‘The State, Governance and Corruption in Malaysia’. In Nicholas Tarling (Ed). *Corruption and Good Governance in Asia*. Routledge.
- Harlow, Carol and Richard Rawlings. 2009. *Law and Administration*. Law in Context. Third Edition, Cambridge.
- Hellman, Joel and Daniel Kaufmann. 2001. Confronting the Challenge of State Capture in Transition Economies. *Finance & Development*. Vol. 38 No. 3.
- Henderson, J. Vernon and Ari Kuncoro. 2006. *Corruption in Indonesia*. The Population Studies and Training Centre. Brown University.
- Himmelfarb. 1960. Lord Acton, 1952. University of Chicago Press.
- Johnston, Michael. 1997. ‘When Politics and Corruption Meet’. In Elliott, Kimberly Ann. (Ed). *Corruption and The Global Economy*. Institute for International Economics. 61-82.



Kaufmann, Daniel. 2010. Breaking the Cycle of Crime and Corruption?. Brookings.edu.

Kupferschmidt, David. 2009. Illicit Political Finance and State Capture. International IDEA.

Lugon-Moulin, Anne. 2010. Understanding State Capture. Freedom from Fear Magazine. March Issue 6.

Maruli, Aditia. 2009. Calon Menteri harus tanda tangani komitmen anti-korupsi. Antaranews.com.

Montinola, Gabriella R. and Robert W. Jackman. 2002. Sources of Corruption: A Cross-Country Study. British Journal of Political Science. Vol. 32, No. 1.

Murray, Matthew H. and Elena A. Panfilova. 2003. How to root out Russian corruption. Russiajournal.com

Nurtjahjo, Hendra. 2015. Fungsi dan Kedudukan Ombudsman dalam Sistem Checks and Balances Ketatanegaraan, Disertasi tidak dipublikasi, Fakultas Hukum Universitas Indonesia, Jakarta.

Pesic, Vesna. 2007. State Capture and Widespread Corruption in Serbia. CEPS Working Document No. 262.

Pradiptyo, Rimawan. 2015. 'A Certain Uncertainty; Assesment of Court Decissions in Tackling Corruption in Indonesia'. In R.N. Ghosh and M.A.B. Siddique (Eds). Corruption, Good Governance and Economic Development, Contemporary Analysis and Case Studies. World Scientific Publishing.

Rinaldi, Taufik, Marini Purnomo and Dewi Damayanti. 2007. Combating Corruption in Decentralized Indonesia. World Bank Executive Summary.

Sheng, Yap Kioe. What is Good Governance?. Unescap.org

Sitorus, Lily Evelina. 2009. Release and Discharge sebagai Alternatif Penyelesaian Masalah (Studi Banding Kasus Kebijakan Penyelesaian BLBI). Unpublished Master Thesis. University of Indonesia

Sollid, Maja Finnes. 2014. From State Capture to Business Capture: A Qualitative Analysis of Institutional Development in Post-Soviet Russia, Unpublished Master Thesis. University Bergen.

Stewart, Richard B. 2005. US Administrative Law: A Model for Global Administrative Law?. Law and Contemporary Problem. Vol. 68:63-108.

Suryadarma, Daniel. 2008. Corruption, Public Spending, and Education Outcomes: Evidence from Indonesia. Research School of Social Sciences. The Australian National University.

The World Bank. 2000. Anticorruption in Transition A Contribution to the Policy Debate. World Bank Report

Tom Ginsburg. 2009. 'The Judicialization of Administrative Governance, Causes, Consequences and Limits,' Tom Ginsburg and Albert H.Y.Chen (Ed). Administrative Law and Governance in Asia, Comparatives Perspective. Routledge. 1-20.

Transparency International. 2010. Money Politics and State Capture. Press Release.

Wheare, K.C. 1973. Maladministration and Its Remedies. The Hamlyn Trust. London.

Woodhouse, Andrea. 2002. Village Corruption in Indonesia Fighting Corruption in Indonesia's Kecamatan Development Program. Indonesian Social Development Paper No. 6. World Bank.



***The Impact of Farmers' Resistance to Trade Liberalization:  
A Comparative Study on Political Process around FTAs in Korea and Japan***

Akio Nawakura, Meiji University, Japan

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

This study asks why South Korea could liberalize its international trade faster than Japan in spite of farmers' strong opposition. Though both Korea and Japan had protected their agriculture until the 1990s, Korea has liberalized its trade of agricultural products much faster than Japan in these a few decades. In both countries, farmers have resisted to trade liberalization. However, Korean farmers have been less influential on their government than Japanese farmers. This is due to the farmers' lobbying strategy. While Japanese farmers have lobbied ruling parties exchanging their ballots with political interests, Korean ones have relied on street demonstrations. Because the Korean farmers have not exchanged political interests with ballots, they have been less influential on policy making than Japanese farmers.

Keywords: Korea, Japan, trade liberalization, FTA, farm lobby

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## Introduction

This study asks why South Korea (hereafter Korea) could step toward trade liberalization faster than Japan in spite of its farmers' strong anti-free trade movement.

Korea and Japan have shared their patterns of economic growth: While exporting industrial goods to the markets overseas, they have protected their vulnerable agriculture from international competition. Agriculture in the two countries is characterized as extremely small family farming<sup>1</sup>, concentration in rice production, and high production cost<sup>2</sup>. These factors have made Korean and Japanese agriculture less competitive and have given the two governments the incentives to protect their agricultural industries by quantitative import restrictions and strict governmental control of rice retailing. The farmers in the two countries have been spoiled and been exempted to compete globally. In short, the agricultural policies in Korea and Japan could be described as 'Closed Door-ism' in terms of international trade before the 1990s.

Since the 2000s, however, these two countries have shaped different patterns each other. Korea has expanded its Free Trade Agreement (FTA) networks with major economies such as the United States, the European Union, and China<sup>3</sup>. These FTAs include the open door-ism not only in industrial goods trading but also in agricultural products trading. Meanwhile, Japan had ratified the FTAs or Economic Partnership Agreements (EPAs) with limited numbers of small economies such as Singapore, Thailand, and Australia until the Trans Pacific Partnership (TPP) with a number of Asia-Pacific countries including the United States in 2015.

Conventional arguments in mass media have pointed out the farmers' resistance as a major reason for the Japan's delay in trade liberalization<sup>4</sup>. However, Korean farmers have also acted to prevent trade liberalization. As widely known, Korean farmers have operated a number of street demonstrations to resist free trade<sup>5</sup>. However, their

<sup>1</sup> The size of farmlands per household accounts less than 3ha both in Korea and Japan as of 2015.

[http://kosis.kr/statisticsList/statisticsList\\_01List.jsp?vwcd=MT\\_ZTITLE&parentId=F](http://kosis.kr/statisticsList/statisticsList_01List.jsp?vwcd=MT_ZTITLE&parentId=F) (Reviewed on Nov. 5, 2016)

<sup>2</sup> For detail of Asian agriculture including Korea and Japan, see Fan and Chan-Kang (2003).

<sup>3</sup> For detail, see

[http://www.mofa.go.kr/ENG/policy/fta/status/overview/index.jsp?menu=m\\_20\\_80\\_10](http://www.mofa.go.kr/ENG/policy/fta/status/overview/index.jsp?menu=m_20_80_10) (Reviewed on Nov. 9, 2016)

<sup>4</sup> For example, a news article in the Bloomberg described the Japanese Agricultural Cooperative's political presence as 'extraordinary, semi-public powers' mentioning to the Prime Minister Shinzo Abe's agricultural reform.

<http://www.bloomberg.com/news/articles/2015-02-10/japan-s-farm-lobby-concedes-to-abe-s-agriculture-reform-plans> (Reviewed on Nov. 6, 2016)

<sup>5</sup> The Korean Peasants' League lists its 'struggle' against free trade on its website.

According to this chronological list, the farmers' group has held more than ten demonstration events to prevent FTAs and other trade liberalization measures.

[http://ijunnong.net/ver2010/introduce/int\\_04.php](http://ijunnong.net/ver2010/introduce/int_04.php) (Reviewed on Nov. 6, 2016)

demonstrations have not performed to prevent trade liberalization in Korea. If their activities have been less influential in trade policy making than other democratic countries, it raises one question: Why were the Korean farmers less influential than Japanese one to prevent free trade agreements? This study focuses on the difference of the farmers' strategy to resist trade liberalization in the two countries.

In the analysis below, the case studies are implemented on three cases: the Uruguay Round Agreement on Agriculture (UR) in 1993, Korea-China FTA in 2015, and Japan-Thailand EPA in 2007. The UR played crucial role for the two countries to open up their agricultural market. China and Thailand are huge exporters of rice and, therefore, the FTA and EPA with the agricultural exporting countries caused the farmers' strong resistance both in Korea and Japan. Therefore, the Korea's FTA with China and the Japan's EPA with Thailand fit the comparative analysis.

### **Previous studies and Their Subjects**

According to conventional arguments in social science, political system has been the main contributor in the difference of trade liberalization in Korea and Japan. Particularly, the Presidential system has been explained as the major contributor for Korea's rapid trade liberalization. While the President of Korea has its strong legal power to ignore the farmers' lobbying, the Prime Minister of Japan is elected by the Diet, where the constituencies in rural areas are over representative. Because the ruling Liberal Democratic Party (LDP) has been based on rural precincts, the party's cabinets have the reason to avoid the trade liberalization in agriculture to gain the ballots from farmers. Because the President of Korea is directly elected by the nationals, meanwhile, over representation of rural voters cannot occur (Saito and Asaba 2012; Takayasu 2014).

The recent changes of the LDP's agriculture policies have been explained as the increase of the Prime Minister's leadership. Since 2012, the LDP government has accelerated trade liberalization including agricultural products. Though the Japan Agricultural Cooperatives (JA) has resisted, the government achieved the final agreement of the TPP, the multi-lateral free trade agreement including Japan, Australia, New Zealand, and the United States. Previous studies have pointed out that the strengthened Prime Minister's leadership in policy network is the major contributor for this achievement (Sakuyama 2015; You 2016).

From the international comparison of farm lobby, however, the arguments above are inadequate to explain the difference between Korea and Japan because farm lobbies in Western countries have overcome the institutional barriers such as strong presidency. As Julien (1989) and Orden et al (2009) point out, the farm lobby in the United States has sustained its political influence for several decades in spite of rule changes in the Congress and of trade liberalization. Both Julien and Orden argue that the farm lobbies have sustained its influence by changing their strategy. Under the WTO regime since the 1990s, for example, the American farm lobbies have shifted their request from price support to income compensation, which the WTO codes approve. Also in Europe, while the convergence under the European Union (EU) proceeds, lobbying groups have activated its contact to the officials in Brussels (Chambers 2016). Therefore, the institutional factors alone cannot explain why the farmers' political action showed different performance in Korea and Japan. What

should be focused on is, rather, how the farmers acted in the process of lobbying.

### Japanese Farmers' Activities

The JA has lobbied the ruling LDP to prevent trade liberalization of agricultural products since the 1990s. Though the population of farmers has been decreased in Japan, the JA counts its membership more than ten million in 2014, which covers the most farmers and rural residents in Japan<sup>6</sup>. Their large numbers of ballots have been quite attractive for the ruling party. When the government faced the need to launch agricultural reforms based on the Uruguay Round Agreement on Agriculture in 1994, the national headquarters of the JA (*JA Zenchu*) required the LDP Diet men to prevent the reforms. In the reform under the Uruguay Round Agreement, the government and ruling parties were planning the cancellation of its price support system on rice, the most major agricultural products in Japan (Yoshida 2009). This became a symbol of the agricultural reform under the UR regime. The JA set the substantial continuing of the price support system as the necessary condition to assist the ruling LDP in coming Diet elections. Because the LDP had depended on rural ballots before the Koizumi Cabinet's structural reforms in the 2000s, the JA's pressure succeeded to prevent the reform (Nakamura 2000). Though the Food Act of 1994 deregulated the retailing process of rice on the one hand, it regulated the rice retailers under the license by the Ministry of Agriculture, Forestry and Fishery<sup>7</sup>.

The JA's 'success' in the 1990s can be seen as a fruit of political situation at that time. As it lost the 1993 election of the House of Representatives, the LDP lost its status as a ruling party and felt how opposition party is less influential in policy making than ruling one (Yoshida 2009). In order to recover their influence on governmental ministries and business groups, the LDP lawmakers sought any political support to win the coming election of the House of Representatives. This situation gave the LDP members the incentive to accept any request from lobbying groups in exchange for their ballots<sup>8</sup>. In other words, the JA used their members' ballots in the coming election as a strategic tool to sustain the protection on rice farming.

Also in the 2000s, the JA continued its lobbying activities. When the government began the negotiation on a new EPA with Thailand in 2003, the JA strongly opposed it. Because Thailand is the world's largest exporter of rice, the JA was afraid of mass import of Thai rice<sup>9</sup>. Different from the case of the UR, however, the business lobby of the Japan Business Federation (*Keidanren*) became further influential in the Koizumi Cabinet (2001-2006) seizing the membership in the Council on Economic and Fiscal Policy, the core of economic policy making conference in the Prime Minister's Office. The *Keidanren* strongly supported the EPA with Thailand from

<sup>6</sup> <http://www.zenchu-ja.or.jp/about/organization> (Reviewed on Nov. 6, 2016)

<sup>7</sup> <http://www.maff.go.jp/j/syouan/keikaku/zyunsyu/> (Reviewed on Nov. 6, 2016)

<sup>8</sup> The former Minister for Agriculture, Forestry and Fishery Yoshio Yatsu professed that the LDP lawmakers had strong will to accept the request from the JA in the mid-1990s. (*Asahi Shimbun* Nov. 12, 2016)

<sup>9</sup> When the government imported Thai rice as an emergency measure due to extreme cold summer in 1993, the Japanese rice market fell on heavy confusion. This experience encouraged the JA's opposition on the EPA with Thailand.



the perspective of market access in Southeast Asia<sup>10</sup>.

While the *Keidanren* supported the tariffs elimination in the EPA with Thailand, the JA operated 'the dual lobbying strategy' to sustain the high tariff barrier of rice: It lobbied not only on the LDP lawmakers but also on farmers' associations in Thailand.

In the EPA negotiation, the government of Thailand requested Japan to open its agricultural market, particularly that of rice, while opening Thai domestic market for Japanese industrial goods. Though Japan hesitated to accept the request due to heavy resistance by the JA, such closed door-ism of Tokyo caused strong complaint of Bangkok. This caused the criticism on the JA as it was an obstacle for free trade. The failure of the EPA negotiation could cause stronger criticism on the farm lobby. In order to avoid the failure of the negotiation, the JA contacted agricultural sector of Thailand and offered development assistance including farming education, introduction of new technology, and personnel exchange (Miura 2011). The JA's offer was expected to assist some poor Thai farmers<sup>11</sup>. This contributed to the Thailand's compromise in the negotiation to omit a number of agricultural products from the Japan-Thailand EPA. As seen above, the JA pursued to protect the interest of Japanese farmers by pragmatic lobbying on political parties and farmers' associations abroad. This realistic approach has influenced to deter trade liberalization of agricultural products in Japan.

### **Korean Farmers' Activities**

Korean farmers began to resist to trade liberalization of agricultural products in the late 1980s, when their country experienced trade friction with the United States. As its economy shifted from developing stage to developed one, Korea faced the antagonism between export-oriented industrial sector and highly protected agricultural one.

Meanwhile, Korea was also in the shift from authoritarian rule to democratic one at the same time in the 1980s. In the process of the democratization, large number of farmers challenged the hegemonic status of the Nong-Hyup (NH), the Agricultural Cooperatives in Korea. Though the NH was the only national center of farmers' associations under the authoritarian rule, the government strictly constrained its political activity. Even the head of the NH was named by the President<sup>12</sup>. The farmers criticized such NH's dependence on the government and launched new associations to represent their own voice: the Korean Advanced Farmers Federation (KAFF) and the Korean Peasants League (KPL). The KAFF was founded as a mutual cooperative association for young farmers in 1987<sup>13</sup>. The KPL was founded

<sup>10</sup> <https://www.keidanren.or.jp/japanese/policy/2011/108/honbun.html> (Reviewed on Nov. 7, 2016)

<sup>11</sup> [http://www.jaica.or.jp/agrinfo/0706/Report\\_241005.htm](http://www.jaica.or.jp/agrinfo/0706/Report_241005.htm) (Reviewed on Nov. 7, 2016)

<sup>12</sup> [http://www.nonghyup.com/nh50th/History50th\\_1980.aspx](http://www.nonghyup.com/nh50th/History50th_1980.aspx) (Reviewed on Nov. 7, 2016)

<sup>13</sup> <http://www.kaff.or.kr/introduce.history> (Reviewed on Nov. 7, 2016)

in 1990 assisted by Catholic churches<sup>14</sup>. Because of the background above, both the KAFF and the KPL tended to be critical on the government.

When the government signed the UR agreement document in 1993, the KAFF and the KPL resisted the agreement because it required each country to remove non-tariffs barriers on trade such as price support within ten years, which was expected to hit Korean agriculture with huge damage. The two associations held street demonstrations to criticize the government mostly every day since the sign in the UR agreement in October 1993<sup>15</sup>.

In January 1994, while the National Assembly dealt the UR-related bills, the government suggested two plans to protect Korean agriculture under free trade. First one is the Special Tax for Agricultural and Fishery Villages. This tax is collected from enterprises and individuals as a fund to assist rural and fishery regions (Office of the National Assembly 1994). However, this tax aimed to raise the farmers' 'productivity' rather than their 'income' and opposition parties criticized this point in the National Assembly's sessions. Secondly, the government launched an advisory council to plan rural policies using the special tax<sup>16</sup>. This was a chance for the KAFF and the KPL to influence on the government and to get the government's commitment on protective farm policies as the JA did.

However, both the KAFF and the KPL did not show their interest in the government's plans. Instead of lobbying the government or the National Assembly members on the plans, they continued the opposition on the UR itself. In February 1994, when the National Assembly ratified the UR, some KPL members intruded the Assembly's building and demonstrated their opposition on the UR<sup>17</sup>. Even after the ratification, both of the farmers' groups continued street demonstrations to insist the denial of the UR itself (KAFF 2014). Because Korea had grown oriented by export, their request to deny free trade under the UR at all was unrealistic. And because the two groups repeated unrealistic request on the street without substantial lobbying, ironically, the government and the advisory council could decide to strengthen the competitiveness of Korean agriculture using the special tax. On the trade liberalization after the UR, in short, the trade-off between ballots and political interests as seen in Japan did not occur in the Korean case.

The similar pattern was also seen in the FTA with China in 2015. When the government announced its plan of the FTA, the KAFF and the KPL criticized it as a predatory action to harm Korea farmers<sup>18</sup>. Though the government held dialogue with farmers, the two groups only criticized the FTA itself and refused any compromise. Rather, the farmers disturbed the government's hearing on the FTA by violence<sup>19</sup>. This resulted in the absence of communication between farmers and the

<sup>14</sup> [http://www.ijunnong.net/ver2010/introduce/int\\_05.php](http://www.ijunnong.net/ver2010/introduce/int_05.php) (Reviewed on Nov. 7, 2016)

<sup>15</sup> *The Chosun Ilbo* Oct. 23, 1993

<sup>16</sup> *The Chosun Ilbo* Jan. 17, 1994

<sup>17</sup> <http://db.kdemocracy.or.kr/photo-archives/view/00755138> (Viewed on Nov. 7, 2016)

<sup>18</sup> [http://www.ijunnong.net/ver2010/introduce/int\\_04.php](http://www.ijunnong.net/ver2010/introduce/int_04.php) (Viewed on Nov. 7, 2016)

<sup>19</sup> *The Chosun Ilbo* Feb. 24, 2012

government. Meanwhile, the business sector has lobbied strategically not only on governmental officers and lawmakers but also on public opinion showing how free trade raises the GDP of Korea<sup>20</sup>. As a result, the government could be free from farmers' lobby in the negotiation with Beijing.

As seen above, the KAFF and the KPL have refused free trade of agricultural products itself and, therefore, they have also refused to participate in policy process in trade liberalization. This pattern is similar to civil movement for democratization in the 1980s and the 1990s, when the two groups were founded. When the authoritarian rulers tried to perpetuate their rules in 1987, students, labors, and religious groups operated mass street demonstration in order to deny the rulers' legitimacy. Previous studies describe this pattern as 'a protest from outside the governmental sphere.'<sup>21</sup> Because participation in political process means the mandate and acceptance of the authoritarian regime, they denied participating in every political process. Following how the democratization activists did, the two groups resisted free trade from the outside of political process. Actually, in the author's interview, the cadres of the KAFF and the KPL recognized that they resisted trade liberalization 'on the extension of the democratization movement' or 'having anger on predatory free trade measured by the government'<sup>22</sup>.

Ironically, their struggle against free trade was less influential than the lobbying strategy the JA did in Japan. The protest without political participation and any compromise did not bear the exchange of ballots and interests and gave the government only the limited incentives to hear the farmers' voice. As a result, the government of Korea could step forward trade liberalization by FTAs without the prevention by farm lobby.

### **Conclusion, Implication, and Subjects**

The analysis in this study indicates that the Korean farmers' opposition on trade liberalization of agricultural products has been too strong to compromise with the free trade-oriented government. Their attitude without flexibility has its roots in the democratization movement in the 1980s and it has prevented them from pragmatic lobbying on governmental officials or lawmakers. This as a result has made them less influential in policy making than the Japanese farmers.

The result of analysis above shows how the farm lobby plays a crucial role to explain the difference between Korea and Japan in terms of trade liberalization since the 1990s. In addition, an important implication can be drawn from the analysis: Interest groups sometime behave irrationally motivated by emotion or ideology. In this study's case, though the KAFF and the KPL were quite passionate, their behavior to protect peasants' interests was less rational than the JA in terms of farmers' interests. Following the way of democratization movement, the Korean

<sup>20</sup> Kim (2010) describes how the Korean businesses lobbied in terms of free trade focusing on the Korea-US FTA.

<sup>21</sup> While arguing the civil associations' political participation in local governance in 1990s, Bae (2012) describes that not all civil groups participated in political process before the 2000s.

<sup>22</sup> Based on the author's own interviews on the cadres of the KAFF and the KPL.

farmers were too dogmatic to pursue interests by lobbying. This is contrary to the perspectives of conventional studies to see lobbyists as rational actors. As Winden (2003) points out, the academic studies on lobby have often been based on the framework of Public Choice, which sees all actors behave rationally in pursuing their interests. The Korean case in this study indicates a case that lobbyists act irrationally.

However, the legacy of democratization observed in this study is just one of the factors to make lobby irrational. It is the future's subject to clarify the whole figure of these factors.



## References

### Books and Articles

Bae, Yoo-il et al. (2012) 'Civil Society and Local Activism in South Korea's Local Democratization' *Democratization* 20 (2): 260-286

Fan, Shenggen and Connie Chan-Kang (2003) 'Is Small Beautiful? Farm Size, Productivity and Poverty in Asian Agriculture' A paper for the 2003 International Association of Agricultural Economists, Durban

KAFF (2014) *Han nong yeon (Korean Advanced Farmers Federation)* Seoul: Korean Advanced Farmers Federation (in Korean)

Kim, Chi-wook (2010) 'South Korea's Business Sector and the Transformation of the ROK-US Alliance: A Case Study of KORUS FTA' a paper for Influence and the Role of Domestic Stakeholders on the US-RoK Alliance Workshop Seoul, February 22

Miura, Hideyuki (2011) 'The Analysis of Japan-Thailand Economic Partnership Agreement Negotiation' *The Journal of Asia-Pacific Studies* 17: 79-98 (in Japanese)

Nakamura, Yasuhiko (2000) *Tanbono kage ni hyo ga aru (Ballots Behind Paddy Fields)* Tokyo: Bungei Shunju (in Japanese)

Office of the National Assembly(1994) *The Proceedings of the 166<sup>th</sup> National Assembly* The National Assembly of the Republic of Korea (in Korean)

Saito, Jun and Yuki Asaba (2012) 'Clientalism and Trade Liberalization: Institutional Foundations of Agricultural Protection in Japan and Korea' *Japanese Journal of Electoral Studies* 28 (1): 114-134 (in Japanese)

Sakuyama, Takumi (2015) *The Truth of Japan's Participation in the TPP negotiations: Revealing Its Policy Process* Tokyo: Bunshindo (in Japanese)

Takayasu, Yuichi (2014) *Kankoku ni okeru shijokaiho to nogyokozo kaikaku (The Market Liberalization and Agriculture Structural Reform in Korea)* Tokyo: Nihonhyoron-sha (in Japanese)

Bae, Yoo-il et al. (2012) 'Civil Society and Local Activism in South Korea's Local Democratization' *Democratization* 20 (2): 260-286

You, Hye-lim (2016) 'Nikkan no FTA seisaku no hikakuseiji gyoseiseido bunseki(Comparative Political and Administrative Analysis on the FTA Policies in Korea and Japan)' A PhD Dissertation in Kyoto University (in Japanese)

Yoshida, Osamu (2009) *Jiminto Nouseishi (The History of Agricultural Policies under the LDP)* Tokyo: Taisei Publishing (Japanese)

Note: The English titles of Nakamura (2000), Takayasu (2014) and You (2016) are unofficial ones translated by the quoter.

### Websites

Bloomberg <http://www.bloomberg.com>

JA Zenchu <http://www.zenchu-ja.or.jp>

Japan Business Federation <http://www.keidanren.or.jp>

Japan Association for International Collaboration of Agriculture and Forestry  
<http://www.jaicaf.or.jp>

Korea Democracy Foundation <http://db.kdemocracy.or.kr>

Korean Advanced Farmers Federation <http://www.kaff.or.kr>

Korean Peasants League <http://ijunnong.net>

Ministry of Agriculture, Forestry, and Fishery of Japan <http://www.maff.go.jp>

Ministry of Foreign Affairs, Republic of Korea <http://www.mofa.go.kr>

Nong-hyup <http://www.nonghyup.com>

Statistics Korea <http://kosis.kr/>

### Newspapers

*The Asahi Shimbun*

*The Chosun Ilbo (The Daily Korea)*

*The Korea Times*

### Interview Data

| Interviewees         | Affiliation  | Date          | Place                               |
|----------------------|--|---------------|-------------------------------------|
| Mr. Han Min-su       | General Manager of Policy Research Section, Korean Advanced Farmers Federation | May. 13, 2016 | The headquarters of the KAFF, Seoul |
| Mr. Choi Hyeong-kwon | Manager of Organizational Education, Korean Peasants League                    | Sep. 6, 2016  | The headquarters of the KPL, Seoul  |
| Mr. Lee Jong-hyeok   | Policy Director, Korean Peasants League  |               |                                     |

**Contact e-mail:** [republic\\_of\\_korea\\_1948@hotmail.com](mailto:republic_of_korea_1948@hotmail.com)



## *The Evidentiary Value of Big Data Analysis*

Marco Pollanen, Trent University, Canada  
Bruce Cater, Trent University, Canada

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

### **Abstract**

Big data is transforming the way governments provide security to, and justice for, their citizens. It also has the potential to increase surveillance and government power. Geospecific information – from licence plate recognition and mobile phone data, biometric matches of DNA, facial recognition, financial transactions, and internet search history – is increasingly allowing government agencies to search and cross-reference. This heightened reliance on big data searches raises the question: what is the probative value of the information that results?

A distinguishing feature of the scientific method is that it begins with the development of an hypothesis that is then tested against data that either support or refute the hypothesis. That method is essentially followed in a conventional criminal investigation in which, after a suspect is first identified, evidence is gathered to then either build a case against, or rule out, that suspect.

The analysis of big data, however, can, at times, be more akin to first trawling for data to only later generate an hypothesis. In this paper, we investigate the conditions in which this may lead to problematic outcomes, such as more data leading to higher rates of false positives. We then sketch a big data analysis legal/policy framework that can circumvent these problems.

Keywords: database searches, forensic science, big data analysis, criminal databases

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## Introduction

With the advent of smartphones, people may now leave behind them a near complete digital trail of their daily lives – from everything we search for and read online, to continuous location information, to a record of their interactions through social media and texting apps. Wearable technology is evolving in the direction of recording complete health and biometric information. Contactless transit cards, and arrays of video cameras coupled with improvements in facial recognition and license plate reading algorithms, allow our movements to be more accurately tracked. And cashless transactions allow every detail of purchases to be recorded.

At the same time, advances in computing and statistical analysis are increasingly allowing for the contents of these vast databases to be analyzed and for inferences to be drawn from those data.

In the United States, dragnets – where large numbers of people are indiscriminately questioned or detained – are a violation of civil liberties and considered unconstitutional. Despite this, recent years have seen growth in the area of digital dragnets that provide law enforcement with access to ever-larger DNA databases, financial and communications records, and the results of widespread electronic surveillance. These dragnets are often justified by threats to security or rationalized as resulting in only metadata. Regardless of how these searches are framed, this paper will show that they collect that may lead to erroneous conclusions.

An important, but often overlooked, aspect of the scientific method is that a hypothesis is formulated *before* data to test that hypothesis are drawn. Without establishing a hypothesis first, it is easy to fall into a trap of data dredging, in which inadvertent patterns are uncovered and misleading conclusions are drawn.

For that reason, modern forensic investigations ideally follow a path akin to the scientific method – a suspect is first identified (i.e., a hypothesis is first formed), then evidence to test that hypothesis is gathered.

In this paper, we will discuss the implications of deviating from that path. To introduce one type of problem that arises when hypotheses are not established first, the next section will outline a well-known result from probability theory known as the birthday paradox (Bloom, 1973). We will then illustrate something akin to the birthday paradox with real examples from DNA database matches. Finally, we will examine the situation with respect to Big Data searches and, and we will discuss potential solutions to the problems that arise.

## The Birthday Paradox

Suppose that, in a group of  $N$  people, each of the 365 possible birthdays is equally probable; we will ignore leap years.

If  $N = 2$ , the probability that they share a birthday is  $1/365 = 0.0027$  – that is, we could assign the first person any birthday, and the second person would have a  $1/365$  chance of having the same birthday.

A question that naturally arises is: how large does  $N$  need to be for it to be likely that (at least) two of the people share a birthday? As it turns out,  $N = 23$  is sufficient to give us a 50.7% probability that (at least) two of the people will share the same birthday. Many would find  $N = 23$  to be a surprisingly small number.

When  $N = 60$ , there are fewer people than required to cover 1/6th of the birthdays. Yet, the probability that two of those people share the same birthday rises to 99.4%.

And when  $N = 200$ , the probability that at least two people share a birthday is an astounding 99.9999999999999999999999998% – roughly equivalent to the probability of winning a multi-million-dollar jackpot in a lottery four times in a row – despite the fact there are only enough people to cover slightly over half (54%) of the birthdays.

The fact that these probabilities are so unimaginably high is referred to as the birthday problem or birthday paradox (Bloom 1973), not because it is a real paradox – after all, the reasons are well understood – but because it is an apparent paradox in the sense that it defies human intuition.

The birthday problem is relevant to our understanding of the effect that hypothesis formulation has on the validity of forensic discovery. To see this, consider the following cases:

Case I: Suppose a suspect has been first identified. Only thereafter is it determined whether that suspect meets a key fact in the investigation. For example, his/her footprint must be of a certain size or he/she is excluded as a suspect. This is akin to asking the question: what is the probability that the birthday of one specific individual matches the birthday of another specific individual in the group? The answer to that question is independent of the number of individuals in the group; the hypothesis would be validated by random chance alone with a probability of only  $1/365$  or  $0.27\%$ .

