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L3-1952

MEN WITHOUT WOMEN: GENDER ANALYSIS OF POLITICAL PARTICIPATION AND SUSTAINABLE DEVELOPMENT IN NIGERIA

SYLVESTER ENABUNENE,[1] TUNDE AGARA[2] AND IMONIE EHICHOYA[3]

ABSTRACT

The Inter-Parliamentary Union (IPU) in its report of September 2010 has ranked Nigeria 117th out of 186 countries on the world scale of gender inequality in politics. Basically, in Nigeria, male dominance of politics and political appointments has predominated in spite of the fact that women constitute about half of the world total population and about 49% of Nigeria's population. The exclusion of women from political participation has also reflected in other areas of the society such as education and even in both the Public and Private Services. This exclusion becomes criminal when seen from the viewpoint of sustainable development of the nation and from which a substantive part of the population has been excluded. The essential attitude of this paper is to explore why this is so, to raise questions and underline dilemmas facing sustainable development in Nigeria and to query if continued exclusion of a substantial part of the population from contributing to policies and participating in politics can be rationalised and allowed to continue. In attempting to offer answers to the queries raised, the paper will investigate the factors that have allowed these skewed participation and ineffective contribution to development in Nigeria by women.

INTRODUCTION

The traditional African society, of which the Nigerian society is not an exception, is paternalistic. Women are rarely mentioned or present during important events or discussions. However, in spite of this, oral traditions of most African communities have confirmed the active roles of women in economic, political and social affairs of their communities especially in periods of crises. For instance, oral histories of ancient empires in Nigeria, the Fon of Benin Republic, the Kikuyu of Kenya and the Ashanti of Ghana have made mention of the heroic exploits and roles played by women in the political and economies of their communities. In Nigeria, oral traditions have mentioned the heroic exploits of Queen Amina of Sokoto (Hausa/Fulani Kingdom), Moremi in Ile-Ife (Yoruba Kingdom), Emotan in Benin (Benin Kingdom) and Inkpi in Idah (Igala Kingdom). Prominently, in literature and other literary works, women had been portrayed as playing the roles of either benevolent or malevolent beings. For instance, women had featured prominently as queen-mothers, regents, obas or kings, priests and even as deities that are worshipped by the people. These show that women's second class status does not have a traditional root but rather can be said to be a modern phenomenon. The criminality of this exclusion of women is more felt when the present day society with its constitutional claim to equality of sexes, the values of individuality and egalitarianism still hold on to alternative beliefs and attitudes about women and their role in a modern society. This is what Bem and Bem (1970:142-155) have called the "non-conscious ideology."

According to the Inter-Parliamentary Union (IPU) in its report of September 2010 Nigeria ranked 117th out of 186 countries on the world scale of gender inequality in politics. Also, as far back as 1975, the International Labour Office (ILO) publication on "Employment of Women" showed that women accounted for half of the world's population while in Africa,

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it is generally estimated that women are numerically superior to men in many countries due to the ravages of war and conflicts. In fact the 1992 census statistics showed that women were superior numerically to men in Nigeria in eleven (11) states. Thus, if it is accepted that in the quest for sustainable development a major resource of every nation is its people and their effective utilisation and contribution is a necessary precondition for social, political, economic and technical development, then the neglect or exclusion, whether consciously or otherwise, of a major part of the total population is not only criminal, it is dangerous, uneconomical and inimical to development and its sustainability.

However, this phenomenon is not peculiar to developing countries alone. Fenn (1976) had noted that in USA, 39% of the total labour force is women and only about 1% of them ever reach the upper level management or the top of their professions. A similar finding has been reported for Nigeria (Makinde et al 1993:567-574). This bias is also reflected in modern management texts which have equated successful leadership characteristics with traits mostly associated with males. According to McGregor (as cited by Dipboye, 1975):

> the model of a successful manager in our culture is a masculine one. The good manager is aggressive, competitive, firm and just. He is not feminine, he is not soft and yielding or dependent or intuitive in the womanly sense.

As in politics, women's career possibility at management level in the Public and Private sectors are faulted by myths and stereotypes which have portrayed them as being intellectually inferior, emotionally unstable, less assertive and when compared to men, do not value achievement and promotion (Dipboye, 1975). In fact researches conducted among children have practically confirmed that there exist great differences between both sexes even right from such tender age as one year old (Goldberg and Lewis, 1969; Smith, 1933; McDavid, 1959; Crandall and Rabson, 1960). Their works have added credibility to the belief that there are innate differences between male and female and that certain female hormones may actually be responsible for their inability to aspire to greatness.

While this argument has been documented, however, counter studies have shown that female characteristics and traits are what are needed by today's managers. For example, Durkin (1971) in his study has concluded that:

> The aptitudes which seem to underline successful management are objective personality, abstract visualisation and high English vocabulary. Equal numbers of men and women possess objective personality and high vocabulary. More women have abstract visualisation than men. The ratios are three in four; and one man in two. Theoretically, at least there ought to be more women in management than men.

Knowles and Moore (1970) have also concluded in their study that:

> About the only testable difference between men and women seems to be women's greater ability in interpersonal relationships. The manager of the future will need to be more people-centred, more able to work with people than to exercise position power.

On the other hand, the relationship between democracy and development has been alluded to by scholars. Most western oriented analysts have argue for democracy as the best, if not the only viable, institutional framework for development. Given the examples of the developed nations, one is apt to agree with analysts; among whom are Sklar (1987 and 1996) and Ake (1989, 1996 and 2002) that democracy, if opted for and properly practised, can facilitate development. In particular, Ake (1989, p. 90) has argued that Africa needs democratic governance not only because it is desirable in itself, but because it will greatly facilitate development. Although this view has been given some credence with the collapse of the former Soviet Union, the end of the Cold War and the emergence of a unipolar power structure manned by America with its claim to Western democratic tenets and principles, however, the examples of China and the Asian Tigers posit to us alternative models of development and a different brand of 'democracy'. Underlying this argument is that democracy of the liberal type facilitates

development but it is not exclusive to it alone. As a matter of fact, our intellectual and academic predisposition is that for a Third World nation that is desirous of rapid development, liberal democracy may posit an avenue but a rather slow and expensive one. Our strong conviction is that liberal democracy with its bi-camera or uni-camera system of representativeness is a luxury that most Third World nations, Nigeria inclusive, may not be able to afford. Although liberal democracy may have facilitated development in the Western nations; this is because they have had ample time at their disposal to develop at their own slow but steady pace and none of them had ever been deliberately underdeveloped. Their rate of development had never been impaired or subjected to control by another sovereign state. The luxury to develop at its own pace and time, hitherto accorded to and enjoyed by the developed nations, is no longer available to the Third World nations if they are going to be a force in the world and in international politics. in spite of this, democracy has become the 'in-thing' now.

Following the Schumpeterian tradition, therefore, Diamond et al (1988, p. xvi, and 1995) have argued that for a political system to be truly democratic, it must exhibits certain features which include (1) periodic competition among individuals and organised groups, (that is, political parties) for effective government positions, (2) a highly inclusive level of political participation in the process of leadership selection through an electoral process that does not exclude any social group, and (3) a level of civil and political liberties such as freedom of expression, freedom of the press, freedom to form and join organisations, sufficient to ensure the integrity of political competition and participation. This suggests therefore, that a system of democracy that will transform the society and put it in the direction of development must provide equal opportunity for all segments of the society to compete and be adequately represented in order to ensure plurality of opinions, result-oriented policies leading to socio-economic transformation of the society. However, in Nigerian democratic system, wide and glaring gender gap in political participation has been identified.

If democracy enhances development and it is necessary for sustaining development, then the exclusion of about 48% of the population from active and relevant participation is a prescription for development failure (See Table 1 below). Deriving from the 2006 Census figures, women were numerically superior in Ebonyi, Enugu, Kebbi and Ogun states. In virtually all the other states, men were just marginally more than women with about 50-1000 population. This paper therefore, seeks to use ex-post facto descriptive statistics to analyse and discuss the skewed nature of political participation of women and discuss its implication for sustaining development in Nigeria.

Table 1: THE 2006 CENSUS FIGURES

STATE	MALE	FEMALE	TOTAL
Abia	1,434,193	1,399,806	2,833,999
Adamawa	1,606,123	1,561,978	3,168,101
Akwa Ibom	2,044,510	1,875,698	3,920,208
Anambra	2,174,641	2,007,391	4,182,032
Bauchi	2,426,215	2,250,250	4,676,465
Bayelsa	902,648	800,710	1,703,358
Benue	2,164,058	2,055,186	4,219,244
Borno	2,161,157	1,990,036	4,151,193
C'River	1,492,465	1,396,501	2,888,966
Delta	2,074,306	2,024,085	4,098,391
Ebonyi	1,040,984	**1,132,517**	2,173,501
Edo	1,640,461	1,577,871	3,218,332
Ekiti	1,212,609	1,171,603	2,384,212

Enugu	1,624,202	**1,633,096**	3,257,298
FCT Abuja	740,489	664,712	1,405,201
Gombe	1,230,722	1,123,157	2,353,879
Imo	2,032,286	1,902,613	3,934,899
Jigawa	2,215,907	2,132,742	4,348,649
Kaduna	3,112,028	2,954,534	6,066,562
Kano	4,844,128	4,539,554	9,383,682
Katsina	2,978,682	2,813,896	5,792,578
Kebbi	1,617,498	**1,621,130**	3,238,628
Kogi	1,691,737	1,586,750	3,278,487
Kwara	1,220,581	1,150,508	2,371,089
Lagos	4,678,00	4,335,514	9,013,534
Nasarawa	945,556	917,719	1,863,275
Niger	2,032,725	1,917,524	3,950,249
Ogun	1,847,243	**1,880,855**	3,725,098
Ondo	1,761,263	1,679,761	3,441,024
Osun	1,740,619	1,682,916	3,423,535
Oyo	2,809,840	2,781,749	5,591,589
Plateau	1,593,033	1,585,679	3,178,712
Rivers	2,710,665	2,474,735	5,185,400
Sokoto	1,872,059	1,824,930	3,696,999
Taraba	1,199,849	1,100,887	2,300,736
Yobe	1,206,003	1,115,588	2,321,591
Zamfara	1,630,344	1,629,502	3,259,846

CONCEPTUAL CLARIFICATION

Politics is nothing more than the exercise of power and so political context is an exercise in securing access to the source of power. Power does manifest in every area of human endeavour, in organisations and even in social relations. Although in organisations, the use of power is regarded as an anomaly, a pathology and dysfunctional (Makinde et al., 1993, p. 568), Zaleznik and Ket de Vires (1975) have acknowledged it as:

> Connoting dominance and submission, control and acquiescence, one man's will at the expense of another man's self-esteem ...Yet it is power, the ability to control and influence others, that provides the basis for the direction of organisations and for the attainment of social goals. Leadership is the exercise of power.

On the other hand, Mmobuosi's (1988) view seems to have seen organisations as assemblage of individuals who are engaged in an apocalypse struggle for power and so he argued that in an organisation, there ensues:

> a struggle, whether subtle or explicit, to control the acquisition and distribution of finite resources include power itself. Power becomes pitched against power.... This is politics in motion. Power is a scarce commodity which must be fought for because its being possessed is a precondition for controlling other scarce resources and for influencing...acceptance.

However within political systems, power is commonly associated with different roles; tyrants, dictators, kings, rulers, generals etc. Power is accessed through participation in the political system and political participation refers to all activities that are voluntarily carried out by citizens with the aim of influencing personnel and policy directions of government at the different levels of the political system (Parry et al., 1992; Suberu, 2004; Verba et al., 1995).

Thus, political participation has been seen as consisting of those levels of activities by private citizens who are more or less directly aimed at influencing the selection of government personnel and/or the actions they take (Nie and Verba, 1975). Political participation has been variously categorised. For instance, Verba et al. (1978) have identified four types of political activities as campaign activity, communal activity, particularised contact and voting; while Milbrath and Goel (1977) have identified six types of activities as falling under political participation and these are; voting, party work, community activism, contacting officials, protest behaviour and communication activities.

Malbraith (1965) has identified three levels at which citizens participate in the political process; spectator, transitional and gladiatorial levels. The spectator level is the lowest in the hierarchy of participation and people at this level are apathetic to politics and its process although they may nevertheless be involved in voting, engaging in public discussion about politics, wearing and displaying of campaign materials and generally making minimal effort to influence others to vote in a certain way or for a certain person or party. The transitional level is only a rung above the spectator level and entails attending party meetings and rallies, making monetary contributions, and maintaining contact with political leaders and public officers. The gladiatorial level involves holding public office, actively seeking for public office, soliciting for funds for the party, attending political party caucus meetings and contributing money, time, and other resources to political campaigns. As Ewemooje and Ezegwu (2011) have noted, about 60% of the population are involved at the spectator level and about 8% and 2% are involved at the transitional and gladiatorial levels respectively. Several factors have been identified as been responsible for this such as; the individual's level of political awareness, political culture, socio-economic status and type of government and party system in practice. However, as it relates to women participation, other factors have been added such as the levels of political knowledge, lower feeling of external efficacy, or the feeling of inability or powerlessness to affect the political system positively (Lambert, 2008).

THE MODEL DILEMMA: FROM 'DEVELOPMENT' TO 'SUSTAINABLE DEVELOPMENT'

The central dilemma facing development scholars is the non-agreement on what the concept means and what actually constitutes development. For instance, development has been construed as implying improvement in the human capacity while others have view it as implying improvement in the physical environment and level of social services. We argue here that real development should encompass both aspects, that is, development should be seen as encompassing human capital capacity development that will eventually translates into the development of the natural resources and endowment of a society, its physical environment leading to the general welfare of the whole citizens. This is in line with Rodney's (2011, p. 1) conceptualisation of development. He argued that:

> Development in human society is a many sided process. At the level of the individual, it implies increased skill and capacity, greater freedom, creativity, self-discipline, responsibility and material well-being... At the level of the social groups, it implies an increasing capacity to regulate both internal and external relations... In the past, development has always meant increase in the ability to guard the independence of the social group.

Dudley Seer's (1963, p. 3) has put his conceptualisation of development in form of three fundamental questions;

> The questions to ask about a country's development are ... what has been happening to poverty? And what has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels, then beyond doubt this has been a period of development for the country concerned. If one or two of these

> central problems have been growing worse, especially if all three have, it would be strange to call the result development even if per capita income doubled

However, according to the World Bank (1991, p. 4), the major challenge facing development:

> ... is to improve the quality of life... a better quality of life generally calls for higher incomes but it involves much more. It encompasses as ends in themselves better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and a richer cultural life .

The International Conference on Popular participation in the Recovery and Development Process in Africa held at Arusha in Tanzania from 12 to 16 of February, 1990, explicitly captures the role of political participation in Africa development and states emphatically that:

> We are united in our conviction that the crisis currently engulfing Africa is not only an economic crisis, but also a human, legal, political and social crises ... the political context of socio-economic development has been characterised, in many instances, by an over-centralisation of power and impediments to the effective participation of the overwhelming majority of the people in social, political and economic development. As a result, the motivation of the majority of African people and their organisations to contribute their best to the development process, and to the betterment of their own well-being as well as their say in national development has been severely constrained and curtailed and their collective and individual creativity has been undervalued and underutilised (UN-IATF, 1990.Art. 6)

Article 7 of the declaration further affirms that "nations cannot be built without the popular support and full participation of the people, nor can the economic crisis be resolved and the human and economic conditions improved without the full and effective contribution, creativity and popular enthusiasm of the vast majority of the people." Article 10 of the declaration states clearly that:

> In our sincere view, popular participation is both a means and an end. As an instrument of development, popular participation provides the driving force for collective commitment for the determination of people-based development processes and willingness by the people to undertake sacrifices and expend their social energies for its execution. As an end in itself, popular participation is the fundamental right of the people to fully and effectively participate in the determination of the discussions which affect their lives at all levels and at all times

However, many development analysts have concluded that the 1980s were a "lost decade" for Africa. This is in spite of a decade long regime of economic restructuring administered through the religiously code of market forces and liberalisation. But almost a decade later, Africa's development conditions and prospects are still considered as more despairing than those of the lost decade. According to Ogunseye (1997, p. 3), in Africa, the various post-independence attempts at state-led development, though reasonably successful in some social sectors and in physical capital formation, were largely undermined by economic and institutional ineffectiveness, corruption and inefficient macro policies. The North-sponsored adjustment policies foisted on African nations as a way of developing constitute nothing short of an enemy's position for it retardation tendency and for not effecting any meaningful development in Africa. Hence the current development model foisted on African nations by the World Bank and IMF is considered to be no longer compatible with the aspiration, vision and focus of these nations. The adoption of sustainable development as a counter measure has achieved a general consensus among development practitioners and agencies.

As laudable as this policy is, some dilemmas underline and challenge its realisation and effectiveness as a counter weight to the North-imposed development option for Africa. First is that sustainable development is presently in a hostile environment basically because most African governments are still 'friendly' with the 'old' SAP model which imposes debt-paying

on African economies, the compliant official rhetoric in favour of sustainable development notwithstanding. As Ogunseye (1997, p. 7) has pointed out, this is because the mainstream development policies and actions of the state and business in Africa are overwhelmingly geared in pursuit of the unsustainable but much admired modernisation benefits enjoyed in the North. Second is the dilemma posed to sustainable development by the attraction of and desire for the symbols and tangible benefits of the existing modernisation model. These symbols include modern consumption patterns, cars, overseas travels, socio-economic and material advantages, all of which command respect and admiration as symbols of success among the poor. Third is given this 'economy of affection' for the symbols of modernisation, how then can the admiring and aspiring poor be persuaded of a new and different model of development based on low-input, low energy consumption, recycling, cycling and walking? This challenge further questions the notion that the poor and marginalised people do not particularly care about many of the material benefits of modernisation, and would be largely satisfied with an appropriate and well-designed 'grass-root development' model that works.

THE NATURE OF THE DILEMMA

A major point been made by this paper is that citizen participation is sina quo non for an effectively functioning democratic system and the full involvement of all citizens in the democratic process can only augur well for the stability of the society and legitimacy of the government. Democracy is premised on equal representation of interests, preferences and needs. It suggests, therefore, that anywhere these basic but fundamental principles of democracy are lacking, such democratic system must be called to question because it denies democracy as ensuring freedom of participation which is a key form of development and sustainable development at that.

Our analysis of women participation and exclusion in the democratic process will be limited to only at the gladiatorial level. As mere symbols of equality, women have not been consciously excluded from participating in politics at both the spectator and transitional levels. In fact their presence at campaign rallies has always been courted if not paid for by the parties. However, it is at the gladiatorial level where those to hold public offices or actively seeking for public offices are chosen that they are often left out. Where they are chosen or appointed, it is only to serve as tokenism because their numbers in government at local, state and federal government levels is serious skewed against their numerical population size (compare Tables 1 &2).

The focus of this paper is basically on gender inequality and participation in politics. Gender like every socially constructed label, transcends biological dimension only. Rather, it should be seen as referring to the socially constructed roles and relationships, personality traits, attitudes, behaviours, values and relative power and influence in society. In reality and in the concrete world, gender refers to the economic, social and cultural attributes and opportunities associated with being either male or female. Gender is also relational, that is, gender roles and characteristics do not exist in isolation. Rather, they are defined in relation to one another and through the demonstration or "doing" of gender in relations to others (Enarson, 2009). The implication of this is therefore that gender equity is not the same as gender equality. Gender equity is the practice of being fair to men and women in relation to their respective situations and needs whereas, on the other hand, gender equality means that men and women enjoy the same social opportunities. It further means that both sexes have equal conditions for realising their full human rights and potential to contribute to national political, economic, social, and cultural development and to benefit from them.

Table 2: Legislative Seats at the National, States and Local Government Areas

Chamber/House	Male	Female	% of Female 1999	Male	Female	% of Female 2003	Male	Female	% of Female 2007
Senate	106	3	2.8	105	4	3.7	100	9*	8.3
House of Rep.	348	12	3.3	338	22	6.1	333	27*	7.5
State Houses	969	21	1.2	951	39	3.9	934	56	5.6
LGA Councillors	8730	80	0.9	8540	270	3.1	8646	164	1.9
Fed. Exec. Council	37	5	12	39	6	13	39	6	13
LGA Chairpersons	767	7	0.9	762	12	1.5	763	11	1.4

Source: Agbi (2011)

Table 3: Total Students Enrolment in Secondary and University by Sex

School/Gender/Year	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
Junior Secondary School	**2,950,737**	**3,684,644**	**3,507,928**	**3,634,163**	**3,695,648**	**3,466,247**	**3,498,553**
Male	1,746,909 (59.20%)	2,083,699 (56.55%)	1,972,637 (56.23%)	1,984,387 (54.60%)	2,040,367 (55.21%)	1,897,430 (54.74%)	1,920,338 (54.89%)
Female	1,203,828 (40.80%)	1,600,945 (43.45%)	1,535,291 (43.77%)	1,639,776 (45.40%)	1,655,281 (47.79%)	1,568,817 (45.26%)	1,578,215 (45.11%)
Senior Secondary School	**2,020,937**	**2,173,533**	**2,826,799**	**2,771,634**	**2,773,418**	**2,819,952**	**2,821,444**
Male	1,115,360 (55.19%)	1,201,219 (55.27%)	1,579,165 (55.86%)	1,567,011 (56.54%)	1,559,038 (56.21%)	1,587,633 (56.30%)	1,580,007 (56%)
Female	905,577 (44.81%)	972,314 (44.73%)	1,247,634 (44.14%)	1,204,623 (43.46%)	1,214,380 (43.79%)	1,232,319 (43.70%)	1,241,437 (44%)
Grand Total Enrolment	**4,601,105**	**5,124,270**	**6,511,443**	**6,279,562**	**6,407,581**	**6,515,600**	**6,319,997**
Students Enrolment in Universities	**444,949**	**606,104**	**727,408**	**724,856**			
Male	274,131	373,778	492,874	466,159			
Female	170,818	232,326	234,534	258,697			

However, the perceived skewed ratio of men to women in gladiatorial politics has set out scholars to attempt to offer possible reasons for this. Harriman (2006) has argued that the reasons for this include fear, poor or low self esteem and lack of confidence, ignorance or indifference to politics. Ezegwu and Okafor (2011) have contended that female low representation in politics is as a result of their weak political orientation. Lambert (2008) has opined that these gaps in representation occur basically because women are more hesitant to express their political preferences and as such, this had led to less representation. In an earlier study conducted to interrogate the skewed sex ratios in the Nigerian Public Service (Agara, 2001), we deduced certain reasons for this differential. While some of the reasons adduced then are still germane to this present study, additional reasons for this differential may also be adduced.

First is faulty early socialisation. Scholars are agreed that political socialisation starts at an early age, what Easton and Hess (1970, p. 129) have called "pre-school age." According to McLean (1996, p. 386), political socialisation is "the process by which people come to acquire political attitudes and values ... and the earliest socialisation is believed to be the deepest." However, in a patriarchal society, faulty socialisation results from how boys and girls are raised. The boys are raised to be more enterprising, daring, assertive, aggressive, competitive and independent while the girl-child is socialised to be dependent, passive and affiliative. The early socialisation of the boy-child prepares him for the world out there, while the girl-child is shielded and protected from the world out there. The political world is a highly competitive world where no hold is barred in the attempt to win all. It was never envisaged that women will venture into this world and hence are not adequately prepared for it.

Although access to education is guaranteed in the country's Constitution for all and irrespective of sex, the society's preference for the male-child (Hoffman, 1977; Sear et al., 1957; Pohlman, 1969) ensures that in case of a choice being made due to financial resources, the male-child will have the first preference of being sent to school. This is reflected on Table 2 where the male child have higher population in schools at every level than the girl child in spite of the fact that the male do not have such great numerical superiority than the female (see Table 1). A prerequisite for participation in politics at the gladiatorial level preclude some form of educational which inculcate some sense of awareness on the person. However, even at that, certain aspects of the school curriculum have also been identified as encouraging gender differences. Delamont (1982) had identified five major ways in which school's socialisation and curriculum have emphasise gender differences to the detriment of the girl child. These include the classroom organisation where male sit differently from female and the register is arranged usually with the girls' names coming after those of the boys.

The third is the influence of role models. Learning theorists have emphasised how this helps to mould the character and ambition of adolescents (Kolhberg, 1966; Mischel, 1966). The is the age children begin to 'dream', form opinions and perceptions of what or who they want to become. They are assisted in doing this by role models, especially those they come in contact. As noted earlier, "proximity plays an important role in this regard" and so it is not unusual to see adolescents wanting to become 'actors' or tailoring their behaviour, manner of dressing, hairstyle, language, and poise after such characters especially in this age of globalisation, televisions and satellites (Agara, 2001, p. 6). In a study conducted by Makinde et al. (1992), 135 women managers in the Nigerian Public Service out of a total of 197 affirmed that their role models were female and specifically their mothers, aunties and sisters. So role models impact on the drive or ambition of female and the dearth of notable women politicians that hve impacted their countries and generations have a hand in influencing younger female to want to participate effectively in politics, at least, at the gladiatorial level.

Fourth is the inclination for women to want to limit themselves to female oriented jobs. Most cultures, and this is not exclusive to developing countries alone, have jobs or occupations that are traditionally ascribed along gender lines. So, there are jobs reserved for male as distinct for others reserved for female only. This has also been reinforced by learning institutions through the use of visual aids and pictures showing male in particular occupations such as lawyers, doctors, pilots etc, and female as nurses, teachers etc. Apart from school, the family also plays an important role here. Weishaar et al. (1981) have reported in a study that while working mothers are often cited as primary influence, fathers are also cited as vocational model by women in non-traditional careers. Auster and Auster (1981) have also reported the influence of the father on women in non-traditional occupation. Women who have transcend gender-based occupational stereotype are influenced by family members who offer support for their ambitions and aspirations. However, in situation where such support is denied because of negative perception of politics, female involvement in this area would, of course, be limited.

Agbi (2011, p. 21-24) has also offered many reasons for female low participation in gladiatorial politics. Of relevance to this thrust of this paper are: (1) that politics involve a lot of money and many women do not have access to such funds; (2) the issue of godfatherism. The issue of godfatherism in Nigeria politics have been seriously interrogated by various scholars (see the Special edition of *The Constitution*, 2007). The menace of godfatherism in Nigerian politics has evolved into two types; godfather-broker and godfather-patron (Agara, 2010; Agara and Ajisebiyawo, 2010); (3) the issue of marginalisation of women in political parties. According to her, a study conducted by the International Institute for Democracy and Electoral Assistance (International IDEA) has shown that political party leaders refuse to take female aspirants seriously and labelled them as cultural deviants. Their argument is that the women do not have what it takes to assume leadership positions at the party level; (4) the lack of substantive women's movement and cohesiveness among women's groups that claim to support women's participation in politics. Many women are reluctant to identify with such group because of the fear of being seen as same-sex people or men-haters; (5) the wrong impression that people generally have about female politicians. They are generally thought of as being promiscuous and loose basically because most of the political caucus meetings are held in he night and sometimes in places far away from their homes.

CONCLUSION

In spite of the gloomy and skewed picture presented above by the tables, Ballington (2004, p. 72) has reported that:

> Nowhere in the world has the rate of increase in the political representation of women been as fast as in Sub-Saharan Africa over the past four decades. The number of women legislators increased tenfold between 1960 and 2003, jumping from one percent to 14.3 percent in 2003. The largest increase came between 1990 and 2003 when the number of seats held by women rose from 8 percent to 14.3 percent. Rwanda became the country with the highest female legislative representation in 2003, as women in that country claimed 48.8 percent of parliamentary seats surpassing the Nordic countries.

Even though this is a welcome development, yet in many countries and even in Nigeria, the barrier to full women participation at the gladiatorial level still persists. Their present level of participation and the number of those involved is not commensurate with their potential contributions and numerical strength in the population. Under representation of any group in the politics of the state makes room for the politics of exclusion which can also create apathy and instigate negative behavioural pattern which may be counter-productive to development and its sustenance. Continued gender gap robs the state of benefits that may accrue to it from their active participation.

Studies have actually shown that women, more than men, have manifested relatively interpersonally oriented and democratic styles and men, more than women, have manifested relatively task oriented and autocratic styles (Eagly and Carli, 2003). Wollack (2010), on the other hand, has pointed out that states where women are political leaders often experience higher standards of living with positive developments in education, infrastructure and health, with concrete steps being taken to make democracy work and deliver. Using data from 19 member states of the Organisation for Economic Co-operation and Development (OECD), researchers have found that an increase in women legislators results in an increase in total educational (Wollack, 2010). As Wollack (2010) has further observed, the West Bengal villages in India that have greater representation of women in local councils experienced an investment in drinking water facilities that doubled those of villages with less women participation in their councils. Khan and Ara (2006, p. 1) have even contended that increased and systematic inclusion and integration of women,

> augments the democratic basis, the efficiency and the quality of the activities of local government. If local government is to meet the needs of both women and men, it must build on the experiences of both women and men, through an equal representation at all levels and in all fields of decision-making, covering the wide range of responsibilities of local governments.

It is no doubt that closing the gender gap will contribute immensely to economic empowerment which is a prerequisite for societal development. Duke (2010) has averred that democratic participation and economic empowerment are mutually supporting phenomena, as each one fuels the other.

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METHODOLOGICAL DEVELOPMENTS AND PUBLICATION TRENDS IN THE DETERMINANTS OF FIRM PROFITABILITY

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ABSTRACT

The purpose of this study is to investigate the methodological and publication trends in the discipline of firm profitability by looking at the determinants of firm profitability. This study includes a sample of 105 articles for the period 1967-2014 and uses content analysis as a primary method for analysis. All the selected articles are conceptual quantitative articles. The time period 1967-2014 has been divided into two time frames: 1967-2005 and 2006-2014. Analysis and advanced cross tabs have been done to look at trends across geographical regions and time period. An increasing trend was found in collaboration of authors from different regions. Academics were found to dominate research in this area. This will lead to future research opportunity for practitioners to collaborate with academics in research activity. An increasing trend was observed in Asia and Europe publishing more studies in the post-2005 era.

Keywords: Profits, firm profitability, publication trends, determinants of firm profitability

INTRODUCTION

Profit is a very important concept for a business. It is very important for the survival of a business, as without profits businesses cannot survive for a long time. Profit is the assessment of true worth of a business. In the simplest sense, profits can be defined as: total revenues less total expenses.