Case II: Suppose a suspect has been identified first, but he/she only needs to match *some* fact in the investigation. This is akin to asking: what is the probability that a specific individual in a group has a birthday that matches that of *some* individual in the group. The probability of this match happening by random chance alone grows as the number of people in the group does. For example, when  $N = 2$  it is 0.27%, but when  $N = 200$  it grows to 42%.

Case III: Suppose that no suspect has been identified and that there no specific exclusionary criteria. Instead, the data are dredged through to find a hypothesis. In the case of birthdays, if N=200, as above a match will be found by random chance alone with a probability of 99.999999999999999999999999%, and so the fact that the birthdays of two individuals in the set match would have no evidentiary value.

In the next section we illustrate how something akin to the birthday problem arises in the context of DNA database matches.

## DNA Database Matches

In recent years there has been a lot of controversy about how to calculate the probability of a random DNA sample matching the profile of one found in a DNA database. While everyone has unique DNA, DNA databases typically only store a profile from this DNA consisting of measurements at a fixed set of locations (or loci) on the chromosome. Typically, 9 to 13 independent loci are selected for the database, with two unrelated samples matching at a particular loci with a probability of about 7.5%. Thus the odds two random unrelated profiles match at a fixed set of 9 loci is about 1 in 13 billion and at 13 loci is about 1 in 420 trillion.

One controversy that has arisen is from the statistical results from *The Arizona DNA Offender Database* (Kaye, 2009). At the time the database had 65,493 profiles, those profiles were analyzed and 122 pairs were found to match at 9 loci, 20 at 10 loci, and 1 pair at each 11 and 12 loci. Many people found these results astounding as the database was relatively small, and, as noted above, the probability of two random samples matching at 9 loci is about 1 in 13 billion, and at 12 loci about 1 in 32 trillion.

There are, however, several reasons why we would expect to see a large number of matches. The first is due to the birthday paradox, as described above. The second reason is that, in the case of 9 loci for example, the loci for which the matches occur could be different for different pairs of matches. From a set of 13 loci there are 715 different ways to choose 9 of them, so allowing partial matches increases the odds of a match by an additional factor of 715.

While these considerations do not fully explain the high number of matches, they do come close – for example, in the case of 9 loci, the expected number of matches would be 68, not 122 as were found. But, given the scale of the numbers being dealt with, that *is* fairly close, particularly given the crudeness of the genetic model in which it is assumed that all individuals are unrelated, and all loci are independent with equal probabilities of random matches. A more sophisticated analysis has been done by Mueller (2008).

One issue that arises immediately from DNA matches is that the science is relatively sophisticated and the odds of a random match can seem so overwhelmingly long that it seems possible to identify and convict a suspect by means of a DNA match only. But this is problematic if the match originated from a database search alone. A few cases are instructive.

In what was the first widely reported false match (Fowler, 2003) from a DNA database, a severely disabled man in the United Kingdom who was arrested for a burglary that occurred some 200 miles away and that involved the burglar climbing through a window. In that case, the only evidence was a match from a database search with a probability of 1 in 37 million, which corresponds to 6 loci. The near impossibility of the man committing the crime did not clear him.

With the population of the United Kingdom being 64 million, on average we would expect any 6-loci DNA profile to be shared by two people. But, by conducting a DNA database search, we essentially trawled through millions of hypotheses to fit the evidence, violating the first tenant of the scientific method – that we must first have a

hypothesis. This illustrates what is known as the prosecutor's fallacy (Thompson & Shumann, 1987), in which investigations and prosecutions revolve around a probability of match. The correct interpretation is that if the suspect is innocent, there is a 1 in 37 million chance that there is a match. However, with the prosecutor's fallacy, the clauses are reversed and the logically incorrect interpretation is adopted – if the DNA matches, there is a 1 in 37 million chance that the suspect is innocent.

It is not just investigators and prosecutors who incorrectly weigh DNA evidence. A 30-year old cold-case (Murphy, 2015) facilitated the analysis of partial matches in the Arizona DNA database. The defendant in that case was identified and convicted largely due to the partial match of the badly degraded DNA sample to a profile found in a California database. The judge allowed only the prosecution's statistic that the chance that an individual picked at random would match the crime-scene DNA is 1 in 1.1 million. Jurors were not informed that the match was a result of a database trawl, whereby 9-loci partial matches are not uncommon, nor were they informed that about 40 people in California would be expected to have a profile that matches the crime-scene sample. The fact that a partial match was used is not that uncommon, as crime scene evidence can be degraded and mixtures of DNA samples can result. Furthermore, different databases often use different loci for profiles, and searches can be done using the profiles of close relatives.

A further problem with assigning astronomical probabilities to a single piece of evidence, such as a DNA database match, is that those probabilities would be dwarfed by real-life considerations, such as laboratory errors and contamination. For example, a man in Australia was convicted of raping a woman found unconscious at a nightclub based solely on a random match in the Australian DNA database (Roberts & Hunter, 2012), despite other evidence suggesting that the individual could not be a suspect. Only through post-conviction serendipity was it discovered that the original rape-kit was likely contaminated at the laboratory, leaving no clear evidence that a crime even took place.

Even when evidence is found at the crime-scene and it is correctly attributed to an individual, the relevance of the sample to the crime must be established. Typically, DNA establishes, at most, the presence of or contact with an individual, not that they committed a crime. In another case, a man in the United Kingdom (Barnes, 2012) was jailed for eight months when a partial match was found between his DNA profile in a database and a crime-scene sample from a murder scene. It has been suggested that because the suspect was a taxi driver, he likely came into contact with the victim individual and some of his shed skin cells clung to that person.

While there are potential pitfalls in interpreting DNA evidence, especially when it comes from random matches found by trawling through databases, it is important to note that DNA evidence is still some of the most reliable types of evidence there is, and that it has likely lead to the exoneration of more people far more often than it has resulted in false convictions. By comparison, while identification by eyewitnesses carries a lot of weight in courts, studies have shown how utterly unreliable eyewitness testimony can be (National Research Council Report, 2014). We introduced the issues with the *Arizona DNA Offender Database* to demonstrate how the birthday problem arises in criminal investigations.

In the next section we will discuss how these problems might be amplified as the number and type of databases used in forensic investigations increases.

### **Big Data Searches**

In recent years, aided by technological advances and often rationalized as necessary to fight terrorism, mass surveillance has been increasing. For example, in the United States, metadata for hundreds of billions of telephone calls has been collected (Cauley, 2006); the exterior of all letter mail is photographed (Miga, 2013); databases containing information on financial transactions, e-mails, and internet surfing habits are maintained; and social media are monitored (Kawamoto, 2006). The FBI has a face-recognition system with a database of over 400 million photos (Kelley, 2016). Combined with the ever increasing array of CCTV cameras, it might be possible to recognize individuals in any public location. For example, the United Kingdom has up to 6 million CCTV cameras (Barrett, 2013), about one for every 11 individuals. Furthermore, location information could also be obtained from license plate recognition or from databases of transit card usage.

In addition to government databases, private companies such as Google and Facebook have access to vast amounts of information about individuals, except where one makes exerts considerable effort to maintain their privacy. This is especially true due to the near ubiquitous use of smartphones. They potentially have access to the contents of every digital communication one partakes in, and to one's location history; they can map one's photographs, social connections, and browsing and search histories; and they can potentially track health and biometric information through a phone's sensors. This information is also available to governments seeking to increase surveillance.

The average individual leaves a vast digital trail throughout the day, from which it may be possible to surmise when he/she woke up and how long they slept, their location throughout the day, including where they work, where they shop, and what they bought, read, or wrote. By combining the available information with information from biometric sensors in smartphones or wearable devices, it may be possible to develop algorithms that give an idea of what an individual thought and felt throughout the day or to predict behavior.

While all of this information can be a boon for law enforcement in their quest to solve crimes, as the number and size of databases grow it also has the potential to lead to an increase in the number of falsely accused individuals. To see this, consider a DNA database in which an individual profile will typically contain information regarding 13 loci. This would be equivalent to an individual having a record in 13 different databases, each containing the information of a single loci. Thus searching through multiple databases of digital information would also be subject to the Birthday Paradox as we have seen with DNA. Moreover, when an individual matches information in only some databases but not others, this further magnifies the problem of false identifications from partial DNA matches have been shown to have with the Arizona DNA database.

While there are many similarities with searching through digital information databases and DNA databases, there are causes for greater concern. DNA analysis



occurs in a laboratory setting, and while the measurements have errors associated with them, they can be estimated. Laboratory errors do occur, of course, but it is still a scientific setting where one would believe every attempt would be made to estimate and minimize these errors. On the other hand, analysis of databases of other digital records might involve information that was not originally intended for forensic examination, such as facial recognition on grainy photos or the inaccuracies of finding the location of a mobile phone user. These errors may be poorly understood and might contribute significantly to birthday paradox collisions. Furthermore, DNA analysis involves trying to match a set number of loci, while a trawl through digital data may involve an unknown number of databases and is problematic because the probability of a match would be incalculable. We have seen that partial matches of only some loci significantly increase the chance of misidentification with DNA databases, but in that case we know which loci cannot be matched and probabilities could be adjusted accordingly. It would be even more problematic if the databases investigated were not known or revealed. For example, suppose while in an investigation, all Google searches for a particular explosive were flagged. If a suspect had searched for that particular compound, that would certainly be used to build the case against him or her. On the other hand, if the suspect was *not* one of the individuals who had made that particular search, that fact might not be factored into the calculation of their probable guilt and it would almost certainly be inadmissible in court.

The concern with searching through a large number of databases for suspects that could fit the evidence of a crime is, of course, that people may be falsely accused. But with such an overwhelming amount of circumstantial evidence pointing to them, it could be difficult to exonerate them. For example, perhaps a murder has been committed, and by pure chance alone an individual is found whose license plate was caught driving nearby at a similar time, traces of whose DNA are found on the murder victim (perhaps because they ate at the same restaurant), and perhaps the day before they bought the same brand of duct tape used in the crime. As technology and pattern recognition algorithms get better, it is likely that even more casual links in vast arrays of data will be found.

## **Discussion/Conclusion**

Databases are important tools for fighting crime and protecting national security. Indeed, as criminals become more sophisticated in their use of technology, there is arguably a need for law enforcement to do the same. A significant problem arises, however, because trawling through a database without a suspect in mind – essentially in violation of the scientific method – may result in erroneous conclusions.

A primary goal, then, should be to put these searches on a more scientific footing. Perhaps the most obvious way to achieve this would be to use the database for identifying a suspect (i.e., formulating a hypothesis), and not for building a case against him or her. Only further evidence gathered from other sources would be used for the purposes of prosecuting. A second possible approach would involve (perhaps randomly) separating a list of all available databases into two parts. From one part, a suspect could be identified, while, from the second part, searches could be conducted to build a case against that suspect. Of course, many would object to either approach, for they would be seen as leaving evidence unused.

Whether or not a hypothesis is found first, it is important to understand the statistical characteristics of many of the key databases used in order to understand their scope and potential inaccuracies. This would be important for assigning a probability of a match for use in the legal system.

Of course, even in the case of DNA, law enforcement agencies have fought access by researchers to study random match probabilities (Kaye, 2009). Yet, potential violations of privacy could be circumvented by removing any to individuals. The data could be scrambled or encrypted in some way without compromising researchers' abilities to analyze the key characteristics of the data. In order to make investigations more scientific, it is important to carefully document all database searches included in the hunt for a suspect, even the ones that lead to negative results. For these purposes, the development of a standardized set of databases and search criteria would be appropriate.



## References

- Barrett, D. (2013, July 10). One surveillance camera for every 11 people in Britain, says CCTV survey. The Telegraph. Retrieved September 7, 2016, from <http://www.telegraph.co.uk/technology/10172298/One-surveillance-camera-for-every-11-people-in-Britain-says-CCTV-survey.html>
- Barnes, H. (2012, August 31). DNA test jailed innocent man for murder. BBC News. Retrieved September 6, 2016, from <http://www.bbc.com/news/science-environment-19412819>
- Bloom, D. (1973). "A Birthday Problem". American Mathematical Monthly. 80: 1141–1142.
- Cauley, L. (2006, May 11). Advertisement NSA has massive database of Americans' phone calls. USA Today. Retrieved September 7, 2016, from [http://usatoday30.usatoday.com/news/washington/2006-05-10-nsa\\_x.htm](http://usatoday30.usatoday.com/news/washington/2006-05-10-nsa_x.htm)
- Fowler, R. (2003, April 27). DNA, the second revolution. The Guardian. Retrieved September 5, 2016, from <https://www.theguardian.com/uk/2003/apr/27/ukcrime7>
- Kaye, D. H. (2009). Trawling DNA Databases for Partial Matches: What Is the FBI Afraid Of?. Cornell Journal of Law and Public Policy, 19(1).
- Kawamoto, D. (2006, June 9). Is the NSA reading your MySpace profile? CNET. Retrieved September 7, 2016, from [http://archive.is/20120720043006/http://news.com.com/2061-10789\\_3-6082047.html#selection-925.5-929.1](http://archive.is/20120720043006/http://news.com.com/2061-10789_3-6082047.html#selection-925.5-929.1)
- Kelly, H. (2016, June 16). FBI's face-recognition system searches 411 million photos. CNN Money. Retrieved September 7, 2016, from [http://money.cnn.com/2016/06/16/technology/fbi-facial-recognition/index.html?iid=ob\\_homepage\\_tech\\_pool](http://money.cnn.com/2016/06/16/technology/fbi-facial-recognition/index.html?iid=ob_homepage_tech_pool)
- Miga, A. A. (2013, August 2). AP Interview: USPS takes photos of all mail. AP Online. Retrieved September 7, 2016, from [http://www.highbeam.com/doc/1A1-10eae68abcc8439fa78610fe561ab6fc.html?refid=easy\\_hf](http://www.highbeam.com/doc/1A1-10eae68abcc8439fa78610fe561ab6fc.html?refid=easy_hf)
- Mueller, L. D. (2008). Can simple population genetic models reconcile partial match frequencies observed in large forensic databases?. Journal of genetics, 87(2), 101-108.
- Murphy, E. E. (2015, October 08). The Dark Side of DNA Databases. The Atlantic. Retrieved September 6, 2016, from <http://www.theatlantic.com/science/archive/2015/10/the-dark-side-of-dna-databases/408709/>
- National Research Council of the National Academies. (2014). Identifying the culprit: Assessing eyewitness identification. Washington, D.C.: National Academies Press.

Roberts, P., & Hunter, J. (2012, May 18). Criminal evidence and human rights: Reimagining common law procedural traditions (P. Roberts & J. Hunter). Bloomsbury Publishing.

Thompson, E.L.; Shumann, E. L. (1987). "Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy". Law and Human Behavior. 2 (3): 167. doi:10.1007/BF01044641.

**Contact email:** marcopollanen@trentu.ca



***Ineffectiveness of Enforcement of the Constitutional Court's Decision in Indonesia***

Muhammad Tanziel Aziezi, Indonesian Institute for Independent Judiciary, Indonesia

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

According to the Indonesian Constitution, the Constitutional Court holds the authority to judicial review the constitutionality of legislation, and the decision shall be final and binding. Data from the official website of the Constitutional Court shows that there is a steady increase in the number of judicial review petitions submitted to the Constitutional Court which indicated the importance of existence of the Constitutional Court in Indonesia because more people use the Constitutional Court to test the constitutionality of a norm in the legislation. But in the reality the decisions of the Constitutional Court are often ignored and not adhered to.

For example, the Supreme Court has sentenced a defendant for imprisonment under articles 76 and 79 letter c of Law No. 29/2004 on Medical Practice, whereas imprisonment in that article has been declared unconstitutional by the Constitutional Court decision No. 4/PUU-V/2007. There is also a Supreme Court Circular Letter No. 7/2014 which states that the judicial review in criminal cases can only be done once, whereas the Constitutional Court has stated that the judicial review can be done more than once through the decision No. 34/PUU-X/2013. These Constitutional Court's decisions ultimately do not have binding effect and so it will remain the detriment of society.

This paper aims to understand the problems of enforcement of the Constitutional Court's decisions in judicial review petitions, and explain about how and why these problems occurred, and what solution can be done to address this problems.

Keywords: Indonesia, Constitutional Court's Decision, Judicial Review, Legislation  
Not applicable

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## Introduction

According to Article 24C Paragraph (1) Indonesian Constitution 1945, the Constitutional Court holds the authority to judicial review the constitutionality of legislation, and the decision shall be final and binding<sup>1</sup>. The Court has authority to declare a norm does not have binding legal force if the Court considers that the norm is contrary to the constitution. The Court is an institution that commissioned the constitution to keep the whole law there is run in line with the constitution, or in another language, the Court may be referred to as the “Guardian of Constitution”<sup>2</sup>.

Based on data from the official website of the Constitutional Court<sup>3</sup>, since the first time Constitutional Court issued a decision in 2003 until August 25, 2016, the number of the Constitutional Court decisions are (approximately) 842 decision. The details of the decision are as follows:

**Table 1.**  
**The Number of Constitutional Court Decision Based on Registration Year**

| Year | Number of Decision |
|------|--------------------|
| 2003 | 21                 |
| 2004 | 23                 |
| 2005 | 20                 |
| 2006 | 22                 |
| 2007 | 23                 |
| 2008 | 33                 |
| 2009 | 65                 |
| 2010 | 77                 |
| 2011 | 86                 |
| 2012 | 118                |
| 2013 | 106                |
| 2014 | 117                |
| 2015 | 107                |
| 2016 | 24                 |
|      | <b>842</b>         |

From the 842 decisions, Constitutional Court has reviewed 3009 norm, whether a law as overall, articles, paragraphs, phrases, words, or request the interpretation of a norm, stating conditional constitutional and stating conditional unconstitutional. From 3009 norm that has reviewed, Constitutional Court has "changed" (approximately) 502 norm, with details as follows:

<sup>1</sup> Explanation of Article 10 Paragraph 1 Law No. 8 of 2011 on Forming Legislation

<sup>2</sup> Jimly Asshiddiqie (n.d). Sejarah Constitutional Review Dan Gagasan Pembentukan Mahkamah Konstitusi, retrieved from <http://jimlyschool.com/read/analisis/276/sejarah-constitutional-review-gagasan-pembentukan-mk/>

<sup>3</sup> [www.putusan.mahkamahkonstitusi.go.id](http://www.putusan.mahkamahkonstitusi.go.id)



**Table 2.**  
**The Number of Norm That Has Been Changed**

| Year  | Decision of Norm |    |    |    |    |      |     |     |    |     |    |     |
|-------|------------------|----|----|----|----|------|-----|-----|----|-----|----|-----|
|       | C                | RL | RA | RE | RP | RN/L | RPh | RWo | CC | CU  | In | Add |
| 2003  | -                | 3  | 1  | -  | 4  | 2    | 8   | -   | -  | -   | 1  | -   |
| 2004  | -                | -  | 3  | -  | 1  | -    | 4   | 1   | -  | -   | 1  | -   |
| 2005  | -                | -  | -  | 2  | 3  | 1    | 1   | 1   | 1  | -   | -  | -   |
| 2006  | -                | 1  | 6  | -  | 6  | 1    | 5   | -   | -  | -   | -  | -   |
| 2007  | -                | -  | 2  | -  | 1  | -    | 12  | 1   | 10 | -   | -  | -   |
| 2008  | -                | 1  | -  | -  | 5  | 6    | -   | -   | 2  | 1   | 1  | -   |
| 2009  | -                | 1  | 4  | 1  | 12 | -    | 8   | 2   | 11 | 5   | 1  | -   |
| 2010  | -                | 2  | 13 | -  | 7  | 2    | 8   | 4   | 3  | 9   | 2  | 1   |
| 2011  | 2                | -  | 4  | 1  | 16 | 8    | 11  | 1   | -  | 15  | -  | -   |
| 2012  | -                | -  | 9  | 5  | 12 | 5    | 17  | 2   | 1  | 46  | -  | 1   |
| 2013  | 1                | 2  | 10 | -  | 8  | 2    | 10  | 1   | -  | 26  | -  | 2   |
| 2014  | -                | 1  | 1  | 1  | 5  | -    | 1   | 1   | -  | 42  | -  | 2   |
| 2015  | -                | -  | 1  | 3  | 1  | 4    | 4   | 3   | -  | 24  | 2  | -   |
| 2016  | -                | -  | -  | -  | 1  | -    | -   | -   | -  | 2   | -  | -   |
| Total | 3                | 11 | 54 | 13 | 82 | 33   | 89  | 17  | 28 | 170 | 8  | 6   |

**Information:**

C : Change Norm

RL : Repeal Law as Overall

RA : Repeal Article

Constitutional

REA : Repeal Explanation of Norm

Unconstitutional

RP : Repeal Paraphrase

RN/L : Repeal Number/Letter

RPh : Repeal Phrase

RWo : Repeal Word

CC : Conditional

CU : Conditional

In : Interpretation

Add : Add New Norm

From the 842 decisions, there are 5 laws which is still has binding force, that most often to be reviewed to the Constitutional Court. They are:

**Table 3.**  
**5 Laws That Most Often to be Reviewed to Constitutional Court**

| No. | Laws  | Number of Review |
|-----|---|------------------|
| 1.  | Law No. 8 of 1981 on Criminal Procedure Law   | 49               |
| 2.  | Law No. 8 of 2015 on Amendment of Law No. 1 of 2015 on Determination of Regulation in Lieu Of Law No. 1 of 2014 on the Election of Governors, Regents and Mayors into Law | 37               |
| 3.  | Law No. 8 of 2012 on the Election of Members of House of Representative, Regional House of Representative, and Regional Representative Board                              | 30               |
| 4.  | Law No. 42 of 2008 on the Election of President and Vice President of Republic  | 30               |
| 5.  | Law No. 30 of 2002 on Corruption Eradication Commission   | 17               |

With that authority, the entire decision of the Constitutional Court should be followed and immediately executed. Moreover, if we look at the number of cases in the Court per year are illustrated in Table 1 above, the data showed, in general, there is a steady increase in the number of judicial review petitions submitted to the Constitutional Court. This indicates that people are increasingly using the Court to review the constitutionality of a norm and hope the Court with its decision to protect community rights set out in the constitution. This certainly reinforces that decision of the Court should be followed and immediately executed. But in the reality the decisions of the Constitutional Court are often ignored and not adhered to.

As first example is the Article 335 Paragraph (1) Criminal Code which contains "unpleasant act" phrase. On January 16, 2014, the Constitutional Court has stated that the phrase contrary to the Constitution of 1945 and does not have binding legal force through decision No. 1/PUU-XI/2013. However, in fact, on the same day, the Bekasi District Court, through decision No. 1234/Pid.B/2013/PN.BKS, punished a defendant named Mulyadi Mulya for committing "unpleasant acts" and impose imprisonment for 1 year. Then, on appeal, the Bandung High Court upheld the decision by the decision No. 219/Pid.B/2014/PT.BDG on September 16, 2014. Bandung High Court stated that the defendant guilty of "unpleasant act" and turn punishment into imprisonment for 4 months.

The second is the case of dr. Bambang. On October 30, 2013, the Court of Cassation at the Supreme Court still impose imprisonment against dr. Bambang for violating Article 76 and Article 79 letter c of Law Number 29 Year 2004 regarding Medical Practice with the Supreme Court decision No. 1110 K/Pidsus/2012. In fact, on June 19, 2007, the Constitutional Court has removed the provision imprisonment on those articles with Decision No. 4/PUU-V/2007. The Supreme Court argued that judges have the independence in consideration until the verdict. Furthermore, the Head of Legal and Public Relations of Supreme Court, Ridwan Mansyur, mention that not all of Constitutional Court decisions have binding force<sup>4</sup>.

Third, the issuance of the Supreme Court Circular Letter No. 7 of 2014 which restricts review in a criminal case can only be done one time. In fact the Constitutional Court has stated that review in a criminal case can be done more than one time with decision No. 34/PUU-X/2013. In this circular letter, Supreme Court mentions that Constitutional Court only stated unconstitutional for rules of review in the Criminal Procedure Code and does not immediately abolish the rules of review can only be done one time in Article 24 Paragraph (2) of Law No. 48 of 2009 on Judicial Power and Article 66 Paragraph (1) of Law No. 14 of 1985 jo. Law No. 5 of 2004 jo. Law No. 3 of 2009 on the Supreme Court, so that the Supreme Court set the review in a criminal case still only be done one time with this circular letter based on rules in Judicial Power Law and Supreme Court Law.

Those examples above illustrate that there are problems in the implementation of the decision of the Court in practice, where the decision of the Court was often not obeyed and not executed. I identify that this problem is caused three factors, they are ignorance of the norms that have been changed by the Court, disobedience to the

---

<sup>4</sup> Kasus dr Bambang, Putusan MK Mengikat Semua Pihak Tanpa Terkecuali!. (September 17, 2014). Retrieved from <http://news.detik.com/berita/2692625/kasus-dr-bambang-putusan-mk-mengikat-semua-pihak-tanpa-terkecuali>

decision of the Constitutional Court, and obscurity about implementation of the decision itself.

## **Literature Review**

For Indonesian matter, I didn't review any literature. I just access informations from some medias that inform about Constitutional Court's condition in Indonesia and arguments from many people about that. But, for comparison study with another countries, I reviewed some literatures from internet, that most of them are from journal, to find Constitutional Court's sytem in another country and get similarities with Indonesian system as much as possible. And after reviewed all of the literature, I found that some countries have the same root system with Indonesia, like Austria, Spain, Germany, Italy, Columbia, and Hungary. But, in implementation, Italy and Germany are the countries that have most similarities system with Indonesian system, so Italy and Germany are the countries that I use in comparison study.

## **Methodology and Methods**

This research is descriptive study. I start with describe some Constitutional Court's decisions that are not obeyed and implemented with the factors that cause it. Then I review those decisions and factors based on some datas, laws and arguments about it. I made comparison study to look how the system in another country. After all, I conclude and suggest about how the system is suppost to be based on my review and comparison study.

## **Discussion**

As I said before, 3 factors that made Constitutional Court's decision is not obeyed and implemented are ignorance, disobedience, and obscurity of the decisions. These 3 factors are the main topic to describe in my research.

### **1. Ignorance of Constitutional Court's Decision**

I found 2 decisions to describe this factor. First, as I described before, decision No. 1/PUU-XI/2013 that stated "unpleasant act" phrase at article 335 Paragraph (1) Criminal Code unconstitutional. In the same day, there is someone who was sentenced for committing "unpleasant acts" and impose imprisonment for 1 year.

Second, on December 13, 2004, Constitutional Court issued a decision number 06 / PUU-II / 2004, which stated that Article 31 of Law No. 18 of 2003 on Advocate unconstitutional. But, in 2008, the Indonesian Legal Resource Center (ILRC) presented their research to the Chairman of Constitutional Court at the time, Jimly Asshiddiqie, that there are law enforcement officers that still prohibits legal clinic to provide legal assistance to the community by using Article 31 Law No. 18 of 2003<sup>5</sup>. Polices are the officer that most often still use this article. Asshiddiqie also stated the same thing considering he had received a letter from

---

<sup>5</sup> Ali. (May 29, 2008). Masih Ada LBH Kampus yang Dilarang 'Berpraktek'. Retrieved from <http://www.hukumonline.com/berita/baca/hol19342/masih-ada-lbh-kampus-yang-dilarang-berpraktek>

the Regional Police Sragen, Central Java, who questioned whether the article has been repealed. These decisions clearly shows us about ignorance of Constitutional Court's decision and the decision is ultimately not executed.

## **2. Disobedience to Constitutional Court's Decision**

The second factor is disobedience to the Constitutional Court's decision, even though the parties who do not obey know and aware of any decision of the Court. At least, there are 3 decisions to describe this factor. For the first and second decision, I have described them before in "introduction" section, first is dr. Bambang's case which is disrespect for the decision No. 4 / PUU-V / 2007 and the second is issuance of Supreme Court Circular Letter No. 7 of 2014 which is disobey to decision No. 34 / PUU-X / 2013.

Third, On May 16, 2016, the Constitutional Court with decision No. 33/PUU-XIV/2016 stated that prosecutor can't apply a review in criminal cases, as has been clearly regulated in Article 263 Paragraph (1) Criminal Procedure Code. The Court considered the essence of the Review itself, which basically is the right of a convicted person, not a right of the State or the victim, so the prosecutor, who representing the State at the Court, can't apply a review.

Respond to this decision, Attorney General, H.M. Prasetyo stated that the prosecutor will continue to apply for a review on the grounds that there is jurisprudence that allows it. Additionally, Prasetyo also said that the prosecutor representing the interests of the State and the victim, so it should be allowed to apply review in criminal cases<sup>6</sup>.

## **3. Obscurity of Constitutional Court's Decision**

Obscurity of Constitutional Court's decision in question is obscurity in implementing the Constitutional Court's decision, because at some of the decisions, the decision requires the advanced settings to be implemented. This is related to the nature of the Constitutional Court as a negative legislator, which can't create new norms, but only can declare whether a norm of constitutional or unconstitutional. As a result of this system, Constitutional Court can't set new norms arising from the decision of the Court, whereas the new norms are needed so the Constitutional Court's decision can be executed. For example is the Obscurity in Implementation of the Constitutional Court Decision No. 16/PUU-XII/2014.

On December 23, 2014, the Court issued a Decision Number 16/PUU-XII/2014, which essentially changed the election system of Commissioner of the Judicial Commission (JC Commissioner). Before the decision, according to Article 28 Paragraph (3) letter c *jo*. Article 28 Paragraph (6) of Law No. 18 of 2011 *jo*. Law No. 22 of 2004 on the Judicial Commission, the system is the Selection Committee, that is formed by the President, gives 21 candidates of JC

---

<sup>6</sup> Rakhmat Nur Hakim. (June 16, 2016). Jaksa Agung: Meski MK Nyatakan Tak Bisa, Kami tetap Ajukan PK. Retrieved from <http://nasional.kompas.com/read/2016/06/06/19043121/jaksa.agung.meski.mk.nyatakan.tak.bisa.kami.tetap.ajukan.pk>

Commissioner to the President, which will then be submitted to the Parliament to select and assign 7 from 21 candidates. After that, the Parliament will submit 7 candidates chosen to the president to be sworn in as JC Commissioner. After the decision, the President form a Selection Committee Election of JC Commissioner, which will submit 7 candidates to the President. And then, the President will submit 7 candidates to the Parliament and the Parliament has the authority to approve or disapprove 7 candidates that is submitted by the President. Later, Parliament approved the candidates and submit them to the President for then appoint as JC Commissioner.

From the system that exists today, there is a obscurity of electoral system of JC Commissioner regarding the implementation of the system of approval by the Parliament itself because the approval system can lead to double interpretation. The first interpretation is the Parliament approve 7 candidates of JC Commissioner in a package system, which means that Parliament can only approve or not approve 7 candidates as a whole becoming JC Commissioner or not approve the seven 7 candidates as a whole. The second interpretation is the Parliament may approve some of JC Commissioner candidates and did not agree the other candidates.