Profits are important for businesses for several reasons. Profits are the true measure of success of a business. They can be used as a source of finance of a business. Profits that are used as a source of finance are called retained earnings. These can be used to expand business operations by introducing new product lines, etc. Profits can attract suppliers, creditors and banks to provide future funds that can be used in to further expand and make a business flourish. The more profitable a business is, the greater the chances that investors would be interested in investing their money in that business, because only a profitable business is going to provide return on their investments. Profits are very important for survival and growth of business. Growth of a business is only possible when it is generating higher profits, and more profitable businesses show that they are being managed efficiently. Profits are the motivation for investors for investing money in businesses; they take a risk by making these investments because they want a return on their money. Higher the risk, higher the return will be for the investor.

Profits are used as a measure of profitability. It is very important to measure profitability. Hofstrand (2009) defined profitability in terms of economic profits or accounting profits: Accounting profits come from a net income statement and ensure the viability of a business, whereas economic profits are calculated by deducting opportunity along with all the business expenses from the total revenue of the business. Hofstrand defined opportunity costs as returns on investment given up by not investing your money somewhere else.

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Profitability and cash flows should not be considered identical. Hofstrand (2009), in his study, explained that a profitable business can have cash flow problems. The income statement includes all the revenue and expenses of a business and the cash flow statement lists all the cash inflows and cash outflows, so the income statement tells about the profitability of a business whereas the cash flow statement tells about the liquidity of a business.

In order to analyse profitability three different methods are used: profitability ratios, break-even analysis, and return on investment and return on asset.

A recent content analysis using the determinants of profitability was performed in 2005. Barringer, Jones and Neubaum (2005), in their study, examined the attributes associated with rapid growth firms. This was a quantitative content analysis based on thematic analysis as the authors were trying to determine the characteristics of rapid growth firms and their founders. Recently no study has provided a comprehensive overview of methodological and publication trends in the literature of determinants of profitability. The purpose of the current study is to contribute to the literature by answering the following questions:

1. What methodologies and research designs have been used regarding determinants of firm profitability? What statistical and analytical techniques have been used in the past and what is their current status?
2. What are the publication trends across geographical regions and time?

LITERATURE REVIEW

Profitability is really important for the survival of a business. Every sector/industry has a different set of factors that determines the profitability of that particular sector of business.

In the manufacturing industry, different measures of market structure play an important in determining the profitability. Jones, Laudadio and Persy (1973) in their research examined the impact of market structure on the profitability of Canadian manufacturing industries for the year 1965. They found that foreign competition, concentration, absolute capital requirements and product differentiation are important determinants of intra-industry differences in profitability. Among all these factors, they found that the coefficient of foreign competition is highly significant, which is why they concluded that it is a very important determinant of profitability.

McDonald (1999) examined in his study the determinants of profitability in Australian manufacturing firms using panel data of firms over the period 1984-1993. The results of this study showed that firm profitability is found to be negatively affected by import penetration and positively affected by industry concentration. The results also showed that industry and other macroeconomic variables significantly affect the profitability of a firm.

In the automobile industry the important determinants of profitability are the industry policies, diversification and the expansion of business. Agarwal (1991) examined the determinants of profitability in the Indian automobile manufacturing industry by taking into account the changes in the policy on profitability since 1981-1982. This study examined two sections – the car and non-car sectors – in the automobile industry using a dataset for the period 1996 to 1987. The results showed that profitability of the car sector is mainly determined by the age of the firm and diversification. It was suggested that older firms diversify their business by introducing new product lines in order to improve their profitability.

METHOD

The primary method used to analyse data in this study is content analysis. "Content analysis is a method for analyzing the content of a variety of data, such as visual and verbal data. It enables the reduction of phenomena or events into defined categories so as to better analyze and interpret them" (Harwood, 2003).

In this research area researchers have used content analysis in their studies but they have made contributions in the literature by primarily focusing on thematic analysis. This study is going to look at the methodological and publication trend analysis of the determinants of firm profitability in different industrial sectors.

SELECTION OF ARTICLES

The selection of articles followed a number of steps:
An advance search was done with the search engine EBSCO to search for the literature related to the determinants of profitability. In EBSCO, the database "Business source complete" was used to search for the articles related to the determinants of profitability, with the keywords 'firm profitability' in one of the 'abstract' or 'title' search field. In search categories, options were selected as follows: In 'publication type', academic journals were selected. In 'limit your results', only scholarly (peer-reviewed) journals were selected. In 'document type', articles were selected. This search returned a total of 1587 articles for the time period 1967-2014.

From 1587 articles, 230 articles were exported to a Microsoft Excel sheet via RefWorks. The RefWorks management software is used to create bibliographies and citations. With the help of RefWorks, articles were exported to a Microsoft Excel sheet from Business Source Complete. But before exporting the data to an Excel sheet, data was edited in RefWorks to check for duplicates. Once all duplicates were removed, data was then exported to an Excel sheet through RefWorks. RefWorks helped to organise the data in a columnar fashion in a Microsoft Excel sheet. In these columns data was presented with various headings such as reference, authors (primary), title (primary), keywords, periodical (full), publication year, publication date, volume, issue, start page, abstract, etc. To further organise this data, a few of the columns that were not necessary were omitted to reformat the data.

These 230 articles were selected randomly because I decided to choose a method of selecting articles that includes everything in the determinants of firm profitability such as all types of industries, various countries, and different forms of businesses, including financial and non-financial sectors. However, there have been different methods available for the selection of articles. The search for articles for such a study could be done through various methods of article selection; for instance, the search could be limited to the type of industries if a researcher wants to see the trends in that particular industry. Similarly, another method could be to restrict the search to a particular country or a particular industry in that specific country. Also, the time frame could be specified to see methodological and publication trends during that time period. I could have selected one of these methods but I decided to choose articles randomly. The search result showed articles from the period 1967-2014. Out of these 230 articles, 190 articles were screened as relevant articles. This screening for relevance was done through the reading the article abstract. As a result 105 articles were selected as a final sample due to the short time and resource availability.

CODING

In the current study working definitions regarding primary data, secondary data, empirical studies and conceptual studies were established. For this paper, empirical studies were defined as those

using primary data and conceptual studies were the ones where secondary data, not firsthand data, was used for the research purpose.

Furthermore, primary data has been defined as data collected first hand, for instance when the respondents fill out a questionnaire and provide all the required information to the researcher. And secondary data is collected from secondary sources such as databanks, annual reports and stock exchanges, etc.

This study is related to the area of finance, so the main source of data used for such studies is secondary data, because for such type of studies researchers collect data for their studies from different databases, so these studies are conceptual in nature. Therefore the final sample of 105 articles selected for this study is based on all conceptual articles.

The two main research methods used are qualitative and quantitative methods. Qualitative research is more subjective in nature and no statistical tests are applied to it. In contrast, quantitative research involves statistical techniques are used for the purpose of analysis.

Four categories can be formed by combining qualitative and quantitative research methods with empirical and conceptual studies. These are empirical qualitative, empirical quantitative, conceptual qualitative and conceptual quantitative.

In the current study all the conceptual quantitative articles are included. The authors of all these articles have used statistical techniques and observed the effect of different variables on the profitability of that business. Also, these articles are conceptual because they have used data taken from different data sources. So the final sample of the current study is based on conceptual quantitative articles only.

ANALYSIS

In this section results of content analysis are presented in two categories: methodological and publication trends. All the methodological and publication trends are provided in detail. Advance cross tabs have been done between different categories of methodological analysis.

METHODOLOGICAL DEVELOPMENTS

This study is based on all the conceptual quantitative studies. This section provides an overview of the methodological developments across regions and times within the discipline of firm profitability.

Figure 1, in Appendix 1, represents the distribution of a total of 105 studies across time. All the studies are conceptual and quantitative because each study is using data from secondary sources and some statistical techniques are applied to that data in order to determine the profitability. The total studies are almost equally distributed in both time frames. Up to 2005 there was a total of 51 studies, whereas in the post-2005 era this number increased to 54. This increase could be due to the greater availability of data sources.

Figure 2 shows the distribution of total studies among various regions. As the figure depicts, out of 105 studies, 33 studies have been done in Asia. This region includes all the countries form Eastern Asia, South-Central Asia and South-East Asia: Malaysia, Japan, China, Taiwan, Sri Lanka, Pakistan, Korea, Vietnam and India. 28 studies have been done in the region of North America. The next highest number of studies comes from Europe; the countries included in this region are Spain, Turkey, Germany, Belgium, France, Greece, Italy, Lithuania and Norway. And in the 'Others' category, countries like Nigeria and Ghana from West Africa and another country, Australia, are included; the total number of studies done in this region is 7.

In Figure 3, a trend in publication is revealed across time and regions. The figure shows that up to 2005 (1967-2005), most of the work was done in North America, but in the post-2005 era (2006-2014), authors from Asia have contributed most in the discipline of firm profitability. In Europe in the first few decades, fewer studies were done, but then in the post-2005 era there was an increase in the number of studies from 10 to 13 studies. A drastic increase is shown in Asia, where the number of studies done before 2006 has been increased from 7 to 26 studies.

Studies use different models in order to understand what actually determines the profitability of firms or industries and how it is going to affect the overall firm performance. Figure 4 represents studies using models with secondary data and 'Others' are the studies without using models to present their findings.

Stierwald (2010) in his study used two schools of thought identified by the modern literature in the discipline of industrial economics. The author used them in order to determine the performance of firms in terms of profitability. These two schools of thoughts were: firm effect model and structure conduct performance (SCP). He explained that in SCP, market structure is the main determinant of firm profitability, and profitability is mainly determined by the industry characteristics, whereas in the firm effect model, it is the firm characteristics that determine the firm profitability. The author examined the determinants of profitability of larger Australian firms and reached conclusions in terms of the models. The main findings of his study were that variables at firm level determine the profitability of firms and industrial characteristics play a minor role.

Similarly, in the current study authors have used different models to explain the determinants of profitability. Most of them used the fixed effect model and random effect model. A few studies have used a multivariate model such as the CAPM model, Fama and French three-factor model, Carhart four-factor model, and five-factor model, and explained their findings in terms of the model used in their study.

Figure 5 shows the distribution of sample size used by studies. 28% of the studies have used the sample size in the range of 0-100. This is then followed by 16% of studies using a sample size of 100-200. There are very few studies using a sample size from medium to large. Only 6% of studies have a sample size of 501-1000. But 15% of studies have used a sample size of 1000 and above, when authors tried to determine the profitability of firms operating at multinational levels or when cross-country comparisons were made. A cross-sectional comparison was done among firms in that particular country with initial public offerings. It had a sample size of 1000 and above. Usually when comparisons were made at a large scale, a large sample size (1000 and above) was used. And comparisons among firms in a particular industry were made using a small size. Also in a few studies, authors were unable to collect data on firms that interested them, which is why they had to restrict their sample size to a small sample.

A comparison was made between the sample size and time in Figure 6, in Appendix 2. As the line of the graph shows, in both the time periods (1967-2005 and 2006-2014) studies have almost followed the same trend. Most of the studies use a sample size of 0-100 or 101-200. However, there is one change that can be seen from the graph, which is that in the period 1967-2005, very few studies have used a sample size of 1000 and above. But in time period 2006-2014 there has been a large increase in using a sample size of 1000 and above, because technology evolved greatly and there was an increase in multinational companies operating in different countries. This is why in order to look at the impact of research, development and technology on firms' profitability, large sample size was taken by the researchers in order to generalise the results.

Figure 7 presents data collection sources used in the articles examined in the current study. The most common data collection source is databases or different databanks such as the Fortune, Compustat, CMIE, Capitaline, ICAP, PATDAT, Compustat (Global), "NEEDS-Financial QUEST", and CMIE Prowess databases. Authors have used databases in their studies of the respective countries on which their studies were based. The next prominent source trend of studies is using annual reports as data collection source of firms of their interest. Stock exchanges have also been used to collect the data when information was required for all the companies listed on stock exchanges. A number of studies also used more than one data collection source.

In the current study, the unit of analysis includes both banks and companies. The number of units of analysis selected by these studies is given in Figure 8. In all the articles included in this study, the terms 'firms' and 'companies' have been interchangeably. But for banks the word 'bank' has been used. In a total of 105 studies, only three studies have used banks as their unit of analysis and the rest of the studies have used companies as the unit of analysis.

Analysis of statistical techniques used by the studies is shown in Figure 9. Mostly descriptive statistics techniques (mean, median, max, min, scatter plots, histogram, variance standard deviation, etc.) are being used by the studies. 22% of studies are using different types of regression other than the linear regression. This is shown in the 'Other Regression' category, which includes various types of regressions such as multivariate regression analysis, pooled OLS regression models, cross-sectional regression analyses, panel data regression, etc. 12% of the studies have used linear regression analysis as a statistical technique to quantify their results. The technique of ANOVA/MANOVA is used by only 4% of studies. Similarly, ratio analysis is used by 2% of studies only. In others, statistical techniques such as chi square, Durbin Watson, path analysis, White test, factor analysis and F-statistics have been used.

Authors have selected different countries for their studies. Figure 10, in Appendix 3, presents the countries of data collection that have been used four times or more than four times. Countries of data collection appearing less than four times are included in the 'Others' category; most of these countries have appeared just once, like Vietnam, Thailand, Turkey, Norway, Italy, Portugal, etc. 24 studies have used USA as the country of data collection; most of the authors of these studies are from the same region, North America, but a few authors from North America collaborated with authors from Europe and Middle East to work on US firms.

In Asia, the countries of data collection are mainly India, Japan, China and Pakistan. Authors in this region have worked in collaboration with authors form other region like North America and Australia. There are a few other countries in the same region but they appeared just once. In Europe more studies have used data from countries like Germany and Greece. In the category 'Different Countries', authors have included more than one country in their studies for analysis. For example, in one study countries from regions such as North America, Europe and East Asia are included. The authors of this study are from Asia and they worked on multinational companies in the international engineering and construction industries.

Authors have chosen either a cross-sectional or longitudinal time horizon. In terms of the time horizon, most of the studies are cross-sectional in nature. Only 38% of total studies are longitudinal studies. In finance, most of the studies have used a cross-sectional time horizon in their studies. Longitudinal studies are fewer than cross-sectional studies, mainly because of the fact that in the long run market conditions change, so this ultimately has an impact on the determinants of profitability. This is why it is better to look at trends over a shorter time period. The reason that longitudinal studies are used less in studies is because it is costly to get the required data and information. Another limitation of longitudinal studies is that while it reveals changes

over time, it tells us very little about what actually caused the change. This change could be because of the change in business cycle or market conditions.

Figure 11 presents the types of industries included in current study. 23% of studies have been in the manufacturing industry. In the manufacturing industry, industries like consumer goods manufacturing, healthcare, machinery, packaging and all the firms related to manufacturing business are included. In a few studies, all the firms related to the manufacturing business were included for analysis in order to determine the factors that can have an impact on the profitability of those companies. In the engineering industry all industries like the automobile, aluminum and steel industries were included, and the proportion of studies done in this discipline is 16%. The non-financial sector comprised 11% of studies; in this sector all the companies that are non-financial in nature are analysed for the respective country. Government-listed companies and multinational companies both comprised 7% of studies.

3% of total studies are from the banking sector. In the airline industry, 3% of studies have been done and this work has been in North America only. In the category of 'various industries', industries like new business startups, firms using new innovations in their business, telecommunication industry, food industry, textile industry, etc. are included. All these industries have appeared less than three times in the current study. In multinational companies' sector, all the countries where that multinational company is operating were taken into account in order to make a comparison among companies and to determine what actually are the main determinants of profitability of these companies in that country. These multinational companies belonged to different industrial sectors such as foreign subsidiaries, multinational industrial enterprises, foreign acquired and non-acquired companies, and international engineering and construction industries.

PUBLICATION TRENDS

This section includes publication trend analysis of 105 studies in terms of authorship type, authorship per study and publication in higher-ranking journals.

Figure 12 presents the authorship type of all studies. All the authors in the current study were academics except for a single collaboration between an academic and practitioner. Bartunek and Daft (2001) in their study, explored this widening gap between academics and practitioners. They made a few suggestions, such as that a higher level of interaction of an academic with a practitioner will help to improve the quality of research. Also, system support such as from journal editors can really help in improving academic-practitioner relationships. It would really help to improve to generate and disseminate knowledge.

Figure 13 reveals authorship per study. Two authors per study has been the most common practice in the current study; 44% of studies have two authors. It is followed by 26% of studies with three authors per study. And next comes single authorship, at 23% of studies. Very few studies have four or five authors per study.

With respect to authors' region, in North America and in the 'Others' region, which includes Australia and Africa, there are no studies with four or five authors. And in Europe no study has five authors per study, but in this region all the rest of the combinations of authorship are found. Only in Asia and in collaboration, where authors are collaborating from different regions all five types of authorships have been used in studies.

DISCUSSION OF RESEARCH FINDINGS

An increasing trend has been observed in Asia, with publishing more studies in the time period 2006-2014. The same trend has been observed in Europe. But in North America fewer studies have been published in the post-2005 era.

More triangulations are found in terms of: more than one author per study, and more than one statistical technique used by studies in order to look at every dimension of the factors determining the profitability of that particular firm.

Academics seem to dominate the research in this area. Practitioners should be encouraged to contribute by participating more in research activity. There should be more collaboration between practitioners and academics.

Collaborations can exist among authors from different regions. This can really be helpful in order to determine the profitability of multinational firms in particular. This is because in the case of multinational firms the profitability is mainly determined by the national factors related to that particular country, so authors from that country can give a more clear and comprehensive picture of what actually is affecting the profitability of multinational firms operating in that country.

CONCLUSION AND FUTURE RESEARCH OPPORTUNITIES

In the literature, content analysis-based reviews of determinants of business profitability use thematic analysis. In recent times no study has been done on the methodological and publication trends in the factors determining the profitability of business. This study is a content analysis-based review of the literature on business profitability based on the methodological and publication trends in determinants of business profitability. Cross tabulations among various categories of data were done across time and authors' regions. An increasing trend is observed in authors contributing from Asia. Also, collaboration between authors from different regions has been found. Analysis revealed that most of the studies have followed the authorship type of two authors. This methodological development and publication trend analysis of determinants of business profitability has developed some useful insights for future research opportunities.

- Research opportunity 1: Mixed-methods research designs such as qualitative and quantitative research designs have the potential to capture reality in its true sense, and more generalisable results can be produced.
- Research opportunity 2: In the current study about 99% of studies are authored by academics. There needs to be more collaboration between academics and practitioners studying business profitability.
- Research opportunity 3: More cross-sectional studies are done. There is a need to widen the scope of longitudinal studies.
- Research opportunity 4: Empirical research has the potential to unearth reality in order to produce more generalisable results in the discipline of determinants of business profitability.
- Research opportunity 5: There needs to be more collaboration among authors from different regions.

LIMITATIONS OF THE CURRENT STUDY

The current study is based on 105 articles, which is a very small sample size. With such a small sample, results cannot be generalised. By taking a large sample size, research findings can be generalised in a broader sense.

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Appendix 1

Figure 1: Total studies vs time

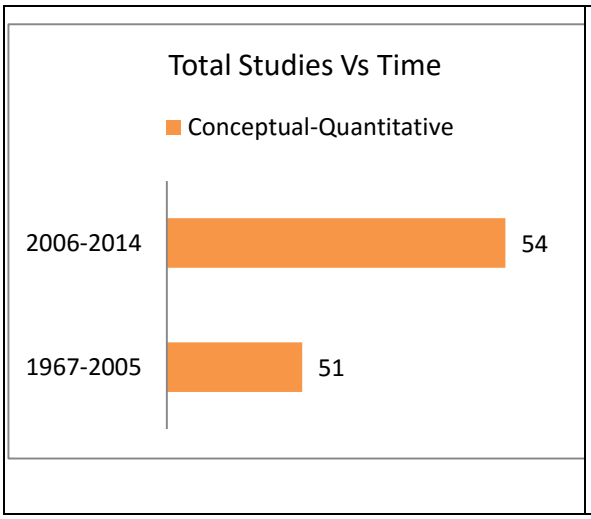


Figure 2: Publication trends across regions

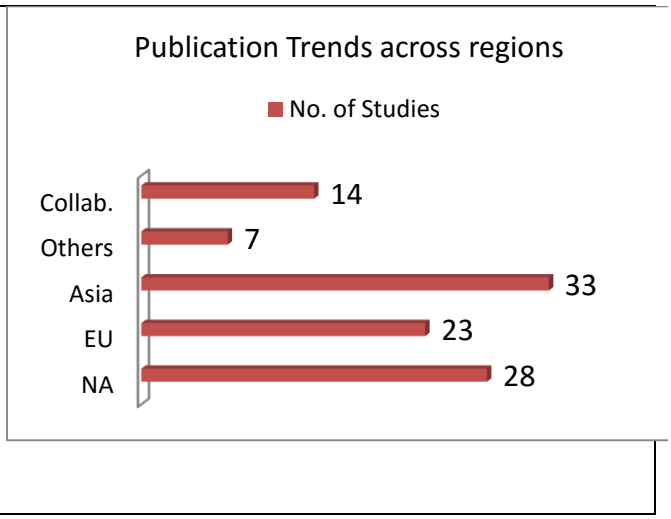


Figure 3: Total studies vs. time and authors' region

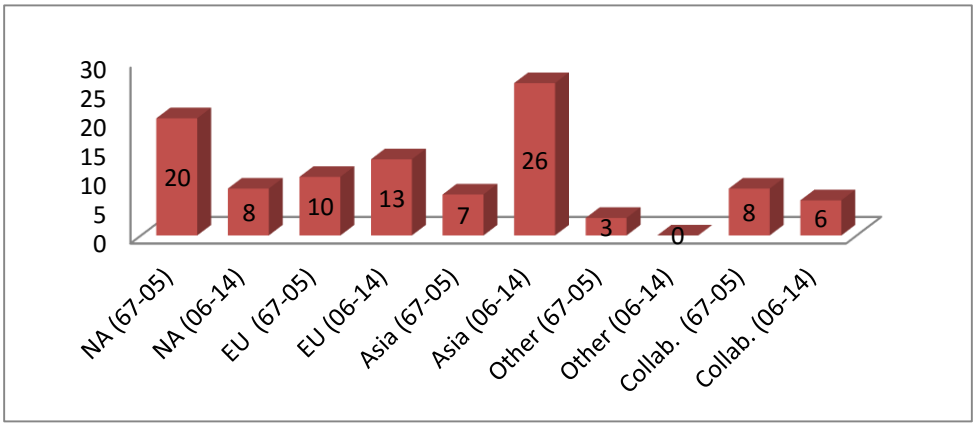


Figure 4: Studies using models with secondary data

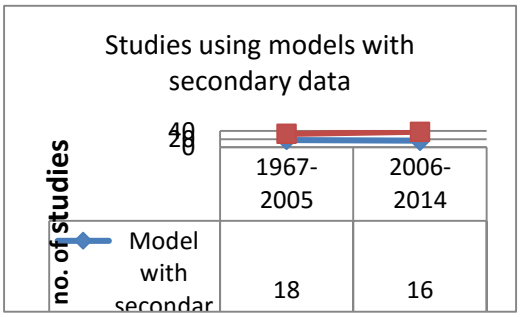
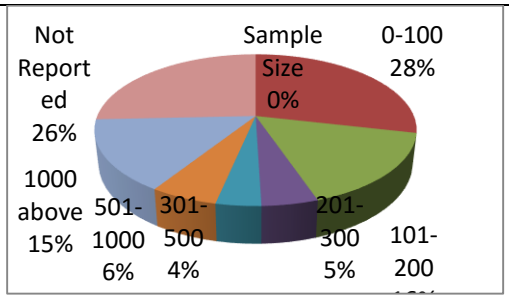


Figure 5: Sample size



Appendix 2

Figure 6: Sample size and decades

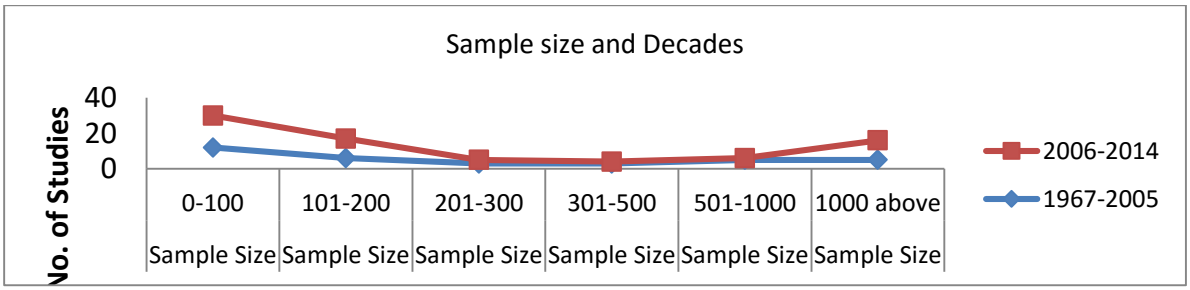


Figure 7: Data collection source of studies

Figure 8: Unit of analysis: Total studies

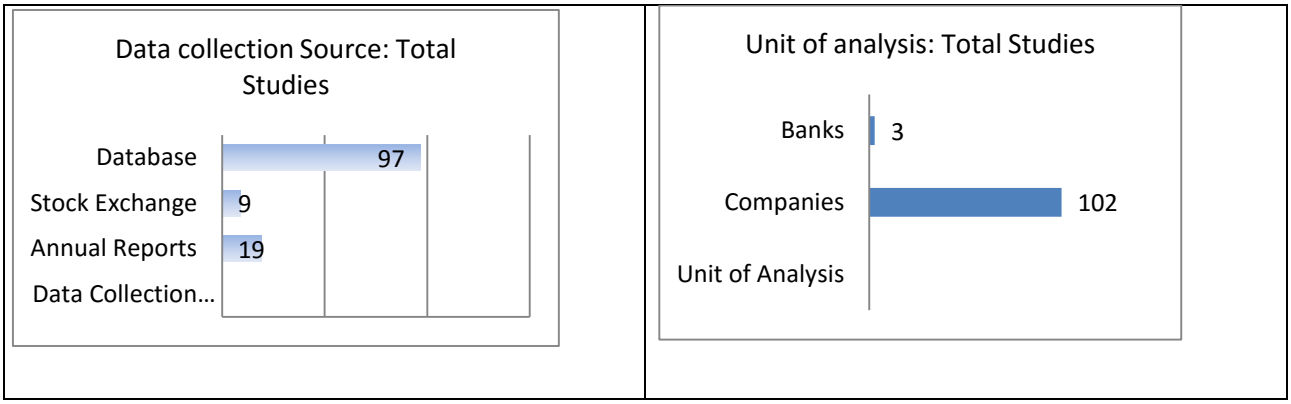
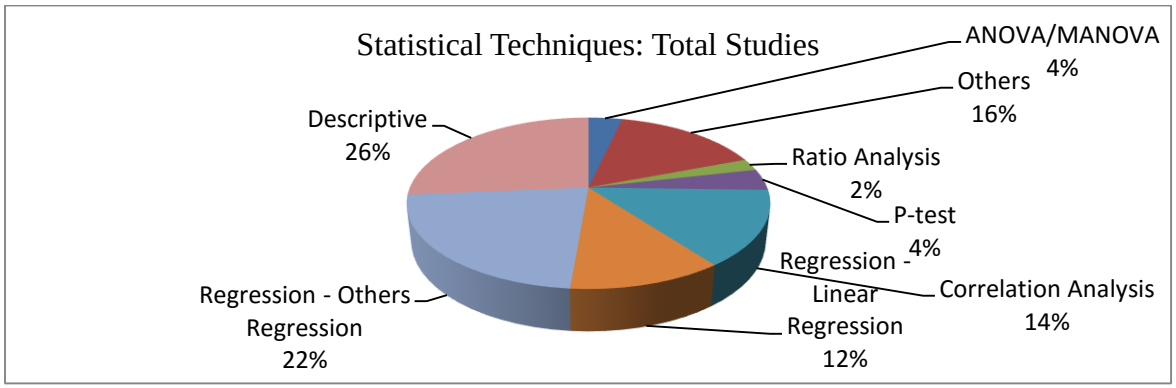


Figure 9: Statistical techniques: Total studies



Appendix 3

Figure 10: Country of data collection

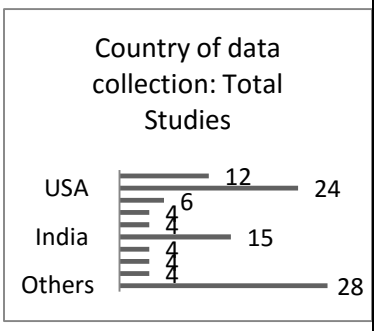


Figure 11: Types of industries and total studies

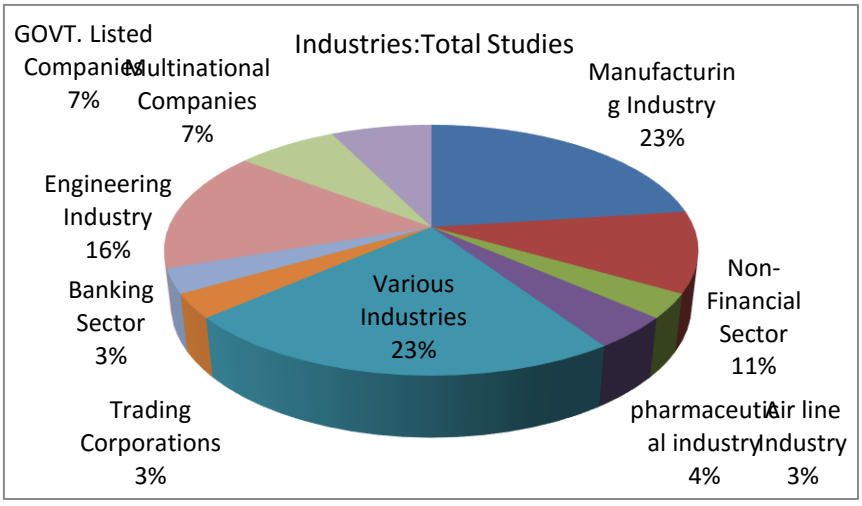
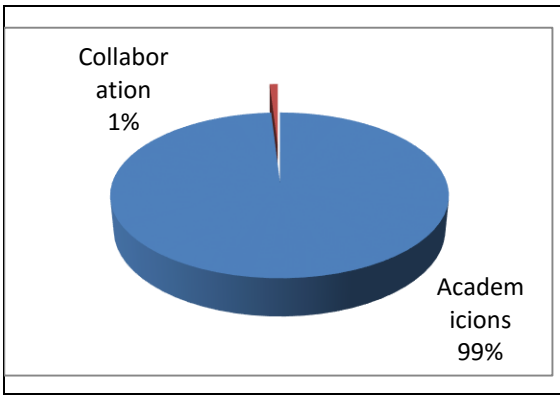
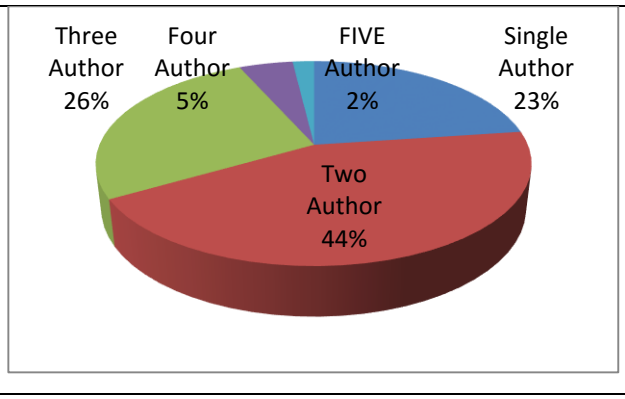


Figure 12: Authorship type: total studies

Figure 13: Authorship per study





Respondent Country of Data Collection																		
Australia AUS	1	100%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%
China CHINA	4	50%	50%	0%	25%	25%	0%	50%	0%	0%	0%	100%	100%	0%	0%	0%	50%	50%
Brazil BRAZIL	1	0%	100%	0%	100%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%
Belgium BELG	3	67%	33%	0%	100%	0%	0%	0%	0%	0%	67%	33%	0%	0%	0%	0%	0%	0%
Canada CAN	1	100%	0%	100%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Finland FIN	1	100%	0%	0%	100%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%
France FR	1	100%	0%	0%	100%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%
Germany GER	4	50%	50%	0%	100%	0%	0%	0%	0%	0%	50%	50%	0%	0%	0%	0%	0%	0%
Ghana GHANA	1	100%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%
Greece GREECE	4	75%	25%	0%	50%	0%	0%	50%	0%	0%	50%	50%	0%	0%	0%	0%	100%	0%
India INDIA	15	13%	87%	0%	0%	93%	0%	7%	0%	0%	0%	0%	14%	86%	0%	0%	0%	100%
Italy ITLY	1	0%	100%	0%	100%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%
Japan JAPAN	4	25%	75%	25%	0%	25%	0%	50%	0%	100%	0%	0%	0%	100%	0%	0%	50%	50%
Korea KOREA	2	50%	50%	0%	0%	100%	0%	0%	0%	0%	0%	0%	50%	50%	0%	0%	0%	0%
Malaysia MALA	2	0%	100%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%
Lithuania LITHU	1	0%	100%	0%	100%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%
Newzeland NEWZ	1	0%	100%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Nigeria NIG	4	25%	75%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	25%	75%	0%	0%
Norway NOR	1	100%	0%	0%	100%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%
Pakistan PAK	6	17%	83%	0%	0%	100%	0%	0%	0%	0%	0%	0%	17%	83%	0%	0%	0%	0%
Portugal PORT	1	100%	0%	0%	100%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%
Spain SPAIN	2	0%	100%	0%	100%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%
Sri Lanka SRI	1	0%	100%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	100%
Taiwan TAIWAN	2	50%	50%	0%	0%	100%	0%	0%	0%	0%	0%	0%	50%	50%	0%	0%	0%	0%
Thailand THAI	1	100%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	0%	100%	0%
Turkey TURKEY	1	100%	0%	0%	100%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%
UK UK	2	100%	0%	0%	50%	0%	0%	50%	0%	0%	100%	0%	0%	0%	0%	0%	100%	0%
USA USA	24	71%	29%	79%	4%	8%	0%	8%	74%	26%	100%	0%	0%	100%	0%	0%	100%	0%
vietnam V	1	0%	100%	0%	0%	100%	0%	0%	0%	0%	0%	0%	0%	100%	0%	0%	0%	0%
Different Countries DC	5	40%	60%	40%	0%	20%	0%	40%	50%	50%	0%	0%	100%	0%	0%	0%	0%	100%
Not Given NG	7	71%	29%	71%	14%	14%	0%	0%	80%	20%	100%	0%	0%	100%	0%	0%	0%	0%
Number of Authors																		
1	24	46%	54%	33%	13%	38%	13%	4%	63%	38%	33%	67%	22%	78%	67%	33%	100%	0%
2	46	50%	50%	26%	24%	30%	4%	15%	92%	8%	64%	36%	21%	79%	0%	100%	29%	71%
3	28	50%	50%	29%	25%	25%	7%	14%	50%	50%	57%	43%	14%	86%	50%	50%	100%	0%
4	5	40%	60%	0%	40%	40%	0%	20%	0%	0%	50%	50%	0%	100%	0%	0%	100%	0%
5	2	50%	50%	0%	0%	50%	0%	50%	0%	0%	0%	0%	100%	0%	0%	0%	0%	100%

Appendis III - Publication Patterns (Percentages)

		By Years		By Region					By Years within Region									
									NA		EU		ASIA		OTHERS		COLLAB.	
	Total	1967-2005	2006-2014	NA	EU	Asia	Others	Collab.	1967-2005	2006-2014	1967-2005	2006-2014	1967-2005	2006-2014	1967-2005	2006-2014	1967-2005	2006-2014
Total Studies	105	51	54	28	23	33	7	14	20	8	13	10	7	26	3	4	8	6
Authorship-Type																		
Academics	99%	100%	99%	99%	99%	99%	99%	99%	99%	99%	99%	99%	99%	99%	99%	99%	99%	99%
Acad./Practioner (Collaboration)	1%	100%	1%															
Authorship-Per Study																		
Single Author	23%	22%	24%	29%	13%	27%	43%	7%	25%	38%	8%	20%	29%	27%	67%	25%	13%	0%
Two Author	44%	45%	43%	43%	48%	42%	29%	50%	55%	13%	54%	40%	43%	42%	0%	50%	25%	83%
Three Author	27%	27%	26%	29%	30%	21%	29%	29%	20%	50%	31%	30%	14%	23%	33%	25%	50%	0%
Four Author	5%	4%	6%	0%	9%	6%	0%	7%	0%	0%	8%	10%	0%	8%	0%	0%	13%	0%
FIVE Author	2%	2%	2%	0%	0%	3%	0%	7%	0%	0%	0%	0%	14%	0%	0%	0%	0%	17%
Journals (Highest Publications)																		
Strategic Management Journal(A*)	5%	8%	2%	0%	9%	3%	0%	14%	0%	0%	15%	0%	0%	4%	0%	0%	25%	0%
Corporate Governance: An International Review (A)	4%	6%	2%	0%	9%	0%	0%	14%	0%	0%	15%	0%	0%	0%	0%	0%	13%	17%
Accounting & Finance (A)	3%	0%	6%	0%	9%	3%	0%	0%	0%	0%	0%	20%	0%	4%	0%	0%	0%	0%
International Journal of Business Insights & Transformation	3%	0%	6%	0%	0%	9%	0%	0%	0%	0%	0%	0%	0%	12%	0%	0%	0%	0%
The Journal of Finance(A*)	3%	6%	0%	11%	0%	0%	0%	0%	15%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Journal of Management & Governance (C)	3%	4%	2%	4%	4%	0%	0%	7%	5%	0%	8%	0%	0%	0%	0%	0%	0%	17%
Managerial & Decision Economics(B)	3%	4%	2%	7%	0%	0%	0%	7%	10%	0%	0%	0%	0%	0%	0%	0%	0%	17%

Appendix 4

Authors' regions	Northern Asia	Australia	Eastern Asia	Eastern Europe	North America	North America	Northern Europe	Southeast Asia	South-East Asia	Southern Europe	Western Europe	Grand Total
Australia												
Brazil												
Eastern Asia		1				1		1				3
Eastern Europe	1											1
Middle East					1							1
North America			1				2		1	1		5
Northern Europe												
Oceania; Australia												
South-Central Asia				1								1
Southeast Asia												
Southern Europe							1				2	3
West Africa												
Western Europe												
Grand Total	1	1	1	1	1	1	3	1	1	1	2	14

L8-2147

ANTI-BID RIGGING IN THE VIETNAMESE PUBLIC PROCUREMENT MARKET: A CRITICAL ASSESSMENT UNDER COMPETITION AND BIDDING LAW.

TAM, THANH TRAN[1] AND HOANG, TIEN NGUYEN[2]

ABSTRACT

Collusion in the Vietnamese public procurement market is a harmful infringement falling within the sphere of both the Vietnamese Competition law and the Vietnamese Bidding Law. However, there has been a significantly limited number of bid rigging cases detected and prosecuted since these laws was first promulgated in 2004 and 2005 respectively. By revisiting the VCL and VBL and relevant governmental Decrees, this paper identifies several shortcomings of these laws contributing to the failure of anti-bid rigging mechanism under Vietnamese public market.

***Key Words**: Bid-rigging, collusive tendering, competition law, public procurement rule, Vietnam.*

INTRODUCTION

Bid rigging is a variegated phenomenon under Competition and Public procurement rules. In Vietnam, this kind of collusion is prohibited under the Vietnamese Competition Law (VCL) and the Vietnamese Bidding Law (VBL). There have been, however, no bid rigging cases either prosecuted by Vietnam Competition Administration Department (VCAD) or adjudicated by Vietnam Competition Commission (VCC) during the last ten years since VCL came into effect on July 1, 2005. Ironically, bid rigging practices are showing no signs of decline and becoming more and more sophisticated through daily newspapers and periodicals. In tandem with the VCL, it is highly noted that the current VBL not only identifies bid rigging collusion as a violation of public procurement rules but also offers a system of sanctions under the enforcement of competent public procurement authorities which is totally different from that of the VCL.

This paper thus aims at explaining the failure of the Vietnamese anti-bid rigging enforcement. Accordingly, the legal regime applicable to bid rigging in Vietnam will be introduced in section 1, followed by a critical assessment of this regime in section 2. The last section concludes several shortcomings that needs further research for improving the current anti-bid rigging mechanism.

OVERVIEW OF THE VIETNAMESE LEGAL FRAMEWORK OF ANTI-BID RIGGING

This section will provide an overview on law regime governing bid rigging conspiracies in Vietnam. Accordingly, the Vietnamese Law on Competition (VLC) and other Government Decrees guiding this law will be examined first, followed by Law on Bidding and its respective Decrees.

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The Vietnamese Competition Law

The VCL was promulgated on December 3, 2004 in an effort to establish a legal framework for a more effective competitive economy as one of the mandatory requirements for Vietnam's accession to WTO. VCA was the outcome of a four-year drafting process with the technical support of the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Program. It is ascertained that VCA is based on the model laws of UNCTAD and the World Bank as well as practical experiences of other countries. However, the VCA is principally patterned on the EU competition law model, particularly Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (Thanh Tu, 2012; Vinh, Bac and Son, 2010; USVTC, 2006). In addition to VBL, Governmental Decrees including Decree No. 116/2005 and Decree No.71/2014/ND-CP are seen the secondary legislations providing guidance for VCL implementation.

Bid rigging is seen 'an agreement in restraint of competition' followed by per-se rule under the ambit of Article 8 of VCA. The enforcement of bid rigging is fully backed up by a system of sanctions under the investigating competence of Vietnamese Competition Administration Department (VCAD) and Vietnamese Competition Council (VCC). Given new competition mechanism, it is expected that cartel infringements in general and bid rigging in particular will come to light. There has been, however, no bid rigging cases either prosecuted by the VCAD or adjudicated by the VCC during the last ten years since the VCA came into effect on July 1, 2005. Ironically, bid rigging practices are showing no signs of decline and becoming more and more sophisticated through daily newspapers and periodicals.[3]

The Vietnamese Bidding Law

The new Bidding Law, being amended from the first Bidding Law promulgated in 2005, was adopted in 2013. The current regulatory framework also references to the US Federal Acquisition Regulation and the model laws as well as guidelines promoted by international organizations such as UNCITRAL, World Bank, ADB and OECD. Also, Vietnamese Government enacted the new Decree No. 63/2014/ND-CP to specify regulation of the current Bidding law.

Noticing that bid rigging is a form of private restriction of competition which prevents public procurers from obtaining the best value for money, the current Bidding Law and the relevant Decree build up a mechanism on handling this violation with the support of distinctive sanctions and competent public procurement bodies at both central and local levels. However, the anti-bid rigging combat under the mechanism of the VBL seems ineffective when the number of official bid rigging cases have been scant. More seriously, this situation leads to the tension and the overlap between the competition law and the public procurement law in terms of anti-bid rigging regulation.

Examining the failure of anti-bid rigging enforcement, the next section will closely scrutinize the current legal framework of anti-bid rigging under the comparative jurisdiction's perspective of the US and the EU. This would help identify the shortcomings under the two Laws and thus create a solid platform for proposals amending current legislation in the last session of this paper.

Critical assessment of the Vietnamese legal framework of anti-bid rigging

It bears mentioning that the enforcement against bid rigging collusions requires not only effective cartel law, appropriate sanctions, leniency programme but also close cooperation between public procurement agencies and competition authorities in terms of bid rigging detection (Anderson, Kovacic and Muller, 2011, p 703-716; Lang, 1998, p. 56). This section

thus examines the concepts of bid rigging and its forms, sanctions, leniency programme and the relationship between VCAD and public procurement bodies under VCL and VBL respectively.

Definition and classification of bid rigging

Bid-rigging is prohibited by Article 8 of VLC as *'an agreement in restraint of competition'*[4]. Accordingly, this offence can be defined as the collusion among bidders to win bids for supply of goods or provision of services. With regard to the regulation's cope, it bears mentioning that the bid rigging conspiracies only occur among bidders (Long, 2011, p. 262). It can be inferred that collusions made between bid solicitors and bidders to facilitate these bidders to win the bid may not fall within the ambit of Article 8 of Competition law (Son, 2006). This exclusion can be explained based on the function of VLC which is controlling and adjusting of the bidder's behaviours and the relationship among them to ensure that such bidders compete competitively (Thanh, 2012). In comparison with VLC, other jurisdictions such as the US and the EU also have the same approach where the collusions made among the bidders only.[5] As regards the form of Bid rigging, the Article 21 of Decree No. 116/2005[6] reflects commonly recognised ones as follows:

> *'1. One or more parties to an agreement withdraw from participating in the bidding or retract their bids already submitted so that one or more parties to the agreement win the bid.*
> *2. One or more parties to an agreement cause difficulties to non-parties to the agreement which participate in a bidding, by refusing to supply raw materials or to sign subcontracts or otherwise.*
> *3. All parties to an agreement agree to offer non-competitive bids or competitive bids accompanied with conditions unacceptable to the bid inviter so as to pre-determine one or more parties that will win the bid.*
> *4. All parties to an agreement pre-determine the number of times each party will win the bid for a given period of time.*
> *5. Other acts prohibited by law.'*

As can be seen from the above, this classification embodies the popular forms of bid rigging (OECD, 2012) such as bid suspension (reflected in sub-para (1)), cover bidding (reflected in sub-para (3)) and bid rotation (reflected in sub-para (4)). It is submitted that the Vietnamese legislators add the practice to prevent collusive bidders from causing difficulties to parties who are not the member of the bidding cartels. This practice is not considered a form of bid rigging in other jurisdictions like the US or the EU. It is also highlighted that this is by no means a closed list. By adding the term 'other acts prohibited by law', it can cover other forms of bid rigging which are not clearly stated in this law.

Bid rigging conspiracy is also prohibited by Article 89.3 of the Vietnamese Bidding Law. The legislators do not provide the definition of bid rigging. Rather, they stress on the form of such practice:

> *'Conclusion with each other in bidding, including the following acts:*
> *a) Agreeing on bidding withdrawal or withdrawal of bidding application already been submitted previously so that one party or parties in agreement win bid;*
> *b) Agreeing to let one or many parties to prepare bid dossier for parties of bidding so that one party may win bid;*

[4] The Vietnamese law is silent on the definition of an 'agreement in restraint of competition'. Pursuant to Article 3.3 of VLC, this practice is seen a form of competition restriction acts which are defined as 'acts performed by enterprises to reduce, distort and prevent competition on the market'.

[5] See Article 5.5 of China Anti-monopoly Law 2007, Article 101(1) TFEU and Article 3 and Article 2(6) of Japan Anti-monopoly Law, and the Section 44ZZRD(3)(c) of the Australian Competition and Consumer Act.

[6] Decree No.116/2005 provides detailed regulations for implementing several articles of VLC.

c) Agreeing on refusal for goods provision, refusal for signing contract of sub-contractor, or forms which cause other difficulties to parties which refuse to participate in agreement.'

Three main forms of bid rigging formulate a closed list, and thus exclude any forms of bid rigging which are not stipulated under this Article will fall outside the ambit of the Vietnamese Bidding Law. It is submitted that the form of bid rigging reflected in the sub-paragraph a) is bid suppression. However, it seems that the other forms of bid rigging such as complementary bid or bid rotation are not caught by this Article although sub-paragraph b) is argued to be more relevant to complementary bid. In my view, it is a subset of the complementary bid. Intrinsically, complementary bid occurs when parties to the collusion submit a higher bid than the designated winner or submit bids with unacceptable specifications. To aim at this, the parties may consent to let one or more bidders to prepare bid dossiers for the remaining bidders. In other words, the sub-paragraph b) represents a method to get complementary bid rather than a complementary bid itself.

Instead of referencing to the definition of bid rigging under VLC, VBL forms a slightly different definition of bid rigging. Specifically, while VLC's definition is much broader and in line with the understanding of OECD and other competition authorities, the VBL's definition does not cover all forms of bid rigging that make competent public procurement agencies have difficulties identifying and detecting bid rigging.

Sanctions

Fines

The fines for offences violating competition law in general and bid rigging conspiracies in particular are governed by Decree No.71/2014/ND-CP. This new Decree is promulgated to develop further and refine the fine polices which had been governed by the Decree No.120/2005/ND-CP for more than nine years. Pursuant to Article 17 of the Decree No.120/2005/ND-CP, the fine for bid rigging is up to five percent of the total revenue of undertaking in the financial year prior to the year in which the breach was committed.[7] This fine will be increased from 5 to 10 per cent either for bid rigging conspiracy leaders or for the goods and services for which the bid was rigged are listed under the Article 10.2 of such Decree. It is noted that the new Decree, however, no longer divides the fine into two levels: Up to 5 percent and from 5 to 10 percent. Rather, Article 15 of this Decree envisages administrative fines not exceeding 10 per cent of the total revenue of undertaking in the financial year prior to the year in which the breach was committed. It bears mentioning that the fine for bid rigging conspiracies in Vietnam is equivalent to that in the EU.[8] Although turnover based fine calculation is preferable among many competition legislations, this proxy is claimed not to be plausible enough to have a sufficiently deterrent effect on cartels. Weishaar points out that turnover based fine calculation may lead to under deterrence and over deterrence (Riley, 2011, p. 553). Specifically, the former exists when a cartelist only serves the cartelized market. In such situation, the basic fine level for this undertaking may exceed the fine cap of 10 per cent of its turnover (Weishaar, 2013). This argument is reinforced when an empirical finding shows that undertakings fined with the higher ratio of their turnover are generally single-product companies while ones fined with the lower ratio of their turnover tend to be larger companies with a multi-billion turnover (Riley, 2011, p. 555). A further problem with turnover based fine calculation is that in a situation where a member cartel has sales turnover but no profits or

[7] It was argued that this fine was too low to secure efficient deterrence. However, according to the Vietnam competition authority, five per cent of total revenue of Vietnamese undertaking in one financial year may even make such undertaking go bankrupt. See VCA, justification and acceptance for comments on Draft Decree 120/2005/ND-CP.

[8] See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).

inconsiderable profits, this proxy may be inappropriate to determine the fines (Ehmer and Rosati, 2009, p. 4).

Two-step method for setting the fines is established by the new Decree including (1) setting the basic fine and (2) adjusting the basic fine based on the certain circumstances.[9] With regard to the first step, the basic fine will be determined by reference to the percentage of the turnover or value of the goods and services related to the violations within the time the undertaking commits violations.[10] This percentage may depend on seven factors listed under Article 4.4 of this Decree: Anti-competitive decree of the violations; Extend of damage caused by the violations; Anti-competitive potential of Bidders; The time when the violations are committed; Scope of violations; Profits from the violations; other essential factors related to each specific case[11]. It is noticeable that this regulation stipulates only the principles to determine the proportion of sales value. Therefore, it allows the competition authority to enjoy a wide margin of discretion to define which percentage of sales value will be applied to specific cases. However, it remains unclear for the competition authority to determine which ratio of sales revenue may produce the deterrent effect for cartelists. In this regard, the basic fine for bid riggings in the EU law may be up to 30 per cent of the sales value of the cartelized goods and services in the relevant market during the cartel year. Furthermore, this basic fine may include another 15 to 25 per cent of the determined sales value known as the additional punishment for horizontal cartels. The basic fine of bid rigging infringement may be, consequently, up to 55 per cent of the sales value of the cartelized goods and services in the relevant market.

In terms of the 2nd step, the basic fine will be adjusted on the basis of aggravating and mitigating circumstances which are stipulated in Article 4.5 of this Decree. Accordingly, the fine might be correspondingly reduced or raised by 15% for each circumstance. It is noticeable that the present Decree is an important improvement when compared to its previous Decree No. 120/2005/ND-CP that fails to set up the specific method for determining and adjusting the basic fines. Article 85 of Decree 116/2005/ND-CP lists four aggravating circumstances and four mitigating circumstances. It can be inferred that the infringement fine will be reduced or increased up to 60% of the basic fine. There is considerable uncertainty as to the basis on which 15 per cent of turnover threshold is applied to consider these circumstances. VCAD, however, claims that this threshold is plausible enough not only to achieve the deterrence but to ensure the undertaking's ability to pay the fines.

Considering the administrative fines for bid rigging collusions, instead of being directly envisaged under the Vietnamese Bidding Law, such provisions are in the ambit of relevant Sub-laws. According to Article 13.7 of Decree No. 53/2007/NĐ-CP[12], an administrative fine ranging from VND 20,000,000 to VND 30,000,000[13] shall be applied to undertakings in bid-rigging conspiracies. It is clear that the administrative fine of Competition Law and Bidding Law is determined by different criteria. While the former requires sufficient monetary resource, the latter is decided on the basis of the revenue percentage. It seems that the fine sanction under the Competition law will have more deterrent effects than that under the Bidding law if bid riggers

[9] This new regulation of Decree No.71/2014/ND-CP is principally based on the EU competition legislation, especially Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).

[10] It is noted that the method to determine the basic fine in EU competition is different from that in Vietnam legislation. Specifically, the basic fine is set based on the proportion of the sale value of the goods and services in the relevant market during the last full business year of undertaking's participation in the infringement. This basic fine then will be multiplied by the duration of infringement.

[11] Compared with the previous Decree, this Decree adds two new factors: Scope of violations and other essential factors related to each specific case. Also, aggravating and mitigating circumstances which were seen as one of the factors for the competition authority to determine the fines in the previous Decree are not used to consider calculating the basic fine.

[12] This Decree stipulates the sanction of administrative violations in the domain of planning and investment. It was repealed on January 01, 2014.

[13] This is approximately $900 to $1350.

have the high revenue and Competition Authority applies a high percentage based on the revenue. The new Decree No. 155/2013/ND-CP[14], however, no longer stipulates the administrative fines to bid riggers. This amendment helps avoiding the overlap between Competition Law and bidding law in terms of fine sanction regulations for bid-riggers.

This amendment has also raised the relationship between the two laws concerning enforcement of anti-bid rigging. On the one hand, it has raised the question whether the authorities entrusted to enforcement of anti-bid rigging under the Vietnamese Bidding law can apply administrative fine prescribed by Vietnamese Competition Law to violating undertakings given the absence of this sanction in Bidding Law. It seems impractical because the application of Competition Law is under the competence of VCC. On the other hand, in the case where the bid rigging offenses of undertakings were sanctioned by Bidding Law, it remains unclear that whether such offenses can be then sanctioned by Law on competition through VCC.

As a matter of Vietnamese law, each administrative violation must be sanctioned only once[15]. Being different from administrative procedure, it is plausible that the sanction of competition law should be applied following the sanction of Bidding Law in some certain cases. And if this is the case, one bid rigging case may be prosecuted twice that will raise the cost of enforcement.

Criminal penalties

The current Vietnamese competition law and its guidance Decree have applied only administrative fines to undertakings. There are no provisions providing criminal penalties for undertakings and individuals directly violating the competition law including the bid rigging conspiracies. The absence of criminal penalties in Vietnam legislation is justified by two main elements. First, as a rule of Vietnam's law, the criminal sanctions are not applied to legal entity including cartel undertakings. Second, according to Vietnam competition authority, the current administrative fines are punitive enough to achieve deterrence.

In comparison with other legislations, more than thirty countries have applied the criminal sanctions against the cartels and this list has no sign of declining (Shaffer, Nesbitt and Waller, 2011). This cartel criminalization trend can be seen even in over half of EU member states where Bid rigging offenses are criminalised (Girardet, 2010) despite the fact that the EU competition legislation has not imposed criminal sanctions against such offenses so far. It is worth mentioning that some jurisdictions like Canada imposes the criminal sanction on only Bid-rigging offence due to its adverse impact on the economy.

Debarment regime of bid riggers

Debarment mechanism is seen an instrumental tool in deterring bid-rigging under public procurement rules[16]. This instrument is prescribed in Article 90.2 of the Vietnamese Bidding law and Article 122 of the Decree 63/2014/ND-CP[17].

> *'…depending on the nature and seriousness of violation, organizations and individuals breaching law on bidding shall be also banned participation in bidding activities and put into list of infringing contractors on the national bidding network system.'*

Accordingly, bid-rigging conspirators shall be debarred from the tender process by administrative decision of the competent persons[18]. However, it is still much debatable when

[14] This Decree takes effect on January 01, 2014 and replaces the Government's Decree No. 53/2007/ND-CP.
[15] Pursuant to Article 3.1(d) of Law on Handling of Administrative Violations
[16] Sanchez Graells, 'Public Procurement and the EU Competition Rules' (2nd edition, Hart Publishing 2015) 296.
[17] This Decree provides detailed regulations for implementing several articles of the Vietnamese Law on Bidding regarding the selection of contractors.
[18] *'Article 90. Dealing with violations*
3. Competence of banning participation in bidding activities is prescribed as follows:

the legislators add *'depending on the nature and seriousness of violation'* into this provision. For that reason, one may argue that debarment decision is discretionary depending on the nature and gravity of violation. It thus does not necessarily apply this sanction in all bid-rigging cases. As compared to the US, it is interesting to know that the purpose of debarment decision is not for punishing violators[19]; Rather, it is only imposed to protect the public interest (Kramer, 2005, p. 544).[20] In this sense, this administrative exclusion is discretionary depending on competent agencies. These agencies, therefore, may suspend or debar a bidder because this is not a mandatory requirement.[21]

The length of debarment time may range from three to five years depending on the decision of competent persons. As stated in *An Giang province v. 7 Bidders in project of high school's equipment*[22]:

> *'The debarment of tenderers aims at deterring violators rather than giving a harsh punishment; however; if debarment time is too long, then it may have an adverse impact on businesses given that these companies infringed for the first time in An Giang province. In addition, it is noted that the cancellation and reopening of bid in An Giang province is fairly frequent due to the fact that there are a limited number of enterprises bidding for the high school's project of teaching equipment. This may lead to lengthen the project. To sum up, debarring bid riggers for long time may restrict the number of potential bidders and lessen the competition in tendering procedure…'*

A minimum of 3-year debarment is implemented by the competent authority for bid rigging conspirators after contemplating a number of relevant factors, including: first-time infringers, market structure at local area, economic cost of reducing the number of bidders and the goal of promoting competition in public tendering. In general, the debarment period in the Vietnamese legislation is longer than that in the US and the EU[23]. The scope of debarment may be applied to bidding projects under the umbrella of either the competent persons giving such debarment or the Ministers or the President of each province in Vietnam depending on the gravity of the violation.

From a comparative approach, there witness no exemptions in the current VBL for the debarment of bid riggers like the US and the EU. Under the EU public procurement rule, the mechanism on exemption of the debarment known as self-cleaning measure was first introduced in the new Directive 2014/24/EU. This measure aims at enhancing the competition in the public market by allowing debarred undertakings to regain their eligibility to enter new contracts with the public procurers (Priess, 2014, p. 121; Arrowsmith et al., 2009). However, there are stringent conditions for excluded undertakings to meet for the self-cleaning which is stated at Article 57.4:

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a) The competent persons shall issue decisions on banning participation in bidding activities for projects, estimate of procurement under their management; case of serious violation, they may suggest the Ministers, Heads of ministerial-level agencies, chairpersons of the provincial/municipal People's Committees to issue decision on banning participation in bidding activities within management of Ministries, sectors and localities or suggest the Minister of Planning and Investment to issue decisions on banning participation in bidding activities nationwide;

b) The Ministers, Heads of ministerial-level agencies, chairpersons of provincial/municipal People's Committees shall issue decisions on banning participation in bidding activities within management of their Ministries, sectors and localities for cases suggested by the competent persons as prescribed at point a this Clause;

c) The Minister of Planning and Investment shall issue decisions on banning participation in bidding activities nationwide for cases suggested by the competent persons as prescribed at point a this Clause.'

[19] 48 C.F.R. §9.402(b)

[20] Public interest may be relevant to national defense or fundamental damage to the programmes of agencies that may prevent these agencies from accomplishing mission requirements. .

[21] 48 C.F.R. §9.402(a)

[22] See Official letter No. 575/VPUBND-ĐTXD dated 06 June, 2014 of Department of Planning and Investment of An Giang province in terms of handling with bid rigging conspirators.

[23] Pursuant to 48 CFR 9.406-4, the debarment period in the US generally does not exceed three years. Similarly, according to the Article 57.7 of Directive 2014/24/EU, the maximum period of exclusion is three years from the date of the relevant event.

> *'…the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.'*

In addition to aforementioned substantive conditions, there are also procedural conditions with regard to the evaluation of proof submitted by economic operators. Accordingly, the contracting authority or other competent authorities are responsible for assessing such proof before making the final decision.

A different picture concerning the exemption mechanism on debarred firms can be identified under the US Federal Acquisition Regulation. In fact, FAR offers two different mechanisms in effort to treat debarred firms more leniently given that the nature of the debarment is not to punish violators. First, the debarred firms may be allowed to enter the new contract with government if there is a 'compelling reason' determined by the agency head[24], implying that a waiver of debarment may only be granted on the basis of contracting authorities' request. Although FAR is silent on the definition of 'compelling reason', examples of such reason can be tracked via agency-specific regulations.[25] However, it is noticeable that compelling-reason exceptions have been interpreted in a narrow manner and there has been a limited number of debarred firms waived from the debarment (Kramer, 2005, p. 543). Second, FAR permits the debarring official to reduce the period or extent of debarment if the debarred firms show the evidences on the basis of certain reasons.[26] Given that exclusion of non-compliant bidders may lead to the excessive restriction of competition in public procurement market, the self-cleaning measures under the 2014 EU Directive and limited waivers of the debarment mechanism in the US FAR needs taking into consideration in the context of the Vietnamese Bidding Law.