In my opinion, the interpretation that should be used is first interpretation, because if we use the second interpretation, the approval system is not different with selection system by Parliament, which that system has been declared unconstitutional by Constitutional Court. But in fact, the last selection of JC Commissioner used the second interpretation. Parliament just approved 5 of 7 candidates. This interpretation cause another obscurities, they are:

- i. How to fill in the blank position after some candidates isn't approved to be JC Commissioner? Is that Selection Committee will reopen the selection to select some candidates in same amount to candidates that isn't approved, or Selection Committee just select candidates from the candidates that aren't selected in first term. In the last selection, mechanism that be choosen is the second mechanism. But, this mechanism doesn't have legal basis because there is no regulation about it, especially after the decision.
- ii. According to Article 29 of Law No. 22 of 2004 *jo.* Law No. 18 of 2011 on Judicial Commission, the term of office is five 5 years. Such conditions exist today, where the election of seven 7 JC Commissioner is not at the same time, clearly raises obscurity about how the term of office of JC Commissioner, especially between the first selected with the last elected. Is it in same period, which that 7 commissioners will end the term of office at the same time even the start of term of office is not the same, or is it based on the laws, which will impact the JC Commissioners KY will not end term of office at the same time.

Before formulating the solution of these problems, we should also compare the practice of the implementation of decision of Constitutional Court in a few countries, especially the countries that has the same characteristics as the Constitutional Court in Indonesia. With characteristic of Constitutional Court of Indonesia, based on

Constitution 1945, Constitutional Court is separate from the Supreme Court<sup>7</sup> and the only institution that can test the constitutionality of an Act of the Constitution 1945<sup>8</sup>. It can be concluded that Constitutional Court of Indonesia is using the "Austrian Model" or "Kelsenian Model", where the most prominent characteristic of this model is the Constitutional Court is an independent judicial institution and also the only institution with has authority to review the constitutionality of an Act of the constitution, otherwise known as "Centralized Model". Model of this Constitutional Court encountered in some countries, such as Austria<sup>9</sup>, Italy<sup>10</sup>, Germany<sup>11</sup>, Spain<sup>12</sup>, Hungary<sup>13</sup>, Columbia<sup>14</sup>, and several other countries, especially those that embrace the Continental European legal systems.

For comparison, the author only chose Italy and Germany. This is due to this 2 countries have an interesting development regarding the implementation of the decision of the Constitutional Court. Implementation of the Constitutional Court decision that the authors mean here is in the context of whether there is any legislation as a follow-up decision of the Court, given the Court in Kelsenian models shaped negative legislator who need a piece of legislation from positive legislator (legislature), so that the norm is modified by the Court can be binding on all parties.

## 1. Italy

Italian Constitutional Court, or *Corte Costituzionale*, formed under Article 134-137 Italian Constitution 1948<sup>15</sup>. Italian Constitutional Court's decision should be applied since publication<sup>16</sup>, that under Part III of Act No. 839, dated December 11, 1984 and Article 21 of Presidential Decree No. 1092 dated December 28, 1985, must be made in the Official Gazette. Once the decision is published, the Court then announced to the Parliament and the Government on the decision, so that Parliament can act according to the constitution procedure if they deem it

<sup>7</sup> Article 24 Paragraph 2 Indonesian Constitution 1945

<sup>8</sup> Article 24 Paragraph 1 Indonesian Constitution 1945

<sup>9</sup> Hans Kelsen. Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution. In *The Journal of Politics* Vol. 4, No. 2 (May, 1942), pp. 183-200. Retrieved from <http://www.jstor.org/stable/2125770>

<sup>10</sup> Gianluca Gentili. Concrete Control of Constitutionality in Italy. Retrieved from <http://www.jus.unitn.it/cocoa/papers/PAPERS%203RD%20PDF/Concrete%20Control%20Italy%20edit%20ok.pdf>

<sup>11</sup> Martin Borowski. The Beginnings of Germany's Federal Constitutional Court. In *Ratio Juris*. Vol. 16 No. 2 June 2003 (155-86). Retrieved from <http://www.direitocontemporaneo.com/wp-content/uploads/2014/02/The-Beginnings-of-Germany-s-Federal-Constitutional-Court.pdf>

<sup>12</sup> Enrique Guillen Lopez, Judicial Review in Spain: The Constitutional Court. In *41 Loy. L.A. L. Rev.* 529 (2008). Retrieved from <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2616&context=llr>

<sup>13</sup> Zoltán Szente, The Political Orientation Of The Members Of The Hungarian Constitutional Court Between 2010 And 2014. Retrieved from [https://uwpress.wisc.edu/journals/pdfs/CSv01n01\\_06Szente\\_FINAL\\_web.pdf](https://uwpress.wisc.edu/journals/pdfs/CSv01n01_06Szente_FINAL_web.pdf)

<sup>14</sup> Luz Estella Nagle. Evolution of The Columbian Judiciary and The Constitutional Court. Retrieved from <https://mckinneylaw.iu.edu/iiclr/pdf/vol6p59.pdf>

<sup>15</sup> *supra* note. 10

<sup>16</sup> The Constitution Of The Italian Republic, 1948 (Last Amandement June 12, 2003), par. 1. See also Italian Law No. 87 of 11 March 1953, The composition and procedures of the Constitutional Court, Section 30



necessary<sup>17</sup>. In addition, when the Italian Constitutional Court ruling handed down, the judge can not use the usual norm declared unconstitutional by the Constitutional Court<sup>18</sup>.

On development, the Constitutional Court decision was very slow response by Parliament so that a legal vacuum. This prompted the Italian Constitutional Court to then produce a decision in the "*Sentenze Interpretative di Riggio*", where the Italian Constitutional Court will endorse only 1 interpretation is considered constitutional and can be used. However, this decision is deemed not to have *erga omnes* effect and often not run by the Judges. On that basis, the Court Italy later issued a variant of the decision of the newly named "*Sentenze Interpretative in Accoglimento*" where Italian Constitutional Court endorse 1 interpretation is causing a norm becomes unconstitutional, and Judge remarkable free to use the interpretation of anything other than the interpretation that led to that norm becomes unconstitutional. In connection with its authority under the constitution can only be stated that a legal norms be unconstitutional, the decision of this variant is considered to have *erga omnes* effect and run by ordinary judge<sup>19</sup>.

In its development, the Italian Constitutional Court then no longer provide any interpretation of the norm, but allow ordinary judge to interpret these norms in real cases with "*constitutionally adequate interpretation*". This is changing the face of the constitutionality of a norm of the constitution in Italy, because the shift system of the Court that "centralized model" into a "decentralized model", which is practiced in Constitutional Court "American model" in which the judge ordinary also has the authority to interpret a norm in the law<sup>20</sup>.

## 2. Germany

German Constitutional Court or the Federal Constitutional Court (FCC), was first set out in the Basic Law dated May 23, 1949 which is then regulated under the Federal Constitutional Court Act (BVerGG), promulgated on March 12, 1951<sup>21</sup>. FCC decision is binding for Parliament, the Courts, and the Public Authority and shall be published in the Federal Law Gazette's like a law<sup>22</sup>.

<sup>17</sup> *Ibid.* par 2

<sup>18</sup> *supra* note. 10 and 15

<sup>19</sup> *Ibid*

<sup>20</sup> *Ibid*

<sup>21</sup> *supra* note. 11

<sup>22</sup> Siegfried BROSS. Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany. Presented in Confrence "*Execution Of The Decisions Of Constitutional Courts: A Cornershone Of The Process Of Implementation Of Constitutional Justice*" On "*The 10th Anniversary Of The Constitutional Court Of Azerbaijan Baku, Azerbaijan 14-15 July 2008*". Retrieved from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2009\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2009)001-e). When this paper was presented, Siegfried BROSS was FCC Judge

In practice, the decision FCC nothing followed up with legislation. One example is in the case of "Exercise to Parental Custody"<sup>23</sup>, or the implementation of the custody of their parents. In 1957, legislators amended the "Equal Rights Act" (*Gleichberechtigungsgesetz*) by regulating the concept of "the joint parental power of both parents," meaning father and mother have joint custody of children, of who had custody of the child is given only to the father. However, no amendment of Article 1628 Civil Code which entitles the father to choose when in the condition of both parents do not agree on child custody. Only under certain circumstances this right may be deprived of a father. FCC then states this rule does not have the force of law (BVerfGE 10, 59). 20 years later, the legislature responded to this decision with amendments to legislation which since January 1, 1980, the law stipulates that if no agreement is reached on the parents regarding custody of the child, then the court can make a decision to whom custody of the child granted.

In another case, there was the decision FCC that have not responded to the legislation, namely Decision on Aviation Security Act in 2006<sup>24</sup>. The decision stated Article 14 Paragraph (3) Aviation Security Act unconstitutional and does not have the legal binding effect. This article authorizes the Federal Defense Minister ordered the army to shoot down the plane, in the case of the passenger plane hijacked by terrorists on the territory of Germany and the air is recognized intended to be used as weapons to kill more people. This provision was canceled by the FCC on the grounds that these provisions violate the humanity, especially to determine a person's life. Until now, there has been no legislation against the decision.

In the development, there are several variants of the FCC decision regarding the implementation of the decision. The first variant is acts as a "substitute Legislature"<sup>25</sup> to make transitional provisions for the norm declared unconstitutional until their new rules replace the norm. This ruling contained in the decision on abortion. This ruling was based on the question whether the exemption from penalty for the termination of pregnancy (abortion) is done until the twelfth week, provided in Article 218 Criminal Code (*Strafgesetzbuch*) is in line with the constitution. FCC declared this provision unconstitutional because the legislature is under an obligation to make abortion as a punishable if there is no special reason to do the abortion. Since the provision invalidated by the decision FCC, the FCC set a transition arrangements with validity until the enactment of a provision amended.

The second variant is when the FCC declared an unconstitutional norm but still have the force of law<sup>26</sup>. In a decision like this, the FCC set a time limit for the legislature to amend the rules declared unconstitutional by the FCC. For the duration of the deadline, there are no specific rules and different in each case. When the FCC cancel rules in inheritance and gift law, FCC gives a 1 ½ year to

<sup>23</sup> Elke Luise Barnstedt. Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?. Retrieved from <http://www.juridicainternational.eu/?id=12698>

<sup>24</sup> *Ibid*

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

be amended. When FCC declared that Article 1685 Civil Code unconstitutional, FCC gives one 1 year for an amendment to those rules. There was also originally FCC did not give a deadline for amendments, but then give the deadline, when there is a provision that the principle of equality requires that remuneration in the form of a one-off payment taken into account in calculating the benefit replacement pay short-term financed from contributions, such as allowances unemployment and sickness benefits, if the one-off payment are subject to social insurance contributions. This rule was removed FCC to enforce these provisions remain indefinitely amendment. Apparently, this rule is not amended and then problems due to this rule occurs again. Finally, the FCC set a time limit amendment for 1 year provided that if these provisions have not legislated, then the rule can not be used anymore.

The third variant is the FCC stating a rule is unconstitutional and does not have binding legal force, as well as allow time for amendments to these rules, which if until the time limit specified these provisions have not changed, then the decision FCC executable (BVerfGE 101, 158 (160) . It is happen in phase 2 last example of the second variant. The decision included this variant is a decision declaring the law on financial compensation between the Federal Republic of Germany and the constituent countries (the so-called Länder) unconstitutional, but ordered subsequent implementations of the law until a certain time limit (in this case until December 31, 2004) to prevent life at the state level were largely paralyzed in the Federal Republic of Germany<sup>27</sup>. Decision FCC be applicable in the case of the legislature did not leave the new regulations in line with the Constitution . Federal Constitutional Court is reacting this way after the legislature has repeatedly ignoring the mandate given to FCC regulations (eg in BVerfGE 72, 330 and 86, 148).

About legislation of FCC decision, there is an interesting thing that happened in 1987. Prior to that year, no one can deny that the rules that have been declared unconstitutional can no longer be adopted and addressed the Parliament and promulgated by the President. However, in 1987, the FCC argued that the legislature could have been legislating rules that have been declared unconstitutional by the FCC when deemed necessary, because it is the discretion of the legislature to legislating. However, there is "The principle of mutual loyalty between constitutional bodies (*Verfassungsorgantreue*)", which limits it happens because this principle states that the legislature prohibited from legislating rules that have been declared unconstitutional by the FCC<sup>28</sup>.

---

<sup>27</sup> *Ibid*

<sup>28</sup> Anke Eilers. The Binding Effect Of Federal Constitutional Court Decisions Upon Political Institutions. Presented in Seminar "*The Effects of Constitutional Court decisions*" (Tirana, 28-29 April 2003). Retrieved from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2003\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2003)018-e) . When this paper was represented, Anke Eilers was clerk of FCC Judge, Rudolf Mellinghof

## Conclusion

After seeing the problems of implementation of Constitutional Court's decision the solution can be done so that the decision of the Constitutional Court in Indonesia can be implemented with the maximum is by legislating norms were amended by the Constitutional Court with a legislation. It is due to several things, among others:

1. With the legislation, then the public will have easier access to the norms that have been altered by the decision of the Court, because the norms are already directly become part of the Act where these norms are.
2. With the legislation, there is no longer any reason to not comply with the decision of the Court because the norms that have been altered by the decision of the Court is already a part of the Act which automatically become legally binding for all citizens of Indonesia.
3. With the legislation, then the resulting legislation will be able to also regulate matters have not been regulated in the decision of the Court, for example, the legal consequences that arise due to changing norms based on the decision of the Court. For example, as in the example of the selection of JC Commissioner.

However, it must be followed with regulation that basically Constitutional Court only can declare that a norm constitutional or unconstitutional, and the legislature will be set further in the new rules. The Court can only provide provisions concerning transitional rules and time limits of legislation on the Constitutional Court's decision provided that if within the period legislature legislating the decision, then the transitional provisions made by the Court applies as the enactment legislation. It is more respect for the authority of the Constitutional Court and the legislature, in which the Court fixed exercise its authority to protect the constitution by setting the transitional provisions and deadlines in legislation and legislatures still run the authority to set a law to be obeyed society. Of course, the legislature should not be set back rules that have been declared unconstitutional, but can only manage what has been declared unconstitutional by the Constitutional Court and its implications arising from the decision of the Court with the freedom possessed by the legislature.

## References

Ali. (2008). Masih Ada LBH Kampus yang Dilarang 'Berpraktek'. Retrieved from <http://www.hukumonline.com/berita/baca/hol19342/masih-ada-lbh-kampus-yang-dilarang-berpraktek>

Asshiddiqie, Jimly. (n,d). Sejarah Constitutional Review Dan Gagasan Pembentukan Mahkamah Konstitusi, retrieved from <http://jimlyschool.com/read/analisis/276/sejarah-constitutional-review-gagasan-pembentukan-mk/>

Barnstedt, Elke Luise. Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?. Retrieved from <http://www.juridicainternational.eu/?id=12698>

Borowski, Martin. The Beginnings of Germany's Federal Constitutional Court. In *Ratio Juris. Vol. 16 No. 2 June 2003 (155–86)*. Retrieved from <http://www.direitocontemporaneo.com/wp-content/uploads/2014/02/The-Beginnings-of-Germany-s-Federal-Constitutional-Court.pdf>

BROSS, Siegfried. Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany. Presented in Confrence "*Execution Of The Decisions Of Constitutional Courts: A Cornershone Of The Process Of Implementation Of Constitutional Justice*" On "The 10th Anniversary Of The Constitutional Court Of Azerbaijan Baku, Azerbaijan 14-15 July 2008". Retrieved from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2009\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2009)001-e)

Eilers, Anke. The Binding Effect Of Federal Constitutional Court Decisions Upon Political Institutions. Presented in Seminar "*The Effects of Constitutional Court decisions*" (Tirana, 28-29 April 2003). Retrieved from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2003\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2003)018-e)

Gentili, Gianluca. Concrete Control of Constitutionality in Italy. Retrieved from <http://www.jus.unitn.it/cocoa/papers/PAPERS%203RD%20PDF/Concrete%20Control%20Italy%20edit%20ok.pdf>

Hakim, Rakhmat Nur. (2016). Jaksa Agung: Meski MK Nyatakan Tak Bisa, Kami tetap Ajukan PK. Retrieved from <http://nasional.kompas.com/read/2016/06/06/19043121/jaksa.agung.meski.mk.nyatakan.tak.bisa.kami.tetap.ajukan.pk>

Kasus dr Bambang, Putusan MK Mengikat Semua Pihak Tanpa Terkecuali!. (2014). Retrieved from <http://news.detik.com/berita/2692625/kasus-dr-bambang-putusan-mk-mengikat-semua-pihak-tanpa-terkecuali>

Kelsen, Hans. Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution. In *The Journal of Politics* Vol. 4, No. 2 (May, 1942), pp. 183-200. Retrieved from <http://www.jstor.org/stable/2125770>

Lopez, Enrique Guillen, Judicial Review in Spain: The Constitutional Court. In *41 Loy. L.A. L. Rev.* 529 (2008). Retrieved from <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2616&context=llr>

Nagle, Luz Estella. Evolution of The Columbian Judiciary and The Constitutional Court. Retrieved from <https://mckinneylaw.iu.edu/iiclr/pdf/vol6p59.pdf>

Szente, Zoltán, The Political Orientation Of The Members Of The Hungarian Constitutional Court Between 2010 And 2014. Retrieved from [https://uwpress.wisc.edu/journals/pdfs/CSv01n01\\_06Szente\\_FINAL\\_web.pdf](https://uwpress.wisc.edu/journals/pdfs/CSv01n01_06Szente_FINAL_web.pdf)

Indonesian Constitution 1945

Law No. 8 of 2011 on Forming Legislation

The Constitution Of The Italian Republic, 1948 (Last Amandement June 12, 2003)

Italian Law No. 87 of 11 March 1953, The composition and procedures of the Constitutional Court, Section 30

<https://www.putusan.mahkamahkonstitusi.go.id>



***Historical Synopsis of the Change-Of-Position Doctrine in Southern Africa,  
American and Continental European Laws***

Aimite Jorge, University of Namibia, Namibia

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

Both common-law and civil-law recognize unjust enrichment in their legal systems. Historically however the concept developed along different lines, especially since the European sixteenth Century. These different development paths were influenced by the social thoughts of their times, particularly by the theological and natural law schools then prevalent in Europe, and the societal context in which the notion of justice operated. For English common-law, historically, a claimant could have recourse to the courts of equity for a remedy, and courts of equity applied 'natural law' principles. This is the version of enrichment liability that American law inherited. For that reason the defendant could resist an equitable claim with an equitable defence, although in some instances with reservation. In Continental Europe when a general principle against enrichment was formulated, it required adequate defences to protect the interest of defendants. The most important defence accepted in Civil-law jurisdictions is loss of enrichment. This paper looks at the historical development of this defence in comparative basis and argues that despite lingering differences, all legal systems analysed here have now converged in this regard. The convergence means that these systems concluded that the easier it is made to claim restitution, the more vulnerable members of society become in securing their own wealth and investments. Therefore loss-of-enrichment as defence is applied as a safeguard to such vulnerability.

Keywords: Comparative law, enrichment liability, disenrichment, loss of enrichment

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## Introduction

When X (the plaintiff) claims that Y (the defendant) has something which he is not entitled to keep as his, there are instances in which Y, though acknowledging the validity of the claim, that is to say, that he has been enriched at the plaintiff's expense and in all probability without 'justification'<sup>1</sup> and the retention of such enrichment in the circumstance would be inequitable, he may nevertheless still be able to plead that he is no longer enriched. This is the change-of-position defence. Generally, this defence balances the plaintiff's interest in recovering the wealth transferred against the defendant's interest in being able to deal with what he honestly believes to be his. The balancing of the plaintiff's and defendant's interests are a clear manifestation of the equitable principles in which an enrichment claim itself is rooted, and such balancing is only possible because of the underlying idea that, where the equities are held to be equal, the loss should lie where it falls. Obviously, if the equities favour the defendant, he should also be able to prevail because the claim itself asserts that the plaintiff is to recover when it is equitable to do so. The need of comparison overwhelmingly (though not exclusively) arises in regard to mistaken payments of money, where the likelihood of 'inevitable loss' to any one of the litigants figures prominently. It will be seen later in detail that some early interpretations of the defence have indeed held that if the right to recover money paid under mistake, for example, is to be measured by an 'equitable' principle, it is logical that an 'equitable' defence should also adhere to this principle,<sup>2</sup> and change-of-position is exactly such defence. However, the notion of an 'equitable' defence has always been a concern since 'equity' has tendency to introduce uncertainty in the law.

## I. Development of Loss of Enrichment in the European Civil-Law Systems.

### A. *Historical notions in the Civil-Law Systems.*

In civil-law systems the defence of change-of-position is ordinarily known either as disenrichment or as loss-of-enrichment. Although some commentators contend that it is a novelty invented by the Pandectists,<sup>3</sup> its embryonic origin seems to go back to the ancient times in the interplay between the notions of distributive justice, commutative justice and corrective justice according to the Aristotelian *Nicomachean Ethics*.<sup>4</sup>

<sup>1</sup> This element is one of the aspects that divide common-law from civil-law in unjustified enrichment claims. 'Sine cause' is the position in civil-law jurisdictions, while common-law jurisdictions adhere to the 'unjust factor' approach. Canadian common-law now expresses it as absence of 'juristic reason'. These issues will be alluded to in more detail later in this paper.

<sup>2</sup> Vinius, for example, discussing the question whether the *condictio indebiti* would lie for error of law as well as error of fact, says: 'Movet me premium haec ratio, quod condictio indebiti ex bono et aequo datur, qui omnino consequens est, eam non nisi exceptione aequitatis ex adverso excludi posse' [The first consideration which moves me is that the *condictio indebiti* is given on the basis of what is decent and fair, from which the main consequence is that, from the other side, it can only be cut off by a defence based on fairness]. See Birks P 1984 *Current Legal Problems* 1, 21).

<sup>3</sup> For example Zimmermann R and Du Plessis J E ((1994) *Restitution Law Review* 38-39 and Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 899ff) implicitly support this view when they, inter alia, say of BGB t 818 (III): 'Such a general rule limiting the defendant's liability to the actual enrichment at the time of *litispendent* was unknown in Roman law and the *ius commune*.'

<sup>4</sup> *Nicomachean Ethics*, v 9, 1130b-1131a. According to Aristotle, while distributive justice gives each citizen a fair share of whatever resources a community has to divide, commutative justice preserves each person's share. In involuntary transactions, one who took or destroyed another's resources has to give back an equivalent amount. In voluntary transactions, the parties have to exchange resources of equivalent value. This distinction between involuntary and voluntary transactions which resembles the one drawn today between delict and contract, seems also to have been the linear ancestor of such distinction, that goes back to Gaius (*Gaius* 3.88), who according to

Academics are not exactly sure, though, when the concept first surfaced in its modern form. They offer differing accounts of its origin though such accounts are not necessarily mutually irreconcilable. Some offer a more historical-philosophical approach to its origin, while others see to it as the necessary culmination of the assertion of a general principle of unjustified enrichment. If the effort of the late scholastics gave rise to the modern idea of unjustified enrichment as a separate body of law at the same level with contract and tort,<sup>5</sup> such an idea needed to be supplemented with a strong defence of change of position / loss of enrichment as a logical consequence. Although some jurisdictions (for example Italy, Brazil, etc.) have opted to limit the ambit of such general principle by making the whole law of unjustified enrichment subsidiary to the other fields of obligations, the defence of change of position certainly plays a major limiting role in many systems. In any event, the concept of disenrichment (or change-of-position) appears prominently in the German BGB and several German authors<sup>6</sup> have devoted efforts to its clarification. Gordley,<sup>7</sup> analysing comparatively such notion in the BGB, expresses the view that the drafters of the BGB took it from the nineteenth-century Pandectists, especially Windscheid and Savigny, both of whom seem, in turn, to have taken it from members of the seventeenth-century and eighteenth-century natural-law school such as Grotius and Pufendorf. They, again, took it from a group centred in Spain in the sixteenth century and known to the historians as the late scholastics. The late scholastics came to the notion of loss of enrichment as a defence while discussing the implications of Aristotle's concept of commutative justice as it had been interpreted by Saint Thomas Aquinas. The latter was of the view that 'if the transaction was purely for the benefit of the person who received the property – for example a gratuitous loan – then compensation is due even if the property has been lost; if it was purely for the benefit of the owner – for example, a deposit, – then compensation is not due except if the loss was caused by grave fault'.<sup>8</sup>

Secondly, the recipient might be liable merely because he had another's property, regardless of how he had come by it (*ipsa res accepta*). According to Aquinas, commutative justice required that he gives it back.<sup>9</sup> In this last case, according to the late scholastics, and then Grotius<sup>10</sup> and Pufendorf,<sup>11</sup> a person who no longer has another's property should still be liable if he has become richer by having once had it. Such a person is liable only to the extent he is still enriched. Thus he is not liable if he consumed another's property or gave it away, except to the extent that he saved money he would otherwise have spent. He is also not liable if he bought and then

---

many legal historians and scholars took it from Aristotle. See Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 10-11.

<sup>5</sup> Feenstra R, 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Influence in Roman-Dutch Law' in Schrage E (ed.) *Unjust Enrichment* (1997) 197; and see especially Hugo Grotius H, *Indeilinge tot de hollandse rechts-geleerheid* 3.30.13. Some authors doubt that Grotius in this paragraph is discussing a formulation of a general principle, and hold that he was merely discussing the *condictio sine causa specialis*. For the different opinions see on the issue see Hallebeek J, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 87-103.

<sup>6</sup> For a summary of old authorities on whether non-enrichment is a defence to the *condictio indebiti*, especially in German law, see *King v Cohen, Benjamin and Co.* (1953) 4 SA 641 (W); Staudinger-Lorenz § 818 No. 12; Zimmermann R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 887-890. For the *condictio* in general see also Malan F R 1992 *Acta Juridica* 131-147.

<sup>7</sup> Gordley J, 'Restitution Without Enrichment? Change-of-Position and *Wegfall der Bereicherung*' in Johnston D & Zimmermann R (eds) *Unjustified Enrichment: Key Issues* (2002) 229-228.

<sup>8</sup> *Summa Theologiae* II-II, Quaest. LXII, art.6. (1974 Walsh G Translation).

<sup>9</sup> *Ibid.*

<sup>10</sup> *De Iure Belli ac Pacis, Libro tres* (1646), II, X, 2.1 (1909 edition by Molhuysen P C).

<sup>11</sup> *De Iure Naturae ac Gentium Libri Octo* (1688), IV, XIII, 6. (1909 edition by Molhuysen P C).

resold another's property except if he made a profit.<sup>12</sup> Finally, James Gordley thinks that the late scholastics as well as Grotius and Puffendorf reached their conclusions by an exercise of setting some reasons aside. They first started by setting aside every other reason that the plaintiff might recover until all that is left is the defendant's enrichment by means of the plaintiff's resources. It is then a defence that the defendant is no longer enriched, but only if he no longer had the plaintiff's property and is not liable because of the way he had initially acquired it, whether wrongfully or with the plaintiff's consent.<sup>13</sup>

Daniel Visser,<sup>14</sup> following a slightly different route by analysing the orientation of various *condictiones* throughout their history, begins by reaffirming that the orientation of 'Roman law was towards the recovery of that which had been given and not towards restoring the balance of enrichment remaining with the enrichment debtor'. However, Visser continues, 'this view that endured tyrannically for centuries caused a discrepancy in the substantive law, because the loss of a *species* was considered a good defence in an enrichment action, but not the loss of a *quantitas*, of a class'.<sup>15</sup> Although some of the medieval jurists apparently realised the logical fallacy of allowing loss of enrichment to be pleaded where a slave was killed by accident, but not where the mice ate a sack of corn, they nevertheless never summonsed the intellectual courage to develop this understanding into a rational solution. It was only with the Pandectists, argues Visser, that it came generally to be accepted that loss of enrichment could be pleaded both in the case of a *species* and of *quantitas*.<sup>16</sup>

Visser arrived at such a conclusion after a detailed examination and interpretation of selected passages of the *Corpus Iuris Civilis* (the Digest) in the European *ius commune* culminating with Flume's<sup>17</sup> analysis of D 12.6.26.12,<sup>18</sup> the central text around which Flume had concluded that the 'loss of enrichment could ward off the *condictio* in all cases'. This text, states the following:

'He also points out that it does happen on occasion that we can bring a *condictio* for something different from what we handed over. For instance, I give land not owed and bring a *condictio* for its fruits; or I give a slave not owed, and you sell him honestly for a small sum ('*modico*') in which case you certainly need only give back what you have left from the price ('*quod ex pretio habes*'); or again, if I have made the slave more valuable by expenditure upon him, must not this too be valued?'.<sup>19</sup>

<sup>12</sup> Gordley J in Johnston D & Zimmermann R (ed) *Unjustified Enrichment: Key Issues* (2002) 229.

<sup>13</sup> Ibid. 229.

<sup>14</sup> Visser D P 1992 *Acta Juridica* 175; Visser DP, *Unjustified Enrichment* (2008) 703ff.

<sup>15</sup> Visser DP 1992 *Acta Juridica* 175, 180-186.

<sup>16</sup> Ibid. 186.

<sup>17</sup> Flume W 'Der Wegfall der Bereicherung in der Entwicklung vom römischen zum geltenden Recht' in *Festschrift für Hans Niedermeyer* (1953) 103ff as cited respectively in Visser D P 1992 *Acta Juridica* 175.

<sup>18</sup> '...et interdum licet aliud praestamus, inquit, aliud condicimus: ut puta fundum indebitum dedi et fructus condico: vel hominem indebitum, et hunc sine fraude modico distraxisti, nempe hoc solum refundere debes, quod ex pretio habes; vel meis sumptibus pretiosorem hominem feci, nonne aestimari haec debent? [...he also points out that it does happen on occasion that we can bring a *condictio* for something different from what we handed over. For instance, I give land not owed and bring a *condictio* for its fruits; or I give a slave not owed, and you sell him honestly for a small sum ['*modico*'] in which case you certainly need only give back what you have left from the price ['*quo ex pretio habes*']; or again, if I have made a slave more valuable by expenditure upon him, must not this too be valued?]. (Visser's translation at Visser D P 1992 *Acta Juridica* 175).

<sup>19</sup> Visser D P 1992 *Acta Juridica* 175, and Visser D P, *Unjustified Enrichment* (2008) 706.

The gist of the matter, according to Visser, is what is meant by ‘*quod ex pretio habes*’ for some translate it as meaning ‘what you have left from the price’<sup>20</sup> while others as meaning ‘what you have received as price’.<sup>21</sup> Noting that both translations are grammatically possible, Visser argues that the true meaning of those words could only be arrived at by analysing the full context in which they are used coupled with evidence elsewhere in the Digest. Hence, a reading of D 12.6.65.5-8 and the interpretation given to it by certain glossators,<sup>22</sup> and Commentators,<sup>23</sup> as well as by some Roman-Dutch jurists<sup>24</sup> and some German members of the *ius modernus pandectarum*,<sup>25</sup> and after reconciling some differences between glossators and commentators, led Visser to conclude that there was a degree of consensus in the *ius commune* that ‘*quod ex pretio habes*’ had to be read as meaning ‘that which was received as price’.<sup>26</sup>

This meant that the position in the *ius commune* (until the time of the Pandectists) was as it was in Roman law, namely:

‘If you lost a *species* you need not restore it, because loss of a *species* can be pleaded. However, if you have received money in the place of the *species*, you had to restore the money that you received – whether you still have it or not – because money is a *genus* and loss of a *genus* cannot be pleaded’.<sup>27</sup>

Given that the loss of *species* until then could be pleaded, as a defence, but not the loss of a *genus*<sup>28</sup> and the law still considered the calculation of exactly what had to be restored where a *species* had been lost, as being firmly based on the defendant’s surviving enrichment, it follows that ‘if the price received from the *res* was lost, the enrichment-debtor would remain liable, because money is a fungible, a *genus*’.<sup>29</sup> That finally conforms with the original *condictio* according to which a *genus* could never be considered lost, and that only the loss of a *species* could be contemplated.<sup>30</sup> Furthermore, Visser explains the reason why the price, and not the true value, of a *species* which had been disposed of, must be restored. That is so because it represents the defendant’s remaining enrichment.