In the event that bid rigging cases are adjudicated by VCC, it is argued whether bid-rigging perpetrators may be governed by the debarment regime under the Bidding law. This is because there have no provisions showing the connection between these two laws in terms of anti-bid rigging enforcement.

Leniency programme

Not all competition agencies find it easy to detect and investigate cartels effectively due to the fact that such agreements are tacitly made. The experiences of several competition agencies worldwide reveal that strict sanctions of competition law may not prevent enterprises from colluding to distort competition. Instead, the lenieny policy is utilised as an effective tool to enforce competition law against cartels (Borrell, Jiménez and García, 2013, p. 108).[27] Leniency policy can be defined as 'the granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities'

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[24] FAR 9.405(2)

[25] Under the regulation of the Department of Defense, 'compelling reason' may include:
'(i) Only a debarred or suspended contractor can provide the supplies or services; (ii) Urgency requires contracting with a debarred or suspended contractor; (iii) The contractor and a department or agency have an agreement covering the same events that resulted in the debarment or suspension and the agreement includes the department or agency decision not to debar or suspend the contractor; or (iv) The national defense requires continued business dealings with the debarred or suspended contractor.' See more at 48 C.F.R. §209.405(a)(i)-(iv).

[26] These reasons include '(1) Newly discovered material evidence; (2) Reversal of the conviction or civil judgment upon which the debarment was based; (3) Bona fide change in ownership or management; (4) Elimination of other causes for which the debarment was imposed; or (5) Other reasons the debarring offical deems appropriate.' See more at 48 C.F.R. §9.406-4(c)(1)-(5).

[27] Since the leniency program was first introduced in the United States in 1993, there has been 59 countries are adopters of such program.

(Wils, 2007). It is noted that the success of the leniency program may be based on three factors: severe sanctions, fear of detection and transparency to the leniency program (Hammond, 2004). However, this policy seems more challenging in the public procurement settings. This may be due to the lack of incentives for blow-whistlers. More specifically, cartels on the public market are much more stable than on the private market and that ability to deviate such cartels is therefore much harder (Heimler, 2012). Furthermore, in many jurisdictions, bid riggers who apply for a leniency program are still faced with criminal charges and debarment from the future bidding (International Competition Network, 2015).

Despite the effectiveness of leniency program in detecting and prosecuting cartels in general and bid rigging in specific, to date it has not been introduced to Vietnamese competition law yet. Rather, current legislation in Viet Nam only considers extenuating circumstances for cartel members. A limited number of investigated cartel cases in Vietnam shows that this regulation may not provide the impetus and benefits for the parties involved in the collusion practices to cooperate with competition agencies.

The relationship between VCAD and public procurement bodies

Given that public procurement entities are best positioned to unearth bid rigging cases, the relationship and cooperation between these entities and competition authorities is legalised under either competition rules or public procurement rules of many major jurisdictions.[28] This has also been stressed by most publications of OECD in the field of public procurement. The forms of such cooperation can be analysed from the preventive perspective and the detective perspective. When it comes to the relationship between the Vietnamese Competition authorities and the public procurement personnel, no connections have been made among these agencies under either the Vietnamese Bidding Law or the Vietnamese Competition Law.

From the detective perspective, public procurement bodies are not obliged to report the evidence of bid rigging collusion to competition authorities. This is because the current Vietnamese Bidding Law empowers public procurement authorities to fight bid rigging by their own procedures. In other words, the role of public procurement authorities may amount to that of real competition watchdog given that they are allowed to put a sanction on bid rigging conspirators. This raises the question about the effectiveness of anti-bid rigging enforcement in Vietnam. In practice, there exist several challenges for public procurement agencies in the fight against bid rigging in Vietnam. Since public procurement may be conducted by State bodies at both central and local levels, state-owned companies and other organizations[29], it is remarkable that there are thousands of respective public procurement bodies throughout Vietnam. However, the procurement capacity and the consciousness of public procurement rules are uneven among each other and generally limited in remote provinces.[30] Therefore, the awareness of public procurement infringements in general and bid rigging in particular may be limited. Also, it is submitted that they are not well-equipped to detect and deter bid rigging in public procurement settings. To date, neither Guidelines nor specific trainings were introduced to address bid rigging conspiracies.

From the preventive perspective, there has been no training programs offered by the Vietnamese competition authority towards educating public procurers about bid rigging. This may be because Vietnamese competition agency is a fairly new agency and there has been no bid rigging cases prosecuted by VCA.

[28] At least 23 nations are successful in cultivating the relationship between public procurement authorities and antitrust entities. See Annex A, Relationships between Competition Agencies and Public Procurement Bodies. Over a half of public procurement institutes surveyed affirms that there is a close interaction between them and antitrust authorities.

[29] See Article 1 of the Vietnamese Bidding Law.

[30] Ministry of Planning and Investment, Report on assessing the implementation of the Vietnamese Bidding Law,6.

CONCLUSION

By conducting the critical assessment of the Vietnamese legal framework of anti-bid rigging, this paper identifies several shortcomings under the current legislation that encourages further research to enhance the anti-bid rigging enforcement in Vietnam. Firstly, there has been no connection between the VCL and VBL in the fight against bid rigging. This leads to the tension and overlap between the two Laws and relevant Decrees when it comes to the definition and classification of bid rigging and sanctions against this infringement. Secondly, following the turnover-based fine of the EU model, the fine sanction under VCL still needs improvements as the basic fine calculation is unclear and depends too much under the discretion of competition authorities. In addition, the absence of criminal sanction under current legislation may not have a sufficiently deterrent effect on bid rigging cartels. Thirdly, the lack of leniency program makes infringers less incentives to blow the whistle. Last but no means least, the absence of cooperation between competition authorities and public procurement bodies contributes to the failure of anti-bid rigging mechanism given that its success in major jurisdictions such as the US and the EU.

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L10-2014

TRIUMPH OVER EVIL': AN ECONOMIC ANALYSIS OF DEATH PENALTY IN INDIA WITH SPECIFIC REFERENCE TO AJMAL KASAB (THE LONE SURVIVING TERRORIST OF 26/11 MUMBAI ATTACKS)

MR. ANMOL MEHTA AND MS. DEVANSHI DALAL[1]

ABSTRACT

"The true measure of crimes is the harm done to society"

Crimes which seemed rare in ancient times have become the rule of the day in most of the countries. These crimes whether small or big are a threat to wealth and life of the society. It instills a sense of fear in the general public which stints and hinders with their growth and mobility. Criminal punishment aims to deter intentional harms, not to compensate them. The punishment for any crime committed is given under the Criminal Procedure Act, 1973. Economic theory proposes the simple goal that Criminal Law should minimize the social cost of crime. This paper mainly takes into consideration the economic analysis of awarding death penalty to Ajmal Kasab, the sole surviving terrorist of the 26/11 terrorist attacks in India which caused exorbitant harms in terms of life, property, monetary losses to the people of the nation.

Keywords: *Economic Analysis, Capital Punishment, Terrorist, Cost of Crime, Social Cost*

INTRODUCTION

Any theory pertaining to crime must essentially answer two questions:

a. What acts should be punished?
b. To what extent?

The first question is asked to distinguish the categories and criteria as to what comprises crime while the second question seeks to calibrate the quantum of punishments given. This paper seeks to answer these two questions more convincingly with precise answers in terms of cost and monetary value of these crimes committed.

Criminal punishment aims to deter intentional harms, not to compensate them. Crimes can be ranked by seriousness and punishments can be ranked by severity. The more sever punishments are typically attached with more serious crimes. So how will a rational criminal respond to the expected punishment to be give for committing that particular crime? Under certain assumptions, a rational, amoral decision maker will commit the crime so long as the benefit derived out of committing the crime exceeds the expected punishment. The implicit assumption being risk neutrality. A risk-averse person is more deterred by a severe punishment applied with low probability than a mild punishment applied with high probability. The punishment for any crime committed is given under the Criminal Procedure Act, 1973. It is the main legislation on procedure for administration of substantive criminal law in India. Crimes impose a certain kind of cost on each society which mainly includes: 1. the criminals gain something, 2. The victims suffer harm to their persons or property. Economic theory proposes the simple goal that Criminal Law should minimize the social cost of crime, which equals the sum of the injury it causes and the costs of

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intercepting it. This paper mainly takes into consideration the economic analysis of awarding death penalty to Ajmal Kasab, the sole surviving terrorist of the 26/11 terrorist attacks in India which caused exorbitant harms in terms of life, property, monetary and personal losses to the economy as well as the people of the nation. This analysis evaluates the efficiency and utilitarian aspect of a Death Penalty to survivors of organized terrorism through economic tools such as Pareto Efficiency, Compensation Theory and the various Externalities that are needed to be considered prior to awarding such an intense punishment. The article intends provide for a detailed analysis of the socio-economic and legal aspects of Capital Punishment in India and the role that the State and courts play in promoting peace, stability and justice in a country like India fragmented by religion united by its cultural ethics. This article gives a detailed justification for imposition of a death penalty in light of upcoming International Human Rights Law in rarest of rare cases.

FACTS OF THE CASE

Mohammed Ajmal Amir Kasab was a Pakistani militant and a member of the Lashkar-e-Taiba Islamist group, through which he took part in the 2008 Mumbai attacks in India. Kasab was the only attacker captured alive by police.

His conviction was based on CCTV footage showing him striding across the Chhatrapati Shivaji Terminus with an AK-47 and a backpack. Towards the end of December 2008, Ujjwal Nikam was appointed as Public Prosecutor for trying Kasab and in January 2009 M. L. Tahiliyani was appointed the judge for the case. Indian investigators filed an 11,000 page Chargesheet against Kasab on 25 February 2009. He was charged with murder, conspiracy and waging war against India along with other crimes. The prosecution submitted a list of charges against him, including the murder of 166 people. On 6 May 2009, Kasab pleaded not guilty to 86 charges. The same month he was identified by eyewitnesses who testified witnessing his actual arrival and him firing at the victims. Later the doctors who treated him also identified him. The special court issued non-bailable warrants against 22 absconding accused including Kasab. In July 2009 Kasab retracted his non-guilty plea and pleaded guilty to all charges. The trial concluded on 31 March 2010 and on 3 May the verdict was pronounced — Kasab was found guilty of murder, conspiracy, and of waging war against India (which also carried the death penalty). On 6 May 2010, he was sentenced to death. A Bombay High Court bench, composed of Justice Ranjanaa Desai and Justice Ranjit More, heard Kasab's appeal against the death penalty and upheld the sentence given by the trial court in their verdict on 21 February 2011. On 30 July 2011, Kasab moved to Supreme Court of India, challenging his conviction and sentence in the case. Thus, a bench composed of Justice Aftab Alam and Justice Chandramouli Kr. Prasad stayed the orders of the Bombay High Court so as to follow the due process of law, and started hearing the case.

On 29 August 2012, Kasab was found guilty of waging war and was sentenced to death by the Supreme Court of India.

While pronouncing this landmark Judgment, references had been made to various landmark Supreme Court Judgments on death penalty including (*Bachan Singh v State of Punjab (1980)* (2) SCC 684). In that case, the Supreme Court laid down the mitigating and aggravating circumstances which the court has to consider when it is called upon to decide whether death sentence should be awarded to a person or not. The apex court in that case had made the following observations:

> *It cannot be over-emphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them ……. that for persons*

convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

They had also taken into account Supreme Court verdict which emphasized on the fact that the "MAGNITUDE OF CRIME" and the "PERSONALITY OF CRIMINAL" will be taken into consideration while awarding death penalty the (*Machhi Singh & Ors. v State of Punjab (1983)* (3) SCC 470). He was charged with numerous crimes, perhaps the weightiest aggravating circumstance Kasab waged a war against the Government of India pursuant to a conspiracy which was hatched in Pakistan, the object of which was to inter alia, destabilize Government of India and to weaken India's economic might. He indulged in mindless killings of innocent people with a view to overawing Government of India and achieve cessation of a part of Indian Territory. Waging war is a serious crime which calls for deterrent punishment.

The defense vehemently argued on the fact that his young age was major factor to be taken into consideration to mitigate death penalty. But as stated by the Supreme Court in the aforementioned cases age is not always a decisive factor for giving lesser penalty of life imprisonment. Extreme brutality and diabolic nature of the crime which arouses public indignation can override this consideration. The brutality, perversity and cruelty exhibited by Kasab by committing multiple murders of innocent men, women, children, aged persons and policemen without provocation for a motive which has no moral justification makes this case a gravest case of extreme culpability. The conduct of Kasab shows that his mental age overrides his physical age. He has never shown any repentance, but has loudly proclaimed that he wants to create more Fidayeen by setting an example by his conduct.

HELD

Taking into consideration the observations of the Supreme Court held that, "The punishment must be fit the crime, The punishment must reflect public abhorrence of the crime. The rights of the victims must also be kept in mind." (*Dhananjay Chaterjee v State of West Bengal (1994)* BLJR 1231) The court held that the Even after according maximum weightage to the age factor, there is no alternative but to confirm the death sentence. This is, indeed, a rarest of rare cases involving uncommon and unprecedented crime for which sentence of life imprisonment is inadequate. The judgement found no mitigating circumstances in the Kasab case. His age and ideology-driven mentality were obliterated by the fact that he was ruthless and remorseless in his deeds. He had many opportunities to free himself from the LeT but he continued in his jihadi venture. And hence the appeal against death penalty was dismissed and that death penalty was confirmed by the Supreme Court bench constituting Justice Aftab Alam and Justice C.K. Prasad.

ECONOMIC TOOLS FOR ANALYSIS OF JUDGEMENT

In normative Economics Welfare Maximization and Efficiency are the two key terms that must be prioritized in assessing the validity, utility and quality of any law. The question then is why welfare and efficiency? In Law and Economics, any law will be deemed useful only when it can contribute towards increasing the welfare of the society at large without imposing too many costs on them. The following economic tools will be used for determining the utilitarian aspects of death penalty:

Pareto Efficiency

Here we shall take Ajmal Kasab, the culprit, on one hand and on the other hand society at large as well as a spot in special prison cell. The society at large cannot be made better off without killing

the culprit. His being alive instills an overall fear and also the possibility of next attack to enforce his release by the LeT terrorist group. Also a fraction of tax paid by the public goes into his security, food provisions, well-being, medical care and interrogations as he is a high-profile criminal. Thus to reduce this burden from the society and to make them better off, Kasab needs to be killed. Similarly, some other criminal who is less dangerous to the society at large cannot be given this spot, occupied by Kasab, until he is sentenced. Hence, the other criminal cannot be made better off without killing Kasab. The perfect law would be Pareto efficient, where all people will be better off without having any losers in the society. This is not the case here. As noted by Cooter and Ulen (2004) Pareto Efficiency is an Allocative efficiency where it is impossible to change the situation without making at least one person better off and without making another person worse off. We are assuming here that killing Kasab would make him worse off even if he was responsible for atrocious killings and death of many. And this would be the cost of making the society and the other criminal better off. Hence, awarding death sentence to him would not be Pareto efficient. However, changing this assumption would make the death sentence economically viable and help in maximizing social welfare.

Kaldor-Hicks Efficiency/Compensation Theory

Here we shall take the same parties of Pareto efficiency as usually Kaldor Hicks efficiency is a measure of economic efficiency that captures some of the intuitive appeal of Pareto efficiency, but has less stringent criteria and is hence applicable to more circumstances. And has more practical applicability. If the gain by the society is so much more than the loss of Ajmal Kasab, that there is surplus benefit to the society that it can compensate Kasab then his Death penalty should be allowed. As comparatively at least one of the party is made better off while compensating the second party. Similarly if the gain of the next criminal taking his spot in the cell is so high that he can compensate Kasab then awarding capital punishment to Kasab should be allowed. But the question here is can they really compensate the Kasab. Is death compensation from living in confines of four walls with constant security and sub-standard commodities with no human contact and possibility of torture or release? If we endorse the Kaldor-Hicks hypothesis, then, because person B is gaining more than person A is losing, the move is considered efficient. Hence, the fact that society is gaining much more than what Kasab is losing, the death penalty would make this Pareto efficient move. Also the fact that it may prove as a strong deterrence to avoid such heinous crimes in future may make this move strongly Pareto efficient as the net gain(saving hundreds of life in future) can compensate the loss of one terrorist who is anyways imprisoned for life. Hence, a law will be considered efficient if it can maximize the overall welfare of the society (so that in general, there is a surplus for the society) and open the possibility of compensating the losers, even though the compensations have not yet been materialized.

Problem of Externalities and Economics of Resources and Cost Benefit Analysis

Buchanan and Stubblebine (1962) explained that in economics, an externality is a cost or benefit that results from an activity or transaction and that affects an otherwise uninvolved party who did not choose to incur that cost or benefit. In case of not giving death sentence to Ajmal Kasab, the citizens of the country as a whole will be paying for the sustenance and well-being of a terrorist who took numerous innocent lives. They did not choose to be a party to pay for his care and security. It is the tax payers money which is implicitly used for keeping him alive despite his having committed heinous crimes against humanity and murdered or abetted to murder a Hundred and Sixty Six Innocent men, women and children. While the overall benefit to the society after incurring these costs was NIL. As his being alive had no productive benefit to the society as such

at large. His contribution, if kept alive, to the economy will be Zero monetarily and at the same time a major chunk of the tax payers' income is wasted by keeping him alive. Hence, the net effect of not awarding capital punishment will be negative. With respect of the costs of imposing death penalty, suffice to say that death penalty is cheaper than prison. Killing one person is definitely easier than maintaining a person's life in the prison for certain period of time.

Another important issue is the costs for administration of death penalty. Since death penalty is irrevocable, in the sense that you can't raise the dead once the sanction has been administered, the administrative costs for getting the right decision tends to be higher in order to avoid costs of wrong decisions (such as longer waiting period for the execution of the penalty, additional costs for producing evidence, etc). However, in this case certainty of fairness and speedy trial was ensured to negate these very claims of unjust sentencing due to viability of sufficient evidences against him.

Lastly, the economics of Natural resources focuses on the efficient allocation of Natural Resources. However, there has been gross wastage of resources which could have been put to more utilitarian alternative usages by the government instead of providing for a terrorist. According to the reports, keeping Kasab alive and providing him a fair trial have cost the state government an estimated 500 ($99.2 million) to 600 million rupees ($108 million). Not only monetary wastage but resource, land, human capital and technical wastage for keeping him alive for four years has been magnanimous. Kasab had been kept in solitary confinement in a specially constructed egg-shaped cell at Arthur Road Jail in Mumbai. This bomb and bullet proof cell cost 52.5 million rupees while his security was entrusted to a special team from the Indo-Tibetan Border Police (ITBP) which cost the government 190 million rupees, according to the government. The salaries of the policemen who protected him was 12 million while his food and medical expenses cost 12,0000 rupees till April 2012, according to the data submitted by the government in the state assembly. Kasab was given a special security as the government feared that there would be attempts on his life. Fearing that he might be killed in a grenade or chemical attack, authorities had constructed a 20-foot tunnel from his cell to the court room situated on the premises of Arthur Road Jail. He was under 24/7 protection and CCTV surveillance. Apart from the salaries of the policemen, legal charges for his lawyers were also borne by the government since Pakistan had refused accept him as its subject despite Kasab's plea for assistance. The state government provided him with attorneys according to the Indian judicial system. Kasab's security and legal expenses together added up to 430 million rupees, according to a senior Indian Police Service officer cited by the local media. Around 150 million rupees were spent on a special ward in Mumbai's JJ Hospital where he was admitted for treatment whenever he fell ill.

Hence, keeping him alive and safe proved to be extensively taxing on the country's limited resources and his execution was a major relief on the country's treasury. Therefore, keeping Kasab alive put unnecessary negative externalities not only on the society but also on the government and human resources of the country the cost for which did not justify the output as there were no returns and it was a one sided transaction. While his survival acted as a major drain on the minimal resources of the country including land, capital, monetary loss and human resource drain which could have been put to more socially advantageous uses and improvement and well-being of the members of society.

Economic Efficiency of Judiciary and the Legal System and Economics of Judicial Performance

The constitution provides with a mechanism for efficient conflict resolution through its creation of Judiciary which is also the Third Pillar of Democracy in India. The efficiency and quality of which can be measured by observing the extent to which the people resort to this machinery for dispute resolution than to the parallel or competing mechanisms for the enforcement of laws. It is indeed an absolute necessity that speedy justice is rendered along with just and fair decisions at the lowest possible cost to the society. A good judicial system is said to be competent which ensures fairness, cost-effectiveness and timely enforcement of laws to maintain harmony and stability in the society which it functions. In this case the Apex Court understanding the sensitivity of the issue and the social costs that were being incurred in keeping the defendant protected gave a speedy and efficient judgment but not at the cost of fairness or authenticity of the trial. Due procedure was followed in administering justice. The hierarchy of courts which is the sanctity of our judiciary was not disturbed. A special court delivered its judgment which then went on appeal to the High Court of Maharashtra followed by an Appeal in the Supreme Court, Which gave its final verdict taking into consideration all the valid aspects of the case. The Clemency appeal (popularly known as the Mercy petition) before the president was also allowed to a terrorist, which was rejected by our esteemed President Mr. Pranab Mukherjee. He was given a proper team of defence lawyers to fight his case. However, one drawback of our judiciary was the high costs involved in providing a fair trial. Kasab's legal and security expenses amounted (including all the trials) to 430 Million Rupees which is a major drain on the resources of the country in times of economic fluctuations and imbalance market conditions. The court has rightly quoted:

> *Law may be guilty of double injustice when it is too late and too costly for it holds out remedial hopes which peter out into sour dupes and bleeds the anaemic litigant of his little cash only to tantalize him into a system equal is form but unequal in fact.* (*Mohd. Ajmal Amir Kasab v State of Maharashtra, (2012)* 9 SCC 1)

Hence, the system meting out justice shouldn't be overly litigated or under professionalized as is the case in majority which can hamper the very objective of its operation. However, in this case justice was delivered efficiently but at a considerable cost. However, a defence against this maybe the fact that keeping the culprit alive for life, which is the only alternative in this case, may have proved comparatively costlier and an even larger drain on our resources. Thus the economic viability of this decision favors the sentencing of Ajmal Kasab.

Efficiency and Equity and the Leaky Bucket Syndrome

Okun (1975) introduced the metaphor of the leaky bucket, which has become famous among economists: "The money must be carried from the rich to the poor in a leaky bucket. Some of it will simply disappear in transit, so the poor will not receive all the money that is taken from the rich"

The convicted here cannot returnto a normal life because of the quantum of crime committed by him and due to the expenses on his security, well-being and living costs can be termed as a waste of resources. The wait for convicted to die a natural death during life imprisonment is taken to be a multi-fold loss of resources which can be diverted to Society or to some other criminals who can be rehabilitated and reformed and serve the society in future. The Leaky Bucket Syndrome and Inefficiency come into play because by the time the criminal dies, the other purposes for which these resources could have been invested in will not have the same high economic rate that they had earlier. Resources spent on the care of the convict will not be

able to help more important and useful causes whose own survival chances would have reduced. This is the Leaky Bucket Syndrome where now the other causes getting the resources have to pay more for their worsened condition. The conclusion under this tool is that Death Penalty in rarest of Rare cases such as this should be allowed.

CONCLUSION

Mohammed Ajmal Kasab, the lone surviving terrorist among the 10 gunmen who attacked Mumbai on Nov 26, 2008, was executed after President of India Pranab Mukherjee rejected his mercy petition. As many as 166 persons were killed and 300 others injured when the Laskhar e-Taiba militants attacked different targets in Mumbai in 2008. Kasab, 25, was hanged at Pune's Yerawada Jail at 7:30 a.m. local time. To ensure a fair trial, India had completed all the required legal processes under its democratic system before hanging the gunman and the process cost millions of rupees to the exchequer. Amidst the joy and celebrations over his death the Indian Judicial System had achieved a new high. The doctrine of a speedy and fair trial was upheld in this case. The Indian Judiciary, generally known for its untimely delays had shown great sensitivity and intelligence by his execution. The judgment in the case of *Mohammed Ajmal Mohammed Amir Kasab v State of Maharashtra* observed a landmark Judgment upholding the sanctity of principle of awarding death penalty in the "rarest of rare" cases. While Ajmal Kasab was convicted for a number of crimes including "waging war against the Government of India" , "merciless killing of innocent people", "carrying unwarranted arms", "destruction of public property"- the whole of India celebrated the destruction of evil. India being one of the recently emerging economies may not be ready for the economic analysis of every problem that comes in its way; however, there ought to be a start somewhere. In purview of the above tools applied to analyze the benefits and costs of awarding death penalty to a criminal it is clear that in light of such grave and horrendous crimes, death penalty is the only economically and socially viable option. However, where the courts are found to be inefficient in the disposing of cases and the settlement of disputes, alternate processes should be resorted to. As it was very rightly observed by the Supreme Court (*Bachan Singh v State of Punjab (1980)* (2) SCC 684)

> *A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."*

In the case, (*Machhi Singh & Others v State of Punjab (1983)* (3) SCC 470) the Apex Court provided a valuable observation:

> *When the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so in rarest of rare cases when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The Supreme Court went on to observe that the community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime.*

In light of the afore mentioned case analysis I hereby conclude by proposing that considering the merits of a particular case, The Death Penalty should be confined to the Rarest of the Rare cases and this discretion of the judiciary should be practiced with due care and taking into account economical benefits as well.

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L16-2084

TRADE LIBERALIZATION AND ECONOMIC GROWTH IN ALGERIAN ECONOMY: AN EMPIRICAL INVESTIGATION BY USING ARDL APPROACH

AMRANE BECHERAIR[1] AND YAGOUB MOHAMED[2]

ABSTRACT

The goal of this paper is to investigate the short and long run relationship between trade liberalization and economic growth in Algerian economy using a Cobb–Douglas production function, which is expanded to take into account the trade liberalization. The bounds testing approach to cointegration and error correction models, developed within an autoregressive distributed lag (ARDL) framework is applied to annual data for the period (1970 to 2014) in order to Measure the impact of extensive reform programs of trade liberalization on economic growth in Algeria.

The experimental results of this study indicate that, in the short and long run, Algerian GDP does not affected by education, and total investment. We find also strong evidence that the Algerian economic growth depend to the oil prices and the radical reforms undergone by the Algerian government does not stimulate its economic growth.

Key words: Trade liberalization, economic growth, ARDL approach, Algerian economy

INTRODUCTION

For decades, researchers have been debating the merits of economic openness and its association with growth. Academic debates on whether openness to trade causes higher growth are riddled with problems of measurement, reverse causation (faster growing countries tend to open their markets more quickly), and omitted variable bias (countries that successfully lower tariffs also adopt other complementary policies). Notwithstanding difficulties in interpreting country experiences during the1990s, almost all economists agree that liberal trade is important for growth over the long run.

Research that focuses on the relationship between trade reforms and economic growth in the 1990s also finds that trade reforms are associated with higher growth, although the strength of the association varies across different studies. Yet trade liberalization by itself is not enough for economic growth. Studies show that trade policy is most likely to be associated with positive outcomes when it is conducted in a favorable economic environment, and that while lack of regulations can undermine the growth effects of trade, in countries with effective regulation the effects of trade reforms are positive for growth.

As a result, during the 1980s and 1990s virtually all developing countries followed the examples set by Singapore, Hong Kong (China), Korea, and Taiwan (China): encouraging exports and reducing levels of protection. And Algeria, like other developing countries, since 1994s Algeria has undergone radical reform of its foreign trade, encompassing the abolition of import restrictions, By solving the committee charged with the import control (AD-HOC); the tariff reduction to 45%; The development of the banking system; Euro-Mediterranean Partnership Agreement signed in April 2002; Request to join the WTO in June 1996, which would enhance the direction of the country towards economic liberalization; the establishment of several institutions to frame the openness and the adoption of many of the laws and

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legislations to provide a favorable environment in the field of foreign trade. For Economic Analysts, two questions arise from these changes: what caused the reforms, and what are their effects on economic growth?

In this context, this paper aims to examine the effect of trade liberalization on economic Growth, advance the debate through new empirical analysis in Algeria country, and to the extent possible come to some conclusions that may be relevant for policymakers.

LIBERALISATION AND GROWTH: EMPIRICAL LITERATURE

Many empirical studies examined the relationship between external trade liberalization and economic growth. The earliest empirical literature in the 1970s and 1980s used trade dependency ratios , the rate of export growth, tariff and non- tariff barriers, as potential candidates for trade liberalization, ((Balassa, 1971, 1978, 1982 and 1985; Litle et al., 1970; Pritchett and Sethi, 1994; Krugman, 1994; Rodrik, 1995). The problem with these indicators, nonetheless, is that they are not necessarily linked to trade policies since a country can distort trade and yet maintain the highest trade dependency ratio. In addition, Most of the cross-national econometric research that was available up to that point focused on the relationship between exports and growth, and not on trade policy and growth. Edwards's evaluation of this literature was largely negative.

In 1987, the World Bank classified a group of 41 developing countries according to their trade orientation in order to evaluate the performance of countries with different degrees of outward/inward orientation. Four categories of countries were classified. The first group consisted of strongly outward, oriented countries, the second group consisted of outward oriented countries, the third group consisted of inward oriented countries, and the fourth group consisted of inward oriented countries. The conclusion from that study is that economic performance of the outward oriented economies has been broadly superior to that of inward-oriented economies.

In 1990s, endogenous-growth, models thought to have provided the missing theoretical link between trade openness and long-run growth. Lucas (1988), Romer (1989), Grossman and Helpman (1991), Feenstra (1990), Matsuyama (1992), and others have worked out examples where a country that is behind in technological development can be driven by trade to specialize in traditional goods and experience a reduction in its long-run rate of growth. In the econometric side, most researchers, tried to construct alternative openness indicators, which were entered with other control variables on growth equation as regressors. Many of these studies confirmed significant positive correlation across countries between growth and trade volumes or trade policies.

The empirical studies using time series analysis suggest that growth is positively associated investment rate but negatively correlated with distortion and variability of the real exchange rate (Dollar, 1992). According to Edwards (1992) the major channel through which trade liberalization enhances growth is the absorption of foreign technology. Levine and Renelt (1992) employed an extreme-bound test proposed by Leamer (1985). Using extreme bound test, Concluded that the beneficial effects of trade reforms might operate through enhanced resources accumulation instead of an efficient allocation of resources. Sala-I-Martin (1997) constructed confidence levels for the entire distribution of coefficients for different determinants of growth. Using this alternative approach, the only openness indicator, which is robust, is a measure of openness constructed by Sachs and Warner (1995).