Finally, Visser opines that it was Glück<sup>31</sup> that took the next step by allowing a loss of enrichment as a defence even where a *genus* was concerned.<sup>32</sup> Glück’s views were

<sup>20</sup> Cf. Kruger, Mommsen & Watson edition of the *Corpus Iuris Civilis* (1985) and Zimmermann R, *The Law of Obligations. Roman Foundations of the Civil Tradition* (1990) 899.

<sup>21</sup> Flume W, ‘Der Wegfall der Bereicherung in der Entwicklung vom Römischen zum geltenden Recht’ in *Festschrift für Hans Niedermeyer* (1953) 103, 104-6.

<sup>22</sup> E.g. the Acursian gloss ‘*Non Tenebris*’ to D 12.6.65.8; The gloss ‘*Solutio*’ to D12.6.65.6; The gloss ‘*Habes*’ to D 12.6.26.12; the Cannon law gloss ‘*Ad pretium*’ to D 12.6.65.8.

<sup>23</sup> Bartolus *Opera Omnia* (Venetiis 1596) ad D 12.6.7; Jason de Mayo *In Secundum Digesti Veteris Partem Commentaria* (Venetiis 16 29) ad D 12.6.7.

<sup>24</sup> Hugo Grotius, *Inleidinge...* (1952 Edition by Dovring F, Fischer HFWD & Meijers EM ); DG van der Keessel, *Praelectiones iuris ad Hugonis Grotii Introductionem at Iurisprudentiam Hollandicam* (1738-1816); Pauw W *Observationes Tumultuariarum Novae* (1712-1787).

<sup>25</sup> Lauterbach W A, *Collegii Theoretico-Practici* (Tubingen 1726) 12.6.29; Claudius A, *De Condictione Indebiti Commentarius* (Francofurti 1605) Ch.7); and Glück C F, *Ausführliche Erläuterung der Pandekten* (1798-1896) vol d ad D.12.6 (§835); Faber A, *Rationalia ad Pandectas* (Genevae 1626-1631) and D 12.6.7 and D 12.6.65.6.

<sup>26</sup> Visser DP 1992 *Acta Juridica* 181-183.

<sup>27</sup> Visser D P, *Unjustified Enrichment* (2008) 704 and 714.

<sup>28</sup> Visser cites here a 1745 Dutch case reported by Pauw W in *Observationes Tumultuariarum Novae* (Fischer WD et al) vol. 1 (1964) 103 (case no. 148).

<sup>29</sup> Visser D P *Unjustified Enrichment* (2008) 703ff.

<sup>30</sup> Visser D P 1992 *Acta Juridica* 185.

<sup>31</sup> Visser sustains this contention by referring directly to Glück CF, *Ausführliche Erläuterung der Pandekten* (1791-1896).



partially in contrast with what the French Humanist Donnelus held in reading the same Roman texts, namely, that a recipient of an undue payment, like a debtor in the case of a loan, bears the risk of the *indebitum* perishing where such *indebitum* is a fungible. Visser indicates that Glück countered this view by arguing that there was a great difference between an obligation based on loan and that based on *indebitum*, since the first rests on contract and persists even though the recipient no longer draws benefit from the loan, while the latter persists only in so far as the recipient has been enriched'.<sup>33</sup>

#### B. *The Current Civilian-Law Approach to Loss of enrichment (Change of Position).*

The defence of change of position/loss of enrichment is generally held to be available where the loss suffered by the defendant is causally connected to his enrichment. *Mala fide* defendants are generally excluded from the defence. Where the defendant has incurred expenses for up-keeping or improvements of the enrichment object, these expenses can be deducted under change of position defence to the extent that such expenses cannot be deducted from secondary sources.<sup>34</sup> For example, in German law where the defence is prominent, the cardinal principle of enrichment law is that 'the recipient must under no circumstance end up worse off than before the enrichment'.<sup>35</sup> This notion permeates both the jurisprudence of the courts<sup>36</sup> and academic writings. The principle is further given full effect by interpreting BGB § 818 (I) narrowly, so as to make the defence available even to a defendant who has been grossly negligent in failing to appreciate the fact that he was not entitled to keep the enrichment.

The diverse manifestations of the defence appear generally in the following factual scenarios, though in some jurisdictions some of them will not be entertained: (i) where there is loss of the benefit itself; (ii) where there is an uneconomic use of the benefit; (iii) where there is an expenditure incurred in connection with the benefit;<sup>37</sup> (iv) where there are other expenditures causally connected to the enrichment, and (v) controversially, where mutual performances have been exchanged and the situation creates an interface between the transfers and the application of BGB § 818 III provisions. In this last situation German law, for example, usually employs its famous *Saldotheorie*<sup>38</sup> (the difference in value between performances). In other words, in the case of bilateral contracts which have been avoided *ab initio*, if performances have passed both ways, the measure of the enrichment claim is the difference in value between the performances. But there are occasions where the *Zweikonktionenlehre* is applied in cases of return of counter-performance impossible, particularly where the contract has been rescinded on ground of deceit, or is void for a minor's lack of

<sup>32</sup> Visser D P 1992 *Acta Juridica* 185. Visser here bases his view on Vol. 5 ad 12.6 (§ 835) of Glück *Ausführliche Erläuterung der Pandekten*.

<sup>33</sup> Visser D P 1992 *Acta Juridica* 185.

<sup>34</sup> BGH 11 January 1980, NJW 1980, 1970; Markesinis BS, Lorenz W & Dannemann G, *The German Law of Obligations* (1997) 764.

<sup>35</sup> Zimmermann R (2005) 15 *OJLS* 403 at 413.

<sup>36</sup> For a collection of German cases on this issue and incidental matters translated into English see Markesinis B S, Lorenz W and Dannemann G, *The German law of Obligations*, Vol. I (1997) 770-816 (Gerhard Dannemann's translation).

<sup>37</sup> See for example Case No. 131 BGHZ 118, 383 (Bundesgerichtshof 12<sup>th</sup> Civil Senate 17 June 1992 (English Version by Dannemann G in Markesinis B S, Lorenz W & Dannemann G, *The German law of Obligations* (1997) 777-778).

<sup>38</sup> The other competing theories to the *Saldotheorie* are the *Zweikonktionenlehre* and the *Lehre vom faktischen Synallagma*.



capacity to contract.<sup>39</sup> Because the provisions of § 818 III BGB limit the duty to make restitution in *species* or in money to the surviving enrichment, the ‘something’ which has to be returned under the general provision in § 812 BGB is generally considered that it ‘cannot be any single value which has passed from the claimant to the defendant, but only the totality of what has passed taking account of the values which were given in exchange and the encumbrances resting on what has been received’.<sup>40</sup>

## II. Developments in the Common-Law Systems.

The history of change-of-position in common-law jurisdictions is closely associated with the development of *indebitus assumpsit*. One of the landmark cases in that development is *Moses v MacFerlan* in which Lord Mansfield among other things, said the following:

‘This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty ... In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money*’ (emphasis added).<sup>41</sup>

From that proposition, as a matter of logical conclusion, Lord Mansfield adds:

‘It is the most favourable way in which one can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; etc; in short, he may defend himself of everything which shows that the plaintiff, *ex aequo et bono*, is not entitled to the whole of his demand, or to any part of it’.<sup>42</sup>

These texts clearly manifest that ‘unjust enrichment’ is rooted in equitable principles in the common-law world, and as such if recovery by the plaintiff is a matter of equity, and the plaintiff may always recover whenever it is equitable to do so, it also follows that the defendant must prevail when the equities are in his favour. Said differently, where the equities are equal, the loss lies where it falls. Early interpretations of the right to recover money paid under mistake, especially in American law<sup>43</sup> were to the effect that if the right to recover money paid under mistake was held to be measured by equitable principles, equitable defences would also adhere to it. Given the fact that change-of-position was a defence in equity, it also followed that change-of-position was a defence in quasi-contracts.<sup>44</sup> In a detailed

<sup>39</sup> Example that fall on the application of the *Zweikondiktionenlehre* would be where A is deceived into buying a car with serious safety defects, and these very defects cause an accident in which the car is destroyed. In this case, it is argued, A can rely on change of position and still claim back the purchase price. (See generally Markesinis & Dannemann, *The German Law of Obligations* (1997) 765).

<sup>40</sup> Staudinger/Lorenz § 818 No. 50 (as cited in Krebs T, in Schrage E J H (ed) *Unjust Enrichment* (2001) 311).

<sup>41</sup> *Moses v MacFerlan* 2 Burr 1005, 1012 (1760).

<sup>42</sup> *Moses v MacFerlan* 2 Burr 1005, 1012 (1760).

<sup>43</sup> Costigan G (1907) 20 *Harvard Law Review* 205; Cohen H (1932) *Harvard Law Review* 1333, 1344 n 33.

<sup>44</sup> Cohen H (1932) *Harvard Law Review* 1333, 1345 n. 35. For the opposite view see Costigan G (1907) 20 *Harvard Law Review* 205.

analysis of the defence, George Costigan,<sup>45</sup> back in 1906 discussing the various circumstances in which the defence arose, especially where neither party was negligent, held that ‘the principle which forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself at the expense of an innocent and blameless defendant’. In a modernised philosophical language, one would say with Lionel Smith<sup>46</sup> that ‘the plaintiff’s claim being based on the Kantian right, i.e, on his status as a self-determining agent, he must respect equally the defendant’s Kantian right’ – i.e, recognise the autonomy of the defendant as self-determining agent. That is so because in any circumstances in which the defendant, before he has any reason to suspect he is liable to a claim in unjust enrichment, he cannot be faulted for behaving as a self-determining agent, including through consuming that which he reasonably believes to be his own wealth. Therefore, in a common-law system, the defence of change-of-position is primarily aimed at protecting the security of the receipt. That notion also accords with the liberal and individualistic approaches of the common-law towards restitution in general and its ordinary system of risk allocation. The defence is concerned with protecting the security of receipt because it is reckoned that where the defendant believes in good faith that he is the owner, ‘no moral issue’ is involved, because ownership is the ultimate right ‘in property’. Where such defendant has changed his position, to deny him a defence would be tantamount to subjecting him to liability without fault and without corresponding benefit. Furthermore, if it is also assumed that the plaintiff is equally without fault, then, the only question that indeed arises in such circumstances is which of the two innocent persons shall bear the loss that has been incurred.<sup>47</sup> The equities being then equal, as already mentioned in the introduction to this article, common-law in general sees no reason why the plaintiff’s loss should be shifted to the defendant who neither made a mistake nor reaped a benefit. Consequently, the logical conclusion is that in such cases the loss should indeed lie where it now falls.

## Conclusion

The common-law and civil law of unjustified enrichment developed along different lines, especially from the sixteenth Century. Both, however, had been influenced by the social thoughts of their times and particularly by the theological and natural law schools prevalent at the time. The notions of justice that prevailed at any given time and the social context in which they operated cannot be dissociated from the legal reasoning of that period. For English law, during the time where justice could not be obtained from the common-law courts due to the rigidity of the rules applied there, a claimant could have recourse to the courts of equity for a remedy, and courts of equity basically applied ‘natural law’ principles. We have seen that the very notion that no one should be enriched at the expense of another without justification, was a notion founded in equity and the defences that could be advanced by a defendant were also seen as equitable, although with some reservation in many instances. The extension of the Roman remedies in civil-law jurisdictions has some equitable elements as well, and when a general principle against unjustified enrichment was finally formulated, it became inevitable that its application should also be complemented with adequate defences to protect the interest of defendants. The most important defence has

---

<sup>45</sup> Costigan G (1906) 20 *Harvard Law Review* 205, 214.

<sup>46</sup> Smith L D (2001) 79 *Texas Law Review* 2115, 2148-2149.

<sup>47</sup> The notion of fault is more prevalent in some United States jurisdictions than in Commonwealth jurisdictions.

generally been accepted to be change of position or loss of enrichment. Although some jurisdictions do not directly have such a defence, or give it that name, they do have subtle mechanisms that in effect amount to applying a defence of change-of-position.

Given that whenever there is a claim in unjustified enrichment a tension will inevitably arise between the demand for restitution of what was acquired without legal ground and the general interest of the receiver to protect his own assets, those jurisdictions that recognised a general principle against unjustified enrichment realised early on that the easier it is made to claim restitution, the more vulnerable members of society becomes in securing their own wealth and investments. Therefore to protect both interests, any generally liberalised system of unjustified enrichment had to afford honest and bona fide receivers a general tool to resist such claims whenever a receiver, inter alia, disposed of a wealth that appeared to be his own as a self-determining agent.



## REFERENCES

- Aquinas T, (1974) *Summa Theologiae* II-II, Quaest. LXII, (Walsh G Translation).
- Aristotle, (2014 Reprint) *Nicomachean Ethics*, (translated with Notes by Reeve CDC), Cambridge, Hackett Publishing Company.
- Bartolus S, (1596) *Opera Omnia*, Venice, Venetiis Apud Juntas.
- Birks, PBH (1984) “English and Roman Learning in *Moses v MacFarlan*” (1984) *Current Legal Problems* 1-34.
- Case Law: Case No. 131 BGHZ 118, 383 (Bundesgerichtshof 12<sup>th</sup> Civil Senate 17 June 1992 (English translation by Gerhard Dannemann).
- Case law: *King v Cohen, Benjamin and Co.* (1953) 4 SA 641 (W).
- Case law: *Moses v MacFerlan* 2 Burr 1005, 1012 (1760).
- Claudius A (1605) *De Conditione Indebiti Commentarius* (Francofurti, Frankfurt).
- Cohen H (1932) Change of Position in Quasi-Contracts (1932) 45 *Harvard. Law Review* 45, 1333-1356.
- Costigan, G (1906) “Change of Position as a Defence in Quasi-Contracts – The Relation of Implied Warranty and Agency to Quasi-Contracts” *Harvard Law Review* 20, 205-2030.
- Markesinis, B S., Lorenz, W & Dannemann, G. *The German Law of Obligations* (1997) Oxford: Clarendon Press.
- Dannemann, G (2001) Unjust Enrichment by Transfer: Comparative Remarks *Texas Law Review* 79, 837-855.
- Du Plessis, J E (2005) Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts From Two Mixed Jurisdictions (2005) *South African law Journal* 122, 142-160.
- Faber A, (1626-1631) *Rationalia in Pandectas* (Genevae, Haeredum Petri de la Rouiere)..
- Feenstra, R (1999), Grotius Doctrine of Unjustified Enrichment as a Source of Obligations and Its Influence in Roman Law in Schrage E J (ed) *Unjustified Enrichment: Comparative Legal History of The Law of Restitution* (pp 289-315 ) 2<sup>nd</sup> Ed. Berlin, Dunker & Humbolt.
- Flume, W (1953) Der Wegfall der Bereicherung in der Entwicklung vom Römischen zum Geltenden Recht in *Festschrift für Hans Niedermeyer zum 70, Göttinger rechtswissenschaftliche Studien*, Volume 10 (pp 103-134), Gottingen, Swartz,

Glück C F, (1798-1896), *Ausführliche Erläuterung der Pandekten*, Stuttgart, Johann Jacob Palm (Erlagen).

Godley J (2012) Restitution Without Enrichment? Change-of-Position and *Wegfall der Bereicherung* in Jonhston D & Zimmermann R (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective*, (pp 227-242 ), Cambridge University Press, Cambridge (UK).

Grotius H, (1646) *De Iure Belli ac Pacis, Libro tres* (1646), (1909 edition by Molhuysen P C with English Translation), Leiden, Hettinga Tromp.

Grotius H, (1688) *De Jure Naturae ac Gentium Libri Octo* (1909 edition by Molhuysen P C with English Translation), Leiden, Hettinga Tromp.

Grotius H, (1645) *Indeilinge tot de Hollandse Rechts-geleerheid* (1952 Edition by Dovring F, Fischer HFWD & Meijers EM).

Hallebeek J, (1996) *The Concept of Unjust Enrichment in Late Scholasticism*, Nijmegen, Gerard Noodt Institut.

Jason de Mayo (1629) *In Secundum Digesti Veteris Partem Commentaria* (Venettis (Venice), Edoardus Pub).

Justinian, (1910 Reprint) *Corpus Iuris Civilis* (edition by Paul Kruger, Theodor Mommsen, Rudolf Schoel and Wilhelm Kroll, The Lawbook Exchange, Ltd.; [Originally published by Berlin: Apud Weidmannos, 1895. 3 Volumes).

Key, P (1995) Change of Position *Modern Law Review* 58, 505-522.

Krebs, T (2001) *Restitution at the Crossroads: A Comparative Study*, London, Cavendish Publishers.

Lauterbach W A, (1726) *Collegii Theoretico-Practici* (Tubingen 1726).

Malan, F R (1992) *Price v Neal Revisited Acta Juridica* 131-147.

Markesinis B S, Lorenz ,W & Dannemann, G (1997) *The Law of Contract and Restitution: A Comparative Introduction* , Vol. 1, Oxford, Clarendon Press.

Smith, L D (2001) Restitution: The Heart of Corrective Justice, *Texas Law Review* 79, 2115-2145.

Van der Keessel D G, (1816) *Praelectiones iuris ad Hugonis Grotii Introductionem at Iurisprudentiam Hollandicam* (Leiden, A. A. Balkema) (Edition by Varmelo, Coetze L I & Gonin LH).

Visser D P (1992) Responsibility to Return Lost Enrichment *Acta Juridica* 175-192.

Visser D P (2008) *Unjustified Enrichment*, Cape Town Juta & Co.

Zimmermann R (1995) Unjustified Enrichment: The Modern Civilian Approach” (1995) *Oxford Journal of Legal Studies* 15, 403-428.

Zimmermann R & Du Plessis, J E (1994) Basic Features of the German Law of Unjustified Enrichment” *Restitution Law Review* 2, 14-42.

Zimmermann R, (1996) *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), Cape Town, Juta & Co.

**Contact email:** joraimite@hotmail.com, ajorge@unam.na





***Legislative Measures Related to Community Rights in Thailand and ASEAN Countries***

Phasai Samart, Rajamangala University of Technology Rattanakosin, Thailand

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

The objective of the research is to study the laws relating to community rights in Thailand and ASEAN countries, as well as the basic international principles of community rights, particularly concerning the problem of access to and search for biological resources and control over natural resources within local communities, and offer recommendations on how to improve the laws relating to community rights in Thailand in order to bring them in better compliance with the principles of ASEAN. The researchers have used the qualitative method to study the laws relating to community rights in Thailand and ASEAN countries. With reference to documents, handbooks, scientific articles and websites of respective authorities, they have analyzed the existing legislation comparing it with the legislation in ASEAN countries. As a result it has been found that the problem of the control over natural resources still exists, ASEAN still does not have principles of direct support of community rights, and each member country still has issues between governmental and community institutions because of imperfection of the law and incoordination in many legal provisions. Besides, opinions about the access to and sharing of the benefits from natural resources differ in terms of procedures and regulations relating to natural resources and environment.

Keywords: Legislative measures, Community rights, ASEAN countries

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## I. Introduction

“Community Rights” first appeared clearly in “The Universal Declaration of Human Rights”. Human rights are the rights that everyone is entitled to on an equal basis just for the reason that the person is human. The rights are based on the human’s consideration of nature, thus, they are rights which occur naturally for a person. At the moment, we do not look at human rights as natural rights only, we also understand that they are largely a result from ideologies and concepts that we human have “constructed” ourselves under different conditions and contexts of each society. The evolution of making demand for community rights have been around for a very long time in various venues such as in case of native tribes who have come together to ask for their rights as citizens. This is considered an important starting point which galvanizes the world to come to realization of the importance of recognizing uniqueness of races and origins and has given rise to making demands for various other things related to community rights in other communities around the world.

As for Thailand, it can be said that the phrase “human rights” (in Thai: “สิทธิมนุษยชน”) was first coined by Professor Saneh Jamarick and several other scholars (Sriwipat, Parichart, 2005), with the intention to express the spirit and the intellect of communities and to also bring back attention to such matters. The early development of human rights in Thailand was usually about “local community rights”, strictly in the sense of the rights according to local custom, traditions, way of life and local culture as well as rules used in managing forests and their resources that the community has observed for a long time. As to be expected, the rights are only limited to how to manage the forests, natural resources or community natural resources only. It was only later that the meaning of the phrase was developed to have wider meaning by also including wider, more abstract meaning -- not limiting to only the rights to make use of the local forest and its resources only (Jamarick, Saneh, 2001). The new definition, therefore, also covers the areas of group rights or community rights or collective rights over community resources, be it land, water, forest, genetic resources, local intellects, etc. Such rights are considered natural rights and it is only righteous if all members within the community come together to look after and make use of the natural resources together.

And because local communities survive and can sustainably develop themselves to have the rights to deny any external infringement that may have negative impact on the natural resources and environment of the communities, they are enabled to exist with dignity and ability to manage the lives within the communities and have the right to deny any external invasion on the basis of collective consciousness of the communities, along with the rights to build relationships between men and the natural world. Communities, established as a result of relationship with natural resources, have always been in development. Therefore, community rights can be considered a process that still connects with local culture, local intellects, as well as culture, custom, and tradition. They can also be used as tools to solve various conflicts within the communities in managing natural resources and the environment surrounding the communities. Furthermore, community rights can help build up collective consciousness and collective ideology of the community in encouraging and creating a self-reliance way of life and raising collective

awareness of personal rights and political rights one is entitled to under democracy, including one's duties in protecting the environment and natural resources, local intellect, good culture and tradition.

After Thailand ratified the ASEAN CHARTER in the 13th ASEAN Summit on 20 November 2007 in Singapore, Thailand became part and a member of AEC or Asean Economic Community, which aims to foster effectiveness within the organization with a people-centered approach, in order to ultimately signify ASEAN progress and unity among the 10 member countries to the international communities. And in so doing, in 2015, all member states must drive forward internal policies to ensure that the multinational integration can be accomplished and will help all member states to achieve all goals and objectives as laid out in the ASEAN Charter.

This is why it is very important that the internal laws and regulations of all member states and the legal enforcement of such laws and regulations must not violate any existing obligations or commitments of the international laws. All member states shall be held accountable upon violation. No member state can cite their own law as the reason to deny commitment and accountability according to relevant international laws. This must be done in order to ensure that our legal institutions are in line with the human rights principles and frameworks of the global communities. And such are the very reasons why raising awareness and encouraging community rights according to the law are very important and should be prioritized. The author of this research, likewise, recognizes the importance of studying and comparing the related legal frameworks of community rights of the Thai laws and the laws of other ASEAN countries.

## **II. Research Objectives**

- 1) To study the laws related to community rights in Thailand.
- 2) To study the laws related to community rights in other ASEAN countries.
- 3) To make useful recommendations in order to improve the laws related to community rights in Thailand to be functional and appropriate.

## **III. Research Methodology**

This research uses qualitative research methodology through collecting information by making comparative study of the laws related to community rights in Thailand and in ASEAN countries. The information largely comes from related documents, books, academic journals and websites of relevant government agencies. The information obtained is then analyzed using logic and legal theories as well as enforced legal frameworks.

## **IV. Research Results**

The results of this research are divided into two parts, including legal measures related to community rights in Thailand and legal measures related to community rights in ASEAN countries. The specific details are as follows.

## **Legal Measures Related to Community Rights in Thailand**

The principle of community participation in the management of local natural resources has been drafted and passed into law and legally enforceable in practice. In addition, the principles of the people's participation and community rights were included for the first time in the Constitution of the Kingdom of Thailand B.E. 2540 and also later in the Constitution of the Kingdom of Thailand B.E. 2550. In the Constitution of the Kingdom of Thailand B.E. 2540, Article 46, it states "People who have collectively come together as an original local community should have the rights to protect or invigorate local traditions, local intellects, and the arts or culture of both local community and the country as well as to be able to participate in the management and making use of all natural resources and the environment sustainably and with balance, or as permitted by the law."

Article 56 "The rights of individuals to participate with their state and communities in enriching and maintaining and retrieving benefits from natural resources and biodiversity, and in protecting, enhancing, and maintaining environmental quality to allow for normal and continuous existence in an environment that will not cause danger to the individual's health and hygiene, safety and security or expected quality of life. All individuals should be entitled to such rights and relative legal protection, or as permitted by the law"

Undertaking projects or activities that may result in drastic impact on the quality of the environment must not be done, except in cases where the individual has conducted thorough studies and evaluation on the possible impacts on the environmental quality alongside independent organizations, which shall include representatives from private environmental agencies and representatives from academic institution(s) who are responsible for an environmental study and providing opinions and recommendations before such projects can be undertaken, or as permitted by the law.

The rights of individuals to pursue legal actions against government agencies, state enterprises, local government authorities, or other government agencies to enforce their roles as legislated in the first and second paragraphs should entitle the individuals to the protection of the law.

From both articles of the B.E. 2540 constitution, it can be concluded that the constitution authenticates two types of rights for original local communities, namely the right to preserve or invigorate local custom and traditions, local intellect, local and national arts or culture and the right to participate with the state and the communities in maintaining and making use of natural resources and biodiversity in ways that will not cause dangers to the people's health, hygiene, welfare or their quality of life.

In addition, there have been other legislations in the form of Acts such as the Environmental Quality Promotion and Preservation Act B.E. 2535, the Plant Varieties Protection Act B.E. 2542, the Thai Traditional Medicine Promotion and Protection Act B.E. 2542, etc.

Later, in the B.E. 2550 Constitution, Section 12 on Community Rights, the authentication of the principles of community rights has been laid out in Article 66: The rights to preserve or invigorate local intellects, and natural and environmental resources as follows.

“Individuals who together comprise a community, a local community, or a local original community shall be entitled to preserve or invigorate local custom and traditions, local intellects, and both local and national arts and traditions. They shall also be allowed to participate in the management, maintaining, and making use of natural resources and biodiversity sustainably and with great balance.”

And in Article 67: The right to preserve, maintain, and benefit from natural resources, it states as follows.

“The right of individuals to participate with the state and their communities in preserving, maintaining, retrieving benefits from natural resources and biodiversity and also in protecting, promoting and preserving environmental quality to ensure normal and continuous way of life in an environment that will not result in dangers to their health, hygiene, welfare, or quality of life. The individuals who exercise such right should be protected by the law as appropriate.”

No project or any activity that may result in severe damages or impacts on the communities whether in terms of environmental quality, natural resources, or personal health and hygiene shall be undertaken, unless thorough studies and evaluations have been conducted on the likely effects on the quality of the environment and the health of the people within the community. Additionally, there should be public hearings held for the people and all parties and stakeholders. Independent organizations consisting of representatives from private health and environmental organizations and representatives from academic institutions who have conducted environmental studies or natural resource studies or public health studies shall also provide opinions before such project can be permitted.

The rights of communities to pursue legal actions against government agencies, state enterprises, local government authorities or other state agencies that are legal entities to enforce their roles according to these acts should warrant their protection under the law.”

Furthermore, the Constitution of the Kingdom of Thailand B.E. 2550 also has provisions in Section 5 regarding the Basic State Policy Approaches, specifically in Part 10: Policy Approaches for People Participation which specifies that the state must operate in line with the policies designed to encourage the people’s participation. The specific details are as follows.

1. Promote the people’s participation in determining policies and planning for economic and social development both at the national and local level.

2. Promote and encourage the people's participation in making political decisions, social and economic development plans as well as providing public services.
3. Promote and encourage the people's participation in investigating the use of public power at all levels in the form of professional organizations or various occupations in other forms.
4. Promote and provide support to enhance the general public political awareness and legislate provisions to allow for the citizens' political development fund to assist with public activities of the communities and provide support to groups of citizens who have come together as networks to be able to express their opinions and make recommendations about what the people in the area/communities require.
5. Promote and educate people on issues related to political development, the awareness and understanding of Democracy with the King as the Head of State (Constitutional Monarchy). This also includes encouraging people to be able to vote with righteousness and integrity.

Thailand has ratified the Convention on Biological Diversity : CBD by making "The Draft for Biological Diversity Safety from Modern Biological Technologies B.E...." and "The Regulation of Biological Diversity Preservation and Utilization Committee" on the criteria and methods in accessing biological resources and retrieving benefits from biological resources B.E. 2554 (Under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity). In addition, there were also management plans with regard to community forests through the policy-making on natural resources and environmental management in the 7th Economic and Social Development Plan (B.E. 2535 – 2539) and making public announcement on water quality for consumption and for surface water, sea water, coastal waters, waste water from buildings and industrial facilities. In terms of air, there are measures implemented such as standards of air quality from sources like industrial facilities and vehicles or standards for noise level, quality and relevant measures of controls. There are also standards for toxic substances and measures of control. This also includes measures for the protection and preservation of natural resources announced through various laws and regulations, for example, the National Environmental Quality Promotion and Preservation Act B.E. 2535, the Promotion of National Cleanliness and Orderliness Act B.E. 2535, the Forestry Act B.E. 2484 with additional amendments B.E. 2485, the National Parks Act B.E. 2504 and the National Wildlife Conservation and Protection B.E. 2535.

### **Legal Measures Related to Community Rights in ASEAN**

There is no clear principle laid out for community rights in ASEAN. However, there have been managements under the Convention on Biological Diversity : CBD. All ASEAN member countries expressed concerns about the preservation of biological diversity, as can be seen from the collective ratification of CBD and close collaboration in determining strategic plans for the management of biological diversity. And even if many



countries still use the same existing law, there have been attempts to draft new law and revise those existing law to be more in line with both the Cartagena Protocol and the Nagoya Protocol.

Many ASEAN member countries continue to face problems arising from limited budgets in trying to raise collective awareness and promoting the people's participation. This is why many countries still need both financial aid and technical assistance from international organizations. In some countries, the laws and regulations to promote and conserve biological diversity and safety from genetically modified products have been put in place.

The Philippines Prior to ratifying the Convention on Biological Diversity, the Philippines government issued Executive Order 247 (1993) for Prescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, Their By-Products and Derivatives for Scientific and Commercial Purposes and for Other Purposes. The order came into effect in 1995. This law is considered the first law in the world on the issue of granting access and encouraging benefit-sharing with regard to natural resources (Medaglia et al, 2010: 31). In addition, there are many more related rules and regulations such as Executive Order 514 (2006) on National Biosafety Framework which directly responded to the Cartagena Protocol [Philippine First Regular National Report on Implementation of the Cartagena Protocol on Biosafety, 2007] and the Wildlife Act (2001) which directly responded to the Nagoya Protocol, specifically in that it permits individuals to take genetic resources from the forest to study and conduct research in order to develop for commercial use in the future. It is important to note, however, that all actions must be carried out while taking into account the culture and traditions of local communities and native tribes as well as the conditions for practice, bioprospecting fees, royalty payments, and up-front payments, or any other non-monetary benefits and penalties in case of violations. The most important thing is that the law of the Philippines allows civil society to actively participate in the investigation on the working and undertaking of those who make use of such resources and related government agencies as the entities responsible for authorizing such actions/projects.

Vietnam Vietnam has passed specific laws and regulations on biological diversity such as Regulation on Management of Biological Safety of GMOs, products and goods originating from GMOs (2005) Decision 79/2007/QĐ-TTg (Control over the sales and distribution of GMO products with risk evaluation, product labelling, research studies and community participation on biosafety issues) and Biodiversity Law 2008. The laws and regulations in place come into existence partly because the Vietnamese government wants to actively and continually promote investments and development in Biotechnology within the country. (Vietnam National Action Plan to 2020 for Implementation of Cartagena Protocol on Biosafety, 2004; and Vietnam First Regular National Report on the Implementation of Cartagena Protocol on Biosafety, 2007)

Malaysia The government of Malaysia has made "Guideline on the Release of Genetically Modified Organisms to the Environment" to be in line with the Cartagena Protocol on Biosafety. The government also issued the Biosafety Act 2007 in support of

the missions laid out in the Protocol on issues of LMOs and GMOs, especially in the aspect of product import and usage within the country. Currently, the government is considering the Bill on Access and Benefit Sharing. As for the local governments in areas with great biological diversity, they have taken necessary steps to control biological and genetic resource usage, as seen from Sarawak Biodiversity Center and Sabah Biodiversity Center. In any event, the central government agencies, such as the Department of Forestry will be responsible for issuing the permit/license to take and make use of the plants and other organisms from the forest. The main emphasis will be given to the use for academic purposes and research benefits. As for the procedures for granting access to such natural resources, this still largely depends on the laws and regulations of each Malaysian state (Malaysia First Regular National Report on Implementation of the Cartagena Protocol on Biosafety, 2007 and Medaglia et al, 2010:31).

**Indonesia** The government of Indonesia has moved forward with Biosafety Clearing-House. However, there are still some problems with translating the information into English. Furthermore, the capacity of their personnel is rather limited, so it is necessary that they must rely on technical assistance from international organizations. In any case, the existing laws and regulations in Indonesia do comply with the procedures as recommended in the Cartagena Protocol on Biosafety. However, there are still many laws and regulations that are still under improvement to comply more with the missions and objectives of the Protocol. This is especially the case for informing and controlling LMO product import [Indonesia First Regular National Report on the Implementation of the Cartagena Protocol on Biosafety, 2007] and the law called GR No.21/2005 (Biosafety of Genetically Engineered Products) to protect and preserve the environment and the health of the general public in accordance with the principle of Safety First.

**Cambodia** In the case of Cambodia, in operating in line with the Cartagena Protocol on Biosafety, the rules, regulations, and activities within the country on the preservation of biological diversity is rather limited even if Biosafety Clearing-House has been established. This is for various reasons: one of them being the fact that Cambodia has never really made any MOU with the international community on importing and exporting LMO products. Furthermore, as of the moment, there is no internal law regulating movement of LMO products. However, the government of Cambodia has made the National Biodiversity Strategy and Action Plan to promote the development of Biotechnology and protection of the environment within the country from the use of LMO products along with the National Law on Biodiversity 2008 (Cambodia First & Second Regular National Reports on Implementation of the Cartagena Protocol on Biosafety, 2007 & 2011).

**Myanmar** Currently, Myanmar is in the middle of the law making process to provide legal support to biosafety-related work operations such as in the Biosafety Framework (Myanmar First Regular National Report on Implementation of the Cartagena Protocol on Biosafety, 2008).

## V. Discussion

Since Thailand became a member of the Convention of Biological Diversity, Thailand has issued and made improvements to existing laws and regulations to be more in line with the Convention. More specifically, the principles of granting access and benefit-sharing with regard to making use of genetic resources appear in many Thai laws and regulations. Each law and regulation is, however, still different in its essence, depending largely on the objectives of issuing the said laws and regulations. In short, the issues of the promotion and protection of biological diversity appear in both primary and secondary laws. As for other ASEAN countries that the author has studied, the first being the Philippines, after joining as a member with the Convention of Biological Diversity 1992, the government of the Philippines has issued laws and regulations granting access and encouraging benefit-sharing of natural resources. The laws have come into effect and existed in two separate laws, namely, Executive Order No. 247 which is used to regulate making use of biological resources by authorizing relevant government authorities to deliberate and grant permission in a decentralized manner. In other words, researchers can request for access to specific biological resources within the areas or original sources for biological resources by asking for permission directly to the government authorities in charge of that particular area. This manner of practice is in line with the principles of the convention which aims to encourage people and community participation in the management of natural resources that will, in turn, promote and support the rights of the communities and the rights of local citizens. In addition, a special committee called Inter Agency Committee on Biological and Genetic Resources has been established under the Department of Environmental and Natural Resources : DENR. The Department of Environmental and Natural Resources controls various departments and agencies to serve as central organizations and operate in line with Executive Order No. 247. The departments and agencies process and authorize requests for research studies. Those who wish to conduct research studies on natural and biological resources of the Philippines must submit an official request to the Biological and Genetic Resources Committee. The request/application must include details such as the objectives, sources of funding, duration of research studies or operations, list and the total amount of biological resources that need to be used. A copy of the application with all the specific details must be sent to community leaders or representatives of nearby communities. Once explicit consent is obtained from all related parties and stakeholders, the research team may then access and utilize the biological resources. As such, the relevant parties who have a say in allowing access and utilization of biological and genetic resources are local communities and local government officials. Once the access is granted, the applicant(s) must sign an agreement, which can be divided into two separate categories: Academic Research Agreement : ARA or Commercial Research Agreement : CRA.

In any event, the enforcement of Executive Order No. 247 still poses many problems. This ultimately results in how the Philippine government chooses to revise the laws and determines new regulations for granting access and allowing benefit-sharing with regards to biological resources under the 2001 Wildlife Resources Conservation and Protection Act.

The objectives of the 2001 Wildlife Resources Conservation and Protection Act include protecting and conserving wildlife and their natural habitats within the country with provisions and various regulation on the access and benefit-sharing of biological resources. The Department of Environmental and Natural Resources also revoked the rules and regulations under Executive Order No. 247.

Later, in B.E. 2547, the Philippine government made an official operational approach for all activities related to accessing biological resources. From that moment on, no matter whose authority on access to biological resources is under, the process for acquiring such access must strictly accord with the official operational approach. More specifically, all research studies, compilations and utilizations of biological resources must be done and achieved under relevant rules and regulations. Those who wish to pursue such research studies and access to the resources must notify relevant parties and stakeholders beforehand and must also make an agreement with local communities and all stakeholders and in the event that the applicants are foreign nationals, the agreement must also be made with relevant local government agencies.

## **VI. Conclusion and Suggestion**

From the study on the legal measures related to community rights in Thailand and in ASEAN, on the issue of access to biological resources and rights of surrounding communities in the co-management of such natural and environmental resources, there are still some problems in the co-management of natural resources. The problems are usually in the form of problems between government agencies or government and private agencies, or private agencies and private agencies. These problems usually arise from errors and disparities in the law. For example, at the ASEAN community level, the issue of community rights and the plans for community rights are not clear. They are simply minor requirements, even if ASEAN has prepared the ASEAN Framework Agreement on accessing and sharing benefits arising from utilizing biological resources and genetic resources fairly and equitably. At present, however, there has not been any action or operation under the framework agreement. This is partly because many ASEAN countries disagree on the extent of granting access and sharing the benefits derived from making use of natural and biological resources. These countries include Malaysia, the Philippines and Indonesia which similarly place highest importance on sharing the various benefits derived from biological resources. At the same time, Singapore has already come up with policies to support the mechanisms for practical operation. As for Myanmar, Laos, Brunei, Vietnam, and Cambodia, the policy on such issues is not clearly specified, with appropriate legal measures and regulation still largely absent.

On the issue of the rules and regulations as well as other legal measures for the management of natural and environmental resources, ASEAN countries have been cooperating well. There are working committees on various issues as well as many international framework agreements established for the management of natural and environmental resources. Moreover, the intra-regional cooperation help ensures good operations. In each ASEAN country, there are special sets of rules and regulations issued to ensure fair and equitable management of natural resources and people participation in

such management in order to conserve and maintain all precious environmental resources sustainably and with balance.

As such, community rights are important rights that must be permitted and supported by the law to ensure good management of vital resources, both natural and man-made within one's community. And because people living in the communities are the individuals who know their community the best in terms of what should be done, what should occur, what to fix and what to restore -- these are things that people actually living in the community will know best. Thus, in many countries, local government authorities are usually responsible for making decisions on related policies in the management of vital natural and environmental resources within their area of responsibility. Such countries include the Philippines, Thailand, etc.

As for the community rights with regard to accessing and managing biological resources, from the case studies in Thailand and the Philippines, it appears that there are clearly defined laws, rules and regulations for the management of community natural and environmental resources. In these countries, all access can be granted once permission and explicit consent from relevant government organizations and surrounding communities have been obtained respectively. On a more formal note, the applicant must also sign an agreement to ensure that their work operations are in line with the original agreement. This also includes sharing all of the benefits that may arise from such research and studies. In its essence, the requirement is in line with the agreement laid out in the Convention for Biological Diversity.

In any case, conserving natural resources and the environment is something that shall be embraced by all people. The attempt will most likely be successful if all people within the same community collectively push forward and abide by the requirements as their cultural constitution. It should be a legitimate right of the people in a community to choose to live or not to live in a specific environment. This will give leverage to the people in such community to negotiate with state authorities and allow for co-management of natural resources. And in the long run, this will help solve the problems of excessive state dominance in both decision and policy making. It is also important to always remember that the management of resources must still be in harmony with the social and cultural context and historical context. This will help improve the strength and collaboration within the community and solve the problems of socio-economic disparities, which is one of the most important and decisive factors to bring about a fair and equitable society.

## **VII. Acknowledgement**

This research was supported by Rajamangala University Of Technology Rattanakosin.



## VIII. References

Anan Kanjanapan. Community Dimensions. Local Thinking Process on Rights, Power and Resources Management, (Bangkok: Office of Research Promotion Fund, 2001).

Bavornsak Uvanno and Tawinvadee Burikul. Participatory Democracy. Bangkok : King Prajadhipok's Institute, 2005.

Chontira Sathayawattana. 2003. The Dynamics of Community Rights : Anthropological Paradigm. Bangkok : Siridhorn Anthropology Center (Public Organization).

James L. Crayton. Manual for People's Participation, Better Decision Making Through People's Participation. Translated by Professor Wanchai Wattanasap, M.D., Tawinvadee Burikul M.D., Assistant Professor Methisa Pongsaksri M.D.; Khon Kaen : Siripan Offset Publishing House, 2008.

Jarun Kosaranant. Human Rights Without Borders :Philosophy, Law, and Social Reality. Nititham Press. 2002.

Kaneungnij Sribuaiam et al. Approaches for Promoting Participatory Democracy In Accordance with the Constitution of the Kingdom of Thailand B.E. 2540 : Problems, Obstacles, and Solutions. Bangkok : Dhammada Place, 2003.

Kanjana Koomsab. Community Rights and Sustainable Management of Natural Resources: Case Study: Community Forest in Ubon Ratchathani Province, Political Science and Law Journal, Kalasin Rajabhat University, Year 4 Issue 1 (Jan – Jun 2015).

Kiertkajorn Vajanasawasdi. "Public Participation Work Operations Under Government Policies for Employment. Bangkok : Planning and Information Division, Department of Employment, Ministry of Labour, B.E. 2550.

Lertchai Sirichai et al. "Community Rights in Southern Thailand, Bangkok. Nithitham, 2003".

Saneh Jamerick, Thai Human Rights in the Global Currents (Bangkok: Office of Research Promotion Fund, 2006).

Suthawan Satheanthai. 1995. Rights and Problems with Communal Natural Resources. Bangkok: Chulalongkorn University.

Somsak Sukhawong. 2007. Community Forest Management: For People and For the Forest. Bangkok. Taweewat Publishing Co.

Yos Santhisombat, Biological Diversity and Local Intellect for Sustainable Development (Chiang Mai : Nopburi Publishing Co., 1999).



***Determinants of Foreign Subsidiary Exploring Location-Specific Advantages:  
Capability Transfer and Experience Accumulation***

Chin-I Chen, National Chi Nan University, Taiwan

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

Concerning the increase of foreign investment activities and changes of global environment, performance of foreign subsidiaries has been a crucial issue. According to the classification of FDI (Foreign Direct Investment) motivation, we identify four types of location-specific advantages such as market advantage, resource advantage, efficiency advantage, and strategic asset advantage. Each advantage is complement with different ownership advantage of MNEs. For example, for those MNEs with R&D capabilities as core competence, FDI locations with resource, efficiency, and strategic asset advantages are preferred choices. On the other hand, MNEs with better marketing capabilities prefer FDI locations with market advantage. Therefore, the degree to which the foreign subsidiaries explore location-specific advantages depends on how well the parent firms transfer their core competence to them. For building the enduring enterprise, MNEs also try to use diversification strategies to enter new foreign markets. With accumulation of international and localized experience, foreign subsidiaries have more decision-making autonomy and higher operational efficiency. In this study, we think determinants of foreign subsidiaries exploring location-specific advantages includes the core competence of parent firms. It depends on whether related or unrelated diversification is executed and how much MNEs accumulate experience. To examine our hypotheses, we use Taiwan Economic Journal and China Statistical Yearbook as database source, tracking operating performance of Taiwanese subsidiaries in China from 2000 to 2013. Affirmative conclusion of interaction effects between foreign subsidiaries' locational advantages and MNEs' ownership advantages on the performance of foreign subsidiaries is made by empirical tests.

Keywords: Location-Specific Advantage, Ownership Advantage, International Experience, Diversification

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## Introduction

Foreign direct investment is an important growth strategy for firms (Chang & Rosenzweig, 2001). Most of previous research indicates that the FDI locations chosen by parent firms influence the operating performance of foreign subsidiary companies (Vanhonacker & Pan, 1997), competitive advantage in a global market (Dunning, 1998), and the globalization of value chains (Yamawaki, 2004). With the increase of international investment activities and the change the global environment, the location choice of FDI has been an important issue both in research and practice (Chadee et al., 2003). Demand patterns in local market as well as changes in resource endowment affect global marketing strategies and strategic resources allocation.

Companies choose to invest in foreign markets for a number of reasons. The eclectic theory proposed by Dunning (1980, 1988) has been one of the main frameworks which were widely applied in the past to explain and examine the FDI decisions of multinational firms over the past two decades. It corporates industrial organization theory, product lifecycle theory, and internalization theory to indicate that three potential sources of advantage that may underlie a firm's decision to become a multinational. There first must be some ownership advantage to investment, which means that the firm controls some specific asset such as know-how, research and development capability, or marketing capability that are not generally available to its competitors which allows it to generate positive profits. Locational advantages focus on the question of where an MNE chooses to locate. There are four main types of benefits pursued by MNEs who decide to go global and enter international markets, including market seeking, resource seeking, efficiency seeking and strategic asset seeking. Market seeking factors of FDI such as market size, market growth, structure of domestic market, etc. aim at penetrating the local markets of host countries. While resource seeking investments are made in order to have access to cheap raw material, pool of labor, infrastructure, etc, new sources of competitiveness, economies of scope and specialization and low cost of production are some of the efficiency seeking factors of FDI (Faeth, 2009). Strategic asset seeking primarily motivates these strategies in advanced economies in the form of acquisitions of local firms (Luo and Tung 2007, Mathews 2006).

Dunning (1995) indicates that FDI location choice is a result of considering MNEs' ownership advantage, their strategic purposes, and the FDI locational specific advantage evaluations. Resource-based view consider MNE's ownership advantage is a combination of superior resource sets and management capability, which can be transferred into competitive advantages in host countries (Barney, 1991). Ownership advantages not only help MNEs to make good use of local resources, but also effectively absorbs and integrates local business knowledge and technology and builds new capabilities (Madhok, 1997). However, each MNE has different core competencies because of different resources, resulting in different motivation of FDI. For example, if MNEs have a leading technological capability, they may seek to diversify their investment in natural resources to reduce their production costs, or to seek market locations to build a leading market position.

Therefore, FDI is an important way to match the core competence of MNEs and the locational advantage of the host country. With different investment objectives, FDI

can be divided into two types: asset exploitation and asset seeking (Galan, González-Benito, & Zuñiga-Vincente, 2007). From the point of view of asset exploitation, MNEs want to transfer their competitive advantage in the home country to overseas markets through FDI, so they prefer to choose developing or emerging countries as FDI locations, for rich natural resources or the large market. From the perspective of asset seeking, MNEs want to learn from overseas markets to enhance their knowledge and technical ability, so the FDI locations tend to be the developed countries or mature capital markets, or as the upstream country (Makino, Lau, & Yeh, 2002). Although these two views appear to be two distinct FDI decision-making thoughts, they are complementary to each other (He & Wong, 2004; Nachum, Dunning, & Jones, 2000).

In addition to expanding the benefits of self-reliance through FDI, MNEs also try to diversify their reach by pursuing growth through new business ventures. However, the international diversification involves the expansion of professional management, diversification and geographical scope. The core competence of the enterprise itself and the subsidiaries' operation projects are crucial to whether the international diversified enterprises can achieve diversified operational risks and make effective use of the overseas geographical advantages so as to improve the financial performance of the subsidiaries.

The accumulation of international experience also affects the subsidiary's decision-making autonomy and operational efficiency. In the early stages of market entry, foreign affiliates face not only the impact of language and cultural differences (Hirsch, 1976) but also the limitations of the local governments. In order to reduce the uncertainty of the local environment, MNEs hope to make full use of their accumulated research and development capabilities, marketing capabilities, management experience, the development of overseas markets or to seek strategic resources to maintain their competitive advantage. With the accumulation of international experience and knowledge, and with a certain degree of understanding of the local market, the autonomy of foreign subsidiaries will be increasingly high, less and less leaning on their parent company. Foreign subsidiaries have the ability to accumulate the local market-related knowledge back to the parent company, and help their diversification and innovation.

In order to validate the above-mentioned points, we must track the location characteristics and management performance faced by foreign subsidiaries, and combine MNEs' self-supporting and international experience to explore the advantages of subsidiaries. Most of past studies use cross-sectional research methods such as case studies (Hannula, 2005) or questionnaires (Makino et al., 2002; Tseng, 2007; Tahir & Larimo, 2004), which show respondents' subjective perception rather than effectively examine the operation of foreign subsidiaries. The literatures of FDI location decision often use the location choice or investment amount as the response variables and clarify which are the most critical locational advantages by testing the effects of location characteristics on firms' performance. This study examines whether these local advantages can be harnessed by foreign subsidiaries from the perspective of business performance of subsidiaries and discusses some moderators such as the parent company's ownership advantage, the degree of international diversification, the accumulation of international experience. It is hoped that the

research results can provide MNEs important information and decision-making environment and ability to make good use of locational advantages.

This study use the Taiwanese firms' investment in the China market as an example, to explore how the foreign subsidiaries adept in using locational advantages. Dunning (1998) divides FDI motivations into four categories: market seeking, resource seeking, efficiency seeking, and strategic asset seeking, and listing the relevant location characteristics respectively. Therefore, we divide the locational advantage into four categories: market advantage, resource advantage, efficiency advantage, and strategic asset advantage, and examines the extent of the subsidiary well utilizing locational advantage. This is our first research purpose.

The benefit of internationalization comes from MNEs' ownership advantages such as R&D intensity, advertising intensity, and capital intensity (Jung, 1991; Dess, Gupta, Hennart, & Hitt, 1995). Yip et al. (2000) have also found that MNEs' FDI strategy presents a combination of the firm's specific assets and capabilities with local resources to maximize the value of the particular assets and capabilities it possesses, overtake or catch up with local competitors. This study aims to measure the Taiwanese firms' ownership advantages from the aspects of technological capability, marketing capability and firm size, and discuss which locational advantage can complement with as to explain the extent to which foreign subsidiaries can make full use of various locational advantage. This is our second research purpose.

The relationship between MNEs' international diversification and business performance has not been consistent. This is because international diversification, while making overseas subsidiaries more complex business environment, but also increase its ability to develop and import new products. Most studies suggest that the direct effect of international diversification on firm performance is a nonlinear relationship of decreasing U positive linearity (Daniels & Bracker, 1989; Mathur et al., 2001). In contrast to this view, this study argues that international diversification affects the extent to which parent companies' ownership advantages and managerial experience can be successfully transferred to overseas subsidiaries, thereby influencing the extent to which subsidiaries can take advantage of local advantages. If there is a large difference in operating items between parent companies and foreign subsidiaries, the diversification may results in difficulty in transferring operating experience, and then the subsidiaries may not be able to make good use of the locational advantage. To study whether the degree of diversification will weaken the benefits of operating experience from parent companies to foreign subsidiaries is our third research purpose.

However, with the accumulation of international experience, MNEs not only get more and more familiar with the business environment and cultural customs in host countries, but also accumulated a certain amount of resources and contacts. At this point, the MNEs are looking to acquire new knowledge from the host country and to evolve their capabilities into new products and services (Luo, 2000). As a result, subsidiaries operating in the old business are more autonomous and less dependent on the parent company, while subsidiaries engaged in new businesses are more able to absorb the support of the parent company because of their familiarity with the local environment. Therefore, after the overseas subsidiaries accumulate some local experiences, it is the fourth research purpose to explore whether the degree of

diversification will strengthen the capacity transfer of the parent company. The conceptual framework for this study is shown in Figure 1.

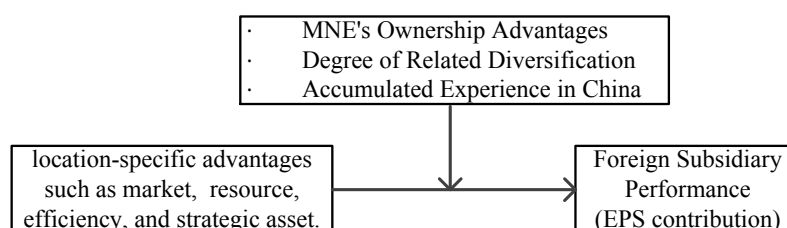


Figure 1: Conceptual Framework of this Research

Taken as a whole, the objectives of this study are to examine how the ownership advantages, diversification strategies, and internalization experience influences MNEs to take advantage of FDI-location antecedents. To this end, this study analyzes a sequence of FDI cases of Taiwanese manufacturing firms in China. According to the latest report of the United Nations Conference of Trade and Development (UNCTAD, 2010), China has become the second largest recipient of FDI after the U.S. and received investments valued at US\$95 billion in 2009. Of the numerous countries investing in China, Taiwan, which officially opened investment in China in 1991, accounts for a large portion of FDI in China in spite of the political hostility between these two parties.

Notably, this paper delves into the FDI patterns of Taiwanese-listed firms (TLFs) in China at the provincial level and explicitly focuses on the economic incentives, like market size and labor cost, each province offers (Buckley, Devinney, & Louviere, 2007; Coviello & McAuley, 1999). Though China is a unitary nation with a uniform legal system, the institutions that contribute to a well operating market economy (e.g., property rights protection and contract enforcement) can vary across provinces and influence a MNE's location choice (Du, Lu, & Tao, 2008). The structure of this paper is as follows. Section two begins with a review of literature on MNEs' FDI motives with their preferred locational advantages. The remainder of this section introduces some major location antecedents that MNEs consider for FDI decisions in China. The final two sections present the empirical results and discussion.

## Literature Review

### 1. International Motivations and Locational Advantages

Compared with exporting, licensing, and non-equity alliances, FDI is an important scope-growing strategy and an entry mode with high commitment (Chang & Rosenzweig, 2001). Although FDI involves higher operational risk and liability for MNEs, they can benefit from this investment through effective management control, communication; and, more importantly, decision autonomy (Zaheer, 1995). Of the FDI-related decisions that MNEs make, location choice has a crucial impact on the probability of success and profits. In his prominent article, Dunning (1998) identifies four FDI motives for MNEs that comprise resource-seeking, market-seeking, efficiency-seeking, and strategic asset-seeking. Following Dunning's classification, Makino et al. (2002) distinguish FDI motives into asset-exploitation and assetexploration, either of which leads firms to choose different location patterns.



Firms with asset-exploitation motives are those that intend to transfer their specialty to a host country and extend their existing asset advantages (e.g., production know-how). Exploitation-oriented investments mostly occur in less developed countries (LDCs) or in a downstream direction.

Conversely, firms with asset-exploration motives expect to acquire/upgrade essential assets (e.g., technology) through FDI, and exploration-oriented investments usually take place in developed countries (DCs) or in an upstream direction. Dunning and Narula (1996) propose similar arguments in their investment development path (IDP) framework. In fact, these two streams are not independent but interrelated (He & Wong, 2004). Nachum, Dunning, and Jones (2000) claim that they are complementary and that an FDI decision is the result of the harmonization of motives of MNEs and the locational advantages of the host country. Galan, González-Benito, and Zuñiga-Vincente (2007) further recognize that the FDI motive of MNEs is the prerequisite of location choice, and MNEs make decisions by linking the evaluation of advantages (characteristics) of a destination with specific motives. MNEs with asset-exploitation mindsets have primarily resource-, efficiency-, and market-seeking motives and prioritize factors such as labor cost and market size and potential; but those with asset exploration mindsets seek strategic assets and emphasize factors such as R&D capability and human capital. All four FDI motives and the correspondent FDI location characteristics are illustrated as table 1.

Table 1: FDI motives and FDI location characteristics

| FDI motive              | Definition   | Location characteristics   |   |
|-------------------------|--|--|---|
|                         |  | Wadhwa & Reddy (2011)  | UNCTAD (1998)   |
| Market seeking          | Focus on local market size or potential of growth.                               | GDP, natural growth rate, import/output  | Market size, income per capita, market growth rate, proximity to global market, preference of local market, market structure.               |
| Resource Seeking        | Seek lower cost and more stable supply of materials and resources                | Import amount, number of people who use internet, number of people who use cell phones, density of traffic network | Cost of materials, number of low-wage blue-collar workers, infrastructure such as convenience of traffic, telecommunication                 |
| Efficiency Seeking      | Global allocation of enterprise's value chain activities based on specialization | Consumer price index   | The adjustment of resources through labor productivity<br>Other intermediate material costs<br>A member of the Regional Cooperative Network |
| Strategic Asset Seeking | Seek a source of technology, marketing and management expertise.                 |  | Number of white - collar workers<br>Technology, innovation, brand equity  |

If the overseas subsidiaries can make good use of the locational advantages, then their operating performance must be improved. According to Table 1, we classify the locational advantages of the locations in China as market advantage, resource advantage, efficiency advantage, and strategy asset advantage, and we propose the following research hypotheses:



H1-1: The better the local market advantage is, the better operating performance the China subsidiaries have.

H1-2: The better the local resource advantage is, the better operating performance the China subsidiaries have.

H1-3: The better the local efficiency advantage is, the better operating performance the China subsidiaries have.

H1-4: The better the local strategic asset advantage is, the better operating performance the China subsidiaries have.

## 2. Ownership Advantage of MNEs

International business and strategic management scholars believe that companies must have some unique advantages or ability to be able to create a competitive advantage, thereby enhancing organizational performance. The eclectic theory (Dunning, 1988) proposes that ownership advantage is divided into asset advantages and trading advantages. The former is the manufacturer itself has the advantages of intangible assets, including technical capacity, management capacity; the latter refers to manufacturers have economies of scale resulting from co-management by international operations. Manufacturers who has intangible assets in the home country have the motivation to the overseas market development. Because the host market and the home market are in different geographical locations, it helps to expand the market, rather than snatch markets from different access channels (Delios & Beamish, 2001; Morck & Yeung, 1998).

For MNEs, appropriate FDI locations help them not only reduce additional costs required for the transfer and application of intangible assets from the home country to the host country, but the expected benefits will not depreciate too much (Delios & Beamish, 2001). Cave (1976) argues that technical competence and marketing expertise are the dominant monopoly advantages of firms. Jung (1991) argues that MNEs must have unique knowledge, such as product differentiation, R&D intensity, and capital intensity, to maintain a competitive advantage in a transnational operating environment. Luo (2002), respectively, to measure the density of ownership of proprietary technology knowledge, the density of advertising spending to measure the ownership of proprietary marketing assets. He found that when two companies have complement resources or consistent target, there is a strong positive relationship between product association and performance.

### (1) Technical Capability and R&D Expenditure Density

The investment in research and development is the basis for the development of technological capabilities. By continually updating product-related knowledge, manufacturers are better able to provide superior products and improve their manufacturing processes to gain competitive advantage (Baily, 1972; 1974). R&D investment as a globally undervalued value chain activity, driven by globalization and technological convergence, it is common for MNEs to set up different R&D centers in different countries. In the past, R&D activities of multinational enterprises have been focused on developed countries, but in recent years there are indications that they are gradually shifting from developed to developing countries (UNCTAD, 2005). The R&D activities of multinationals in East Asia are not just technology transfer, but also new forms such as R&D outsourcing, technology search and R&D network

cooperation (Reddy, 2000; Howells, James, & Malik, 2003). In the past, some studies have found that Taiwanese firms' FDI location choices are significantly related to their technological capabilities (Chen and Chen, 1998; Makino et al., 2002; Liu and Liu, 2007).

From the perspective of asset exploitation, MNEs want to transfer their competitive advantages to their overseas markets through FDI, so they tend to set up subsidiaries in developing countries or emerging countries, making full use of abundant natural resources or low R&D cost (Makino et al., 2002). MNEs also hope that the investment in the host country will help to well use their technical capacity, or to avoid the technology being imitated. FDI is believed to help foreign subsidiaries to make good use of local R&D human quality and intellectual property rights. Therefore, we propose the following research hypotheses:

H2-1: Taiwanese parent company's technical capacity helps to enhance the positive effect of local resource advantages on China subsidiaries' performance.

H2-2: Taiwanese parent company's technical capacity helps to enhance the positive effect of local strategic asset advantages on China subsidiaries' performance.

The network theory of outward investment suggests that FDI is an approach for firms seeking assets such as management, technology and marketing expertise to reinforce, supplement or create new ownership advantages (Buckley & Ghauri, 1989). Chen & Chen (1998) found that Taiwanese investment in Southeast Asia and China is dominated by relational linkages. Firms, while being separate entities, are networked with many other firms to reduce costs, diversify risks, and gain access to key resources through network relationships. A manufacturer of foreign investment, often lead the other upstream and downstream manufacturers together action. So the network will result in the phenomenon of collective foreign direct investment. After the manufacturers of the finished products assembly factories in certain industries invest in China, the upstream parts suppliers will naturally go to invest in order to maintain the network relationship, timely supply and finished assembly, and save the transportation cost and tariff. In the Chinese market. Therefore, the following research hypothesis is listed:

H2-3: Taiwanese parent company's technical capacity helps to enhance the positive effect of local efficiency advantages on China subsidiaries' performance.

## (2) Marketing capabilities and advertising spending density

Marketing is the ability to make the value of innovation created by R&D activities exclusive to the firms' investment activities. Firms use advertising, promotions, and promotions in marketing strategies to influence consumers' perceptions to increase the value of the brand, as competitors' imitation and competition barriers help manufacturers increase their market share and generate better profit (Bunch & Smiley, 1992; Kessides, 1990). Because of the heterogeneity of consumer reactions and the dynamics of the market (Dickson, 1992), firms must have the marketing ability to understand the needs of the target market and give consumers a good brand reputation and corporate image. The ability of such assets to allow manufacturers to be convertible between different markets, so that manufacturers can more effectively use

lower cost and potential buyers to communicate in order to create new market segments (Hall, 1992, 1993; Jain, 2001 ).