Existing studies investigating the effect of trade liberalization on economic growth, with applied Cross section countries and panel data models include (Wacziary, 1998; Greenaway et al., 1998 and 2002; Wacziag and Welch, 2003; Dollard and Kraay, 2001 and 2004; Patrikh and Stribu, 2004; Paulino and Thirwall) focus that liberalization exert positive effect on Growth of real GDP per capita. the most famous study (Dollar and Kaaray, 2004), which provided clear evidence about the positive effects of trade liberalization on growth in developing countries,

where concluded that, one third of developing countries in the world has a positive relationship between the quality of institutions trade liberalization and economic growth on the one hand. In addition, the Influence of international Trade on economic growth, on the other hand, so the high-performance of foreign trade, and the good quality of institutions, accelerate the pace of economic growth.

Results from empirical analyses regarding the impact of trade liberalization on economic growth in developing country, but there are some problems have made these results relative and not absolute; the first problem is the statistical support is not uniform across all indicators of trade liberalization. Second is how to define openness/trade liberalization. The third, causality is difficult to establish. Forth difficulty is that if trade liberalization is to have a permanent effect on growth, it must be implemented concurrently with other complementary policies. Fifth most of the studies have focused on a large number of countries. While it is true that cross-country studies do provide a good empirical generality, its problem is that they suffer from heterogeneity problems prevailing in the countries under investigation.

TRADE LIBERALIZATION IN ALGERIA

Algeria is a country in North Africa on the Mediterranean coast. Its capital and most populous city is Algiers. Algeria is the tenth-largest country in the world and the largest in the Arab world and Africa. In January 2013, Algeria's population was an estimated 37.9 million. About 90% of Algerians live in the northern, coastal area; Algeria is classified as an upper middle-income country. Algeria has the 17th largest reserves of oil in the world, and the second largest in Africa, while it has the 9th largest reserves of natural gas. Hydrocarbons have long been the backbone of the economy, accounting for roughly 60% of budget revenues, 30% of GDP, and over 95% of export earnings.

Over the last twenty years, Algeria has undergone radical reform of its foreign trade, encompassing the abolition of import restrictions, By solving the committee charged with the import control (AD-HOC); the tariff reduction to 45%; The development of the banking system; Euro-Mediterranean Partnership Agreement signed in April 2002; Request to join the WTO in June 1996, which would enhance the direction of the country towards economic liberalization; the establishment of several institutions to frame the openness and the adoption of many of the laws and legislations to provide a favorable environment in the field of foreign trade.

Since the early years of independence (1962), Algeria followed a monopoly policy of trade, by controlling imports and export, in particular on imports. These politicians, based on system of quotas, the lifting of tariffs and controls exchange. During 1989-1993, the country has started to reform the economy after the 1986 (negative growth rate (-3.1%), the budget deficit (1.7% of GDP), deficit in the trade balance (1825 billion DZD) and debt of $ 25.32 billion. Under these reforms, the government in the supplementary finance bill for the year 1991 (Article 40.41) approved the gradual liberalization of foreign trade. During the period, 1994-1998 Algeria has started a new package of reforms, which included the full liberalization of foreign trade.

In 2012, Algeria continued to intensify its efforts to diversify its trade and promote economic and regional cooperation. In this context, Algeria is pursuing its negotiations to become a member of the World Trade Organization in order to consolidate its on-going economic reforms and become better integrated into the global economy.

Algeria signed three new co-operation agreements with the European Union (EU) in October 2012 to increase its trading with Europe. In addition, after more than two years of talks, Algeria and the EU reached an agreement on a revised schedule for tariff dismantling under the terms of the Algeria-EU Association Agreement.

However, Algeria's surplus trade stood at $4.63 billion in 2014, against $9.94 billion in 2013, declining by nearly 53.5%. This decline in the trade surplus is driven by increased exports by 3% during last year in comparison with 2013, the Algerian Customs' National Centre of Data Processing and Statistics (CNIS). In 2014, the exports were $62.95 billion against $64.97 billion, down by $2.02 billion (-3.11%), mainly induced by a 4.5% flattering of hydrocarbon exports. On contrary, the imports have soared to $58.33 billion in 2014 against $55.03 billion, up by $3.3 billion (+6%) over the same period of reference. The percentage coverage of imports by exports hit 108% in 2014 against 118%, one year earlier. The hydrocarbons made the bulk of Algeria's exports with 95.54% of the overall volume of exports, i.e. $60.15 billion in 2014 against nearly $63 billion in 2013, down $2.85 billion (-4.47%).

METHODOLOGY OF THE STUDY

In this empirical evidence on the impact of trade liberalization $\varepsilon$and economic growth, we use three econometrics methods mentioned below. The study specifies the growth function for Algeria in the form of equation as follows:

$$GDP = \delta_0 + \delta_1 EDU + \delta_2 LAB + \delta_3 INV + \delta_4 OILP + \delta_5 OPEN + \delta_6 DU94 + \varepsilon_i \quad [1]$$

We regress the Real Gross Domestic Income adjusted for changes in the term of trade (GDP), by the ratio of total investment to GDP (INV), the School enrollment, secondary rate (EDU), The labor force (LAB), Oil prices (OILP); Considering that Algeria is an oil country, openness rate (OPEN), UU94 is a dummy variable representing the date on which Algeria has the liberalization of its foreign trade in 1994, which is equal to zero from 1970 to 1993 and one otherwise, and is an error term. All variables are expressed in natural logarithms in order to estimate their elasticities.

The data are annual time series observation from 1970 to 2014, the sources of the data were; Penn *World Table* Version 7.1, published by Alan Heston, Robert Summers and Bettina Aten 1991, include: Real Gross Domestic Income adjusted for changes in the term of Trade and the Openness indicator defined as a sum of exports plus imports divided by the real GDP. The international monetary fund, include total investment, Labor force. NYU Development Research Institute include the School enrollment, secondary rate, and database of National Statistics Office of Algeria include oil price.

Time series analysis underscores the importance of testing for unit root in time series data before running regressions. Having this in mind, we use the Augmented Dickey Fuller test (ADF) with and without a trend to test for the unit root. Note that the ADF is virtually the same, as the Dickey Fuller (DF) test except the lag length has to be long in order to reflect the additional dynamics that cannot be captured by the DF to ensure that the error term is a white noise. It is also used in our study the Philips Perron Test to make sure the ADF test results.

THE ARDL BOUNDS TEST APPROACH

We adopt the autoregressive distributed lag (ARDL) framework popularized by Pesaran and Shin (1995 and 1999), Pesaran, et al. (1996) and Pesaran (1997) to establish the direction of causation between variables. This approach does not involve pretesting variables, which means that the test for the existence of relationships between variables is applicable irrespective of whether the underlying regressors are purely I(0), purely I(1), or a mixture of both. In order to obtain robust results, we utilize the ARDL approach to establish the existence of long run and short-run relationships. The ARDL has been chosen since it can be applied for a small sample size as it happens in this study. The ARDL approach consists of estimating the following equation.

$$\Delta LGDP = c + \delta_1 LLAB_{t-1} + \delta_2 LINV_{t-1} + \delta_3 LEDU_{t-1} + \delta_4 LOILP_{t-1} + \delta_5 LGDP_{t-1} + \delta_6 LOPEN_{t-1} + \sum_{j=0}^{p} \alpha_j \Delta LGDP_{t-j} + \sum_{j=0}^{p} \omega_j \Delta LLAB_{t-j}$$

$$+ \sum_{j=0}^{p} \varphi_j \Delta LINV_{t-j} + \sum_{j=0}^{p} \theta_j \Delta LEDU_{t-j} + \sum_{j=0}^{p} \gamma_j \Delta LOILP_{t-j} + \sum_{j=0}^{P} \lambda_j \Delta LOPEN_{t-j} + \varepsilon_t \text{.....[2]}$$

The second part of the equation with $\alpha_j, \omega_j, \varphi_j, \theta_j, \gamma_j$ and λ_j represents the short-run dynamics of the model whereas the parameters $\delta_1, \delta_2, \delta_3, \delta_4, \delta_5$ and δ_6 represents the long-run relationship. The null hypothesis of the model is:

$$H_0 : \delta_1 = \delta_2 = \delta_3 = \delta_4 = \delta_4 = 0 \text{ (There is no long-run relationship)}$$

$$H_1 : \delta_1 \neq \delta_2 \neq \delta_3 \neq \delta_4 \neq \delta_4 \neq 0$$

We start by conducting a bounds test for the null hypothesis of no co-integration. The calculated F-statistic is compared with the critical value tabulated by Pesaran (1997) and Pesaran et al. (2001). If the test statistics exceeds the upper critical value, the null hypothesis of a no long-run relationship can be rejected regardless of whether the under lying order of integration of the variables is 0 or1. Similarly, if the test statistic falls below a lower critical value, the null hypothesis is not rejected. However, if the test statistic falls between these two bounds, the result is inconclusive. When the order of integration of the variables is known and all the variables are *I (1)*, the decision is made based on the upper bound. Similarly, if all the variables are *I (0)*, then the decision is made based on the lower bound.

In the second step, if there is evidence of a long-run relationship (co-integration) among the variables, the following long-run model (Equation 3) is estimated:

$$LnGDP = c + \sum_{j=0}^{p_1} \alpha_j LnGDP_{t-j} + \sum_{j=0}^{p_2} \omega_j LLAB_{t-j} + \sum_{j=0}^{p_3} \varphi_j LINV_{t-j} + \sum_{j=0}^{p_4} \theta_j LEDU_{t-j} + \sum_{j=0}^{p_5} \gamma_j LOILP_{t-j} + \sum_{j=0}^{P_6} \lambda_j LOPEN_{t-j} + \varepsilon_t \text{.....[3]}$$

If we find evidence of a long-run relationship, we then estimate the error correction model (ECM), which indicates the speed of adjustment back to long-run equilibrium after a short-run disturbance. The standard ECM involves estimating the following equation.

$$\Delta LnGDP = c + v(ECM)_{t-1} + \sum_{j=0}^{p_1} \alpha_j \Delta LnGDP_{t-j} + \sum_{j=0}^{p_2} \omega_j \Delta LLAB_{t-j} + \sum_{j=0}^{p_3} \varphi_j \Delta LINV_{t-j} + \sum_{j=0}^{p_4} \theta_j \Delta LEDU_{t-j} + \sum_{j=0}^{p_5} \gamma_j \Delta LOILP_{t-j} + \sum_{j=1}^{p_6} \lambda_j \Delta LOPEN_{t-j} + \varepsilon_t \text{.....[4]}$$

The Third equation with $\alpha_j, \omega_j, \varphi_j, \theta_j, \gamma_j$ and λ_j represents the short-run dynamics of the model whereas the parameter v represent error correction Coefficient. The model (ECM) is:

$$ECM_t = LnGDP_t - C_0 - \hat{\beta}_1 LLAB + \hat{\beta}_2 LINV_t + \hat{\beta}_3 LEDU_{t-1} + \hat{\beta}_4 LOILP_t + \hat{\beta}_5 LOPEN_t \text{.....[5]}$$

To ascertain the goodness of fit of the ARDL model, diagnostic and stability tests are conducted. The diagnostic test examines the serial correlation, functional form, normality, and

hetroscedasticity associated with the model. The structural stability test is conducted by employing the cumulative residuals (CUSUM) and the cumulative sum of squares of recursive residuals (CUSUMSQ).

RESULTANTS AND DISCUSSION

Table [1] reports the results for unit root test. From the Augmented Dickey-Fuller (ADF) and Phillips Perron (PP) tests based on regressions with and without a trend, we find that the null hypothesis that the first differences of these variables have a unit root is strongly rejected at 95% critical values. Hence, it seems reasonable to conclude that our variables are integrated in the first order I (1); therefore, we can proceed with ARDL testing.

Table 1: Result of ADF test

Variables	Augmented Dickey-Fuller test statistic		Philips Perron Test statistic	
	Intercept	Intercept & trend	Intercept	Intercept & trend
DLGDP	-8.46	-10.23	-8.009	-8.94
	(0.000) ***	(0.000) ***	(0.000) ***	(0.000) ***
DLLAB	-5.70	-6.15	-5.70	-6.09
	(0.000) ***	(0.000) ***	(0.000) ***	(0.000) ***
DLINV	-7.04	-6.96	-7.20	-7.11
	(0.000) ***	(0.0001) ***	(0.000) ***	(0.0001) ***
DLEDU	-5.24	-6.60	-5.25	-6.60
	(0.0001) ***	(0.000) **	(0.000) ***	(0.000)
DLOilP	-6.32	-6.20	-6.32	-6.20
	(0.000) ***	(0.000) ***	(0.000) ***	(0.000) ***
DLOPEN	-6.28	-6.34	-6.28	-6.34
	(0.000) ***	(0.000) ***	(0.000) ***	(0.000) ***

Note:

1.*,** ,*** Imply significance at the 1%, 5% and 10% level, respectively.
2. The numbers within parentheses for the ADF (Dickey-fuller 1979) statistics represents the lag length of the dependent variable used to obtain white noise residuals.
3. The lag length for the ADF was selected using Akaike Information Criterion (AIC).

Now we turn to the ARDL approach to testing the existence of a level relationship among the variables in the ARDL model. F-statistic is equal to 1.9307, given that this value is below the lower bound (2.7636) critical value reported in Pesaran et al. (2001) at the 95% significance level. So following the null hypothesis of no level effect cannot be rejected (Table 2):

Table 2: Testing for existence of a level relationship (Pesaran et al. (2001))

F-statistic	Lower Bound 95%	Upper Bound 95%	Lower Bound 90%	Upper Bound 90%
1.9307	2.7636	4.1069	2.3235	3.5569
W-statistic	**Lower Bound 95%**	**Upper Bound 95%**	**Lower Bound 90%**	**Upper Bound 90%**
13.5152	19.3454	28.7480	16.2648	24.8982

The empirical results of the long-run model for the optimal number of lags and for each of the variables based on Schwarz Bayesian Criterion (SBC). Indicate as ARDL (1, 0, 0, 0, 1, 0, 0) Table-3.

Table 3: Autoregressive Distributed Lag Estimates Selected based on Schwarz Bayesian Criterion.

Regressor	Coefficient	Standard Error	T-Ratio [Prob]
INPT	-1.3053	3.2383	-0.40309 [0.689]
LGDP (-1)	0.71574	0.11165	6.4103 [0.000]
LLAB	0.12592	0.19247	0.65421 [0.517]
LINV	-0.024123	0.080544	-0.29951 [0.766]
LEDU	-0.010436	0.067554	-0.15448 [0.878]
LOILP	0.19913	0.035470	5.6140 [0.000]
LOILP (-1)	-0.14137	0.042522	-3.3245 [0.689]
LOPEN	0.38800	0.16380	2.3686 [0.024]
DU94	0.0033883	0.059265	0.057172 [0.689]
R^2=0.94248	**Adjusted-R^2= 0.92933**	**DW=2.0544**	**F (8,35)=71.6845 [0.000]**

Note:*,** ,*** represents significant at 1%, 5% and 10%.

The results above indicate that the Gross domestic product for the previous period is an important determinant of Gross domestic product (LGDP) and statistically insignificant at 1% confidence level. Similarly, the sign of the Gross domestic product for the previous period variable is consistent with the endogenous growth approach. The impact of Oil prices on growth is positive and statistically significant at 1% confidence level. This indicates that, the Algerian economy is linked to the oil price in international markets. The coefficient of openness indicator remains positive and statistically insignificant at 1% confidence level. The predictive power of the ARDL model as shown by the adjusted R^2 is very high, suggesting that the influence of omitted variables is trivial. The F-statistic indicates that our regressors are jointly significant at 1% confidence level.

Table 4 displays the long-term coefficients under ARDL Approach. Results reveal that, in the long-run the oil prices (OILP) and the openness (open) are statistically insignificant at 10% and 5% respectively. More specifically, in the log-run one percent increase in openness leads to 1.3649 percent increase in GDP. According to reported results the dummy variable DU94, It has no effect on GDP, indicating that the trade liberalization reforms undertaken by Algerian government has no impact economic growth.

Table 4: Estimated Long Run Coefficients Using the ARDL Approach

Regressor	Coefficient	Standard Error	T-Ratio [Prob]
INPT	-4.5920	11.6403	-0.39449 [0.696]
LLAB	0.44297	0.67055	0.66060 [0.513]
LINV	-0.084863	0.28493	-0.29784 [0.768]
LEDU	-0.36712	0.23577	-0.15571 [0.877]
LOILP	0.20321*	0.11149	1.8227 [0.077]
LOPEN	1.3649**	0.66031	2.0671 [0.046]
DU94	0.011920	0.21029	0.056684 [0.955]

Note:*,** ,*** represents significant at 1%, 5% and 10%.

The following table (5) reports the short run coefficient estimates obtained from ECM version of the ARDL model. The coefficient of error correction term for growth equation is -0.28426 and is statistically significant at 5% confidence level suggesting that the pace at which the equation returns to its equilibrium once it has been shocked is not fast enough.

We also note that, the openness indicator in table 5 continues to hold positive sign, which is statistically significant. Similarly, the long run coefficients reported in Table 4 hold the same signs like in table 3. The error correction model based upon ARDL approach establishes that changes in oil price variable, is statistically significant while changes in GDP.

Table 5: Short-Run Error Correction Model (ECM), Dependent Variable: dLGDP

Regressor	Coefficient	Standard Error	T-Ratio [Prob]
dLLAB	0.12592	0.19247	0.65421 [0.517]
dLINV	-0.024123	0.080544	-0.29951 [0.766]

dLEDU	-0.010436	0.067554	-0.15448 [0.878]
dLOILP	0.19913	0.035470	5.6140 [0.000]
dLOPEN	0.38800	0.16380	2.3686 [0.023]
dDU94	0.0033883	0.059265	0.057172 [0.955]
ECM (-1)	**-0.28426**	**0.11165**	**-2.5459 [0.015]**
R^2=0.65510	**Adjusted-R^2= 0.57627**	**DW=2.0544**	**F (7,36)=9.4970 [0.000]**

Note:*,** ,*** represents significant at 1%, 5% and 10%.

We apply a number of diagnostic tests to the ECM, finding no evidence of serial correlation, heteroskedasticity and ARCH (Autoregressive Conditional Heteroskedasticity) effect in the disturbances. The model also passes the Jarque-Bera normality test, which suggests that the errors are normally distributed. The table (6) shows that, the model passes all of the reported diagnostic test.

Table 6: Diagnostic tests

	LM version	F version
A:Serial Correlation	CHSQ(1) = 0.11470 [0.735]	F(1,34) =0.088865 [0.767]
B: Functional form	CHSQ(1) = 0.017826 [0.894]	F(1,34) =0.013780 [0.907]
C: Normality	CHSQ(2) = 3.3165 [0.190]	Not applicable
D: Heteroscedasticity	CHSQ(1) = 0.66462 [0.415]	F(1,42)= 0.64414 [0.427]

CONCLUSION

This study has carried out an in-depth investigation on the consequences of trade liberalization on Algerian economic growth. For the period, 1970 to 2014 by using ARDL approach based on bounds testing procedure proposed by Pesaran and Shin (2001). The ARDL approach has been applied as it more powerful procedure to explore the long run relationship as well short term dynamics of relationship and yields consistent estimates of the long-run coefficients that are asymptotically normal, irrespective of whether the underlying regressors are I(0) or I(1).

Using a Cobb-Douglas production function, the study confirm that, the variables in the economic growth function are co-integrated. When the oil price and the openness indicators increase, the gross domestic product increases. The coefficients of these two variables are positive and statistically significant at 1%, 5% level respectively. The coefficients of trade liberalization dummy variable, education and investment are statistically insignificant.

In summary, we conclude that the Algerian radical reform of its trade sector were not enough to influence the rate of growth, whereas the value of exports outside hydrocarbons did not exceed 2%. Therefore, the national economy is a yield economy depends on the export of hydrocarbons to finance its expenditures.

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A STUDY OF CONSUMERS' WILLINGNESS TO PAY FOR NON-PIRATED SOFTWARE IN INDONESIA

MINSANI MARIANI[1] AND RAVINA G. ALIMCHANDANI[2]

ABSTRACT

The purpose of this research is to provide effective solutions for escalating piracy in Indonesia by understanding factors that would affect consumer purchase decision-making. An online survey using convenience sampling targeted 218 respondents was conducted.

Perceived social and perceived prosecution risk did not prove significant. Price was also proven as a determinant factor at predicting behavior; individuals with high willingness to pay indicated more favorably towards the variables. Value-consciousness was indicated to be different among occupation groups and association was detected between software preference and future purchase intention and normative susceptibility.

Recommendations on further methods of combating piracy by all stakeholders such as government, software companies, developers and consumers are illustrated in the study. An increase in creating awareness and perception value of software are required. Further exposure on the tangible damages towards the economy, privacy infringement, and malware should be conducted.

Keywords –Normative Susceptibility, Value Consciousness, Novelty Seeking, Performance risk, Social Risk, Prosecution Risk, Willingness to Pay.

INTRODUCTION

Software piracy is defined as the copying or distribution of software applications on personal computers, servers, desktops, laptops, and other portable electronic devices, without the permission of the software authors or organization who owns the copyright or intellectual property (BSA, 2011). The ease of duplicating software is the reason behind it becoming a global phenomenon (Hsu and Shiue, 2008). Furthermore, the improvement in technology such as the high speed of broadband, the development of the Internet and improvements in network technology has facilitated piracy even more. Based on research by Business Software Alliance (2010), 71% of computer users are concerned about intellectual property rights protection. However a contradiction is observed as 47% of the global population claim to obtain their software illegally.

According to research by BSA in 2011, Indonesia has a piracy rate of 86%, which ranks them at number 11 among other 'pirate' nations and its loss on software piracy has reached $1.46 billion (Figure 1).

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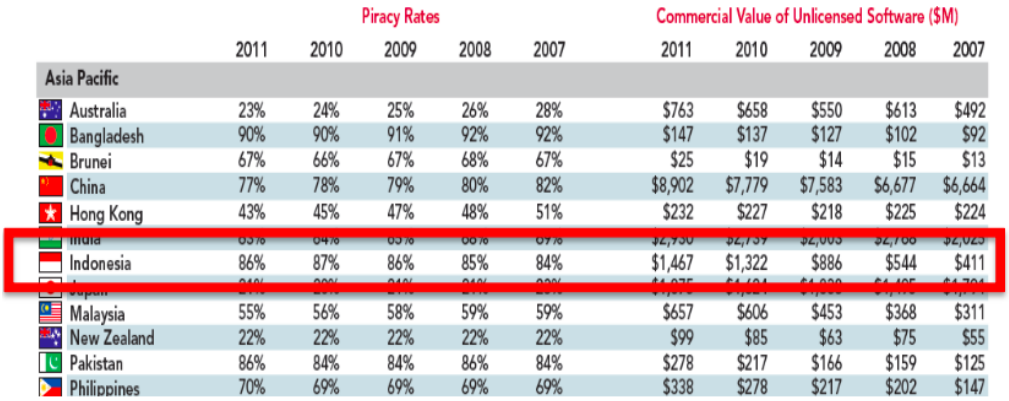
Figure 1. Piracy Rate and Commercial Value Comparison (Source: www.bsa.org)



	Piracy Rates					Commercial Value of Unlicensed Software ($M)				
	2011	2010	2009	2008	2007	2011	2010	2009	2008	2007
Asia Pacific										
Australia	23%	24%	25%	26%	28%	$763	$658	$550	$613	$492
Bangladesh	90%	90%	91%	92%	92%	$147	$137	$127	$102	$92
Brunei	67%	66%	67%	68%	67%	$25	$19	$14	$15	$13
China	77%	78%	79%	80%	82%	$8,902	$7,779	$7,583	$6,677	$6,664
Hong Kong	43%	45%	47%	48%	51%	$232	$227	$218	$225	$224
India	65%	64%	65%	66%	69%	$2,930	$2,737	$2,003	$2,166	$2,025
Indonesia	86%	87%	86%	85%	84%	$1,467	$1,322	$886	$544	$411
Japan	21%	20%	21%	21%	22%	$1,875	$1,824	$1,828	$1,495	$1,791
Malaysia	55%	56%	58%	59%	59%	$657	$606	$453	$368	$311
New Zealand	22%	22%	22%	22%	22%	$99	$85	$63	$75	$55
Pakistan	86%	84%	84%	86%	84%	$278	$217	$166	$159	$125
Philippines	70%	69%	69%	69%	69%	$338	$278	$217	$202	$147

The purpose of this research is to focus on the circumstances of Indonesia. What is the main driver of influence towards the willingness to pay for non-pirated software? This is to strategize means of combating piracy appropriately, based on the influential factors.

THEORETICAL CONTEXT

This study focuses on the prevailing issue of software piracy by constructing a model that weighs the purchase decision circumstances which result in obtaining non-pirated software. The model is formed by the following constructs: attitude towards intellectual property rights and the perceived risk associated with the willingness to purchase non-pirated software.

Table 1. Author's Source for Research

Perspectives	Variables	Source	Theory
Attitude towards IP rights	Normative Susceptibility, Value-Consciousness and Novelty-Seeking.	Hoon Ang et al. (2001), Wang et al. (2005), Hsu and Shiue (2008)	Theory of reasoned action
Perceived Risk	Performance Risk, Social Risk and Prosecution Risk.	Chiou et. al (2005), Tan (2002), Wang et al. (2005), Wee et al. (1995), Hsu and Shiue (2008)	Theory of planned behaviour

Intellectual property (IP) is defined as an intangible product that is usually generated by the idea of an individual. To protect ownership rights copyright, patents and trademarks are originated. In a study of student attitude on piracy, Robert Siegfried (2004) concluded that attitudes towards software piracy have not changed over time. This indicates there is a lack of concern about *the degree* of how unethical software piracy is. The cross-cultural study of Swinyard et al (1990) comparing Singapore and US students indicated that even though students in Singapore were more knowledgeable concerning the IP laws the attitude towards piracy was worse than US students.

Based on the theory of reasoned action, where if an individual does not consider the deed unethical and is simultaneously supported by the surroundings, this results in increased likelihood to perform the behavior (Ajzen, 1991). Subjective norms are based on social pressure

to perform a behavior. Thus, when family, friends, government and experts are consistent at proving the deed as unethical, tendencies of performing the action would be reduced. The approval of surrounding peers highly affects the willingness to purchase.

Novelty-seeking affects the demand for innovative products. This satisfies consumers that are driven by variety and are trend-followers (Ponnu and Ratnasingam, 2008). Novelty-seeking is regularly concerned with consumers who attain products ensuring low risk. However there is a contradiction with regard to counterfeit products, whereby consumers with high novelty-seeking preferences react positively to piracy. This could be due to the demand of frequent changes; thus they neglect the risk as well as the IP rights (Harun et al., 2012). Thus this motivates novelty-seeking as a factor to be explored on the research to identify whether it influences willingness to purchase non-pirated software.

Value-consciousness defines consumers that are sensitive towards price and weigh up each purchase on the basis of whether they perceive the product to be valuable (Ponnu and Ratnasingam, 2008). Value-consciousness is the willingness to seek an opportunity to purchase at a price worth the money (Hoon Ang et al., 2001). Value-conscious consumers perceive counterfeit products as a cost-saving mechanism (Harun et al., 2012). Individuals with high value-consciousness are inclined to be favorable towards piracy. Since they perceive the functionality of pirated versions are almost similar to that of the original ones, in which at least the basic functions are fulfilled.

Perceived risk is when an individual is aware of taking the risk due to attaining the pirated software, and of the negative consequences. Perceived risk is considered as one of the ethical determinants towards purchase behavior (Koklic, 2011). In research by Augusto De Matos et al. (2007), it was revealed through the findings that perceived risk is the most important and crucial variable at predicting consumers' purchase of counterfeits. Perceived risk was also incorporated into the theory of planned behavior that does not only revolve around individual volatile behavior at decision-making but also considers factors above and beyond the control of the individual (Ajzen, 1991).

Perceived prosecution risk is created by committing crime (Ponnu and Ratnasingam, 2008). Prosecution risk relates negatively to the unauthorized duplication or download of a pirated product (Chiou et al., 2005). Currently the Indonesian government is taking more rapid action towards the prosecution of software piracy. Under Act 72, Third Amendment No.19, it is specified that for any deliberate duplication of a computer program, be it software or application, without consent of owner shall be sanctioned for 5 years or fined the amount of Rp 500,000,000 (Five hundred million Rupiah, or $38,000 at the time of writing).

Performance risk is defined as the consequences that the product would not perform as satisfyingly as the original version or is provided with less functionality (Bauer, 1960). There is a lack of assurance of product performance and no guarantee or legal licensing provided by the sellers. The pirated software might be at risk of malfunction and viruses (Ponnu and Ratnasingam, 2008).

Social risk involves the self-image of the individual, whereby the actions are driven by the impact on the social status the individual would like to be project if he commits to the purchase decision (Pope et al., 1999). Status consumption is defined as a group of people exhibiting their prestige and status by utilizing strictly genuine products to establish a social ranking and to demand respect from others (Phau and Teah, 2009). Perceived social risk therefore in this instance is what the individual presumes are the consequences that they will face for the purchase decision (Tan, 2002). Consumers that are concerned with high social-consciousness and peer-image and a certain status among their group tend to have a positive attitude towards purchase of non-pirated software (Swinyard et al., 1990).

It is a commonly-observed phenomenon that the factor that leads to very high rates of piracy is the price barrier. Studies have proven the correlation between income level and

willingness to purchase, as higher income level results in higher willingness (Fu et al., 1999). In emerging countries the problem is due to unrealistic pricing with a vast GDP gap. A study by Thatcher and Mathews (2012) indicated that citizens resorted to pirated software due to the price. A study in Singapore also indicated how lowering prices would result in reduced purchasing of pirated products (Tan, 2002).

However willingness to pay for non-pirated software does have a positive influence when the education of the individual is higher. Customer satisfaction also relates positively towards purchase intention attitude, where they view purchases in a cumulative manner instead of on a per transaction base only (Homburg et al., 2005). A study also determined that customers who believe price reflects quality form a positive behavior towards the willingness to pay (Huang et al, 2004).

RESEARCH METHOD

The research framework was developed based on a previous study conducted by Hsu and Shiue (2008). Eight hypotheses were tested:

- H1: Attitude towards IP rights is positively related to consumers' WTP for non-pirated software.
- H1a: Normative susceptibility dimension is positively related to consumers' WTP for non-pirated software.
- H1b: Value-conscious dimension is positively related to consumers' WTP for non-pirated software.
- H1c: Novelty-seeking dimension is positively related to consumers' WTP for non-pirated software.
- H2: Perceived risk is positively related to consumers' WTP for non-pirated software.
- H2a: Performance risk dimension is positively related to consumers' WTP for non-pirated software.
- H2b: Social risk dimension is positively related to consumers' WTP for non-pirated software.
- H2c: Prosecution risk dimension is positively related to consumers' WTP for non-pirated software.