Because Taiwan domestic market is limited, if manufacturers do not focus on international strategies such as foreign trade or foreign direct investment, they will be limited by the domestic market and reduce its growth. Therefore, MNEs focus on the overseas investment location of the market advantages, including market growth, market size and so on. Moreover, they hope that the foreign subsidiary can effectively undertake the parent company's marketing capabilities, make good use of the local market advantage. Accordingly, the following research hypothesis is listed:

H2-4: Taiwanese parent company's marketing capacity helps to enhance the positive effect of local market advantages on China subsidiaries' performance.

### 3. Degree of diversification and international experience

Enterprises develop new markets or operate new businesses to pursue growth or to improve synergy (Ansoff, 1965). MNEs' overseas subsidiaries can not only increase the utilization rate of resources, but also share new technologies or resources with the existing businesses, or combine the resources of the enterprises with existing resources or make good use of the remaining resources, so as to seek diversification of new markets. A number of studies have also suggested that performance in international related diversification is superior to international unrelated diversification (Berger & Ofek, 1995; Varadarajan & Ramanujam, 1987). Therefore, if the degree of diversification of MNEs is lower, or the overseas subsidiaries are engaged in the original business or related diversification, they can make the subsidiaries more effective use of local resources, or more effectively absorb the original parent company from the application of Advantages. Accordingly, the following research hypothesis is listed:

H3-1: China subsidiaries who are engaged in related diversification have better absorbing ownership advantages from Taiwan parent firm so that the effect of locational advantages on these China subsidiaries' performance are better.

Although the international diversification makes MNEs in a more complex environment, but by the stimulation of external environment, MNEs get a lot of learning opportunities. Bartlett & Ghoshal (1989) propose that international diversification can make MNEs not only avoid the risks associated with the operation of a single industry, but also avoid the ups and downs of the industry, which cause large fluctuations in corporate earnings. However, in the early stages of internationalization, MNEs are not yet familiar with the overseas markets they enter. As the uncertainty faced by managers increases, the complexity of decision-making increases, and management costs increase, the risk of overseas operations is increased, offsetting the benefits of diversification.

However, with the accumulation of international experience, MNEs are more and more able to adapt to the economic, political, legal and cultural environment of the host country and reduce the unfamiliar and unfamiliarity with the market of the host country (Beamish, 1988). Johanson & Vahlne (1977) defines international experience as international market knowledge which is a unique resource embedded in the internal human resources of an organization and is an important source of information

about the operation of an enterprise's overseas markets. With experience in overseas markets increasing, MNEs can gain market-specific knowledge, including the structure of the market mechanism, the cultural patterns and the characteristics of the downstream companies. Increased knowledge of MNEs' experience of customers, markets and needs in the host country will confirm opportunities in overseas markets and reduce the risk of developing local markets. Even if the undertaking is not the same or unrelated to the parent company, the overseas subsidiaries may, with experience, know how to re-apply the seemingly unrelated parent company's ownership advantage. MNEs can also increase internal knowledge, such as skills and experience, by promoting and coordinating the flow of knowledge within the organization (Gupta & Govindarajan, 1994), thereby increasing tacit knowledge, enhancing the innovation capacity of MNEs (Subramaniam & Venkatraman, 2001). Accordingly, the following research hypothesis is listed:

H3-2: Even if Taiwanese firms engaged in non-related diversification in China, with the increase of international experience, the China subsidiaries also have better absorbing ownership advantages from Taiwan parent firm so that the effect of locational advantages on these China subsidiaries' performance are better.

## Methodology and methods

In order to obtain the openness and objectivity of the data, this study uses the official database as the empirical data to verify the hypothesis. First, the Taiwan Economic Journal (TEJ) database provides basic information on Taiwan-listed and OTC companies as well as various public financial statements such as research and development (R&D) expenditures, advertising and promotional expenses, total assets and net sales, Business investment in the China subsidiary of the operating details of the situation, such as business projects, such as operating profit margins. Second, the official China Statistical Yearbook of the China contains information on the socio-economic characteristics of the provinces and municipalities directly under the central government. The China Electricity Yearbook provides information on electricity production statistics and the preferential policies on foreign investment provided by China's special economic zones.

### 1. Study the definition of variables

#### (1) Response Variables: The performance of China subsidiaries

In this study, the financial performance indicators of China subsidiaries of Taiwan firms provided by TEJ database are used to measure the performance of subsidiaries. Variables provided by the database include operating earnings, income before tax margin, earnings per share (EPS), and rate of net income before tax margin (NIBT). Because EPS and NIBT are more informative and standardization, they are the response variables in this study. The formula for calculating these two indicators in the TEJ Database is as follows:

EPS contribution = (NIBT of China subsidiary x shareholding ratio of Taiwan parent company) / stock shares of Taiwan parent company

$$\text{NIBT rate} = (\text{NIBT of China subsidiary} \times \text{shareholding ratio of Taiwan parent company}) / \text{NIBT of Taiwan parent company}$$

In addition, we convert these two variables into dummy variables. If the data is positive, it is encoded as 1, the data is 0 or the negative value is encoded as 0.

## 2. Location-specific advantages

According to the type of FDI motive, this study divides the locational advantages into four categories (Wadhwa & Reddy, 2011).

Table 2: Types of Locational Advantages

| Location-specific Advantage | Dimensions                                   | Proxy Variables   |
|-----------------------------|--|---|
| Market Advantages           | Market Size                                  | Gross Domestic Product, Average Income Per Capita, Population, Population Growth Rate |
|                             | Market growth rate                           | population growth rate, per capita income growth rate                                 |
| Resource Advantages         | Labor Cost                                   | Per Employee 's Salary  |
|                             | Infrastructure                               | railway density, highway density, water density, water supply and power supply        |
| Efficiency Advantages       | Preferential policies for foreign investment | Number of local special economic zones  |
|                             | Agglomeration economy                        | the logarithm of the number of local foreign firms                                    |
| Strategic Asset Advantages  | Human Capital                                | The number of people who receive higher education                                     |
|                             | R&D Capacity                                 | Number of registered patents  |

### (1) Market advantage

In order to seek the motive of the market-oriented FDI, tend to choose a large market size and market growth rate with the market area advantage of the location. The large market size facilitate manufacturers reduce the cost of entry and reach economies of scale. China is often viewed as a huge investment potential for development because of its large population and territory. However, individual spending power is the key factor in determining the size of the market, can form an effective demand. Zhao and Zhu, 2000), local exports (Wadhwa & Reddy, 2011), the average gross domestic product per capita (Wadhwa & Reddy, 2007) Are common market size measure. In addition, the high market growth rate on behalf of the product market is booming, manufacturers should enter early to gain first-mover advantage. Population growth rate and growth rate of income per person and other economic indicators are commonly used proxy variables.

### (2) Resource advantages

FDI with resource-based motivations tends to choose labor costs, raw materials or capital as low capital, that is, sites with resource advantages (Dunning, 1993). For example, Taiwan's traditional industries set up factories in Southeast Asia or the China to seek low-cost labor, raw materials and land. According to the theory of classical international division of labor, manufacturers in different regions through the production of FDI, trying to reduce production costs around to achieve the purpose of maximizing profits. Past studies have found that labor costs account for the majority



of firms' operating costs (Bajo-Rubio & Sosvilla-Rivero, 1994). Too high labor costs will affect the profitability of manufacturers, so manufacturers tend to choose a relatively low labor environment to invest (Coughlin et al., 1991; Zhang, 2001). In the past, labor cost per worker was often used as a measure of labor costs, but high salaries may also reflect a higher quality of local labor while producing a better gross output. Therefore, this study increases the rate of change in labor remuneration per employee as a proxy for labor resources.

Investment location of the basic equipment, the better, the more can reduce the logistics cost of the product. Regional infrastructure can include local transport facilities and electrical equipment. In this study, a standardized total index was established based on railway density (Zhang, 2001), highway density (Zhang, 2001), water density (Broadman & Sun, 1997), water supply and power supply (Li, 2004). Measure the quality of basic equipment around, as a proxy variable for equipment resources.

### (3) Efficiency advantage

FDI-oriented, efficiency-oriented motives, low barriers to trade choices, free and mobile MNEs inputs and outputs, or high corporate network densities, where external economies are available, with an efficiency advantage. With the aim of economic growth, the China authorities are planning to invest in a variety of special economic zones at the national or provincial level to promote investment in attracting foreign investment. Special Economic Zones (SEZs) are areas in which the China government allows foreign enterprises or individuals and overseas Chinese, Hong Kong and Macao compatriots to carry out investment activities and implement special policies. The special economic zones are Shenzhen, Zhuhai, Shantou, Xiamen and Hainan. Open Coastal Cities Plan the region and focus on building infrastructure to create an investment environment that is world-class in order to attract foreign investment. Both the New and High-tech Industrial Development Zones and the Economic and Technology Development Zones are aimed at creating knowledge-intensive and open conditions, attracting foreign advanced technology and capital, Local R&D capabilities, and to encourage local higher education and business cooperation. Free trade zones (Free Trade Zones) and tax-free zones (Tax Protection Zones) and more in the port, the development of international trade, export processing, bonded warehousing, allowing foreign investment in international trade (Cheng & Stough, 2006; Zhou, Delios, & Yang, 2002). In this study, the number of local special economic zones, as an alternative variable of foreign preferential policies.

In the early stages of Taiwanese businessmen setting up factories in the China, they often had to purchase large quantities of machinery and equipment, raw materials and semi-finished products from Taiwan because of the shortage of local supporting industries, thus driving Taiwan's exports to the China. The higher the volume of imports, the greater the local government's desire for local development to meet foreign investment expectations, thus encouraging local imports. Sun, Tong, & Yu (2002) use the ratio of local imports divided by gross domestic product as proxy variables for the degree of openness of the local government to foreign investment. The higher the degree of opening to the outside world, the more conducive to foreign investment through common management control over local investment activities, such as respectively in the home country and the host country were concentrated in



research and development activities and production activities, to obtain economies of scale.

Taiwan firms may set up factories in the China to follow the upstream manufacturers, or industry-related suppliers or customers have moved to the China, had to invest in China. After the formation of local manufacturers' cluster networks, newcomers are more likely to have access to high-quality labor, local information, and convenient transportation, leading to positive vendor aggregation (Chen & Chen, 1998). Wei et al. (1999) pointed out that Chinese firms choose to invest heavily in local FDI. Zhang (2001) study also found that manufacturers are more willing to choose the density of the manufacturing sector in the province. Therefore, this study uses the number of local foreign businessmen (logarithmic value) as a measure of the degree of aggregation economy (Hong, 2007).

#### (4) Strategic asset seeking

Oriented FDI with efficiency, the tendency to choose R&D knowledge, technology and management and other strategic capital is rich, with Gang strategic assets of the location. Human capital comes from the local people's educational level. (Cheng et al., 2002), or the adult literacy rate (He, 2006), which is higher than the number of local scientists or engineers (Cheng and Stough, 2006). More universal and representative. The measurement of R&D capacity is set to the number of patent rights registered in each local year (Sun et al., 2002).

### 3. Moderators

#### (1) Technical capacity and marketing capability of parent firms

Firms must have some unique advantages or capabilities to create competitive advantage and thus improve organizational performance, such as vendor-owned technology assets and marketing assets (Delios & Beamish, 1999; Morck & Yeung, 1991). Firms' investment in R & D is the foundation of product value innovation, enabling manufacturers to gain knowledge of the product, enabling it to provide superior products and improve its own manufacturing processes, enabling Firms to better match their customers' (Baily, 1972; Branch, 1974; Tsai & Wang, 2004; McAlister et al., 2007). In addition, by advertising and promotion activities, changing consumer perceptions to create brand value (Aaker, 1996; Keller, 1998), allows manufacturers to differentiate their products in the minds of customers to prevent competitors from imitating competition barriers and creating firm value (Joshi & Hanssens, 2004; Kirmani & Zeithaml, 1993). In this study, we use TEJ database to collect the annual research rate and the advertising expenditure rate of the Taiwanese parent company, that is, the ratio of R&D or advertising expenditure divided by net sales, as the proxy of technological capability and marketing capability respectively.

#### (2) Diversification

We classify divides international diversification into relevant and unrelated diversification (Mansi and Reeb, 2002; Rosenthal and Sullivan, 1985). The TEJ database is only available for China subsidiaries and does not provide industry classification codes. Therefore, this study uses the content analysis, the China

subsidiary of the business item literally dismantling, calculated with Taiwan business parent company's business project content consistent with the formula is as follows:  
 Percentage of related diversification = the number of same words in operating items of Parent company's and subsidiaries / the number of words in operating items of subsidiaries.

For the sake of simplicity, it is assumed that subsidiaries with a percentage greater than 0.3 are set to be related to diversification; and those with a percentage less than 0.3 are non-correlated.

### (3) Internationalization experience

The accumulation of international experience and knowledge of local markets in the internationalization process is an important determinant of MNEs' future investment. Johanson & Valne (1977) argues that in the process of internationalization, firms need general knowledge as well as Market-Specific Knowledge. Among them, market-related knowledge is mainly derived from the local market operating experience, not easy to transfer to other FDI locations; and the production of knowledge due to more standardized, it is easier to different locations in the transfer of technology or knowledge. The measure of international experience can be divided into depth and breadth (Ogasavara & Hoshino, 2009). Depth refers to the number of years of experience, such as the number of years of overseas operations; breadth refers to the number of experience, such as the number of product lines or industries, or the number of overseas subsidiaries or overseas investment in the number of countries. However, most of the China subsidiaries in the TEJ database were not in existence for years, so this study only calculates the number of subsidiaries in China for each data year, as the index of China experience of MNEs.

## 4. Research model

For the sake of clarity, a simplified regression model is presented without adding control variables and explanatory variables that are not expected to have a significant impact. First, under the assumption that only four regional advantages are considered, the regression model is as follows:

Financial Performance =  $\beta_0 + \beta_1 \text{Markets} + \beta_2 \text{Resources} + \beta_3 \text{Efficiency} + \beta_4 \text{Strategic Assets}$

Based on the hypotheses H1-1 ~ H1-4, the regression coefficients ( $\beta_1, \beta_2, \beta_3, \beta_4$ ) are expected to be positive. Secondly, under the assumptions of adding two ownership advantages, technical capability (TC) and marketing capability (MC) as moderators in our models, the regression model is as follows:

Financial Performance =

$\beta_0 + \beta_1 \text{Markets} \times \text{MC} + \beta_2 \text{Resources} \times \text{TC} + \beta_3 \text{Efficiency} \times \text{TC} + \beta_4 \text{Strategic Assets} \times \text{TC}$

According to the hypotheses H2-1 ~ H2-4, the regression coefficients ( $\beta_1, \beta_2, \beta_3, \beta_4$ ) are expected to be positive. Then, we also use related diversification (RD) as a moderator as follows:

Financial Performance =

$\beta_0 + \beta_1 \text{Markets} \times \text{RD} + \beta_2 \text{Resources} \times \text{RD} + \beta_3 \text{Efficiency} \times \text{RD} + \beta_4 \text{Strategic Assets} \times \text{RD}$

According to the hypothesis H3-1, the regression coefficients ( $\beta_1, \beta_2, \beta_3, \beta_4$ ) are expected to be positive. If we consider both ownership advantages and related diversification as moderators, then the model is set as follows:

Financial Performance =

$$\beta_0 + \beta_1 \text{Markets} \times \text{MC} \times \text{RD} + \beta_2 \text{Resources} \times \text{TC} \times \text{RD} + \beta_3 \text{Efficiency} \times \text{TC} \times \text{RD} + \beta_4 \text{Strategic Assets} \times \text{TC} \times \text{RD}$$

According to the hypothesis H3-2, the regression coefficients ( $\beta_1$ ,  $\beta_2$ ,  $\beta_3$ ,  $\beta_4$ ) are expected to be positive. At last, we add international experience (IE) of MNEs as moderators as follows:

Financial Performance =

$$\beta_0 + \beta_1 \text{Markets} \times \text{MC} \times \text{RD} \times \text{IE} + \beta_2 \text{Resources} \times \text{TC} \times \text{RD} \times \text{IE} + \beta_3 \text{Efficiency} \times \text{TC} \times \text{RD} \times \text{IE} + \beta_4 \text{Strategic Assets} \times \text{TC} \times \text{RD} \times \text{IE}$$

According to the hypothesis H3-3, the regression coefficients ( $\beta_1$ ,  $\beta_2$ ,  $\beta_3$ ,  $\beta_4$ ) are expected to be negative.

## Discussion

First, the results show all four kinds of location specific advantages partly have positive effects on China subsidiaries' performance, which means H1 is partly supported. Second, only marketing capacity of Taiwan firms is successfully transferred to China subsidiaries which take advantage of income of local consumers better to generate more EPS contribution. So, H2 is also partly supported. Third, the results also show both the similarity of operating items between parent companies and subsidiaries (related diversification) and accumulated FDI experience in China make marketing capacity be better transferred from parent companies to subsidiaries so the income of local consumers have more positive effects on EPS contribution of subsidiaries. Therefore, H3-1 and H3-2 are also partly supported.

Table 3: Types of Locational Advantages

| m = market seeking<br>r = resource seeking<br>e = efficiency seeking<br>s = strategic asset seeking | Y= EPS contribution of China subsidiary to Taiwan parent firm |                 |                         |                           |                       |                      |
|---|---|-----------------|-------------------------|---------------------------|-----------------------|----------------------|
|   | H1  | H2              | H3-1                    |                           | H3-2                  |                      |
|   |   |                 | Related Diversification | Unrelated Diversification | Higher FDI Experience | Lower FDI Experience |
| m_ln(income)  | -0.009  | -0.016          | -0.012                  | -0.032                    | -0.009                | -0.016               |
| m_ln(population)  | -0.065  | -0.066          | -0.064                  | -0.088                    | -0.065                | -0.066               |
| m_natural growth rate   | <b>0.003***</b>   | <b>0.003**</b>  | <b>0.002*</b>           | 0.003                     | <b>0.003***</b>       | <b>0.003**</b>       |
| r_traffic convenience   | <b>0.001***</b>   | <b>0.001***</b> | <b>0.001***</b>         | 0.001                     | <b>0.001***</b>       | <b>0.001***</b>      |
| r_ln(water usage)   | <b>0.077***</b>   | <b>0.078***</b> | <b>0.095***</b>         | 0.023                     | <b>0.077***</b>       | <b>0.078***</b>      |
| e_ln(# of foreign firms)  | 0.005   | 0.004           | 0.007                   | -0.015                    | 0.005                 | 0.004                |
| e_consumer price index  | -0.004**  | -0.004***       | -0.006***               | 0.001                     | -0.004**              | -0.004***            |
| s_rate of first quality   | <b>0.001***</b>   | <b>0.001***</b> | 0.001***                | 0.001                     | <b>0.001***</b>       | <b>0.001***</b>      |
| m_ln(income) X marketing capacity   |   | <b>0.044*</b>   | <b>0.066**</b>          | -0.041                    | <b>0.115***</b>       | <b>0.044*</b>        |
| m_growth rate X marketing capacity  |   | 0.002           | 0.003                   | -0.002                    | 0.001                 | 0.002                |
| r_traffic density X R&D capacity  |   | -0.001**        | -0.001**                | 0.001                     | -0.002***             | -0.001**             |
| s_rate first quality X R&D capacity   |   | 0.001           | 0.001                   | 0.001                     | 0.001                 | 0.001                |
| constant  | 0.059   | 0.054           | -0.147                  | 0.986                     | 0.0592                | 0.054                |
| Number of observations  | 24,771  | 24,771          | 18,739                  | 6,032                     | 24,771                | 24,771               |
| Number of subsidiaries  | 2,919   | 2,919           | 2,186                   | 733                       | 2,919                 | 2,919                |

## References

- Aaker, D.A. 1996. *Building Strong Brands*. Free Press. New York.
- Ansoff H. I. 1957. Strategies for Diversification. *Harvard Business Review*, 35(5), 113-124.
- Atuahene-Gima, K. 1995. An exploratory analysis of the impact of market orientation on new product performance: A contingency approach. *The Journal of Product Innovation Management*, 12(4): 275-293.
- Baily, M. N. 1972. Research and development costs and returns: The u.s. pharmaceutical industry. *The Journal of Political Economy*, 80(1): 70-85.
- Bajo-Rubio, O., & Sosvilla-Rivero, S. 1994. An econometric analysis of foreign direct investment in Spain, 1964-89. *Southern Economic Journal*, 61(1): 104-120.
- Barney, J. 1991. Firm resources and sustained competitive advantage. *Journal of Management*, 17(1): 99-120.
- Bartlett, C. A. & Ghoshal, S. 1989. *Managing Across Borders: The Transnational Solution*. London: Hutchinson Business Books.
- Beamish, P. 1988. *Multinational Joint Ventures in Developing Countries*. Routledge, London
- Berger, P. G. & Ofek, E. 1995. Diversification's effect on firm value. *Journal of Financial Economics*, 37, 39-65.
- Best, R. J. 2000. *Market-Based Management: Strategies for Growing Customer Value and Profitability*, 2nd ed. Prentice Hall, Upper Saddle River NJ.
- Birkinshaw, J., & Hood, N. 1998. Multinational subsidiary evolution: Capability and charter change in foreign-owned subsidiary companies. *The Academy of Management Review*, 23(4): 773-795.
- Branch, B. 1974. Research and development activity and profitability: A distributed lag analysis. *The Journal of Political Economy*, 82(5): 999-1011.
- Braodman, H. G., & Sun, X. 1997. The distribution of foreign direct investment in china. *World Economy*, 20(3): 339-361.
- Buckley, P. J., & Casson, M. C. 1976. A long-run theory of the multinational enterprise. In P. J. Buckley and M. C. Casson (eds), *The Future of Multinational Enterprise*. London: Macmillan, pp.32-65.
- Buckley, Peter J., & P. Ghauri, 1989. *The Internationalization of the Firm: A Reader*. Academic Press, London.

Bunch, D. S., & Smiley, R. 1992. Who deter entry? Evidence of the use of strategic entry deterrence. *The Review of Economics and Statistics*, 74(3): 509-521.

Caves, R. E. 1971. International corporations: The industrial economics of foreign investment. *Economica*, 38(1): 1-27.

Chadee, D. D., Qiu, F., & Rose, E. L. 2003. FDI location at the subnational level: A study of EJV's in China. *Journal of Business Research*, 56(10): 835-845.

Chang S. J., & Rosenzweig, P. M. 2001. The choice of entry mode in sequential foreign direct investment. *Strategic Management Journal*, 22(8): 747-776.

Chen, H., & Chen, T.J. 1998. Network linkages and location choice in foreign direct investment. *Journal of International Business Studies*, 29(3): 445-467.

Cheng, L. K., & Kwan, Y. K. 2000. What are the determinants of the location of foreign direct investment? The Chinese experience. *Journal of International Economics*, 51(2): 379-400.

Cheng, S., & Stough, R. R. 2006. Location decisions of Japanese new manufacturing plants in China: a discrete-choice analysis. *The Annals of Regional Science*, 40(2): 369-387.

Conner, K. R., & Prahalad, C. K. 1996. A resource-based theory of the firm: Knowledge versus opportunism. *Organization Science*, 7(5): 477-501.

Coughlin, C. C., Terza, J. V., & Arromdee, V. 1991. State characteristics and the location of foreign direct investment within the United States. *Review of Economics & Statistics*, 73(4): 675-683.

Daniels, J. D. & Bracker, J. 1989 Profit performance: do foreign operations make a difference. *Management International Review*, 29, 47-56.

Delios, A., & Beamish, P. W. 1999. Geographic scope, product diversification, and the corporate performance of Japanese firms. *Strategic Management Journal*, 20(8): 711-727.

Delios, A., & Beamish, P. W. 2001. Survival profitability: The roles of experience and intangible assets in foreign subsidiary performance. *Academy of Management Journal*, 44(5): 1028-1038.

Dess, G. G., Gupta, A., Hennart, J. F., & Hill, C. W. L. 1995. Conducting and integrating strategy research at the international, corporate, and business levels: Issues and directions. *Journal of Management*, 21(3): 357-393.

Dickson, P. R. 1992. Toward a general theory of competitive rationality. *Journal of Marketing*, 56(1): 69-83.

Dunning, J. H. 1980. Toward an eclectic theory of international production: Some empirical tests. *Journal of International Business Studies*, 11(1): 9-31.

- Dunning, J. H. 1988. The eclectic paradigm of international production: A restatement and some possible extensions. *Journal of International Business Studies*, 19(1): 1-31.
- Dunning, J. H. 1993. *Globalisation of Business*. Routledge, London and New York.
- Dunning, J. H. 1995. Reappraising the eclectic paradigm in an age of alliance capitalism. *Journal of International Business Studies*, 26(3): 461-491.
- Dunning, J. H. 1998. Location and the multinational enterprise: A neglected factor? *Journal of International Business Studies*, 29(1): 45-66.
- Dvir, D., Segev, E., & Shenhar, A. 1993. Technology's varying impact on the success of strategic business units within the miles and snow typology. *Strategic Management Journal*, 14(2): 155-162.
- Faeth, I. 2009. Determinants of foreign direct investment – A tale of nine theoretical models. *Journal of Economic Surveys*, 23(1), 165-196.
- Flores, R. G., & Aguilera, R. V. 2007. Globalization and location choice: An analysis of US multinational firms in 1980 and 2000. *Journal of International Business Studies*, 38(7): 1187-1210.
- Forsgren, M., Johanson, J., & Sharma, D. 2000. Development of mnc centres of excellence. In *The Emergence and Impact of MNC Centres of Excellence – A Subsidiary Perspective*, Holm, U & Pedersen, T. (eds). MacMillan Press, Houndsmill, Bas.
- Galan, J. I., Gonzalez-Benito, J., & Zuñiga-Vincente, J. A. 2007. Factors determining the location decisions of Spanish MNEs: an analysis based on the investment development path. *Journal of International Business Studies*, 38(6): 975-997.
- Gates, S. R., & Egelhoff, W. G. 1986. Centralization in Headquarters -- Subsidiary Relationships. *Journal of International Business Studies*, 17(2): 71-92.
- Gupta, A. K., & Govindarajan, V. 1994. Organizing for knowledge flows within MNCs. *International Business Review*, 3(4): 443-457.
- Hall, R. 1992. The Strategic Analysis of Intangible Resources. *Strategic Management Journal*, 13(2): 135-144.
- Hall, R. 1993. A framework linking intangible resources and capabilities to sustainable competitive advantage. *Strategic Management Journal*, 14(8): 607-618.
- Han, J. K., Kim, N., & Srivastava, R. K. 1998. Market orientation and organizational performance: Is innovation a missing link? *Journal of Marketing*, 62(4): 30-45.



- Hannula, K. K. 2005. Host country determinants and investment motives of Finnish FDI in the publishing sectors of Bulgaria and Romania, Case: Sanoma Magazines International, *Electronic Publications of Pan-European Institute*, Turku School of Economics and Business Administration.
- He, C. 2006. Regional decentralisation and location of foreign direct investment in China. *Post-Communist Economies*, 18(1): 33-50.
- He, Z. L., & Wong, P. K. 2004. Exploration vs. exploitation: An empirical test of the ambidexterity hypothesis," *Organization Science*, 15(4): 481-494.
- Hirsch, S. 1976. An international trade and investment theory of the firm. *Oxford Economic Papers*, 28(2): 258-270.
- Hong, J. 2007. Firm-specific effects on location decisions of foreign direct investment in China's logistics industry. *Regional Studies*, 41(5): 673-683.
- Hurley, R. F., & Hult, G. T. M. 1998. Innovation, market orientation, and organizational learning: An integration and empirical examination. *Journal of Marketing*, 62(3): 42-54.
- Hymer, S. 1960. *The International Operations of National Firms*. Ph.D. Dissertation, Massachusetts Institute of Technology.
- Jaworski, B. J., & Kohli, A. K. 1993. Market orientation: Antecedents and consequences. *Journal of Marketing*, 57(3): 53-70.
- Jeremy Howells, A. J., & Malik, K. 2003. The sourcing of technological knowledge: Distributed innovation processes and dynamic change. *R & D Management*, 33(4): 395-409.
- Johanson, J., & Vahlne, J. E. 1977. The internationalization process of the firm - A model of knowledge development and increasing foreign market commitments. *Journal of International Business Studies*, 8(1): 23-32.
- Joshi, A. and Hanssens, D. M. 2004. Advertising spending and market capitalization. Working Paper No. 388, Marketing Studies Center, Anderson School of Management, University of California, Los Angeles.
- Jung, Y. 1991. Multinationality and profitability. *Journal of Business Research*, 23(2): 179-187.
- Keller, K. L. 1998. *Strategic Brand Management*. New York: McGraw-Hill.
- Kessides, I. N. 1990. The persistence of profits in U.S. manufacturing industries," in Dennis Mueller (eds.), *The Dynamics of Company Profit*. Cambridge University Press.
- Kirmani, A. and Zeithaml, V. 1993. Advertising, perceived quality and brand image. In *Brand Equity and Advertising*, David A. Aaker and Alexander Biel (eds).

Hillsdale, NJ Lawrence Erlbaum Associates, 143-162.

Kogut, B. 1983. Foreign direct investment as a sequential process. In C. Kindleberger, and D. Andretsch (eds.), *The Multinational Corporation In The 1980s* (p.38-56). The MIT Press, Cambridge, MA.

Kotler, P. 2003. *Marketing Management*, Prentice Hall, USA.

Kudina, A., & Jakubiak, M. 2008. The motives and impediments to fdi in the cis, *OECD Global Forum on International Investment*, OECD Investment Division, March 27-28.

Lagerstrom, K., & Andersson, M. 2003. Creating and sharing knowledge within a transnational team - The development of a global business system. *Journal of World Business*, 38(2): 84-95.

Li, S. 2004. Location and Performance of Foreign Firms in China. *Management International Review (MIR)*, 44(2): 151-169.

Li, T., & Calantone, R. J. 1998. The impact of market knowledge competence on new product advantage: Conceptualization and empirical examination. *Journal of Marketing*, 62(4): 13-29.

Luo, Y. 2000. Dynamic capabilities in international expansion. *Journal of World Business*, 35(4): 355-378.

Luo, Y. 2002. Product diversification in international joint ventures: Performance implications in an emerging market. *Strategic Management Journal*, 23(1): 1-20.

Madhok, A. 1997. Cost, value and foreign market entry mode: The transaction and the firm. *Strategic Management Journal*, 18(1): 39-62.

Makino, S., Chung-Ming, L., & Yeh, R. S. 2002. Asset-exploitation versus asset-seeking: Implications for location choice of foreign direct investment from newly industrialized economies. *Journal of International Business Studies*, 33(3): 403-421.

Mathur, I., Singh, M., & Gleaso, K. C. 2001. The evidence from canadian on multinational diversification and perform. *The Quarterly Review of Economics and Finance*, 41, 561-578.

McAlister, L., Srinivasan, R., & Kim, M. 2007. Advertising, research and development, and systematic risk of the firm. *Journal of Marketing*, 71(1): 35-48.

Morck, R., & Yeung, B. 1998. Why firms diversify: internalization versus agency behavior. Working Paper. University of Michigan Business School, Ann Arbor.

Nachum, L., Dunning, J. H., & Jones, G. G. 2000. Uk fdi and the comparative advantage of the UK. *The World Economy*, 23(5): 701-720.

Ogasavara, M., & Hoshino, Y. 2009. Implications of firm experiential knowledge and sequential FDI on performance of Japanese subsidiaries in Brazil. *Review of Quantitative Finance & Accounting*, 33(1): 37-58.

Reddy, P. 2000. *Globalization of Corporate R&D: Implications for Innovation Systems in Host Countries*. Routledge, London and New York.

Subramaniam, M., & Venkatraman, N. 2001. Determinants of transnational new product development capability: Testing the influence of transferring and deploying tacit overseas knowledge. *Strategic Management Journal*, 22(4): 359-378.

Sun, Q., Tong, W., and Yu, Q. 2002. Determinants of foreign direct investment across China. *Journal of International Money & Finance*, 21(1): 79.

Taggart, J., & Hood, N. 1999. Determinants of autonomy in multinational corporation subsidiaries. *European Management Journal*, 17(2): 226-236.

Tsai, K.H., & Wang, J.C. 2004. The r&d performance in taiwan's electronics industry: a longitudinal examination. *R&D Management*, 34(2): 179-189.

Tseng, C. H. 2007. Exploring location-specific assets and exploiting firm-specific advantages: An integrative perspective on foreign ownership decisions. *Canadian Journal of Administrative Sciences*, 24(2): 120-134.

UNCTAD. 1998. *World Investment Report 1998: Trends and Determinants*, New York and Geneva: United Nations.

UNCTAD. 2002. *World Investment Report 2002*. New York and Geneva: United Nations.

UNCTAD. 2005. *World Investment Report 2002*. New York and Geneva: United Nations.

Vanhonacker, W. R., & Pan, Y. 1997. The impact of national culture, business scope, and geographical location on joint venture operations in china. *Journal of International Marketing*, 5(3): 11-30.

Varadarajan, P. & Ramanujam, V. 1987). Diversification and performance: A re-examination using a new two dimensional conceptualization of diversity in firms. *Academy of Management Journal*, 30 (2), 380-397.

Wadhwa, K., & Reddy, S. S. 2011. Foreign direct investment into developing asian countries: the role of market seeking, resource seeking and efficiency seeking factors. *International Journal of Business and Management*, 6(11): 219-226.

Wei, Y., Liu, X., Parker, D., & Vaidya, K. 1999. The regional distribution of foreign direct investment in china. *Regional Studies*, 33(9): 857-867.

Yamawaki, H. 2004. The determinants of geographic configuration of value chain activities: Foreign multinational enterprises in Japanese manufacturing. *International Economics and Economic Policy*, 1(2/3): 195-213.

Yip, G. S., & Monti, J. A. 2000. The role of the internationalization process in the performance of newly internationalizing firms. *Journal of International Marketing*, 8(3): 10-35.

Zaheer, S. 1995. Overcoming the liability of foreignness. *Academy of Management Journal*, 38(2): 341-341.

Zellner, A. 1962. An efficient method of estimating seemingly unrelated regressions and tests of aggregation bias. *Journal of the American Statistical Association*, 57(298): 348-368.

Zhang, K. H. 2001. What attracts foreign multinational corporations to china? *Contemporary Economic Policy*, 19(3): 336-346.

Zhao, H., & Zhu, G. 2000. Location factors and country-of-origin differences: an empirical analysis of fdi in china. *Multinational Business Review*, 8(1): 60-73.

Zhou, C., Delios, A., & Yang, J. Y. 2002. Locational determinants of Japanese foreign direct investment in china. *Asia Pacific Journal of Management*, 19(1): 63-86.

iafor

***Power-Dependence of British Central-Local Government Relations and  
Interdependence of International Relations in the EU***

Yoshihiro Nagata, Nagoya University, Japan

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

The power-dependence theory of intergovernmental relations and the interdependence theory are well known approaches for analysis of intergovernmental relations and international relations. Both theories deal with political dependence and conflict in different fields, that is, the domestic political situation within the same regime of the state but different evaluation systems, and multiple states some of which belong to one regime but the other of which belong to different regime. Nevertheless, similarity between power-dependence theory and interdependence theory is worth exploring. In this paper I investigate power-dependence theory focusing on center-local governmental relations in the UK, and theory of interdependence focusing on the EU. The organization of this paper consists of three parts. First, outlined are power-dependence theory of intergovernmental relations by Rhodes and interdependence theory of international relations by Nye and Keohane. Second, I analyze characteristics of these two theories especially by considering common factors consisting of linkage, asymmetry and cost in the power-dependence theory and interdependence theory. Third, I scrutinize the power-dependence from viewpoint of the discretion of the local authorities through analysis of the financial policies in the UK. I also scrutinize the international interdependence from viewpoint of degree of the harmonization through analysis of effects of the directives in the EU. I also discuss sanction which is relevant to the discretion of the local authority in the UK and soft law in the EU.

**Keywords:** Power-dependence, interdependence, intergovernmental relations, international relations, UK, EU

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## Power-dependence Theory in Intergovernmental Relations

In 1981, Rhodes presented power-dependence theory for analysis of the intergovernmental relations in the United Kingdom (UK) (Rhodes, 1981). Rhodes' concept of the power-dependence is based on the process of resource exchange between domestic organizations. In other words, the concept of the power-dependence is a counterexample of the traditional concept that the local government is the agency of the central government. Rhodes' power-dependence theory is addressed as policy networks (Rhodes, 1997, pp. 29-45). However, Morgan *et. al.* criticized Rhodes' 'governing without government' by showing their case study that "while central government may no longer be so directly involved in the local economic development arena, it continues to exert an extremely powerful influence" (Morgan, Rees and Garmise, 1988, p. 195-6).

Rhodes considered analysis level of the power-dependence theory composed of micro-level of analysis, meso-level of analysis and macro-level of analysis. The objectives of the micro-level of analysis are resources and internal political process. The objective of the meso-level analysis is pattern of interaction which is analyzed by corporatism as a theory of classification. The objective of the macro-level of analysis is distribution of power which is analyzed by corporatist theory (Rhodes, 1986a, pp.7-9). Rhodes proposed five propositions about dependency of domestic organizations. These propositions on the power-dependence are defined as

- (a) Any organization is dependent upon other organizations for resources.
- (b) In order to achieve their goals, the organization have to exchange resources.
- (c) Although decision-making within the organization is constrained by other organizations, the dominant coalition retains some discretion. The appreciative system of the dominant coalition influences which relationships are seen as a problem and which resources will be sought.
- (d) The dominant coalition employs strategies within known rules of the game to regulate the process of exchange.
- (e) Variations in the degree of discretion are a product of the goals and the relative power potential of the interacting organizations. This relative power potential is a product of the resources of each organization, of the rules of the game and of the process of exchange between organizations (Rhodes, 1981, p.98-9, Rhodes, 1986b, p. 17).

These organizations are summarized as four components; the central government, the national community of the local government, the local authority as the member of the national community of the local government and single function policy community. The relation between the association and central department is characterized by bargaining for resources. The resources in the above propositions are authority, money, political legitimacy, information and organization (Rhodes, 1986b, pp.17).

## Interdependence in the International Relations

The interdependence in the international relations is the concept against the traditional view of the realist who believes the global structure is determined by the military power between states. Although the traditional view based on the military power has been accepted till end of the Vietnam War, new norm of the interdependence emerged



in the mid of the 70s motivated by the Detente between the United States and the Soviet Union. The emergence of this norm are due to two reasons; recognition for a new equilibrium of post-Vietnam War as a National Security Advisor of the USA (Kissinger, 1979, pp. 65-70), and recognition of crucial importance of soft power. Nye's belief about power of the sovereign is the military power, economic power and soft power. Nye proposed the soft power by the warning that the use of force might jeopardize economic objectives (Nye, 1986, p.10). In this context, Keohane and Nye called the concept of the interdependence the overall structure approach which does not differentiate among issue areas in the world politics. These issue areas includes not only the political issue, for example the nuclear disarmament negotiation resulted in the Strategic Arms Limitation Talks 2 (SALT II), which was signed in 1979 between USA and USSR but not ratified, but also the global environment issue represented by a report 'Limit to Growth' published by Club of Rome in 1972. The traditional view of the realist based on the state power never agreed theory of regime change. However, Keohane and Nye assert that as the power of states changes, the rules that comprise international regimes will change accordingly. They emphasize this dynamic, the regime change, is at the heart of their model on the overall power structure. From viewpoint of the interdependence, the border between the domestic issue and the foreign issue becomes fuzzy. The international interdependence also affects domestic matter (Nye, 2007, pp. 210-213, Keohane and Nye, 1977, pp. 42-46).

### **Comparison between Power-dependence Theory and Interdependence Theory**

This section considers comparison between the power-dependence theory and the interdependence theory. First, actors of the power-dependence are organizations composed of the central government and local governments within the same regime of the state but different evaluation systems, while actors of the interdependence are states some of which belong to one regime but the other of which belong to different regime. The legislative rule in the power-dependence relations is the statute and common law, while the legislative rules in the interdependence relations are the international law including treaty and soft law, especially manipulating on the balance of power and collective security. Second, common factors between the power-dependence theory and the interdependence theory are linkage, asymmetry and cost of change. Concept of the linkage is essential both in the power-dependence in the intergovernmental relations and the interdependence in the international relations. The power-dependence itself is the concept of linkage between the central government and community of the local authorities. In the framework of the power-dependence in the UK there exist four kinds of linkages. Example of the linkage between the national government environment and the national local government system is a connection between Department for Communities and Local Government and the Consultative Council on Local Government Finance (Rhodes, 1986b, p. 101). Example of the linkage within the national community of local government is a connection among Association of County Councils (ACC), Association of District Councils (ADC), Association of Metropolitan Authorities (AMA), Greater London Council (GLC) and so on (Rhodes, 1986b, p. 255). Example of linkage between the national community of local government and the single function policy community is a connection between Police & Fire Committee of AMA and Central Fire Brigades Advisory Council (Rhodes, 1986b, p. 310). Connection between Education Committee of ACC and Advisory Committee in the Department of Education and Science is also above example (Rhodes, 1986b, p. 330). The linkage plays an important role in the

international interdependence theory. Nye pointed out that much of the political conflict over interdependence involves the creation or prevention of linkage, and economic sanctions are often an example of such linkage (Nye, 2007, pp.216-7). Asymmetry is also common factor in the power-dependence and the international interdependence. Asymmetry is a concept of unbalanced power between two organizations or states. Rhodes recognizes asymmetry in the intergovernmental relations (Rhodes, *The National World of Local Government*, p. 20). Nye pointed out that asymmetry is at the heart of the politics of international interdependence. He analyzed its reason that if two parties are interdependent but one is less dependent than the other, the less dependent party has a source of power as long as both value the interdependent relationship, and concluded that manipulating the asymmetries of interdependence can be a source of power in international politics (Nye, 2007, p.215). Cost of change is also common factor in the power-dependence and the international interdependence. Rhodes pointed out that unilateral action is not cost-free; as the cost becomes visible, the government either intensifies the attempt to direct local authorities or employs different strategies by recognizing its dependence on local authorities (Rhodes, 1986a, p.6). The cost of international interdependence corresponds to sensitivity and vulnerability, respectively. Due to Nye's definition, sensitivity means amount and pace of the effects of dependence: scale and quickness which change in one part influences to another part. Vulnerability means the relative costs of changing the structure of a system of interdependence (Nye, 2007, pp. 213-4). Difference between power-dependence and interdependence exists in sanction. Within the intergovernmental relations in the UK, the discretionary power of the local authority is conferred by the Parliament. Although the local authority can implement policies using conferred discretion, the local authority must comply under the principle of *ultra vires*. Therefore, the sanction does exist even if the local authority acts beyond the statute. In the interdependence relations, the bilateral treaty or multilateral treaty and many trade agreements or environment protocols never provide sanction based on the legal force. However, if the compliance is not maintained, stronger state sometimes maneuvers political sanction or economic sanction. For maintaining peace and stability, the balance of power and collective security sometimes require the political sanction. The states seek alliance, the balance of power and the collective security. NATO (OTAN) is the typical collective security. The Britain and the United States special alliance and Treaty of Mutual Cooperation and Security between the United States and Japan are typical alliance. Japan-UK Foreign and Defence Ministerial Meeting is a linkage.

I also discuss degree of dependence in the power-dependence of the intergovernmental relations and interdependence of the international relations. The political agenda in the intergovernmental relations is featured by the bargaining between the state strategy and the local interest. The political agenda in the international relations depends on the regime of states. As pointed out by Krasner, the regime is defined as a set of principles, norms, rules and decision-making procedures around which expectations of actors converge in the given area of international relations (Krasner, 1982, pp. 185-7). The interdependence relations also exist between different regimes by considering balance of power. The financial policy seems the most uncompromising agenda between centre and local in the UK, that is, the financial policy is featured by the unilateral decision of the central government, while the local government is discretionary in the decision of the rate. However, the bargaining between centre and local exists in the form of the grant negotiation, where

the grant is provided by the central government to the local authority. The financial policy motivated by the big company and National Bank is featured based on the national interest. Sometimes states within the same regime attempt coordinated intervention to avoid financial crisis issued from the critical state. The agenda of the global environment is featured by almost all states. Although the purpose of the global environment is decided as the international protocol, this decision is an objective to be complied with sanction-free. The public policy is the agenda with sanction-free in the intergovernmental relations within the state and the Member States under the EU.

**Table 1 Comparison between Power-Dependence Theory and Interdependence Theory**

|                            | Power-Dependence Theory   | Interdependence Theory                                    |
|----------------------------|---|---|
| representative Researchers | R.A.W. Rhodes   | Joseph Nye<br>Robert Keohane                              |
| Research Area              | Administration  | International Relations                                   |
| Objective                  | Intergovernmental Relations between Centre and Local                                  | International Relations among States                      |
| Common Concept 1           | Linkage between Centre and Local<br>Connection between Organizations, Policy Networks | Linkage between States                                    |
| Common Concept 2           | Asymmetry between Centre and Local  | Asymmetry between States                                  |
| Common Concept 3           | Cost<br>Unilateral decision is not cost-free.   | Cost<br>Short-term sensitivity<br>Long-term vulnerability |
| Law                        | Law, Statute  | Treaty, Soft Law  |
| Sanction                   | Law with sanction   | Treaty and Soft Law without sanction                      |
| Stability                  | Principle of <i>Ultra Vires</i>   | Collective Security and Balance of Power<br>Alliance      |

This Table is made by the author. Cited by Rhodes (1986a, b), Nye (2007), and Keohane and Nye (1977).

### **Power-dependence in the UK and Interdependence in the EU**

I scrutinize power-dependence from viewpoint of discretion through analysis of the local finance in the UK and international interdependence from viewpoint of the harmonization of the directives in the EU. Policy networks have significant degree of autonomy from government (Rhodes, 2006, p.10). The discretion of the local authority is an evaluation measure of power-dependence in the intergovernmental relations. On the other hand, the directive of the EU must be harmonized in the Member States. Therefore, effect of the EU directives is also an evaluation measure of interdependence in the international relations.

First, I focus on the financial policies of the UK as an example of the resource-exchange process in the power-dependence theory, where the central government attempts to decrease local expenditure using the rate support grant (RSG), while the local authorities attempt to increase the rate with their discretionary power. The financial policy through bargaining of the rate support grant is an appropriate example to show the power-dependence theory. I trace short history of the relationships between the national government and the national local government system. The Local Government Act 1974 is codified to establish new financial management (Local Government Act 1974, Part 7A) and rate and charges (LGA 1974, Part 9). Rhodes pointed out that this Act sought to make changes in the fiscal system to coincide with the reorganization of local government (Rhodes, 1986b, p.107). Rates rose by 25% in 1974-75 (Travers, 1986, p.41). To cope with this situation of the enormous increase of the rate, the government set up the Layfield Committee to review the local government finance in 1974. The Consultative Council on Local Government Finance (CCLGF) was established in 1975. The Consultative Council seems to start in the context of the Layfield Committee. But Rhodes pointed out that CCLGF did not originate in the deliberations of the Layfield Committee. In 1974-9, the CCLGF played successfully in the grant negotiation in place of the AMA as the existing member of the RSG machinery (Rhodes 1986b, p.114). In 1975, cash limit in the grant system was introduced for the 1976/7 negotiations (Rhodes 1986b, p.108). Hepworth addressed that the grant aid using the cash limit is fixed in terms of the price levels considering the year of the expenditure rather than at the price levels with automatic adjustment for inflation in the previous November (Hepworth, 1984, p.29). In 1975-76, the rate support grant (RSG) increased by 66.5% which was never seen before (Travers, 1986, p.41). The central grant to local government amounted £ 8.4 billion annually and the total expenditure of the local government is £ 14.8 billion in 1975/6 (Rhodes 1986b, p.102). In 1979 the Thatcher Administration reduced the statutory services of the local authorities such as the school meals and milk. As a consequence of reduction of the statutory services, there was a room for the discretion of the local authority such as adult education service (Elcock, 1994, p. 115-20). The parental participation in the school board and parental school selection at the admission are also the delegation from the local authority to the parent (Education Act 1980). However, Thatcher's successive financial legislations to restrain the rate resulted in reduction of the discretionary services by the local authorities. The role of CCLGF was also declining in 1979-83. Because Secretary of State, Michael Heseltine, took unilateral requirement of the RSG settlement; 3 % reduction in 1979/80 and 5 % reduction 1980/81 in the targets of the Labour government's White Paper, *The Government's Expenditure Plans*, 1979-80 to 1982-83 (Cmnd 7439) (Rhodes 1986b, p.140). In November 1979 Secretary of State, Michael Heseltine, announced block grant to cope with the overspenders, that is, the local authorities. In March 1980 against the block grant the local authorities also produced a joint alternative proposal by the ACC and AMC with the London Boroughs' and the Great London Council. However, in March 1980 this joint proposal was rejected by the government (Travers, 1986, pp. 87-89). The Local Government, Plan and Land Act 1980 set out the block grant. The block grant is a new system of the rate support grant. The amount of block grant for a year is the balance left after deducting the amount of domestic rate relief grant from the aggregate amount of the rate support grants (The Local Government, Plan and Land Act 1980, section 56). The Local Government Finance Act 1982 established rate capping which is limiting of rating power. The limiting of rating power is codified as follows; A rating authority shall not have power-(a) to make a

supplementary rate; or (b) to make a rate for any period other than a financial year (Local Government Finance Act 1982, section 1). Furthermore, Local Government Finance Act 1988 introduced the poll tax. The Thatcher Administration in 1979-90 is addressed by wandering RSG policies by many changes of unilateral legislation.

From this short history, it is seen that when unilateral decisions of the central government increase, the linkage for the negotiation between centre and local decreases. The power-dependence between centre and local financially depends on the budget of the local government. The local authorities' expenditure affects the discretionary activity. In the 1960s and 1970s, the statutory services was about 80 per cent of the local authorities' budget such as education and social service, and remaining 20 per cent was discretionary activities (Elcock, 1994, p. 115-20). Even in the statutory service, the discretionary power exists in the local authorities. As the Thatcher Conservative Administration reduced the discretionary power of the local authorities, due to the rate restraint policies, the power-dependency between the centre and local changed from bargaining in the 70s to unilateral central control in the 80s. The Thatcher Administration is remarked by frequent transfer of power from the local authorities to the private sector in the education, housing and health care, using the Act of Parliament. These examples are seen in the transfer of power from the local education authority to the privatized body corporate of the further education established in the Education Reform Act 1988, that from the local authority to the private tenant by the 'Tenant Choice' codified in the Housing Act 1988 and that from the Regional, District or Special Authorities to the National Health Service trusts codified in the National Health Service and Community Care Act 1990. Detailed study of the relationship between delegation and intervention in the education policy is seen in the literature (Nagata, 2015, pp. 95-106, Nagata, 2016, pp. 455-66).

Second, degree of discretion of the local authority in the UK is an index of the power-dependence of the intergovernmental relations, because the discretion is interpreted as trust. The discretion is tightly connected with the delegation conferred to the local authority by the Parliament. The degree of discretion is reflected not only in the local government finance but also legislation. I discuss the degree of discretion from viewpoint of the finance. In 2011-2012, local authorities' total expenditure is £ 162bn and the central government's total expenditure is £ 535bn, that is, the local government expenditure is 23 % ( $=162/(162+535)$ ) in total managed expenditure, while the central government expenditure is 76%. About 63% of local authorities' total gross income in 2011-12 came from central government and the remaining 37% from local source. Total grant to the local authority is £ 87.4bn in the gross income of £ 162bn. The total grant consists of the specific government grants outside AEF (£ 18.6bn), the specific government grants inside AEF (£ 45.5bn), the revenue support grant (£ 5.9bn), the police grant (£ 4.5bn), the council tax benefit grant (£ 4.3bn) and the capital grants (£ 8.6bn), while the council tax is £ 22.2bn (DCLG, 2013, pp. 9-10, 14).

Third, as for the interdependence in the EU, I discuss degree of harmonization in the EU in a sense of effects of directive. Before proceeding to the discussion, the EU legislation is outlined. There are three basic types of EU legislation: regulations, directives and decisions. A regulation is binding like a national law with the difference that it is applicable in all EU countries. Directives set out general rules to



be harmonized into national law by each Member State as they deem appropriate. The directive requires individual Member State to set out goal to be achieved. A decision only deals with a particular issue and specifically mentioned persons or organizations (European Commission, [http://ec.europa.eu/legislation/index\\_en.htm](http://ec.europa.eu/legislation/index_en.htm)). The directives and decisions are also binding. Other than them there are non-binding recommendations and opinions. Especially, the open method of coordination is a procedure to set out the goal of the harmonized directive and monitor the achievement process of the goal. As the directives must be harmonized in the individual Member State, degree of harmonization is a measure of the interdependence between the EU and Member States. I introduce a survey concerning degree of harmonization in the Member States by focusing on three kinds of directives; the working time directive, the young workers directive and the part-time work directive. The working time Directive lays down minimum safety and health requirement for the organization of working time (OJ 1993 No L307/18-24). The young workers directive lays down so that Member States take the necessary measures to prohibit work by children (OJ 1994 No L216/12-20). The purpose of the part-time work directive is to implement the Framework Agreement on part-time work concluded on 6 June 1997 between the general cross-industry organizations (UNICE, CEEP and the ETUC) annexed hereto (OJ 1998 No L14/9-14). Degree of legal misfit of the Working Time Directive is medium (France), medium (Finland) and low (Germany), while degree of total policy misfit is low (France), medium (Finland) and low (Germany). Degree of legal misfit of the Young Workers Directive is low (France), low (Finland) and low (Germany), while degree of total policy misfit is low (France), low (Finland) and low (Germany). Degree of legal misfit of the Part-Time Work Directive is medium (France), high (Finland) and medium (Germany), while degree of total policy misfit is low (France), medium (Finland) and low (Germany) (Falkner, Treib, Hartlapp and Leiber, 2005, pp. 100, 125, 165). I calculated degree of misfit from Falkner's survey of effects of these directives. Degree of legal misfit of the Working Time Directive is low (27%), medium (47%) and high (27%), while degree of total policy misfit is low (53%), medium (33%) and high (13%). Degree of legal misfit of the Young Workers Directive is low (62%), medium (38%) and high (0%), while degree of total policy misfit is low (62%), medium (38%) and high (0%). Degree of legal misfit of the Part-Time Work Directive is low (29%), medium (21%) and high (50%), while degree of total policy misfit is low (50%), medium (50%) and high (0%). I also calculated averaged degree with weight one to low, two to medium and three to high. The results are the following: averaged degree of legal misfit of the Working Time Directive is 2.2 (medium), that of total policy misfit of the Working Time Directive is 1.1 (low), that of legal misfit of the Young Workers Directive is 1.38 (low), that of total policy misfit of the Young Workers Directive is 1.38 (low), that of legal misfit of the Part-Time Directive is 2.2 (medium) and that of total policy misfit of the Part-Time Directive is 1.5 (low). The averaged degree of misfit of three directives is low or medium. From this result, I can evaluate that interdependence between the EU and its Member State holds in the aspect of the harmonization of the EU Directive. Furthermore, I discuss sanction which is relevant to the discretion of the local authority in the UK and soft law in the EU. The discretionary power conferred to the local authority by statute is not subject to control by the courts (Garner, 1974, p.423), but this power depends on the doctrine of *ultra vires*. The *ultra vires* doctrine applies to every legal person including local authorities. The exercise of an administrative power is *ultra vires* (Garner, 1974, p.302). The EU directive is binding but sanction free, therefore, the EU monitors every Member State about extent of implementation



of the derivative and recommends next goal for achievement of the derivative using the Open Method of Coordination (Kröger, 2009, p.1-5).

## Conclusion

The intergovernmental relations and international relations are different fields. However, the power-dependence theory and the interdependence theory interact each other. I attempted to study this interaction in this paper. After delineating the power-dependency theory of intergovernmental relations and the interdependence theory in the international relations, I discussed comparison between them. Especially, I focused on common factors between power-dependency and interdependence: linkage, asymmetry and cost. The linkage in the power-dependency is connections for bargaining or negotiation for achieving goals rather than relations of dispute or conflict between central government and local government. However, when unilateral decisions of the central government increase, the linkage for the negotiation declines and the litigations against the central government occur, as seen in the mid of the 80s. It is true that asymmetry exists in the intergovernmental relations. However, Page criticized the power-dependence theory because levels of central government are embedded in complex network and the scope for unilateral influence upon the policy process is limited (Rhodes, 1986a, p. 5, Page, 1982, p. 336). As for cost, Rhodes pointed out that unilateral action is not cost-free (Rhodes, 1986a, p. 6). This lesson is examined by the wandering policies of the rate support grant by unilateral legislation in the Thatcher Administration. I also discussed the power transfer from the local authority to the privatized sector in education, housing and health in the 1980s. As for power-dependency in the intergovernmental relations, the degree of discretion in the UK was studied from the budget of the local authority. It is observed that the discretion in the UK is explained by (1) local authorities' total expenditure is 23% (£ 162bn) in total managed expenditure, (2) local authorities' total gross from central government (63%) and local source (37%), and (3) the total grant (£ 87.4bn) in the gross income of £ 162bn in 2011-2012. The degree of harmonization in the EU is also important index in the interdependence. From the survey of effects of three EU directives, the averaged degree of misfit of three directives is low or medium. From this evaluation, I can conclude that EU harmonization is well worked.

## References

- Elcock, H. (1994), *Local Government, Policy and management in local authorities*, Third Edition, p. 115-20
- Falkner, G., Treib, O., Hartlapp, M. and Leiber, S. (2005), *Complying with Europe, EU Harmonisation and Soft Law in the Member States*, Cambridge University Press, pp. 100, 125, 165
- Garner, J. (1974), *Administrative Law*, Butterworths, p.302, p.423
- Hepworth, N.P. (1984), *The Finance of Local Government*, Seventh Edition, George Allen & Unwin, p.29
- Keohane, R. and Nye J. (1977), *Power and Interdependence, World Politics in Transition*, Little, Brown and Company, pp. 42-46
- Kissinger, H. (1979), *White House Years*, Little, Brown Company, pp. 65-70
- Krasner, S. (1982), Structural Causes and Regime Consequences: Regimes as Intervening Variables, *International Organization*, 36, 2, MIT, pp. 185-7
- Kröger, S. (2009), Open Method of Coordination: Underconceptualisation, overdetermination, de-politicisation and beyond, *European Integration online Papers*, Special Issue 1, Vol. 1, Art 5, pp.1-5
- Morgan, K., Rees, G. and Garmise, S. (1988), Networking for Local Economic Development, Edited by Stoker G., *The New Management of British Local Governance*, Palgrave, p.195
- Nagata, Y. (2015), Delegation and Intervention of Education Policy in the UK, *Conference Proceedings, The Asian Conference on Education & International Development 2015*, IAFOR ISSN 2189-101X, pp.95-106
- Nagata, Y. (2016), The Audit Commission of Local Government in the UK, *Conference Proceedings, The Asian Conference on Education & International Development 2016*, IAFOR, ISSN 2189-101X, pp.455-466
- Nye, J. (2004), *Soft Power, The Means to Success in World Politics*, PublicAffairs, p.10
- Nye, J. (2007), *Understanding International Conflicts, An Introduction to Theory and History*, Sixth Edition, , Pearson Longman, pp. 210-213, 213-4, 215, 216-7
- Page, E. (1982), *Central Government Instruments of Influence on Local Authorities*, Unpublished PhD thesis, Strathclyde University, p. 336
- Rhodes, R.A.W. (1981), *Control and Power in Central-Local Relations*, Farnborough, Gower, pp. 98-9

Rhodes, R.A.W. (1986a), Power dependence' Theories of central-local relations: a critical assessment, Edited by Michael Goldsmith, *New Research in Central-Local Relations*, Gower, Publishing Company Limited, pp. 5-9

Rhodes, R.A.W. (1986b), *The National World of Local Government*, pp.17, 101-2, 107-8, 114, 255, 310, 330

Rhodes, R.A.W. (1997), *Understanding Governance, Policy Networks, Governance, Reflexivity and Accountability*, Open University Press, pp. 29-45

Travers, T. (1986), *The Politics of Local Government Finance*, Allen & Unwin, pp. 41, 84-92

Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organization of working time, OJ 1993 No L307/18-24

Council Directive 94/33/EC of 22 June 1994, on the protection of young people at work, OJ 1994 No L216/12-20

Council Directive 97/81/EC of 15 December 1997, concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC, OJ 1998 No L14/9-14

Department for Communities and Local Government, Local Government Financial Statistics England, No. 23, 2013, pp. 9-10, 14

European Commission, [http://ec.europa.eu/legislation/index\\_en.htm](http://ec.europa.eu/legislation/index_en.htm)



***The Exclusion of the Taliban from Afghanistan's State-Building and Its Human Security Vulnerabilities***

Sajjad Ahmed, Osaka University, Japan

The Asian Conference on Politics, Economics & Law 2016  
Official Conference Proceedings

**Abstract**

This paper discusses the impact of the Taliban's exclusion from both Bonn Conferences (2001 & 2011) on Afghanistan's state-building process and prolonged humanitarian disaster consequences. It outlines the current challenges facing the democratic institutions of Afghanistan due to the non-recognition and exclusionist policies adopted by the United States and its partner forces. It reviews the background to these challenges focusing on an interpretive framework and ripeness theoretical tool for conflict analysis to examine and analyze the impact of marginalization of Taliban on them. It also focuses on the overall political dynamics of protracted Afghan war. By developing an understanding the dynamics of the issue, it endeavors to find an elucidation for this prolonged exclusion of the Taliban and long lasting human massacres along with its domestic and fast-paced adverse impact on regional and global polity. Lastly, this study endorses the need of negotiation and peace talks among confronting parties in order to offset the ongoing human atrocities in Afghanistan.

Keywords: Afghanistan, Bonn, Conferences, Exclusion, Marginalization, Taliban, United States,

**iafor**

The International Academic Forum  
[www.iafor.org](http://www.iafor.org)

## Introduction

The people of Afghanistan have suffered for last quarter of century due to civil war and external military interventions. The devastation by the conflicts has resulted in the collapse of government including physical, economic, and administrative infrastructure across the country. After the fall of the Taliban in 2001, a conference held in Bonn paved the way for an accord for creation of a post-Taliban administration in Afghanistan. The Bonn Agreement, that followed, aimed, as it stated, to 'end the tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights in the country'. Ironically, two major conferences at Bonn (2001 and 2011), along with the other seven international conferences, on Afghanistan could not bring a lasting peace and stability in the country.