This study uses a cross-sectional study design, and thus the study is taken during a limited time frame: March through June 2013. A convenience sampling method is used for better accuracy of results. This is done to eliminate efficient chances of unqualified respondents aside from those screened out through the filter questions. The total number of desired respondents was 200-250, composed of high school students, undergraduates, graduate students and general consumers. The results would later be calculated and analyzed using multiple linear regression, one-way Anova, cross-tabulation and cluster analysis.

FINDING AND ANALYSIS

Descriptive Results of Respondents

There were a total of 218 valid samples with the majority of the respondents being males (72%). The age group ranged from 20 to 24 years old (60%). The majority were undergraduate students (77%), and about 46% of the respondents had an average expenditure of Rp 1,000,000 to Rp 3,000,000 per month. The results indicated that currently 126 respondents (57.7%) are using pirated versions of Microsoft Windows and 82 respondents (37.6%) are using pirated Microsoft Office. This affirms that in Indonesia Microsoft Windows is more pirated than legal.

To further understand the types of software pirated, the highest piracy was in the form of games, followed by operating systems, then editing, and multimedia software.

The majority of respondents acquired pirated software through virtual distribution such as peer-to-peer websites or torrents. The second highest was through sharing among family and friends, followed by buying in shops. Price was the factor that mostly influenced their purchase decision. Aside from price, convenience, source reliability, up to date features, free updates and technical support also influenced their considerations.

Results of Inferential Statistics

Based on the statistical analysis that is summarized in table 2, the summary table indicates normative susceptibility, value consciousness, novelty seeking and performance risk influence the willingness to pay for non-pirated software. Meanwhile, perceived social risk and perceived prosecution risk does not significantly influence willingness to pay for non-pirated software. Furthermore, it can be inferred from the table below that 'attitude towards IP rights' is proved to significantly influence 'willingness to pay compared to perceived risk'.

Table 2. Summary of Independent Variable Relationship

Variables		**R^2**	**Sig.**	**Unstandarized Beta**	**Result**
Attitude towards IP rights		.362	.000	.766	Accepted
H1	Normative Susceptibility	.357	.000	.346	Accepted
H2	Value Conscious	.357	.000	.228	Accepted
H3	Novelty Seeking	.357	.001	.210	Accepted
Perceived Risk		.362	.049	.169	Accepted
H4	Performance Risk	.137	.000	-.068	Accepted
H5	Social Risk	.137	.328	.355	Rejected
H6	Prosecution Risk	.137	.665	.030	Rejected

The results obtained indicated that both attitude towards IP rights and perceived risk positively correlated towards willingness to pay for non-pirated software. However it can be inferred from the results that attitudes towards IP rights are a bigger influence towards willingness to pay compared with perceived risk. This observation differs from the findings of Augusto De Matos et al. (2007) that indicated perceived risk as the strongest predicting factor. Based on the theory of planned behavior it is confirmed that purchase behavior and decision are determined by purchase intention which is in turn determined by attitude (Ajzen, 1991). A study by Chiou et al. (2005) also supported the relevance of a correlation between attitude and purchase decision of pirated products. Thus an increase in attitude towards IP rights would result in a higher willingness to pay and worse attitude towards IP rights would thus result in lower willingness to pay.

Acknowledging the high rate of intellectual property rights violations through piracy in Indonesia, we can conclude there is lack of value provided in respecting intellectual property rights. This result is consistent with a study conducted by Phau (2010) that even consumers who showed a high value of integrity and honesty still pirate software. Thus this reflects that there is a lack of concern towards IP rights in Indonesia. Previous studies conducted by Siegfried (2004) stated people do not consider software piracy as a form of stealing, which could be due to the fact it is not a tangible item.

From the regression results, consumers that are more normatively susceptible would have a higher willingness to pay. This result is consistent with research in a previous study (Hsu and Shiue, 2008) where normative susceptibility is stated to have the highest influence towards willingness to pay for non-pirated software. Normative susceptibility as one of the dominating factors are supported by studies conducted by Hoon Ang et al. (2001) and Thurasamy et al. (2003) where consumers with higher normative susceptibility have a lesser attitude towards piracy software or even music. This is particularly due to the mindset of normatively susceptible consumers where they have high expectations and concerns on the impression of others, since pirated software do not create a good impression thus resulting in choosing legal authorized products (Hoon Ang et al., 2001).

Value-consciousness is the second most determining factor of willingness to pay for non-pirated software. This indicates that consumers would have a higher willingness to pay as long as the value obtained from the product is worth the price. In the previous study Hsu and Shiue (2008) indicated that students still pursuing education would be willing to pay higher for legal software if they consider it is worth the price. Similarly the findings suggest that if the consumers perceive the software as valuable and worth the price they would obtain the original version. If in their opinion the product is overpriced meaning the quality received does not balance the amount spent they would find a cheaper alternative. These findings are also consistent with research by Summers et al. (2006) where value consciousness is positively correlated with their purchasing. Furthermore, it is to be noted that value-conscious consumers are not only price-sensitive but also quality-sensitive. In the case of price cut promotions, they would not only consider it is a better value for the money but would upgrade to a better version since quality value is also considered (Summers et al., 2006).

Novelty-seeking is the third influential factor in determining willingness to pay. Novelty seekers tend to purchase legal software due to the innovation being for job-related purposes or purely curiosity due to their product satisfaction (Ponnu and Ratnasingam, 2008). This means the higher the willingness of the consumer to try the new product - whether due to their requirement or curiosity - would lead to a higher willingness to pay for non-pirated software. Thus if consumers are not very concerned towards that specific innovation they would potentially have a lower willingness to pay. This finding is aligned with research by Harun et al. (2012) and Phau et al. (2009) where novelty-seeking is positively correlated with purchasing decisions.

This study has proved a positive correlation between perceived risk and willingness to pay. This result is aligned with research conducted by Augusto De Matos et al. (2007), and Tan (2002). However, only perceived performance risk proved to be a significant in determining willingness to pay for non-pirated software. Similar studies also indicated that higher perceived performance risk leads to lower purchase of pirated software and thus a higher tendency to purchase original software (Tan, 2002; Ponnu and Ratnasingam, 2008). This asserts that when a consumer perceives a high risk of performance failure in the pirated software, thus the perceived performance risk increases and simultaneously the willingness to pay for non-pirated software also increases. Performance risk is commonly faced with pirated software due to the absence of any warranty or the ability to be repaired in the case of malfunction such as viruses, damage to the computer systems or loss of data since there is no assurance provided by the seller. The product is gained illegally and not from the company, thus the risk is bigger. This study shows that consumers in Indonesia are concerned with performance risk. Legal software developers could utilize this as a strategy by providing more awareness of the consequences of malfunction. Another option could be to create a mutually exclusive performance functionality that is only able to be carried out by authenticated authorized software.

Regarding the insignificance of social risk, this could be due to the fact that piracy is not considered a crime by many levels of society in Indonesia. This statement is well supported by research conducted by Phau (2010) among Indonesia consumers that indicated people who had proven to have high integrity and who claimed would not commit any crime still were complicit in software piracy. This shows the permissive behavior of the society towards piracy where they consider it an acceptable action and not a crime. Siegfried (2004) stated in his research on student attitudes to software piracy and related issues of computer ethics that those who commit piracy do not consider their action illegal even though they claim to have a high degree of ethical compliance. This leads to the status quo whereby consumers are concerned with the impression they create among the society as proven through normative susceptibility. However, since there is no threat of impact from a deterrent authority or objection from society, thus perceived social risk is not a valid variable in determining willingness to pay for non-pirated software.

With regard to perceived prosecution risk, this result is aligned with the result obtained in the previous study (Hsu and Shiue, 2008) where prosecution risk proved insignificant in predicting willingness to pay. Perceived prosecution risk is defined as the probability that the acquisition of pirated software would result in imprisonment, a fine or legal prosecution towards the person who committed the piracy (Chiou et al., 2005). The Indonesian courts do have a law that prosecutes those who commit software piracy. However, there have not been any piracy cases brought to court, as the software companies mostly only conduct raids and no further legal action or punishment are enacted. Thus, due to lack of law enforcement and lack of feasibility to prosecute private users of pirated software, perceived prosecution risk seem to be invalid at determining willingness to pay for non-pirated software.

Aside from regression analysis, the author conducted a one-way Anova to observe the difference in behavior of occupations among the variables. It can be inferred from the result there was a difference in behavior for only the variable value-consciousness: higher education students had the highest value-consciousness. This suggests they are most cautious in terms of price and quality received, where they would only conduct a purchase if they see the item to be worth its price. This means they respect value and thus would purchase original software if they consider it is worth the price and could afford the price.

Cluster analysis was also conducted to observe behavior between consumers with high willingness to pay and those with lower willingness to pay. The results indicated that the higher the consumer's willingness to pay the more positive attitude they had to normative susceptibility, value-consciousness, novelty-seeking and perceived performance risk.

Future purchase intention to purchase pirated software was also relevant to the cluster analysis. Results indicated that consumers with a high willingness to pay had lower future purchase intentions, in comparison to consumers with willingness to pay. A similar behavior was also indicated in the current usage of pirated Windows and Microsoft Office as well as software preferences, individuals with a low willingness to pay showed a greater preference for piracy overall.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

This study has proved that attitude towards IP rights are a significant factor in determining a consumer's willingness to pay. In terms of the 'attitudes towards IP' variables of normative susceptibility, value-consciousness and novelty-seeking, the results indicated all variables were supported. This study has significantly shown that the more a consumer complies with IP laws the more they would be willing to pay for non-pirated software. Currently, the rate of piracy in Indonesia is 87% (International Intellectual Property Alliance (IIPA), 2012) thus reflecting the

attitude to intellectual property rights which is low and hence Indonesians have a relatively low willingness to pay. The results have shown that more aggressive action should be taken to improve the implementation and compliance of intellectual property law in Indonesia.

Perceived risk was indicated to be less influential in determining willingness to pay for non-pirated software in comparison to attitudes toward intellectual property rights. Nevertheless it is still supported to have a contribution at predicting a consumer's willingness to pay for non-pirated software. Of the perceived risk variables of performance risk, social risk and prosecution risk, only performance risk was identified to affect willingness to pay. This result is aligned with the theory of planned behavior, which also considers the perceived ease or consequences faced by the individual in performing the action from external forces aside from just the personal intention of the individual at performing the behavior (Liao et al., 2010). Studies by Augusto De Matos et al. (2007) and Ponnu et al. (2008) have also confirmed that some factors of perceived risk is significant in influencing decision-making against piracy.

Normative susceptibility has proven to be the most significant factor at predicting the willingness to pay for a non-pirated software. The study indicates that in Indonesia there is a positive correlation between normative susceptibility and willingness to pay for non-pirated software. This result has been consistent with studies by Hoon Ang et al. (2001) and Thurasamy et al. (2003) which indicated that individuals who are highly susceptible are more driven to non-pirated software. These findings are also strengthened by the cross-tabulation conducted by the author between normative susceptibility and software preference, wherein respondents who preferred non-pirated software had higher normative susceptibility.

Value-consciousness is the second variable that has a strong influence on willingness to pay for non-pirated software. This indicates Indonesian consumers who have high value-consciousness thus make informed decisions based on a stronger understanding of quality and price and have the tendency to have higher willingness to pay for non-pirated software. However, if consumers are under the perception that the value offered is not worth the price, this might lead them into purchasing other alternatives. Novelty-seeking follows shortly after value-conscious in influencing willingness to pay for non-pirated software. The results exemplified that consumers who are concerned towards innovation and trying new products are more driven to higher willingness to pay of non-pirated software.

Lastly the variable that influences willingness to pay for non-pirated software is perceived performance risk. This is very common in pirated software since no warranty is provided by the seller due to the fact that it is illegally obtained (Tan, 2002). The data indicated perceived performance risk significantly correlates with the willingness to pay for non-pirated software, meaning that the higher the perceived performance risk is by the consumer in purchasing the pirated product the more likely is their willingness to pay for the non-pirated product and vice versa. Results from this study yielded that social risk and prosecution risk do not positively correlate towards willingness to pay for non-pirated software.

Managerial Implications

The results of this research bring several managerial implications for the stakeholders in the software industry. The stakeholders involved include the government, software companies, anti-piracy associations, activists, and end-users. Based on the findings, attitudes towards IP rights needs to be further focused in order to combat piracy.

The government should support anti-piracy campaigns in society to create an impact as a whole through socialization and education of the harms in terms of malware and even tax evasion that impacts upon the community as a whole. Results indicated no perceived fear even after the law had been established. Thus, it is suggested to conduct stricter sanctions on

violations. Until the time of writing, Indonesia has not brought any software piracy cases to the court. The Internet is the primary conduit for the downloading of pirated software discussed in this study. Thus the government could collaborate with Internet service providers and block sites that violate intellectual property rights.

Software companies could join the government officials in combating piracy. Technology education should be provided to the general public, not only to intellectual property rights such owners as programmers. Software companies could fund campaigns and provide education based on how disrespectful, not to mention illegal, it is to commit software piracy. The medium of engagement should be made according to the target group, such as viral videos aimed at university and high schools. These media should be interactive, perhaps incorporating the creation of competitions with rewards to spread awareness on the pernicious nature of IP exploitation.

Software companies should be able to convince consumers on the value of legal software, and provide alternative purchase solutions for the software: subscription, pay-per-use etc. Software companies could also provide up-to-date features which are promptly attainable from the Internet only for authorized software users.

Consumers who are sensitive to perceived performance risk would be susceptible to information campaigns from software companies or anti-piracy activists to publicize extensively the dangers of malware in pirated software. For instance pirated software has the ability to corrupt and tweak software code, and insert viruses. These alarming facts on pirated software should be disseminated effectively in order to produce the desired result of maximum compiance.

Software developers could collaborate with Digital Rights Management (DRM), which has been successful in preventing game distribution due to limiting the functionality. This could be the action conducted by software developers to influence a higher willingness to pay for software. Another alternative could be to provide subscription-based software for a low amount or payment according to specification or period of access.

Limitations and Recommendations

The current research based the survey upon the most pirated software: Microsoft Windows and Microsoft Office. However, the results from this research revealed that highest piracy rate was among games. Research in the future could extend the product category or type to include games, or other counterfeit product types such as fashion, or music, and behaviors could be compared based on the product category as to the nature of intangible and tangible characteristics of a product.

This research has only considered the default options of software between pirated and non-pirated. We did not include other forms such as open-source or cloud-based software. Another recommendation would be to assess the voluntary willingness of individuals to divert to cloud-based software or open-source such as Office 365. Their attitude towards this new innovation could be interesting to compare. This could be by adding a dependent variable on *the willingness to alter*. However there has not been any research on willingness to alter usage of pirated software to cloud-based software or open-source.

This study does not considering the existence of piracy due to facilitation. One previous study on facilitation conditions was held by Limayem et al. (2004) which concluded a negative correlation towards willingness to pay. It is suggested that environmental conditions do influence, utilizing Ajzen's theory on theory of planned behavior where environment forms a support not a risk.

Another limitation is due to the sensitivity of the issue, as software piracy is an unethical behavior, so the respondents have a tendency to answer in a biased manner by providing a more favorable answer, and casting themselves in a better light. Furthermore, a random sampling

method would allow for a more thorough analysis that could strongly indicate societal behavior. A wider range of research to compare attitudes among the different regions in Indonesia or by creating a cross-cultural analysis with a comparison with a study from another country would provide a deeper understanding of the issue.

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THE FOLKLORE SHADOW-BANKING IN CHINA: HOW MUCH ATTENTION DOES IT NEED FROM THE REGULATORS?

DIFAN QU[1]

ABSTRACT

According to the Financial Stability Board (FSB, 2014, 1), shadow-banking is the "credit intermediation involving entities and activities outside of the regular banking system." Such a definition does not entirely apply to China. In China, shadow-banking system can be divided into two parts, the state-dominated shadow-banking system, which resembles the definition of shadow-banking as offered by the FSB, and the folklore shadow-banking system. This paper addresses the regulation of the latter from a legal perspective to see how much regulation it is needed from the financial regulators.

Key words: Chinese shadow-banking, Folklore shadow-banking, Rotating Savings and Credit Association

BACKGROUND

Chinese folklore shadow-banking system encompasses mainly the institutionalised folklore financing activities, i.e., the Rotating Savings and Credit Association (ROSCA), private lending and underground banks. According to existing research, these financing activities are relational in nature as opposed to "entity based" that is "based on trust rooted in social norms and relations." (Pistor, Guo and Zhou, 2015; Sheng, 2001). These activities are typical shadow-banking activities that do not appear on entities' balance sheets that are subject to financial regulators' oversights. The enforcement of these activities are also based on trusts and reputations (Pistor, Guo and Zhou, 2015; Sheng, 2001) where the defaults of payment and enforcements of promises are guaranteed by the inherent bonds and ties among related people that have been in existence for centuries and have been acting as deterrence throughout the Chinese history. Existing research argues that the blood ties among people in China serves as the very fundament of cultural and social order back in agricultural societies, (Chen, 2009, p. 10) which are the optimal fundaments in maintaining the credibility of a society (Chen, 2009, p. 10) absent a well-established legal framework and a system that guarantees the enforcement of laws. As a result of which, it is fair to say that the Chinese folklore shadow-banking system has yet undergone through the process of financialisation, which is "a pattern of accumulation in which profits accrue primarily through financial channels rather than through trade and commodity production." (Krippner, 2005).

Private lending in China is a very popular financing activity, most of these lending are carried between private individuals with a willing lender and a willing borrower. These

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activities are sometimes referred as underground banking, and are regarded as part of the Chinese shadow-banking system. In 1991, the Supreme People's Court issued a suggestion (China. *Several Opinions Regarding Money Borrowing Cases by People's Court 1991*), article 6 of which states that the interest rate of private lending can be higher than that of the bank, but cannot surpass four times of the bank's loaning interest in the same period. And should such a limit be exceeded, the exceeding part will not be protected. Thirteen years later, the People's Bank of China (China. *Notice of the PBoC regarding Adjustment of the Deposit and Loan Ratio 2004*) states that from October 28, 2004 financial institutions other than Urban and Rural Credit Unions (*cheng xiang xin yong she*) no longer have a maximum limit (China. *Notice of the PBoC regarding Adjustment of the Deposit and Loan Ratio 2004*). On appearance, these two rules are contradicting with each other, the former established a limit and the latter relieved such a limit. The purpose of the Supreme Court Interpretation by setting an upper limit of loan rate is to prevent usurious loan, while the latter rule issued by the PBoC is to promote liberalisation of the interest rate so to reduce the administrative intervention to the banking sector. An alternative interpretation for these two contradictive phenomena is that, the PBoC actually sets a minimum level of loan interest rate while the Supreme People's Court essentially established a maximum level of loan interest rate. The latter interpretation has created a safe-zone for bank to make an almost risk free profit since deposit interest rate is predetermined, and as long as the banks can keep their loan interest rate between this interval, and to manage to cover all the costs, then the bank can be promised a guaranteed profits.

On the other hand, it is very difficult for Small and Medium Enterprises (SMEs) to secure a loan from the banks, which forced them to seek financing mechanism elsewhere, and most SMEs eventually financed either fully or partially from underground banks. This has created a huge demand for underground banking and other forms of shadow-banking. As a result, many people who were able to obtain a loan from the banks started underground banking business themselves by firstly secure a loan from the banks, and then form a corporation to use this source of funds to make loan themselves by charging a higher rate (Tsai, 2002, p. 35). This lending cycle involves two intermediaries, i.e. bank and the underground bank, which makes the loaning process inefficient and the cost of financing ever more expensive. In addition, this process is quite meaningless to the extent that it allowed too many parties to be involved and eventually burdening the SMEs, making them less competitive, which impedes innovation. In addition, this mechanism poses systemic risk since, should the ending borrower defaults on the loan, then it will cause a chain reaction which amounts to banks' bad loan. And if the banks suffer too many bad loan cases, then they will be more meticulous in offering loans for prospective borrowers which will make it more difficult to obtain loans in the future.

In the 90's of the twentieth century, due to socialist ideological dominance, the folklore shadow-banking activities was once declared as illegal in China, and the government once at that time took an extreme hostile approach towards the regulation of the folklore shadow-banking (Tsai, 2002). Such overwhelming attitude of regulation has been proved to be ineffective since folklore shadow-banking has been continuously growing since.

With regard to the four key characteristics of determining shadow-banking activities, i.e., maturity transformation, liquidity transformation, imperfect credit risk transfer, and leverage (FSB 2011), this research concludes that the folklore Chinese shadow-banking system only share three of the four risky factors excluding the leverage factor.

The feudal Chinese society is a de facto platform of shadow-banking activities and is often more effective in tackling with systemic risk problems on a superficial level. This is because that systemic risk, in the modern sense financial system, often results in individual losses since financial risks have been transferred and often enlarged after each financial transaction. When the final blow of risk reaches its destination of the chain, i.e., individual investors, or creditors to these investors, the loss is often devastating. In this sense, the

deleterious effect of the outbreak of systemic risk is still different than that of the systemic risk that underlies a Chinese feudal society. In feudal China, systemic risks do not entirely[2] portray itself as a strike on financial wellbeing. In feudal China, the elderly serves as investors and youngsters serve to be the financial products that are traded. Except these "financial products" are not only channel that allocate funds from the investors to the investees; these youngsters are themselves investees and channels at the same time. In such a system, investors (elderly) only suffer systemic risk when external supervision or the entire societal mechanism fails. However, due to very compelling mental restrictions as prescribed by Confucianism, the youngsters are the de facto "victims" of the system. The constant encroachments of the rights of the youngsters are what make the shadow-banking system less deleterious.

THE WENZHOU MODEL AND BIAOHUI

People from Wenzhou, Zhejiang province are known for their exceptional talents in running small businesses (Zhang, 2009, p. 40). In China, many myths have been told about Wenzhou businessmen and their almost miraculous successes. The fame of Wenzhou businessmen is not restricted in China alone. In New York and in Paris, people from Wenzhou have established their own empire in operating SMEs. However, despite explanations that may seem as cliché regarding their successes such as Wenzhou people are diligent, frugal and that they were in poverty, another often overlooked aspects of Wenzhou's "non-elite immigrants"(Wang, 2000) success is that they possess a semi-secret method of financing. Indeed, as some have argued that, poverty alone cannot be the sole reason for a region's business success since there are just so many regions in the world that is in poverty, and most of these places remain to be indigenous (Wu, 2006). Wenzhou's reputation in financing business greatly rests upon its unique operation of shadow-banking in the form of Rotating Saving and Credit Association (ROSCAS).

The emergence of Wenzhou as a competent city in terms of economic development was not by accident. Before the establishment of the PRC, Wenzhou was one of the rare ports that is opened for trade and is considered as important (Zhang and Mao, 1993, p. 61-62; Tsai, 2002, p. 122). After the establishment of the PRC, because of ideological differences and close proximity of Wenzhou in terms of distance to Taiwan, the central government at that time disfavoured policies that tend to boost coastal economies since they do not wish upon warfare, that these areas would fall into the hands of the Nationalist Party (Tsai, 2002, p. 122). This can be seen by the fact during the times when Mao Zedong was still active in ruling China, Wenzhou only received one percent of "Zhejiang's fixed capital investment" as opposed to the fact that Wenzhou comprises eleven percent of Zhejiang province's land area and fifteen percent of its population (Wang and Li, 1986, p. 14; Tsai, 2002, p. 122-123). This list of disadvantages goes on. The combination of the advantages and disadvantages of Wenzhou serve a rough yet promising start. The more universal view with regard to the rise of Wenzhou rests upon the theory that the strong ties within family and relatives helped Wenzhou businessmen to utilise financing mechanisms that are necessary to start businesses (Zhang, 2009). At one time, the daring use of shadow-banking in creating credit run counter with the regulations mandated at the central level and has clearly vexed central government concerning the losing of control of financial sector and the disobeying of central regulations by the localities (Tsai, 2002, p. 121;

[2] It is still subject to further research on the effects of the deleterious effects or systemic risk of the feudal Chinese shadow banking activity on people.

Huang 1996, p. 259). However, soon after the opening and reform, ideology no longer poses a problem. The adoption of capitalism no longer serves as a prima facie indictor of deviating from the "China socialist path." The central government, realising the need of private sector development and the strong potential of shadow-banking system in generating credit, and that it is still controllable, began to promote the so called Wenzhou model.

The legend of Wenzhou's miraculous business performance was mostly due to the social "cotton clan." Back in the time of planned economy, there is shortage on daily consumption product (Wu, 2006). The cotton makers, known as the "cotton clan," traveled around the nation to sell cottons and at the same time, they acquired the information on which type of daily needs products was needed in the market and they shared this information with the people from their hometown, Wenzhou (Wu, 2006). And next time when they travel around the country to sell cottons, they would bring the product that they produced in Wenzhou and sell them in addition to their cotton products (Wu, 2006). These selling activities during planned economy were illegal and thus the businessmen in Wenzhou depended on the trust between each other in order to sustain their businesses. This network of interdependence was formed during the hardest time when all policies and laws are anti-commercialism. And as a result, the trust formed during this time has laid a strong foundation for the special financing method that is almost exclusive to the people of Wenzhou (Wu, 2006).

The Wenzhou's way of financing is known as the *Biao Hui*, which is a form of ROSCAS (Zhu, 2013, p. 79). It is a financing method established upon the trust and the interconnectedness among people more likely with established connections. *Biao Hui* is a popular financing activity with a long history and has been adopted in many places in China. However, the time that *Biao Hui* has caught a wide span of attention is when this financing method was successfully adopted overseas by Wenzhou people especially in New York and Paris. Namely, although *Biao Hui* has been in existence for a very long time in China, little attention was paid to the study of such a phenomenon from legal perspective apart from the more common approach is to associate *Biao Hui* as a type of criminal activity (Zhang, 2013). In addition, existing literature rarely include *Biao Hui* as a part of the shadow-banking system in China, and as a result of which, rendering the definition of shadow-banking incomplete and the regulators or the court would have failed to extent their oversights on this important financing sector which is capable of destabilising the economy as well as the financial sector. On the other hand however, if handled properly, *Biao Hui* can serve as a way of supplementing the state-dominated credit sector in China. This paper argues that *Biao Hui* is a type of shadow-banking activity and should be included in the broad definition of Chinese shadow-banking system but should be not be treated on a equal basis with other types of shadow-banking activities in which a bank or a formal financial institution is involved.

Biao Hui has a strong cultural bond which makes it a viable financing tool that can only serve a small number of people who belong to a certain culturally distinguishable group (Zhu, 2013, p. 73). This is so because there is a major concern of moral hazard that one participant might abscond with the fund that he or she has financed through *Biao Hui*. The promoter or the initiator of *Biao Hui* is known as the "*Hui Shou*" (Head of *Biao Hui*) (Zhu, 2013, p. 73; Chen, 2005, p. 80), who must be a reputable and honorable person within the community that he or she wishes to start the *Biao Hui*. The word "*Biao*" in Chinese character means "bid," so "*Biao Hui*" means the bid meeting. Despite the good character and reputation of "*Hui Shou*," in order to successfully start a *Biao Hui*, the *Hui Shou* also need a very good reason since *Hui Shou* would typically be the person to firstly entitle to the usage rights of the funds (Zhu 2013, p. 79). Reasons such as the urgent need of fund to start a business or the need to acquire real estate would usually suffice (Zhu, 2013, p. 79). In addition, those who participate the *Biao Hui* are the people who are well acquainted with the *Hui Shou*, and sometimes they are the relatives of *Hui Shou* (Zhu, 2013, p. 79). These participants are known as the "*Hui Jiao*" (The foot of *Biao*

Hui) (Zhu, 2013, p. 79). In simple words, The *Hui Shou* needs to initiate the *Biao Hui* and set up a meeting on a given date, and the meeting would be reorganised on a monthly basis (or other predetermined intervals). In the first meeting, the *Hui Shou* needs to establish the rules with regard to how the meeting can be organised. Another task of *Hui Shou* in its initial meeting was to set the quota of the bid, known as the *Biao Jin* (Zhu, 2013, p. 74). *Biao Jin* varies from region to region.

For the sake of analysis, let's set the *Biao Jin* to $1,000, with one *Hui Shou*, and 19 *Hui Jiao* (Zhu, 2013, p. 79).[3] In the first meeting, the *Hui Shou*, according to his or her responsibility, assembles the meeting with 19 *Hui Jiao* and explains basic rules. The *Hui Shou* would also announce the amount of *Biao Jin*. In simple words, the *Hui Shou*, being a reputable person among his or her community, assemble the *Biao Hui* with urgent need of acquiring funds. In the first meeting, the *Hui Shou* is able to acquire $19,000 without having to pay for any interest. However, *Hui Shou* will then have to repay 1,000 to each of the bidders for the next 19 consecutive months (Zhu, 2013, p. 79).

In the second meeting which takes place in the second month, the *Hui Shou* reassembles the meeting with all the *Hui Jiao*. If someone were absent, then absentee's share would then have to be paid by the *Hui Shou*. In the second meeting, all the *Hui Jiao* would then bid for the *Biao Jin* excluding the *Hui Shou* since he or she has been announced as *Si Hui* (or dead meeting). The rest of the *Hui Jiao* would then submit their bid; only this time the bid is rather an annunciation of a number than the actual submission of money. The next highest bidder would then receive the payment of money less the amount that he or she bids from each of the other *Hui Jiao*s who did not have a chance to win the bid yet and who are still not *Si Hui*.

By the same rationale, the meeting will continue to be held for another 18 times with 20 times in total. The mechanism that there is a bidding procedure is to enable the person that mostly needed the financing fund to get the money. However, such a need will come at a price, i.e., how much is the bidder willing to sacrifice in order to turn a long term liability into short term asset. (Zhu, 2013, p. 79).

Biao Hui resembles the character of shadow-banking activity in that it provides "loans" to the borrowers. Namely, *Biao Hui* itself serves to be the "bank" that attracts funds and rechanneling these funds into the person that mostly need them. Despite the function plays by *Biao Hui* and its effectiveness in financing, others criticise its risks. From a legal perspective, *Biao Hui* is illegal and has always been a striking target of the state. In a document issued by the China Banking Regulatory Commission (CBRC) (China. *The Reply of the CBRC to the Suggestion Made by Eleventh NPC Second Session, 2009*), *Biao Hui* has been regarded as an illegal underground activity and that the CBRC will cooperate with local governments to continue monitor and strike it down according to law. In addition to its illegality status, the media often describes *Biao Hui* as a fraudulent and Ponzi type of activity which only cause the participants to lose money (Zhang, 2013).

This raises a problem, if *Biao Hui* fits the definition of shadow-banking, then it should be regarded as a part of the Chinese shadow banking system. If the Chinese shadow-banking system should be regulated or continuously supervised, then *Biao Hui* should also become a target of regulation. However, *Biao Hui* should not be regulated by the regulators, due to it inner nature of "relational finance" (Pistor, Guo and Zhou, 2015).

[3] These examples are based on the work of Zhu, 2013.

THE REGULATION OF FOLKLORE SHADOW-BANKING SYSTEM

Folklore shadow-banking activities is essentially comprised of ROSCAs such as *Biao Hui* and should subject itself to the regulation of laws and regulations yet should receive least regulations from financial regulators.

This seemingly paradoxical conclusion might create apparent confusion if one associates shadow-banking as subject to the financial regulatory rules and laws with official financial regulation. The former means that laws in the broad sense are passively applied in which the folklore shadow-banking participants are not actively regulated by the financial regulators, i.e., the CBRC. Instead, the regulation of the folklore shadow-banking system should be left to the courts. The latter, i.e., official financial regulation, means the positive pursuit of the shadow-banking participants by the financial regulators. In this regard, the regulation is more administrative in nature. The regulation of the folklore shadow-banking thus should depend on the right pursuance of relevant beneficiaries or public authority other than the financial regulators, and they need to work closely with the judiciary. Although China is a state with strong centralised power, in terms of using its power of financial regulation on a central authority level, there is little that the central authority could do with regard to the informal banking sector, or the folklore shadow-banking system (Tsai, 2002, p. 5). This is possibly due to the very covert nature of the folklore shadow-banking activities, and that China is just too big in terms of both population and land area in order for the centralised power to properly function at the local level. It is possible that Western experiences in terms of effective governance of the government rest not on structural institutional design, but simply because they do not possess the amount of land area and the large population as China does. As a result, financial regulations should therefore not extend its jurisdiction to the folklore shadow-banking activities.

More traditional literature on law and finance, or, as they are generally acknowledged as the "conventional law and finance scholarship" (CLFS) (Awrey, 2015, p. 9), undermines the "role of politics" (Awrey, 2015, p. 9) and build their theory upon the absence of political interventions, and they propose that common law legal systems are better in the protection of investors than civil law jurisdiction (La Porta et al., 1998), and that the better the development of the stock market often is associated with better legal protection (La Porta et al., 1997, p. 1131). Chinese folklore shadow-banking activities are a type of finance activities that are least affected by political factors due to their dynamics, small scale, and their potential little harm, which makes itself an ideal target of application for the CLFS. And according to the CLFS, that China, as a civil law jurisdiction, cannot offer as good a protection to the investors since it is neither a common law legal system nor a jurisdiction with advance stock market development. Consequently there is little that financial laws can do for the folklore shadow-banking participants in China. And as a result, the folklore shadow-banking activities in China should therefore not subject to the regulation of official governmental regulatory agencies.

Furthermore, the areas where folklore shadow-banking, especially these more traditional types of informal financing such as the ROSCAs, existed mostly in the areas where state dominated enterprises have either little involvement or the infrastructure of which are not quite significantly established as other areas where the state deemed strategically important (Tsai, 2002, p. 15-16). These areas include southern coastal areas that are in proximity to Taiwan in terms of distance, depriving investment in such areas has the potential benefits of not losing important infrastructures or development achievements in times warfare during which these areas can be jeopardised (Tsai, 2002, p. 15). However, it is in these areas that folklore shadow-banking thrived and benefited private entrepreneurs to a great extent (Tsai, 2002, p. 15-16). In other words, according to the conclusion the other level of shadow-banking is state dominated, in areas where SOEs customarily cast strong influence, the absence of

folklore shadow-banking system may not jeopardise economic development as much as those areas where SOE intervention is strong. No evidence suggests that the intervention of governmental financial regulator in these areas where folklore shadow-banking proliferates will result in any effective regulatory outcome.

Another argument in supporting the theory to exclude financial regulator's intervention to the folklore shadow-banking system is that the degree of commercial development is not really revealed by the prosperity of the level of shadow-banking institutions' development (Tsai, 2002, p. 61). Namely, at that time, the folklore shadow-banking system was still dominated by the government in prioritising certain sectors' development while subduing others (Tsai, 2002, p. 61). In other words, absent governmental intervention, the development of local economies in China should be positively correlated with the level of informal finance development. The local government at that time, although did not favour shadow-banking system, was aware informal finance/shadow-banking sectors' potential in economic development.

In terms of taking action against the folklore shadow-banking sector, the attitudes of different local government is not always consistent. Different divisions under the State Council might have different interests at stake and thus formulating diverse policies with regard to folklore shadow-banking system at the local level. In the earlier stages of development, the shadow-banking sector in Wenzhou encountered different treatments from different branches of the government (Tsai, 2002, p. 218). Local state banks often take a hostile approach towards private credit firms since such an attitude was backed by the PBoC or that the PBoC pressurised these local state banks to do so (Tsai, 2002, p. 218). On the other hand, the industrial and commercial bureaus (responsible for approval of establishing corporations) often do not share such concerns and would not adopt harsh measures to go after the enterprises that are implicated in financial intermediation (Tsai, 2002, p. 218). The confusing structural framework has rendered a chaotic situation in which participants and especially initiators of the shadow-banking system continually have to speculate who is the ultimate "boss" that they have to obey.

CONCLUSION

This paper over all argues that the folklore shadow-banking system in China is unique in the sense that it has little potential in causing systemic risk the accumulation of which may result in a financial crisis. In particular, folklore shadow-banking in China thrives largely due to financial repression in which state-dominated banking system does not assume the role of extending credit to small-and-medium enterprises. In addition, this paper argues folklore shadow-banking system has been in existence throughout the Chinese history and has been continuously serving as the non-standardized channel of investment and financing among the Chinese people. Furthermore, folklore shadow-banking differs from state-dominated shadow-banking in that it only serves the purpose of raising pension and financing instead of profit-making. As a result, the folklore shadow-banking system should receive less oversight from the financial regulators.

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DISCHARGE IN BANKRUPTCY: A COMPARATIVE ANALYSIS OF LAW AND PRACTICE BETWEEN MALAYSIA, UNITED KINGDOM (UK) AND SINGAPORE

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ABSTRACT

In the common law jurisdictions like Malaysia, UK and Singapore, the legal mechanism to deal with the bankrupts is bankruptcy law and proceedings whereby such laws allow the bankrupts to be discharged of indebtedness and have a fresh start. In UK, a bankrupt who is blameless for his insolvency, he could automatically discharged after the expiry of one year from the commencement of bankruptcy and ceases to be liable for his debts. Yet, no equivalent concept has been introduced in Singapore. Meanwhile, in Malaysia, the Department of Insolvency has recently proposed a reform of Malaysian Bankruptcy Act 1967 and the reform has suggested bankrupts to be given a second chance where they could be conditionally discharged after five years from the commencement of bankruptcy. This paper aims to examine the principles of discharge as a form of rehabilitation. It also compares the law and practice in Malaysia, UK and Singapore regarding discharge of bankrupts.

Keywords: fresh start; automatic discharge; discharge of bankrupts; comparative analysis

INTRODUCTION

Bankruptcy is a legal definition of a debtor's inability to meet all debts in full as they fall due (Pheng and Detta, 2014). Bankruptcy attracts a very negative connotation in that there remains a social stigma attached to it. During the period that a bankrupt remains undischarged, a number of disabilities are imposed on the bankrupt. History has shown that the debtors faced problem in the past until the idea of rehabilitation was introduced to relieve the bankrupts through the concept of discharge from liability of the existing debts if he co-operated with the creditors. The effect of discharge is just like wiping a slate clean; allowing the discharged bankrupts to start again with all the debts wiped away (Goudy, 1914; Cork Report, 1982; Keay and Walton, 2008; Goode, 1997). The discharge provides the debtor a fresh start and in that context seen as a form of rehabilitation. Considering the impact of bankrupt on individual, family and society this paper aims to examine the purpose of discharge's concept as a form of rehabilitation recommended by International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL), United Nations Commissions on International Trade Law (UNCITRAL) and the World Bank. Then the discussion resumes with the comparative analysis of the law and practice in Malaysia, UK and Singapore regarding discharge in bankruptcy. In order to analyse the concept of discharge and the law and practice of discharge in bankruptcy between Malaysia, UK and Singapore, the authors collected information through primary and secondary data. Sources of data are statutory provisions, judicial decisions, textbooks, reports and articles from journals and law reviews.

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PRINCIPLES OF BANKRUPTCY/PERSONAL INSOLVENCY LAW – TO ACCOMMODATE DISCHARGE OF INDEBTEDNESS, REHABILITATION OR "FRESH START" FOR THE DEBTOR

It should be noted that International institutions such as the International Monetary Fund (IMF), the World Bank and the UNCITRAL have all developed their own benchmarks against which domestic insolvency systems may be appraised (McKenzie Skene and Walters; 2008). Regardless of whether the individual debtor is a business or consumer debtor, there are concerns about the social impact of over-indebtedness on families and communities (McKenzie Skene et. al 2008).

UNCITRAL (2005) has published the '*Legislative Guide on Insolvency Law'* to help the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. UNCITRAL believes that the insolvency regime needs to focus not only on addressing the administration of failure but also upon facilitating a fresh start for insolvent debtors by clearing their financial situation and taking other steps to reduce the stigma associated with business failure rather than upon punishment of the debtor (UNCITRAL, 2005). Apart from it, insolvency law should remove unnecessary conditions and restrictions on discharge without forgetting policy to protect the public and the commercial community from those debtors whose conduct of their financial affairs has been irresponsible, reckless or dishonest (UNCITRAL, 2005).

Meanwhile, the World Bank has formed the World Bank's Insolvency and Creditor/Debtor Regimes Task Force in 2011 which later on has come out with *"Report on the Treatment of the Insolvency of Natural Persons,"* whereby the report has among others discussed about the purpose and characteristics of discharge for individual bankrupt*,"*(World Bank, 2011). Prior to UNCITRAL and World Bank, INSOL has established the INSOL Consumer Debt Committee which among others emphasized on provision of some form of discharge of indebtedness, rehabilitation or "fresh start" for the debtor (INSOL, 2001). It has been pointed out that in providing a fresh start, firstly, the debtor has to be freed from excessive debt and the most effective form of relief from debt is a "straight" discharge of debt, which provides an immediate and unconditional fresh start for the debtor (World Bank, 2011). Secondly, debtors being treated on an equal basis with non-debtors after receiving relief facilitate effective rehabilitation (World Bank, 2011). Finally, to ensure lasting relief, debtors should be in a position to avoid excessive indebtedness in the future, which may require some attempt to change debtors' attitudes concerning proper credit use (World Bank, 2011).

Furthermore, it is recommended that discharge should cover as many debts as possible that exist at the beginning of the proceedings or at the time that the discharge is obtained (World Bank, 2011). It is believed that in promoting rehabilitation to the debtors, the effective insolvency regime should eliminate more debts following the bankrupt's discharge (World Bank, 2011). The recommendations by UNCITRAL, the World Bank and the INSOL Committee has emphasized that effective personal insolvency law or bankruptcy must be able to offer individual debtor a discharge from indebtedness as a method of concluding a bankruptcy procedure.

The following discussion will examine the law and practice of discharge in bankruptcy for Malaysia, UK and Singapore.

DISCHARGE OF BANKRUPT IN MALAYSIA

In Malaysia, an individual who becomes bankrupt is governed by the Bankruptcy Act 1967 ("BA 1967") and the Bankruptcy Rules 1969 ("BR 1969") which are modeled on English Bankruptcy laws. A bankrupt in Malaysia may end his bankruptcy by way of discharge by court order, or

discharging of bankrupt by certificate of Director General of Insolvency (DGI) or discharge by annulment.

Discharge of Bankrupt by Court Order

Section 33 of the BA 1967 provides for a discharge by the Court. However, in the exercise of its discretion under section 33, the court in *Public Bank v Choong Yew Wah* (2014) was in opinion that it must have regard not only the interest of the debtor-creditor but also the public at large for the simple reason that the society at large must not have the impression that being a bankrupt is not a serious matter.

According to section 33(1) BA 1967, the bankrupt may apply to the court for an order of discharge at any time after the bankruptcy order has been made and the court shall appoint a day for the hearing of the application. Notice of the appointment by the court of the day for hearing the application for discharge shall be published within 14 days before the hearing date to each creditor who has proved and the court shall hear the DGI and also the creditor (Section 33 (9) BA 1967).

It should be noted that if the bankrupt is discharged by court order, the report of the DGI are prima facie evidence for the court to exercise his discretion (Section 33 (8) BA 1967; Fiona Lee, 2006). Consequently, as being decided in *Re Lau Kah Lay & Tang Kuong Tiew; Ex P Cold Storage (Malaysia) Bhd* (2001), the discharge order was void where it is not supported with the the report from the DGI or where the report from DGI was incomplete. The court also held that the Official Assignee (OA) carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children. Similarly, in the case of *Lim Hun Swee v Malaysia British Assurance Bhd. & Ors And Other Appeals* (2010) if in the court's view that the report of the DGI is considered as incomplete the court is not bound to accept it. Other than the failure of the DGI to prepare a complete report, the decision to grant the discharge might be varied if it is proved to the satisfaction of the court that the bankrupt has committed an offence under the Act or under any written law repealed by it, or under sections 421-424 of the Malaysian Penal Code (Section 33 (4) and 33(6) of BA 1967).

Discharge by Certificate of DGI

According to section 33A (1) of the BA 1967 the DGI has a discretionary power to issue a certificate discharging a bankrupt from bankruptcy. However the certificate can only be issued after a period of five-year lapse since the date of receiving order and adjudication order were made.

However, the issue of the certificate of discharge is subject to the creditor's objection which must be made within 21 days from the date of the notice to discharge a bankrupt is served on him. The creditor must state the ground for his objection in his notice of objection and submit it to the DGI. If his objection has been rejected by the DGI, he has the right to bring his objection's application before the court (Section 33B (3) of BA 1967). However, the court in dismissing or granting the creditor's objection for not discharging the bankrupt shall hear the explanation from the DGI and also the bankrupt (Section 33B (6) of BA 1967).

In the case of *Re Rajangam Marimuthu Mudalliar; Ex P Parkash Singh Wasawa Singh* (2010), the court upheld the decision of the DGI to give certificate of discharge to the bankrupt by considering that the DGI had administered the bankrupt's estate for more than 10 years, age, education background and the employment of the bankrupt. It was held that, it was against the public policy to maintain a person as a bankrupt for his entire life without any way out when there is no rational justification to do so.

Discharge by Court's Annulment

Under section 105 (1) of BA 1967 the bankruptcy order may be annulled under several circumstances; if the bankruptcy order ought not to have been made or if the bankrupt has settled his debts in full or if proceedings are pending in the Republic of Singapore for distribution of assets ought to be under the bankruptcy or insolvency laws of the Republic of Singapore or if the bankrupt's offer of composition or scheme of arrangement has been accepted by creditors and approved by the court (Fiona Lee, 2006). The court in the case of *Omar Khayam Enterprise v Perwira Affin Bank Bhd* (2010, p.285) has defined the word 'annul' as 'to declare invalid' or 'to cancel' and/or 'abolish'. The court was in opinion where the annulment is granted, the effect of the annulment was as if the debtor was never a bankrupt.

Usually the court will grant an order for annulment when it involved a technical ground for example where the calculation of interest of the debts was inaccurate. In the case of *Hasnah Che Hasan v. Hong Kong Bank Malaysia Bhd* (2010) the bankrupt appealed to annul the bankruptcy order to be granted among others as the calculation of interest in the bankruptcy notice was inaccurate. The court held that the miscalculation in the interest and that the interest claimed in the bankruptcy notice was more than the amount due and the bankruptcy notice was therefore a nullity. In *Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak* (2005, p. 809) annulment of bankruptcy order does not cover only technical defects like defective service of the bankruptcy notice but is wider and covers other "legal grounds" which may include the ability of a debtor to pay debts. In this case since the respondent was able to pay his debt, the court considered it was a legal ground for the court to annul the bankruptcy order under section 105 of BA 1967.

Meanwhile, in the case of *Ting Nguk Yong v Bank Utama (Malaysia) Bhd* (1999) the court disallowed a bankrupt to be discharge since the agreement to pay Ringgit Malaysia (RM)500,000.00 in a full settlement total of the debts i.e. RM1,500,000.00 is not valid. Similarly, in the case of *Kwong Yik Bank Bhd v Hah Chiew Yin Yin* (1985) the application for annulment was not granted since the respondent (bankrupt) had failed to satisfy that the debt lawfully due to the appellant had been paid in full in cash.

The Call to Review Malaysian Bankruptcy Law on Discharging Bankrupt

A review for method in discharging bankrupt is under way to give a second chance for the bankrupts. The proposal to reform the specific provision in the methods of discharging a bankrupt, has been proposed on April 2015 (Department of Insolvency, 2015). Among others proposal includes to promote a second chance to the bankrupt where the bankrupt will be discharged after five-years from the date of bankruptcy order was made only if the bankrupt had paid at least 50 percent from the debts provable in bankruptcy, fulfill all the condition imposed on a bankrupt under BA 1967 and obeyed all the instruction given by the DGI (Department of Insolvency, 2015).

DISCHARGE OF BANKRUPT IN SINGAPORE

In Singapore, the Bankruptcy Act 1995 (BA 1995) came into force on 15 July 1995. Prior to reforms towards BA 1995, the old legislation only provides for a bankrupt either to be discharged by court order or annulment by court. Only in 1995, discharge by Official Assignee (OA) was inserted in the BA 1995 with rejection towards an automatic discharge (Yeo and Gan, 2006). The changes aim to promote the use of alternatives to bankruptcy, to facilitate speedier discharge for bankrupts in appropriate circumstances and to enable bankrupts to continue to be economically

productive during bankruptcy (Report of The Insolvency Law Review Committee Singapore, 2013).

Discharge of Bankrupt by Order of Court

An application to be discharged by order of court may be made by the OA, the bankrupt or any other person having an interest in the matter at any time after the making of the bankruptcy order (Section 124 of BA 1995). Every such application shall be served on each creditor who has filed a proof of debt and on the OA if he is not the applicant, and the court shall hear the OA and any creditor before making an order of discharge (Section 124(2) of BA 1995).

In supporting the regime of easier discharge from bankruptcy, the procedures of application to be discharged by court order had been made less onerous. For example under section 124 (2), the application can be made at any time either by the bankrupt or any other person having interest in the matter and the need for public examination of the bankrupt was removed. In granting a discharge, the court powers are wide either to grant the discharge or not under section 124(3) of BA 1995. However, the court in exercising its discretion must consider not only the interest of the debtors and creditors but also the public at large and the applicable law including section 124(4) of BA 1995 which dealt with the offences committed by a bankrupt (Report of the Insolvancy et al., 2013).

Discharge by Certificate of OA

Discharge by OA was introduced in 1995 due to the problems under the old law where there were weaknesses in the discharge mechanism that caused undischarged bankrupt remained within the bankruptcy regime almost indefinitely until his application to be discharged is approved by the court (Mohan, 2008).

The OA may, in his discretion and subject to section 126, issue a certificate discharging a bankrupt from bankruptcy after a period of three-years has lapsed since the date of commencement of the bankruptcy; and the debts which have been proved in bankruptcy do not exceed $500,000, or such other sum as may be prescribed (Section 125 (1)(2) of BA 1995).

Although discharge by certificate of OA is seen as an easier discharge, there were concerns on such discharge which among others about the fairness of the OA in deciding whether to discharge a bankrupt or not (Mohan, 2008). In responding towards this issue the Insolvency and Public Trustee's Office has issued a ''Guide to the Bankruptcy Act 1995'. The Guide, had laid down several factors that the OA would consider includes (Insolvency and Public Trustee's Office, 1999):

(1) The cause of the bankruptcy
(2) The period of the bankruptcy
(3) The bankrupt assets and payments to his bankruptcy account
(4) The bankrupt conduct; and
(5) The level of bankrupt's co-operation given to the OA in the administration of his affairs.

Nevertheless, the issuing of the certificate is subjected to the creditor's objection. A creditor may within 21 days from the notice given by the OA furnish the OA a statement of the grounds of his objection (Section 126(2) of BA 1995). If he failed to furnish it, he shall be deemed to have no objection to the discharge (Section 126(3) of BA 1995). Also, if the objection was rejected by the OA, the creditors may within 21 days of being informed of his objection make an application to the court for an order prohibiting the OA from issuing a certificate (Section 126 (4) of the BA 1995).

On an application made under section 126(4), the court may, if it thinks it just and expedient under section 126(5) dismiss the creditor's application or postponed the granting of the certificate not exceeding 2 years; or make an order permitting the OA to issue a certificate discharging the bankrupt but subject to such conditions as the court may think fit to impose.

Mohan (2008) believes that the discharge by OA has worked well in practice and indeed the success went beyond all expectations. This can be seen where it involves; i. low creditor objection as the OA was choosing people who truly deserving a discharge; ii. high rates of discharge; iii. benefits for creditors from dividend payments; and iv. assistance being offered to bankrupt through Employment Assistance Scheme (EASE). EASE was established by the OA in order to help an unemployed bankrupt to get employed. Although the reforms to discharge a bankrupt by certificate of OA have obtained a success in its implementation, there were arguments that the current balance of interests between bankrupts and creditors may need to be reviewed (Report of the Insolvency Law et.al, 2013).

Annulment of Bankruptcy Order

Under BA 1995, the annulment of a bankruptcy order may be made whether or not the bankrupt has been discharged from the bankruptcy (Section 123(2) of BA 1995). Once it was granted, will wipe out the bankruptcy altogether as if the order has never been made on the debtor.

In this context, the application to annul the bankruptcy order may be made to the court under section 123(1). Under the said provision, the court may annul a bankruptcy order if it appears to the court that:

(a) at the time the order was made, the order ought not to have been made;
(b) both the debts and the expenses of the bankruptcy have all, since the making of the order, either been paid or secured for to the satisfaction of the court;
(c) proceedings are pending in Malaysia for the distribution of the bankrupt's estate and effects amongst the creditors under the bankruptcy law of Malaysia and that the distribution ought to take place there; or
(d) a majority of the creditors in number and value are resident in Malaysia, and that from the situation of the property of the bankrupt or for other causes his estate and effects ought to be distributed among the creditors under the bankruptcy law of Malaysia.

Instead of court, an application to annul the bankruptcy order also can be made to the OA under section 123A. The OA may issue a certificate annulling a bankruptcy order if it appears to the OA that, to the extent required by the rules, the debts which have been proved and the expenses of the bankruptcy have all, since the making of the order, been paid.

Amendments of Singapore's Bankruptcy Laws Proposed

Recently, in responding to Report of The Insolvency Law (2013), the proposal to discharge the first-time bankrupts after seven years in bankruptcy even if they cannot resolve their debts during that period was tabled by the Law Ministry for the first time in Parliament on 11thof May 2015. Under the proposed framework those who fail to pay the target contribution in full prior to their discharge will have their records retained permanently on a register that can be accessed by the public. This will be maintained by the OA. This is to help creditors make an informed decision when extending credit to this group. But those who settle the target contribution in full will be removed from the register five years after discharge (Mokhtar, 2015).

DISCHARGE OF BANKRUPT IN UK (ENGLAND AND WALES)

Insolvency law in UK has developed parallel systems for dealing with insolvency of individuals (bankruptcy) and corporate insolvency, In the UK, bankruptcy is governed by Part IX of the Insolvency Act 1986 (IA 1986) and Insolvency Rules 1986. In the UK automatic discharge, Bankruptcy Restrictions Order (BRO) or Bankruptcy Restrictions Undertakings (BRU) has been introduced thirteen years ago following the coming into force of the Enterprise Act 2002 and these will be discussed in the following sections.

Automatic Discharge

The main reform in UK with regards to discharge from personal bankruptcy is concerning an automatic discharge. An automatic discharge requires no application to be made to the court. Under a new section 279 of IA 1986, a bankrupt will be discharged one year from the making of the bankruptcy order where that order is made on or after 1 April 2004 subject to application made by Official Receiver (OR) or estate of the bankrupt under section 279(3) and offences committed by the bankrupt. According to Conway (2013), the bankrupt will be discharged without making any application to the court and it released him from all debts except for the debts including:

a) any money owed under family court proceedings
b) any court fines or debts arising from fraud or certain other crimes.
c) debts incurred after the bankruptcy order.
d) all outstanding student loans for those who made bankrupt before 13 April 2005.

It is said an automatic discharge should be able to remove the stigma of bankruptcy, to give bankrupts the opportunity of prompt rehabilitation in relation to their financial affairs and to encourage entrepreneurs to try again (Conway, 2013). Most importantly, the discharge not only could release the debtor from his bankruptcy debts but with a view to giving the debtor a fresh start.

BRO and BRU

For the effective application of an automatic discharge, which seeks to give a second chance to the bankrupt, it also must be balanced with public protection. Consequently, the BRO is introduced for public protection in a response to misconduct by a bankrupt in connection with the bankruptcy, whether prior or subsequent to the bankruptcy order (West, 2012). Moreover, the aims of UK's IA 1986 regarding BRO as being pointed are as follows (Moser, 2013):

a) to allow lenders and the public to differentiate between culpable and non-culpable bankrupts and make better informed decisions in their dealing with them and
b) to provide more effective protection for the public and the commercial community against the small group of culpable bankrupts.

On one hand, BRO is introduced to protect the public from culpable bankrupts, yet on the other hand, the length of restriction period is seemed to act as a punishment. In *Re Sevenoaks Stationers (Retail) Ltd* [1991], Dillon L.J. had divided the duration of a disqualification into three brackets according to the seriousness of the case. It has been pointed out "…in deciding how much of 15 years to disqualify, only serious cases, which may include someone who was already disqualified should be for ten years and above; for six to ten years are those who do not merit the top bracket and for two to five years, not very serious cases" (*Re Sevenoaks Stationers (Retail) Ltd* [1991], p.325). This classification was accepted in *Randhawa v Official Receiver* (2006) where it was held that the appropriate period for a BRO must be fixed by reference to the gravity of the misconduct taken in conjunction with any aggravating or mitigating factors.

As mentioned earlier, one of the intentions in introducing an automatic discharge is to remove a stigma of bankruptcy. However, Moser (2013) contended that the BRO itself can contribute to the increase in stigma with personal insolvency and appears to contradict the fresh-start policy where some lenders who will directly reject the application for the discharge bankrupt from entering into any contract with them once the person is declared bankrupt although the BRO itself is used to differentiate between culpable and non-culpable bankrupts and when the name of the discharge bankrupt is still remain on their credit reference file for certain period of time.

Discharge by Court Order

As regards to the statutory requirement to obtain an automatic discharge, a bankrupt who is not eligible for it may apply his discharge from bankruptcy by applying to the court. In the UK discharge from bankruptcy by court order is provided under section 280 IA 1986. A bankrupt may at any time apply to be discharged from bankruptcy after the end of the period of five-years after the date of adjudication of bankruptcy. However, on an application the court may under 280 (2) of IA 1986 refuse to grant the discharge, grant the discharge or grant a conditional discharge.

Discharge by Court's Annulment

In addition to automatic discharge and discharge by order of court, the court has a discretionary power to annul a bankruptcy order as provided under section 282(1) of IA 1986 (Keay and Walton, 2008). The annulment of a bankruptcy order may be made whether or not the bankrupt has been discharged from the bankruptcy where at the time the order was made, the order ought not to have been made or the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court (*Henwood v Customs & Excise ([1998]; Halabi v London Borough of Camden [2008]).* Similar to provisions in Malaysia and Singapore, if the court annuls a bankruptcy order, the effect of the annulment is as if the bankruptcy order had never been made.

EVALUATION ON COMPARATIVE LAW AND PRACTICE BETWEEN MALAYSIA, SINGAPORE AND UK

It should be noted that Malaysia's BA 1967 and Singapore's BA 1995 provide three methods for the bankrupts to be discharged i.e. discharge by the certificate of the DGI (or also known as OA in Singapore), discharge of bankrupt by court order and discharge by annulment of court. Even though these discharge provisions in both jurisdictions comes from the different statutes there are a lot of similarities. The application to be discharged by court order can be made at any time after the bankruptcy order was made against the bankrupt. Further, in both jurisdictions, the application to annul the bankruptcy order maybe made in considering the time the bankruptcy order was made, the payment of the debts, the residents of the majority creditors and where the court's proceedings were pending.

Yet, there are differences in discharge of bankrupt by certificate of the DGI or the OA. In Malaysia, the discharge application can be made after a period of five-year lapse since the date of receiving order and adjudication order were made, whereby in Singapore, this only can be made after a period of three-years has lapsed since the date of commencement of the bankruptcy; and the debts which have been proved in bankruptcy do not exceed $500,000, or such other sum as may be prescribed. Unfortunately, discharge by court order, annulment or certificate of the DGI (Malaysia) or OA (Singapore) were considered as complex as it involved very cumbersome procedures that caused very hard for the discharge application to be granted. The period to be discharged from

bankruptcy is too long even the bankrupt has given a good cooperation during his bankruptcy and has no assets for the benefits of his estates. Like Malaysia and Singapore, the UK IA 1986 also provides a bankrupt to be discharged by court order and by annulment of court. Interestingly, automatic discharge is only available in UK. There is no such provision on automatic discharge in Malaysia or Singapore. Under automatic discharge applicable in UK, a bankrupt is discharged automatically after one year from the date of the bankruptcy order was made unless the bankrupt is subject to BRO or BRU.

It is important to note that there were suggestions for Malaysia and Singapore to emulate UK's automatic discharge. However, the recall has been rejected. Only on April 2015, the Department of Insolvency has proposed a reform of Malaysian BA 1967 and the reform has proposed bankrupts to be given a second chance to the bankrupt. Meanwhile the proposal to discharge the first-time bankrupt in Singapore who can not resolve after seven years in bankruptcy has been tabled by the Law Ministry for the first time in Parliament on 11th of May 2015. These moves are a step on a right direction to set a maximum period or duration for bankrupts to be discharged and get away from his bankruptcy status and disabilities of being bankrupt. Furthermore, in parallel with the objective of automatic discharge as a fresh start policy, BRO or BRU is introduced to protect the public from culpable bankrupts, yet it seemed that the length of restriction period is seemed to act as a punishment.