Evidently, Afghanistan is still far from reaching the commitments and benchmarks set in Bonn Accord (2001) fifteen years ago. The current development of enduring reconstruction and state-building in Afghanistan has been seriously questioned by academics, policy-makers, and experts on Afghanistan. Therefore, this paper purports to focus, through the lens of an interpretive framework for conflict analysis, on examining and explaining the real perspective and dynamics of the conflict. In addition, the paper under a qualitative research code it draws a leaf from the ripeness theory as a yard stick and cautions that how exclusion of a major stakeholder of the Afghan conflict affect the peace process and state-building in Afghanistan. This paper therefore set out two comprehensive hypotheses that will be tested, hypothesis one; 'the United States and its coalition forces misperceived the imperatives of stability in Afghanistan' and hypothesis two; 'exclusion of the Taliban from the Bonn Conference sowed the first seeds of long lasting insurgency and re-emergence of the Taliban'.

In fact, this paper as an attempt to explore the effects of Taliban's exclusion from the negotiations and peace process and to assess the impact/challenges of their exclusion to the current state-building in Afghanistan. In addition, this paper pays attention to the contexts, characteristics, and complexities of these peace processes and their possible consequences in both scenarios of inclusion and exclusion of the Taliban. Specifically, the purpose of this current study is to address; how does the exclusion of Taliban affect Afghanistan's state-building and human security? In addition, it identifies the opportunities and obstacles (difficulties) generated by Afghanistan's transition for peace, stability and nation building after decades of state failure.

## I. Background of The Study

### 1. History and Demography of Afghanistan at a Glance

Historically, Afghanistan has proven to be the 'graveyard of empires', where many empires flourished and got demolished on its land. Since the earlier times, the country has been under the formidable influence of Persians, Arabs, Turks, and Mongols from time to time. Afghanistan also became a battleground between Britain and Russia in the 19<sup>th</sup> century. On the land of Afghanistan three Anglo-Afghan wars, in 1839 to 1842, 1878 to 1880, and 1919 did not end conclusively (Runion, 2007). However, this war against Britain was not the last war for the Afghan people, and in early 1980, the



Soviet Union occupied Afghanistan. Later, the Soviet army forced had to leave (or left) Afghanistan on February 15, 1989. Subsequently, the people paid a huge cost to fight against the Soviet, but unfortunately, war never ended until December 2001 (Rashid, 2002).

Being a landlocked country, its total land is 652,230 square kilometer (km). It shares borders with China 76 km, Iran 936 km, Pakistan 2,430 km, Tajikistan 1,206 km, Turkmenistan 744 km, Uzbekistan 137 km. Ethnically, it has a diverse demography and the largest ethnic group in Afghanistan is the Pashtun (including Kuchis), comprising 42% of Afghans from the estimated population 32.5 million. The Tajiks are the second largest ethnic group, at 27% of the population, followed by the Hazaras 9%, Uzbeks 9%, Aimaq 4%, Turkmen 3%, Baluch 2%, and other groups that make up 4% (CIA-The World Factbook, 2016).

## **2. The Collapse of the Taliban Regime**

The Taliban are ethnically Pashtuns and they belong to half the population of Afghanistan. By 1999, they controlled most of Afghanistan, apart from some areas in the north without having any experience to run government institutions. They lost international support as it imposed self-interpreted strict Islamic customs in areas it controlled and employed harsh punishments, including executions, bans on television, Western music, and dancing. It prohibited women from attending school or working outside the home, except in health care, and it publicly executed some women for adultery (Katzman, 2015, p. 5). This policy of violence and their close ties with Al Qaeda, Taliban gained limited acceptance and recognition at the international level (Gilles, 2005). However, the Taliban's hosting of Al Qaeda's leadership gradually became the U.S. overriding agenda item with the Taliban and caused Taliban to step down forcefully by the U.S. after the September 11 terrorist attacks. When the coalition forces over threw the Taliban in December 2001, it continued to fight the international presence and, subsequently, the new regime (Shultz & Dew, 2006).

## **3. The Post-Taliban Developments**

Since the defeat of the Taliban was imminent, a conference was organized in Bonn on 5 December 2001. The UN sponsored Bonn Conference brought together the "winner" of the war to discuss how the new Afghanistan should be governed without the "losers" Taliban. It was the beginning of a long and complex international military engagement in Afghanistan, which has evolved over time. Since then, the Taliban have been fighting with the aim of overthrowing the government and forcing the international presence out of Afghanistan (Sinno, 2008, p. 255).

According to the Figure 1 by (Brown Watson Institute for International and Public Affairs, 2015) around 23,000 civilians have been killed in direct violence by all parties in Afghanistan. Over 68,000 people have died in Afghanistan due to direct war violence, including armed forces on all sides of the conflicts, contractors, civilians, journalists, and humanitarian workers. Whereas, hundreds and thousands of soldiers have been wounded and traumatized seriously. It is likely that many times more than 68,000 people have died indirectly in this war, due to malnutrition, widespread diseases, and environmental degradation. Since 2001, more than 5.7 million former refugees have returned to Afghanistan, but 2.2 million others remained refugees in

2013. In January 2013, the UN estimated that 547,550 were internally displaced persons (IDPs), a 25% increase over the 447,547 IDPs estimated for January 2012 (UNHCR, 2015).

Figure 1: Direct war deaths in Afghanistan October 2001- April 2014

| Personnel                        | Deaths          |
|----------------------------------|-----------------|
| U.S. Military                    | 2,313           |
| U.S. Contractors                 | 3,248           |
| Allied Military and Police       | 13,0176         |
| Other Allied Troops              | 1,114           |
| Civilians                        | 21,000 - 23,000 |
| Opposition Forces                | 15,000 - 25,000 |
| Journalists and Media Workers    | 28              |
| Humanitarian/NGO workers         | 298             |
| TOTAL (rounded to nearest 1,000) | 56,000 - 68,000 |

## II. Major Contemporary Challenges

### 1. Rampant Insecurity

Despite strong presence of the U.S. and other North Atlantic Treaty Organization (NATO) forces for more than a decade and half, Afghanistan remains unstable and insecure, with the government failing to address even basic security issues. The Taliban and its supporters have been attacking time to time, for instance during the 2014 presidential elections, the Taliban conducted a total of 761 attacks during the elections, though only about 174 were effective (McNally & Bucala, 2015). The emergence of new international jihadi groups, such as the Islamic State of Iraq and Syria (ISIS), may also be trying to establish themselves in Afghanistan. Since 2015, insecurity has significantly increased throughout the country, civilian deaths have shot up, and the Afghan security forces are taking large and potentially unsustainable casualties (Felbab-Brown, 2015).

Phyllis Bennis argued “the U.S. was not able to impose peace when it had 100,000 troops on the ground at one time in Afghanistan with another 45,000 NATO troops. Now when it has 11,000 troops and about 2,000 international troops, it certainly is not going to be able to militarily impose anything remotely resembling peace (RT-News, 2014). In fact, the U.S. and many NATO members have already pulled out a substantial number of their troops and they have switched their security responsibility in such a critical situation to poorly trained and ill-equipped Afghan forces. Security experts had previously warned that without the U.S. and NATO military presence, current democratic setup would soon collapse.

### 2. Endemic Corruption

A deep-rooted corruption in the Afghan society is also one of the major challenges for effective state-building in Afghanistan. Corrupt Afghan government institutions have failed to implement important reforms that are needed to promote human and socioeconomic development in the country. Corruption Perception Index for country's ranking, Afghanistan is 166<sup>th</sup> out of 168 countries list in 2015 (i.e. third worst in the world). Nixon quotes a former *Wolesi Jirga* member who said that “you hardly find

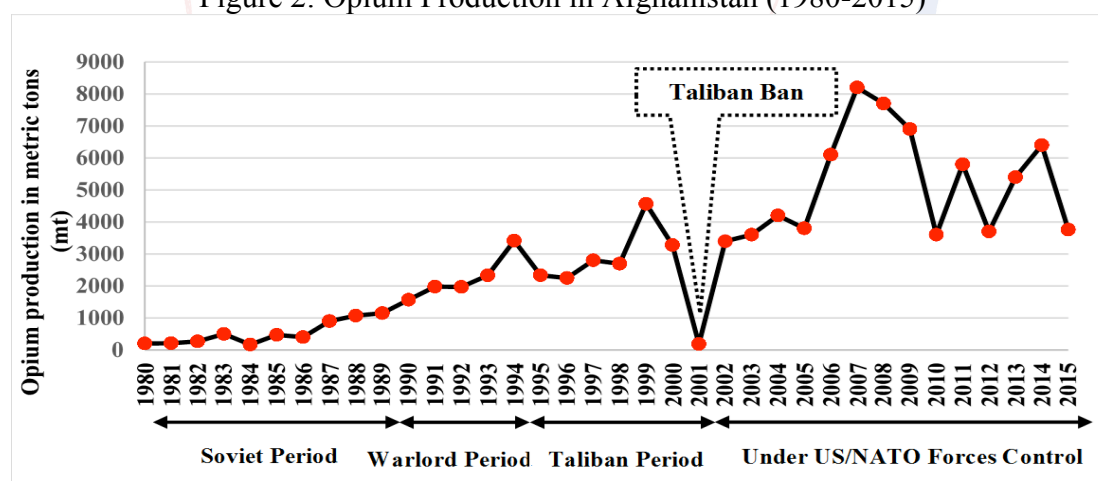
honest compatriots, if a district governor is corrupt, the whole district officials are corrupt. If the minister is corrupt, all the staff will be corrupt (Nixon, 2011).

In reality, public positions and services are seen by many as being for sale; the police, justice system, municipalities, and customs department are widely seen as the most corrupt institutions. Extortion and other crimes by police and drug-related corruption are major issues (The World Bank, 2009). The United Nation Office on Drugs and Crime (UNODC)'s 2012 report articulates, "half of Afghan citizens paid a bribe while requesting a public service and the total cost of bribes paid to public officials amounted to US\$ 3.9 billion. This corresponds to an increase of 40% in real terms between 2009 and 2012" (UNODC, 2012, pp. 5-6).

### 3. Illicit Narcotics (Opium Poppy Cultivation)

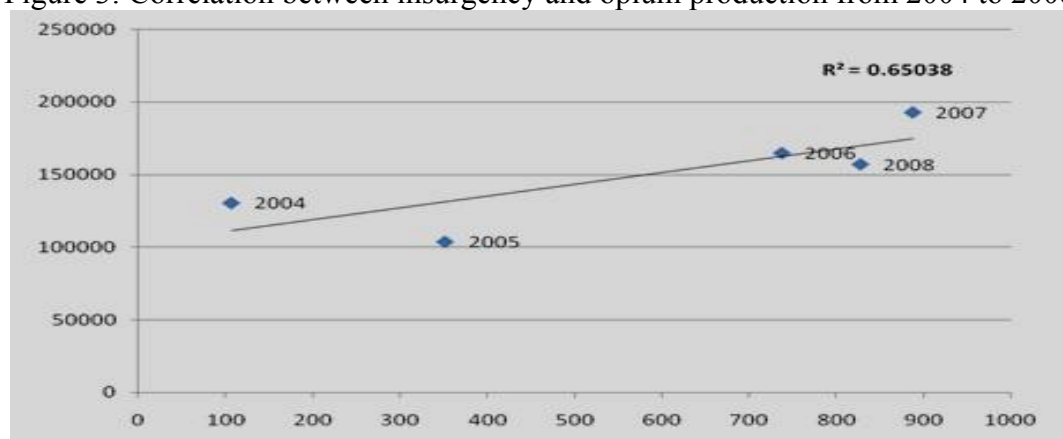
In the dire security situation, the only sector flourishes is the narco-economy. Afghanistan is the world's largest producer of narcotics with the share of 90% of the whole opium production of the world (UNODC, 2009). In 1986, opium production was 875 metric tons (mt), which increased to 3,416mt in 1994 during the warlord period. By the end of 1999, its production increased to 4,500mt when Taliban had occupied 90% of Afghanistan (UNODC, 2009, p. 7). In July 2000, the Taliban leader Mullah Omar declared that poppy cultivation was un-Islamic, resulting in one of the world's most successful counternarcotic campaigns ever in the history. The figure 2 (data calculated from UNODC's opium surveys, 2009 and 2015) gives a stark presentation of the Taliban's stringent measures of ban when the production fell drastically from the previous year 3,278mt, bringing down the total to 185mt.

Figure 2: Opium Production in Afghanistan (1980-2015)



However, under the U.S. and NATO forces control, opium poppy cultivation and production have been drastically increased. Since 2001, the U.S., the United Kingdom (U.K.), and Afghanistan have been struggling to eradicate poppy cultivation with their separately abortive counternarcotic strategies. In fact, Afghan narco-economy being a lucrative source fueling endemic corruption and long lasting insurgency and terrorist networks in the country. The figure 3 authored by (Stancombe, 2009) illustrates the relationship on the aggregate data from entire Afghanistan and the correlation coefficient is 0.65. This suggests a moderately high correlation of insurgents to continue to operate in those areas.

Figure 3: Correlation between insurgency and opium production from 2004 to 2008.



#### 4. Weak Governance

Weak governance, as defined by Rotberg, is the inability of state institutions to deliver proper “political and public goods” to the people. Afghanistan’s weak institutional capacity, ineffective and bad governance with extensive corruption contributes to the political insecurity, lawlessness, insurgency, and so forth (Rotberg, 2007, p. 2). Afghan Ambassador to India Shaida M. Abdali states that “the powerful individuals, mostly outside of the government apparatus, act independently and undermine government power and influence, particularly; insurgents use drug production both to raise funding for war and violent activities and to weaken governance, further delegitimizing the government” (Dehli Policy Group, 2015, pp. 1-10).

Evidently, a vicious cycle by (The World Bank, 2004) presented below in the figure 4 illustrates that weak governance is unable to provide effective security, while poor security creates favorable environment for illicit opium cultivation and narco-trade. Consequently, illicit drug trade financially fuels insurgents, militia, and corrupts officials (IMCO) in Afghan government. As vice versa, IMCO undermines national security and destabilizes Afghan government institutions building.

Figure 4: A vicious cycle of insecurity, corruption, narcotics, and weak governance.



Afghanistan has suffered as a broken, futile, and externally dependent state facing a well-organized insurgency, an uncontrolled and politically pervasive opium trade, and continued penetration by regional criminal networks (Martin, 2011).

### **III. A Theoretical Prospect for Negotiations with the Taliban**

This article challenges some of the underlying assumptions for stability and the notion of political reconstruction that the U.S. and the Afghan government have implemented so far are being largely responsible for the gloomy state of affairs in that country. The paper uses the *ripeness theory* expounded by Zartman (2008), centers on the concept of a 'mutually hurting stalemate' as a yardstick to and cautions that how exclusion of a major stakeholder of the Afghan conflict affect the peace process and state-building in Afghanistan.

The proponents of ripeness notion believe that when warring parties are locked into a conflict that is mutually painful and both believe that they cannot escalate to victory, the prospects for a negotiated outcome improve significantly. To assess whether or not a 'mutually hurting stalemate' exists in Afghanistan it is important to consider the conflict conditions and then the parties' perception of those conditions (Zartman, 1995). In this scenario, the two principal parties to the conflict, the U.S. led coalition and the Taliban are in stalemate. Since 2005, Taliban insurgents have made steady gains; however, they are unlikely to achieve any major strategic gains, such as seizing control of major urban centers. In contrast, international coalition and Afghan forces have not been able to contain the insurgents' territorial expansion.

International military casualties have escalated; so far more than 3,500 NATO troops, including at least 2,381 Americans have been killed; and just in two years there were 711 coalition deaths in 2010, up by 36% on the same period for 2009 (ICCC, 2016). And the war is increasingly costly, it is costing nearly US\$100 billion per year, roughly seven times more than Afghanistan's annual gross national product (GNP) of US\$14 billion (Ayman, 2013). Nasuti argues that 2,000 Taliban are being killed each year and that the Pentagon spends US\$100 billion per year on the war. In other words, US\$50 million is being spent to kill each Taliban soldier. Nonetheless, a rough estimate of the Taliban field strength is 35,000 troops; if that were the case then killing all the Taliban would cost US\$1.7 Trillion (Nasuti, 2015). Both sides could be said to be 'mutually hurting', as the theory requires.

### **IV. The Taliban's Inclusion-Exclusion Through the Lens of Critical Analysis**

The study uses a comprehensive qualitative research methodology of analysis to explain through 'an interpretive framework' as a lens to examine the flawed strategy of exclusion of the Taliban and magnify previously mentioned causes and conditions that led to the Taliban's exclusion and Afghanistan's instability. In addition, in the light of facts and figures and theoretical discussion of the pervious sections the study testes the hypotheses in order to formulate a better understanding of the causes of exclusion of Taliban from the Bonn conferences. Additionally, the article also elaborates the prospects of the inclusion of the Taliban in state-building of Afghanistan and gives a thoughtful analysis of the envisioned consequences.

According to the interpretive framework of five-level model analysis, the U.S. and



NATO forces represent its global level, these actors has direct involvement in the conflict. The second level of the framework magnifies and proves the role of regional actors, in particular Pakistan and China's role that have a vital impact due to their security concerns. Thus, the study has mainly focused on the role of both regional countries rather focusing other regional actors due to sensitivity and their direct relation to the issue in the subsequent sections. The third level indicates the state's socio-political and economic failure as the previous sections of the study has proved them. Socially, Afghanistan is an extremely fragile society, and ethnically imbalance one. Economically, weak and it has illicit narcotics based economy, deep-seated poverty. Politically, Afghanistan has enormously weak political institutions, partisan government, and high-level corruption. The fourth level has been proving throughout the study that conflicting parties have incompatible goals; therefore, they are in conflict. The final level of the analyses, which is the core of this study that defines non-recognition and exclusionist policies against the Taliban by the U.S. and coalition forces. In addition, this level tests two hypotheses based on pervious sections' findings and theoretical discussion.

## 1. The Impact of the Erroneous Exclusion

Many scholars have heavily criticized the flawed exclusionist strategy and called as historical blunders of the U.S. and coalition forces. In order to find the answer to the core issue, this study tests the first hypothesis through factual and theoretical considerations.

**Hypothesis 1:** *'The United States and its coalition forces misperceived the imperatives of stability in Afghanistan'.*

Previously discussed theoretical deliberations and extensive facts findings provide an adequate justification to test the first hypothesis that the U.S. and its coalition partners misperceived the unconquerable history and socio-political and ethnic complexities in Afghanistan. Afghanistan being a graveyard of empires has never been conquered even by the most powerful of empires and it is ungovernable by outsiders due to its complex nature of socio-ethnic dynamics.

Many scholars and researches have criticized the U.S. short sightedness and short-term faulty initiative to fix the issue. For instance, the U.S. assigned key positions to former warlords regardless their atrocious and ferocious past. At least four appointed Ministers were militia leaders and in 32 provinces, 22 provincial governors were militia commanders; others were bribed directly in order to ensure short-term stability in their regions (Giustozzi, 2004). Furthermore, the U.S. and its allies' miscalculation undermined seriously the legitimacy and state building in Afghanistan in two ways. First, disenfranchised but still powerful, the Taliban and Hizb-I Islami became spoilers, driven to a lasting insurgency. Thus, the feelings of disenfranchisement arose particularly in the Pashtun South. Second, the co-option of the warlords into the government undermined the legitimacy of the government in the eyes of opposing factions and the wider population" (Fukuyama, 2006). Evidently, the U.S. forceful escalation strategy has proved counterproductive (Ayman, 2013).

In the light of above facts findings, the second hypothesis of this study characterizes the exclusion of Taliban from the Bonn conferences and state-building caused serious



obstacles and had a negative impact on the peace process. The second hypothesis of study is;

**Hypothesis 2:** *‘Exclusion of the Taliban from the Bonn Conference sowed the first seeds of long lasting insurgency and re-emergence of the Taliban’.*

A great number of conflict resolutions academia and peacebuilding analysts associate exclusion of the Taliban with the current insurgency and insecurity in Afghanistan. According to Afghan officials, the conflict will not be resolved until the Afghan Government along with the U.S. and NATO stop making contact with the Taliban’s leadership (Rubin, 2010). Aimal Faizi, the spokesperson for Karzai, told Reuters, “I can confirm that the Taliban are willing more than ever to join the peace process, but the organizers (U.S.) was uncomfortable with them (Rob, 2014).

Julian Borger also criticized the Americans’ attitude and articulated that the 2001 Bonn agreement is as the root cause of the current Afghanistan conflict (Borger, 2011). The U.S. made a prejudgment about the motives of the opponents-the Taliban and Sunni insurgents; thus, it shut down the possibility of reconciliation in early stages of peacebuilding, and contributed hugely to the insurgencies in the later stages (Higashi, 2015, p. 26). Jonathan Powell a well-known British mediator argues that, the problem for the West is that we left engaging with the Taliban terribly late, in retrospect, it was a mistake to have excluded them from original Bonn talks on the future of country in 2001-2011 (Powell, 2014).

Based on the academic literature and extensive analyses of facts, this study proves both hypotheses positive and suggests that the conflicting parties have possible loses; therefore, the only possible way is to negotiate and find a political solution to the issue. In other words, when a “mutually hurting stalemate” occurs that urge parties to comprehend that they cannot escape from the deadlock by escalating the conflict (Zartman, 1989). Thus, this study further discusses some important developments and indicates significant potential of successful negotiations in the following sections.

## **2. Ripeness for an Inclusion and Negotiated Political Settlement**

The Taliban are vividly part of the Afghan socio-political landscape. Without the Taliban, Afghanistan’s future is uncertain. Indeed, communication is the most important element in settling matters: “without a process of reconciliation, conflicts considered to have been resolved can reappear and jolt the social climate in the national and international arena” (Nets-Zehngut, 2007). In fact, the U.S.-Taliban negotiations formally started in January 2013, in Doha, Qatar, but the Taliban left the negotiating in March, Americans failed to fulfill the conditions for peace negotiations to proceed.

A recent development by the support of Pakistan in July 2015, Afghan government officials and the Taliban leaders met in Murree-Pakistan. Pakistan, being universally recognized as the most crucial external actor has been supporting the Afghan Peace Jirga initiative to bring together influential leaders from both sides and providing a good opportunity to overcome the current stalemate in peace negotiation with the Taliban (Brahimi & Pickering, 2001).

China being a supporter of the peace talk provided an opportunity of meeting between Afghanistan's peace envoy and an unofficial Taliban delegation in the western Chinese city of Urumqi. Since, China has serious concern over Islamic movement and frequent political upheaval in Chinese Muslim populous areas; they believe that anti-China Islamic movement gets physical and financial support from the regional insurgency (Matveeva & Giustozzi, 2008).

Other regional actors (i.e. Turkmenistan, Uzbekistan, Tajikistan, and Iran) who are neighbors of Afghanistan have close historical, cultural and traditional links are in general supportive of the political process (Masadykov, Giustozzi, & Page, 2010). Some European countries are keen supporters of reconciliation, as demonstrated by the funding they have given to the Strengthening the Peace Program (PTS) (Semple, 2010). Moreover, an increasing number of the western countries are becoming interested in a political process. The perception is that they are waiting only for a clear statement and policy from the Obama administration in the U.S., and for the U.S. to take the lead (Fields & Ahmed, 2011).

## **V. Conclusion**

Afghanistan has suffered profoundly enough from the clandestine designs of external powers. Certainly, the reality is that the war in Afghanistan is unwinnable. Yet the U.S. still believe that massacre of Taliban fighters' keeps up military pressure that might eventually lead their desired outcome. As vice versa, the Taliban also see military pressure as sound strategy. However, both sides are probably mistaken. The escalated military fight is likely to be as unwinnable as the war. Accordingly, this study has figured out the simplistic notion that a single factor such as non-recognition and exclusion of the Taliban is the primary reason for the current dismal situation of Afghanistan.

The Taliban has a major stake in Afghanistan, it would be extremely unwise to disregard the Taliban and exclude them from the ambit of the Afghanistan. In such a scenario, it is conceivable that the Taliban may not only discard any decision but also significantly intensify their violent activities against Afghan government. While, engaging Pakistan in negotiation process is of paramount importance, given its strategic interests in Afghanistan, it is reckless to omit the Taliban from it. Denial of the fact that Taliban were, they are and will remain not only a potent but dominant force in Afghan politics. Needless to say, that 'No' genuine 'Reconciliation' is possible without real (not engineered/coerced) cooperation and participation of Taliban / Pashtuns (Johnson, 2006).

This paper concludes that peace and stability in Afghanistan can only be achieved through negotiations and political settlement. Many scholars and political analysts consider the inclusion of the Taliban as a viable quick path to a settlement. Let this paper end with a local saying that when there is a stain on clothes, it should be removed by washing rather than cutting the stained area, otherwise there would be a permanent hole on the clothes and this what happened to Afghanistan in the case of Taliban exclusion.

## References

- Ayman, S. G. (2013). Reconciliation with the Taliban: Challenges and Prospects. *Journal Security Strategies Year: 9*, Issue: 17.
- Borger, J. (2011, June 20). Bonn conference could mark formal start of Afghan peace process. *The Guardian*. Retrieved from <http://www.theguardian.com>
- Brahimi, L. & Pickering, T. R. (2001). *Afghanistan Negotiating Peace*. New York: The Century Foundation, Inc.
- Brown Watson Institute For International And Public Affairs. (2015). Cost of War in Afghanistan: Brown University. Retrieved from <http://watson.brown.edu/costsofwar/>
- Central Intelligence Agency-The World Factbook. (2015). Afghanistan. Retrieved from <https://www.cia.gov>
- Dehli Policy Group. (2015). Guest Brief on “Weak Governance and Instability in Afghanistan: The Way Forward”, pp. 1-10, Retrieved from <http://www.delhipolicygroup.com>
- Felbab-Brown, V. (2015). Blood and hope in Afghanistan: A June 2015 update. *Brookings*. Retrieved from <http://www.brookings.edu>
- Fields, M., & Ahmed, R. (2011). A review of the 2001 Bonn Conference and application to the road ahead in Afghanistan. Washington, D.C.: National Defense University Press.
- Fukuyama, F. (2006). *Nation-building beyond Afghanistan and Iraq* (Ed.). Baltimore: Johns Hopkins University Press.
- Gilles, D. (2005). *Revolution Unending: Afghanistan, 1979 to the Present*. C. Hurst & Co. Publishers.
- Giustozzi, A. (2004). Good State vs. bad warlords? A critique of state-building strategies in Afghanistan. London: Crisis States Research Centre. Working paper no. 51.
- Higashi, D. (2015). *Challenges of Constructing Legitimacy in Peacebuilding: Afghanistan, Iraq, Sierra Leone, and East Timor*. New York: Routledge.
- Iraq Coalition Casualty Count. (2016). Afghanistan Coalition Military Fatalities by Year. Retrieved from <http://www.icasualties.org>
- Johnson, T. H. (2006). Afghanistan’s Post-Taliban Transition: The State of State-Building after War. *Central Asian Survey*, V.25 (1/2), pp. 1-26.
- Katzman, K. (2015). Afghanistan: Post-Taliban Governance, Security, and U.S. Policy. Congressional Research Service, pp. 4-5. Retrieved from <https://www.fas.org>

Martin, P. (2011). Intervening for Peace? Dilemmas of Liberal Internationalism and Democratic Reconstruction in Afghanistan. *Journal of Military and Strategic Studies*, 13 (3). ISSN: 1488-559X.

Masadykov, T., Giustozzi, A., & Page, J. M. (2010). Negotiating with the Taliban: Toward a solution for the Afghan conflict. London: Crisis States Research Centre.

Matveeva, A., & Giustozzi, A. (2008). *The SCO: A Regional Organization in the Making*, Crisis States. Working Paper 39, Series 2, London; London School of Economics.

McNally, L., & Bucala, P. (2015). *The Taliban Resurgent: Threats to Afghanistan's Security*, *Afghanistan Report 11*, Institute for the Study of War. pp. 22-23. Retrieved from <http://www.understandingwar.org>

Nasuti, M. (2015, December 4). Killing Each Taliban Soldier Costs \$50 Million: *Information Clearing House*. Retrieved from <http://www.informationclearinghouse.info>

Nets-Zehngut, R. (2007). Analyzing the Reconciliation Process. *International Journal on World Peace*, 24(3), pp. 53–81.

Nixon, H. (2011). *Achieving Durable Peace: Afghan Perspectives on a Peace Process*. Oslo: Peace Research Institute Oslo (PRIO).

Powell, J. (2014). *Talking to Terrorists: How to End Armed Conflicts*. Random House, ISBN: 1448137527.

Rashid, A. (2002). *Taliban: Islam, Oil, and the New Great Game in Central Asia*. London: I. B. Tauris.

Rob, C. (2014, February 4). Hamid Karzai in secret talks with the Taliban. *The Telegraph*. Retrieved from <http://www.telegraph.co.uk>

Rotberg, I. R. (2007). *Building a New Afghanistan*. (Ed.) Brookings Institution Press and World Peace Foundation, p. 2.

RT-News. (2014) 'Afghanistan to experience gradual erosion of the security situation even further'. Retrieved from <https://www.rt.com>

Rubin, A. J. (2010, January 28). *A Reconciliation Plan in Afghanistan*. *The New York Times*. Retrieved from <http://www.nytimes.com>

Runion, M. L. (2007). *The History of Afghanistan*. U.S.: Greenwood Publishing Group.

Semple, M. (2010). *Reconciliation in Afghanistan*, United States Institute of Peace Perspectives Series, Washington DC: USIP Press.

Shultz, R. H., & Dew, A. J. (2006). *Insurgents, terrorists, and militias: The warriors of contemporary combat*. New York: Columbia University Press.

Sinno, A. H. (2008). *Organizations at War in Afghanistan and Beyond*. Ithaca, NY/ London: Cornell UP, p. 255.

Stancombe, J. (2009). *Vicious Circle: An Analysis of the Role of Narcotics in Insurgent Violence in Afghanistan from 2001 to 2008*. Indiana University.

The World Bank. (2004). *Afghanistan: State-Building, Sustaining Growth, and Reducing Poverty*. In Country Economic Report. *The World Bank*. p. 87.

The World Bank. (2009). *Fighting Corruption in Afghanistan: Summaries of Vulnerabilities to Corruption Assessments*. *The World Bank*. pp. 1-67.

Transparency International. (2015). *Transparency International's Corruption*.  
transparency.org

United Nations High Commissioner for Refugees. (2015). *UNHCR country operations profile – Afghanistan*. Retrieved from <http://www.unhcr.org>

United Nations Office on Drugs and Crime. (2009). *Addiction, Crime, and Insurgency: The Transnational Threat of Afghan Opium*. Vienna, p. 45.

United Nations Office on Drugs and Crime. (2012). *Corruption in Afghanistan: Recent Patterns and Trends*. pp. 5-6. Retrieved from <https://www.unodc.org>

United Nations Office on Drugs and Crime. (2015). *Afghanistan Annual Opium Poppy Survey 2015*. Executive Summary. Retrieved from <https://www.unodc.org>

Zartman, W. (1989). *Ripe for Resolution: Conflict Resolution in Africa*. Second ed., Oxford University Press, New York. Oxford: Routledge.

Zartman, W. (2008). *Negotiation and Conflict Management-Essays on Theory and Practice*. Oxford: Routledge.

Zartman, W. I. (1995). *Elusive Peace, Negotiating an End to Civil Wars*. Washington DC. The Brookings Institution.

**Contact email:** [sajjadagem@gmail.com](mailto:sajjadagem@gmail.com)







© The International Academic Forum 2016  
The International Academic Forum (IAFOR)  
Sakae 1-16-26-201  
Naka Ward, Nagoya, Aichi  
Japan 460-0008  
[www.iafor.org](http://www.iafor.org)