CONCLUSION

In the common law jurisdictions like Malaysia, UK and Singapore, the bankruptcy laws allow the bankrupts to be discharged and have a fresh start. Indeed these jurisdictions bankruptcy regimes are in line with the recommendation made by INSOL, UNCITRAL and World Bank that effective insolvency systems should be able to offer individual debtor a discharge from indebtedness as a method of concluding a bankruptcy procedure. However, for bankrupts in Malaysia and Singapore, they have to wait longer and there is no automatic discharge available to them unlike those bankrupts in the UK. In conclusion, Malaysia, Singapore and UK's provisions for discharge of a bankrupt come into force to help the bankrupt from continuously sit in his bankruptcy status with no way out. The fact that such a discharge provision is too cumbersome or less onerous is something that must be looked into to give a second chance to the bankrupt to continue with his life without ignoring to balance the interest of the bankrupt and the creditor.

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THE UNREGISTERED COMMUNITY DESIGN, A WEAK WAY OF PROTECTING DESIGN?

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ABSTRACT

This communication aims to analyse the scope of protection conferred by the unregistered design right, both European and British, and point out the advantages this new intellectual property right confers. It can be of great benefit, especially, for industries producing short-lived objects, such as furniture, toys, clothes, shoes or technology. For this purpose, the paper will compare some aspects- the requirements, scope of protection and relationship with copyright- of two pieces of legislation, the 6/2002 Regulation and the 1988 Designs Act.

Keywords: industrial design, unregistered design right, Community Regulation, British Designs Act.

WHAT IS THE INDUSTRIAL DESIGN RIGHT AND HOW DID IT APPEAR?

Taking a simple approach to the concept, it could be said that industrial design is the appearance of the products made industrially. The quality of being "unregistered" means that the right is opposed to a registered one, which requires a formal procedure before an intellectual property office.

The external configuration of objects, protected by this right, is a characteristic that may well influence the customer towards buying one product, instead of another. This does not seem a minor issue, especially in industries where a great deal of competition exists and products go out of fashion in a short time, such as the toy or furniture sector.

How is it, then, that despite being so omnipresent the industrial design right is so unknown? The explanation may lie in the fact that it has not been given as much importance as other IP rights such as patents, trademarks or know-how. Industries in the 19th century, and even early 20th century, seemed more worried about protecting the technical function (by patents) or the prestige of products (by trademarks) than their appearance.

However, little by little, the need for industrial design protection became obvious and different countries developed their own legislation to create the right of industrial design. Some of them approached this new right in a similar way to the patent right, and others to the one for copyright. This resulted in a chaotic European scenario where big differences in protection existed depending on the state.

This was the situation when the European Union started a process whose aim was to achieve uniformity in the right: those differences had to be left behind to meet a common right. This was neither easy nor fast, and the proof is that almost 30 years passed from the first reports of the European Commission about industrial design were made to the finishing of the Green Paper[2], and many conflicts of interest arose during that long path.

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2 Green Paper on the Legal Protection of Industrial Designs, June 1991.

The turning point of the process was the creation of two instruments: a Directive[3], which harmonised some aspects of the registered design right, and a Council Regulation, number 6/2002,[4] about both registered and unregistered design. So, apart from unification, the European Union created a "new" right, "the unregistered design" one, due to the fact that "some of those sectors [of industry] produce large numbers of designs for products frequently having a short market life where protection without the burden of registration formalities is an advantage and the duration of protection is of lesser significance."[5]

However, it is to be highlighted that this right is not so "new" because it existed in the UK Law since the 1988 Act[6] even though the reasons for creating the rights were slightly different and some aspects of the protection changed significantly between them. An example is the period of protection and the exceptions to it. We will analyse and compare the two rights, with the purpose of defending this IP right that, although considered as "weak" in comparison to the registered one, may be highly useful for short-lived products.

THE 6/2002 EUROPEAN REGULATION AND THE UNREGISTERED DESIGN

In the same line as Recital 16, Recital 25 explains:

> Those sectors of industry producing large numbers of possibly short-lived designs over short periods of time of which only some may be eventually commercialised will find advantage in the unregistered Community design.

There is no doubt that unregistered European Community design is intended for "short-lived designs", which have a limited life in the market and for which it is highly desirable to remove the long and cumbersome process of registration. Some authors believe that the creation of this right was associated with article 25.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which suggested to the Member States simplifying that protection for textile designs[7].

Apart from this function, the unregistered right can also serve the purpose of testing the success of a product in the market, giving a grace period of 12 months from the disclosure of the design. In this period, the requirements of novelty and individual character would remain unaltered, not infringed, if the design is registered within that period.[8]

The concept of design in the Regulation and the requirements for protection

Article 3(a) defines design (both for the registered and unregistered rights) as "the appearance of the whole or part of a product resulting from the features or, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation."

Recital 12 of the Regulation, as well as article 4.2.b, states that visibility of the product incorporating the design is required. In fact, all the characteristics that are part of the list are perceived by the human eye, and the term "appearance" has a concordant meaning. This could be considered a requirement for protection[9].

After explaining the concept, the Regulation goes on to establish the requirements for protection, which are, according to article 4, novelty and individual character. The concept of "disclosure" is present in both requirements and is explained in article 7. This is a very important element in terms of the unregistered design right, because the disclosure fixes the

3 Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs.
4 (EC) 6/2002 of 12 December 2001 on Community Designs.
5 Recital 16 of the Regulation.
6 1988 Copyright, Designs and Patents Act.
7 Fernández-Nóvoa, C. (2003) El diseño no registrado. *Actas de Derecho Industrial*, 24, 84.
8 Article 7.2. b) of the Regulation.
9 In sharp contrast, the British Law gives protection to some internal features.

exact instant when the protection conferred by the right starts. It will be crucial for designers to keep a record, as proof, of the different stages of the development of the design and, specially, of its disclosure.

a. Novelty (article 5)

New, according to the Regulation, is everything that is not identical (meaning "*different in more than immaterial details*") to other designs made available to the public before a certain moment, which, for the unregistered right, is the date on which the new design is first made available to the public. It means that the design is compared to previous designs.

The novelty requirement is an objective but limited one because it is judged by the specialised circles of the sector (specialists, designers, merchants, and manufacturers in the sector concerned) that operate within the European Community.[10] Something will be considered "new" if it is completely different from anything known by them at the specific point in time; or because the design presents enough differences from known designs to be considered a creative independent development.[11]

b. Individual character (article 6)

The second requirement implies that the overall impression that the product creates in the informed user's brain is different from the overall impression produced in the same user by any design that has been already made available to the public before the day on which the new design is published, commercialised, etc.

It is a subjective requirement and the person in charge of judging it is the "informed user",[12] a middle figure between an expert in the field (as in patents), for whom minor differences in designs can be very noticeable, and an average customer (as in trademarks),[13] for whom these differences may not be sufficient to create the idea of novelty (of something never seen before) when comparing the two designs. Some judgements from the European Union[14] have developed the characteristics of this informed user, and what "overall impression" means.

The final section of the article states that *"in assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration"*. This may be applied to those industries, such as the fashion and shoe industries, and even the furniture and car industries to some extent, where fashions almost dictate the pattern of designs for a certain season or period.

10 Article 7.1 *in fine*.

11Green Paper on Industrial Design, page 71.

12 Recital 14 of the Regulation.

13 Procter & Gamble Co. v. Reckitt Benckiser (U.K.) Ltd., [2007] EWCA (Civ) 936, [15]–[32] (Eng.).

14 Procter & Gamble Co. v. Reckitt Benckiser (UK) Ltd., Pepsi Co. Inc. v. Grupo Promer Mon Graphic SA (both on registered design because requirements are the same for this right) and Karen Millen v. Dunnes Stores on unregistered design.

Figure 1: Oxford shoes.

The so-called "oxford shoes" were created long ago but have been "resurrected" in the latest seasons. Thus, many brands produce them, for men and women, in different colour combinations, shapes, materials, etc. Every pair will be new if it is not identical to one made available to the public before, and every pair will have an individual character if it produces a general impression in the informed user that is different from previous designs.

Design protection is given for specific products, and takes into consideration the freedom of the designer, the industrial sector and even the nature of the product. However, it cannot mean giving such a broad scope of protection over one design that anything with a certain degree of similarity to it could fall into the definition of a copy or a threat of a copy (Moore, 2015). Conferring protection to one brand for a group of things would imply giving a monopoly to the company to make the whole group, excluding other brands from producing them, an undesirable effect that would not enrich the design corpus in the market.

c. Disclosure (articles 7 and 11

Although article 7 explains the general concept of disclosure to which the requirements of novelty and individual character refer, article 11 establishes the specific disclosure that fixes the commencement of the unregistered design protection.

The concept of "disclosure" is a broad one and goes from publishing the design to using it in trade, with the important note that it has to become known to the circles specialised in the sector concerned, operating within the European Community (as seen in the novelty requirement). This is called "the saving clause" because not any disclosure breaks the novelty requirement, only those than can be known by the circles.[15]

2. The exceptions to protection (article 8)

There are two exceptions to protection, apart from those products that are not considered as such in terms of design right. The first group excepted comprises the functional designs, which are designs only dictated by their technical purpose. The reason for this exception is that this kind of design will normally be protected by patents or utility models, in those countries where they exist.

15 In the case H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH of 13 February 2014, the European Court of Justice analysed the interpretation of disclosure according to article 11.2 to determine if disclosure took place when images of the design were distributed to traders. The Court pointed out that the disclosure has to be fixed in each case.

It is possible, and even common, for a patent and industrial design right to coexist in a product. Furthermore, other IP rights may also be present in the same object. An example of different IP rights in an object could be the "tangle teezer", where the shape and placing of the teeth of the hairbrush are protected by a patent, while the different external styles may be protected by industrial design right. Even the original drawings could be the object of copyright protection in some countries.

Figure 2. The tangle teezer and the different IP rights.

A grey zone will appear if the elements have a technical and also a decorative function. In this case, judges will have to try to separate the two IP rights and decide which one is predominating, according to criteria such as whether variations, even small, in the design would mean a change in the function.

The second exception refers to designs that have a certain shape or dimensions only because they have to be connected to another object. It is called the "must-fit" exception and it could be seen, in our opinion, as a continuation of the previous exception because, actually, to perform the technical function of fitting in, the design has to have those specific characteristics.

The third section of the article is like an exception to the exception, because the right does protect the design of products that form modules. These are designs that allow *"the multiple assembly or connection of mutually interchangeable products within a modular system".*

3. The scope of protection

The Community unregistered design protects only against copies,[16] so the holder can only prevent third parties from using his or her design (making, offering, putting on the market, importing, exporting or stocking the products incorporating the design) if this use results from copying it. This scope of protection is very similar to copyright, although it must be remembered that copyright protection starts with the creation of the work, while the design right starts the moment the work is made available to the public.

The unregistered design right produces a degree of legal uncertainty because it starts automatically and there is no record in any public office of all the designs launched on the market. Thus, designers cannot be aware of every single design that is divulgated and protected. The Regulation, on this point, establishes that if another designer comes to the same design idea independently, he or she would not be infringing the previous design right. The difficulty for the second designer could lie in proving that the he or she has, in fact, arrived at the idea independently[17].

16 Recital 21 and article 19.1 of the Regulation.

17 This motive is frequently alleged as a defence, as in H. Gautzch Großhandel GmbH & Co. KG v. Münchener Boulevard Möbel Joseph Duna GmbH (above).

As an unregistered design right is thought to be for short-lived objects and fast markets, the duration of the right is shorter in comparison to the registered one. Article 11.1 establishes a period of three years[18] from the time the products are made available to the public.

4. Trade and licences

The third Title of the Regulation is dedicated to those trade businesses in which the design right could be the object. The majority of the articles in the Title refer to the registered design; the reason for this is that normally property rights need to be kept in a commercial register in order to cause effects against third parties. For this, a public document could be needed.

We have already mentioned the uncertainty the unregistered design implies because the proof of its possession depends on the documents and records the designer himself or herself has produced, and these would be normally in the "private" sphere and not in the "public" one. For the acquirer, not being able to make the right prevail against third parties other than with a private contract means even more legal uncertainty.

The Regulation is anticipating that unregistered designs will not be the object of commerce as much as registered ones. However, article 32 explains licences in general, and makes a special mention of registered design in section 5. All this lead us to think, accurately, that licences can be obtained for an unregistered design as well.

The minimum or maximum duration of the licence is not mentioned in the Regulation. However, it does not seem likely that the latter would extend to more than three years from the disclosure of the design, due to the fact that the design is no longer protected by the right after those three years. It could be protected through the unfair competition rules, but only if the requirements for it are conveyed. This would mean uncertainty for the licensee, who would not know if he or she is going to be legally shielded against a copy.

5. Relationship with copyright

IP rights cannot be put into different coffers as if they were "pure elements" in law. On the contrary, following the analogy, they are commonly like chemical compounds. A common situation is the coexistence of a design right and copyright in the same product, but only if it meets the requirements the national legislation establishes for the latter right.

Copyright protection differs noticeably from one country to another. These differences have been noticed by the European Community, which gives, in article 96.2, no other choice to the Member States than regulating the accumulation of copyright and design rights.[19]
The article continues by saying that the extent and conditions of the accumulation, including the level of originality required, are elements in which every state is free to rule. In Spain, for example, the accumulated protection will only subsist for industrial products that possess a certain level of artistic value.[20] The case of the UK will be studied in a specific section of this paper.

THE BRITISH UNREGISTERED DESIGN

Unregistered design has existed in the United Kingdom since the 1988 Copyright, Designs and Patents Act. It appeared to overcome the problem that some previous acts had created when they extended copyright protection even to spare parts, whose only purpose was to replace an original part and whose design depended on the product to which they had to be assembled (Cornish and Llewelyn, 2003).

18 The Max Planck Institute proposed an even shorter period, of only 2 years. See Green Paper on Industrial Design, page 82.
19 In the same line, Recital 21 of the Regulation explains the option for accumulation.
20 For a complete study on this topic, see Otero Lastres, J.M. (2015) El sistema de la acumulación restringida y el diseño no registrado. *Revista de Derecho Mercantil*, 296, 263-282.

The most representative case that pointed out the prejudice this all-inclusive protection created was British Leyland v. Armstrong.[21] Thus, the 1988 Act created the unregistered design, or simply "design right". Functional designs were, from 1988 on, under the scope of the unregistered design.

The British right also protects designs without "eye appeal" and even ones that are not visible. These are some of the most relevant differences the British Law possesses in relation to the European Regulation, and even to the British registered design right. Other variances are the requirements for protection and the duration of the right.

1. The concept of design in the 1988 Act and the requirements for protection

Section 213 of the Act is the first section dedicated to design rights and starts explaining the definition of "design" as the *"aspect of the shape or configuration (whether internal or external) of the whole or part of an article".*

The section does not refer to "requirements" because, as opposed to British registered design and to European Community unregistered design, nothing such as novelty and individual character is needed to obtain unregistered design protection. However, for the purpose of comparing the right to the Community one, previously explained, we have concluded that originality, qualification of the design and recording of it may be considered as such.

a. Originality (section 213 (1) and (4))

The design for which protection is sought through this right must be original. It is so if it is not *"commonplace in the design field in question at the time of its creation"*. This originality concept is related to the copyright approach, and it implies that the design is not a slavish copy from a previous design. In a second stage, it has to be verified whether the design is or not commonplace.

This concept of "commonplace design" is a new one. In Farmers Build v. Carrier Bulk the Court of Appeal interpreted it narrowly in the case of functional designs, according to the legislative history and purpose of the right.

b. Qualification (sections 213 (5) and 217 -219.

This requirement demands that the design has a certain link with the UK. There are four possible routes to qualification: the designer, the commissioner, the employer or the first marketing of articles made to the design (Bainbridge, 2002).

c. Recording document or article made following the design (section 213 (6))

This condition implies that the design cannot be a mere idea, not yet materialised. On the contrary, it has to be registered in a design document or an article has to be made reproducing the design. For this purpose, a "design document" is, according to section 51 (3), *"any record of a design, whether in a form of a drawing, written description, photograph, data stored in a computer or otherwise".*

2. The exceptions to protection

This is one of the main differences between the British design right and the European Community unregistered design right. On one hand, the British right excludes from its protection surface decoration, which can be protected by registered design or by copyright if it

21 British Leyland v. Armstrong [1996] R.P.C. 279.

is considered "artistic", while the European Regulation includes it in the definition of design with the term "ornamentation".

On the other hand, a design right is allowed for functional designs unless their shape is determined exclusively for a must-fit or must-match purpose. Designs made for the exclusive purpose of being connected to other parts to perform a function are covered by the former exception. What is curious is the case of Ocular Sciences v. Aspect Vision Care[22], in which contact lenses were excluded from protection because their dimensions were determined for the purpose of fitting the human eye. So the connection is not limited only to artificial or industrial products.

The must-match exception is similar to the previous one but it brings attention to the fact that the article is made in a certain shape so, once assembled to other articles, the combination can have the same appearance, not function, they had before. The Act also establishes an exception over methods or principles of construction.

3. The scope of protection

The design right has been described as a "conceptual cocktail" of copyright and registered designs.[23] This is because the protection given to the design right shares some characteristics with the registered design right, and at the same time is very similar to the copyright one. In fact, the protection, which starts automatically, is only against copies. Thus, the exclusive rights the holder has are producing articles to the design and also producing design documents recording the design to enable such articles to be made. The other side of these positive rights is the possibility to litigate against all those who use the right or authorise it, without the required licence for it.

Those acts are included in the primary infringement, while the secondary infringement is established in section 227 and includes importing the articles into the UK for commercial purposes or actually dealing with them commercially, without the licence of the design right owner.

The duration of the right, established in section 216 is also very different from the European Community one. In the British Law, the right expires at two different moments, depending on the fact that products with the design are made available to hire or sale in a certain period of time or not.

In the second case, the right will last for fifteen years from the end of the calendar year in which the design was recorded or the articles were made using it. In the first case, the products have to be made available for hire or sale in the market in the first five years from the recording of the design or the production of an article with that design; and from that moment on, the protection will last for 10 years.

4. Trade and licences

Some differences arise in this field between the British legislation and the European one. First of all, the Act is clearer than the Regulation because it stipulates expressly the possible businesses that can have a design right as their object.

The first premise is that design right is transmissible, and the possibilities to transmit it are assignment, testamentary disposition or operation of law. Also important is the disposition of section 222.3 that *"an assignment of design right is not effective unless it is in writing signed by or on behalf of the assignor"*. We must understand these dispositions as a guarantee of legal certainty and also as a requirement for validity in the contract.

22 Ocular Sciences v. Aspect Vision Care [1997] RPC 289, 424-8.

23 Farmers Build v. Carrier Bulk Materials Handling [1999] RPC 461, 480.

Section 224 mentions the presumption that if the proprietor of a registered and an unregistered design is the same person and an assignment is made over the registered right, the unregistered one is also being transmitted. There is a reciprocal presumption in the Registered Designs Act 1949, section 19 (3B).

The Act also stipulates the "licences of right", which do not exist in the European Regulation. According to section 237, in the last five years of the right's life anyone could obtain a licence, by the mere fact that the protection is coming to an end. However, as licences mean a concurrence of wills, if this agreement does not take place, the comptroller is the one in charge of settling the terms of the contract.

5. The relationship with copyright

The 1988 Act considers, in fact, design right as a part of copyright. This explains why, for the Act, one right excludes the other, as is explained in sections 236 and 51. On one hand, the first section states that for designs that are not artistic works or typefaces, making articles using those designs or copying the articles made with the designs is not an infringement of the copyright. We must conclude that these actions would be infringements of the design right.

On the other hand, section 236 explains, in a cumbersome way, that if design right and copyright subsist in an article, an infringement of copyright would absorb the infringement of the design right. That is, if the articles made using the design are themselves works of copyright, they will be protected by copyright rather than by the design right. This could be so if the articles were works of artistic craftsmanship, as David Bainbridge points out (2002). So, the conclusion of this section is that copyright is the predominating right if both rights coexist in the design.

CONCLUSION

Many elements of the European Regulation and British Design Act may be improved. For the former, it would be highly desirable to achieve more clarity in the instrument itself, instead of leaving so many broad concepts opened to the arbitrary interpretations of judges. Some of these topics to complete would be, in our opinion, the requirements for protection, the notion of an "informed user", and the licences.

Continental law, contrary to the British legislation, is generally not based on case law, and although the European Court of Justice has provided good solutions for some legal lacunas and open concepts of the Regulation, the instrument itself should be more defined. We cannot forget that the Regulation aims to institute a new and uniform unregistered design for the whole European Community, as the United Kingdom is the only country that possesses a similar right.

In the British Act, the greater strength is the regulation of licences. The weaknesses would be the open concept of "commonplaceness" and the cumbersome explanation of the relationship between copyright and a design right.

For both pieces of legislation, more precision in this right's limits and scope of protection would mean more certainty for designers and lawyers. For the former, it would imply more encouragement to use the unregistered design right instead of the registered one, when it is more convenient for the type of product and because it does not neglect all the guarantees needed for exposing a new product to the public. For the latter, it would mean more certainty in the litigation motives, and the system in general.

By encouraging design, both technology innovation and development would be promoted, as the Regulation states in its Recitals. This implies "richness in the corpus shapes" for consumers, who may choose one product instead of another because of its appearance, especially in industry sectors such as fashion or technology. Companies, being aware of this

fact, may use the appearance of a product as an important intangible value and element of competition in the market.

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GHANA'S LEGAL REGIME FOR MERGERS AND ACQUISITION ACTIVITY AND THE TREATMENT OF FOREIGN CAPITAL- THE GOOD AND THE UGLY

KWESI KELI-DELATAA[1]

ABSTRACT

The wave of economic down-turns in many developed countries and even broad recessions in others has led to competitive searches for alternative destinations for capital in new frontier markets. Ghana in the last decade and a half has leveraged its best attribute of political stability to profit immensely from large foreign direct investments by way of Mergers and Acquisitions (M&A). Besides, the growing size, diversity and sophistication of the Ghanaian economy over the period have all combined to increase the space for accommodating foreign capital.

While this is the case, the legal infrastructure for regulating such investments through mergers and acquisition activity have developed piece-meal and left scattered in several separate legislations. This, and the substantial content and quality of some of the laws regularly frustrate not just foreign owners of capital looking to do business in Ghana, but lawyers who are hired to structure M&A deals.

Mergers and Acquisition laws must be fair, robust and internally coherent and comprehensive. There are always allowances for autobiographical elements that are a reflection of national goals, priorities and even culture, but by and large, the M&A legal infrastructure must compare favourably with best practices globally.

This paper focuses on the treatment of the foreigner and foreign capital by Ghana's mergers and acquisitions laws with a view to highlighting those that unnecessarily undermine the government's emphasis on foreign capital as an engine of growth. This work, hopefully, must also add to the research literature on how to improve the legal environment for M&A activity involving foreign capital by emphasizing equality and accommodation.

The spectacular economic recession experienced by several developed economies of the West in the early 2000s made large capital formation and movement to alternate competitive destinations a rational imperative. Particularly, locating destinations that offered the less risk but most returns for investments had echo and resonance with captains of capital portfolios abroad.

The literature is settled that large investments jostling for new competitive and rewarding climates found their way into African countries through mergers and acquisitions activity[2]. The relevance and suitability of African markets as hosts for western capital is hardly rocket science. Over the past decade, the continent's GDP growth rate exceeded five percent (5%), translating easily into the fastest growing economic region in the world (African Development Bank, 2012). During the same period, African governments became combative in enhancing their attractiveness to foreign capital by

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[2] The exact scope and meaning of the term is defined *ante.*

privatizing strategic economic sectors and relaxing restrictions on business activities that admitted no foreign involvement.

Foreign capital took notice of these positive developments and reacted swiftly. Consequently, cross-border mergers and acquisitions activity to the African region increased remarkably. The total value of transactions grew exponentially from USD 485 in 1990 to USD 44 billion in 2010 (African Development Bank, 2012). Additionally, mergers and acquisitions- related capital transfers to sub-saharan Africa a lone relative to mining and energy sectors rose to USD 11.3 billion in 2010 from the low of USD 4.7 billion in 2009.

So it is hardly exaggeration to claim that the appetite for shifting capital, particularly foreign capital to new destinations across the world, in response to the unattractiveness of Europe has contributed to a steep spike in worldwide cross-border transactions volumes. The combined worth of global transactions is projected to breach the USD 2.6 trillion mark this year (2015) representing an almost twenty five percent increase of 2014's USD 2.1 trillion (Kindergan, 2015).

Mergers and Acquisitions[3]

Mergers and acquisitions (M&A) describe a distinct type of business activity rather than a discrete collection of laws. M&A activities encompass the sale and purchase of business entities in whole or in part, in a way that allows previously independent entities to unify ownership of assets and to dismantle separate controls (Maynard, 2009).

The decision to acquire a stake in another company has been directly related to a desire to achieve economies of scale, react to unpleasant economic realities and install efficient management (Croson et al., 2004). The entity making an acquisition or merging decision expects corporate strategic goals to be accomplished in a more cost-efficient way leading to shareholder value addition (Haspeslagh and Jamison, 1991).

M&A's have been staples in the business calculations of owners of capital for many years and have featured prominently in international capital movements. In fact, acquisitions have formed about 97% of cross-border M&A events globally in the last decade.

M&As have to be understood as special occurrences. The decision to acquire another entity, especially when such an acquisition is transnational is not taken lightly. This is why such transactions receive serious attention and are superintended by the most celebrated and experienced business professionals who are assisted by lawyers and bankers (Lanevoort, 2011).

Through mergers and acquisition events, we have seen large companies either acquire assets or shares in smaller entities. The benefits of M&A globally, especially the implications for shareholder value, has received ambivalent reviews in scholarly articles. Shareholders or sellers of businesses may benefit from temporary high yielding returns from M&A-related investment placements but generally in the medium to long term, they tend to experience devaluation in their investments (Cartwright and Schoenberg, 2016). The empirical evidence over the years points to next to zero returns for acquiring firms in the immediate post-acquisition years (Agrawal and Jaffe, 2000). And further, that acquisitions destroy share value in the medium to long term (Moeller, 2005; Lys and Vincent, 1995; Andrade, 2001).

[3] In this paper, the two terms are used interchangeably.

These negative reviews besides, M&As have become critical modes of investments into Africa for both local and international businesses or businessmen. The phenomenon has led to capital consolidation, better market access and competitiveness to African economies (African Development Bank, 2012). African countries have remained attractive to foreign capital despite recent recession because of resilience of their economies and unprecedented GDP growths.

Foreign Capital through M&A activities in Ghana.

Ghana's history of foreign capital investments through Foreign Direct Investments (FDIs) by way of M&A activities is similar to those of many other African countries, and perhaps does not require retelling.

Attracting FDIs has remained one of the main economic policy strategies of the Government of Ghana since 1983 when the country launched the Economic Recovery Programme. In this direction, the country hosted number of events including the 5th African-American Summit and the 3rd Pan African Investment Summit held in May and September 1999, respectively. The marked decline in foreign investments in the early 2000s represented in statistical terms by an overall decline in FDI inflows into Africa from USD 19 billion in 2001 to USD 11 billion in 2002 became an added impetus for a combative drive by many African countries to increase their share of foreign capital looking for suitable destinations.

Ghana's reaction to this competition was to privatize public enterprises and to increase room for absorption of foreign capital by removing restrictions on some business activities which were closed to foreigners (Abdulai, 2005). Besides, Ghana's varied and abundant natural and human resources, dynamic economy and peaceful political transitions have all combined to give Ghana a competitive advantage in the clamours for foreign capital investments.

It is hardly surprising that Ghana has gained increasing recognition as a favourable place to do business. The country's prestigious recognition by the World Bank as the "Best Place for Doing Business in the ECOWAS region" (World Bank, 2014) attests to the incremental improvements in the general investment climate through deliberate policy instruments over the years.

As a consequence of tangible political gains and deliberate policies, the country has benefitted immensely from impressive foreign capital inflows by way of M&A activities. Between 2013 and 2014, a total of USD$ 7,834. 847 of foreign capital was invested in the Ghanaian economy. USD$4,418.237 of this figure represents the value of business combinations between foreign investors and Ghanaian businesses with wholly owned foreign businesses accounting for the difference.[4]

Year 2013 recorded significant acquisitions events despite widely acknowledged economic challenges that have threatened physical consolidation and macro-economic stability. Republic Bank of Trinidad and Tobago (RBTT) increased its stake in Home Finance Company (HFC) to 32% and the Abraaj Group acquired a 100% stake in Fan Milk International A/S which until Abraaj's moves had controlled 56.64% of Fan Milk Ghana

[4] 2013 and 2014 Ghana Investment Promotion Centre (GIPC) Investment Reports.

Limited.[5] Arisaig Africa Consumer Fund Limited increased its stake in Unilever by the purchase of 1.13% shares levelling its overall equity stake at 10.33%.

Legal Regime for Mergers and Acquisitions in Ghana.*[6]*

As is the case for many countries, Ghana's M&A laws developed piece-meal and as evidence, they can be found in several scattered pieces of legislations. This is largely because of the multi-dimensional quality of M&A activity and the layers of institutional governance required for their beneficial integration into national economies.

Ghana has an avowed central government policy of enhancing the country's competitiveness as a business destination and has demonstrated through a series of legislations that its commitment is not a mere rhetoric.

The major legislations that govern M&A activity in Ghana include but not limited to The Companies Act 1963 (Act179), The Securities Industry Act 1993 (PNDCL333) as amended by the Securities Industry (Amendment) Act 2000 (Act 590), Ghana Investment Promotion Centre (GIPC) 2003 Act (Act 865), The Securities and Exchange Commission Regulations, 2003 (L.I. 1728), The Takeover and Mergers Code (Code) and The Securities Depository Act 2007 (Act 733).

There are also industry-specific legislations of immense relevance to M&A activity in Ghana and this research paper in particular. These include the Foreign Exchange Act, 2006 (Act 723), Internal Revenue Act 2000 (Act 592), The Fisheries Act 2002 Act 625), The Petroleum (Exploration and Production) Law 1984 and the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I.2204).

These are complemented by a robust anti-corruption legal regime reflected in The Criminal Offenses Act, 1960 (Act 29), The Whistleblower Act, 2006 (Act 720), the Anti-Money Laundering Act 2008 (Act 749). In addition to these, the Parliament of Ghana has ratified two important anti-corruption conventions on October 18, 2002: The United Nations Convention Against Corruption and the African Convention on Preventing and Combatting Corruption.

Ultra- nationalists argue, sometimes with justification, that the legal infrastructure for M&A activity accords foreign capital a more favourable treatment than it accords indigenous capital. While this may be a slight exaggeration, an examination of the legal environment generally reveals some soft spots for alien capital. Recall that this is not surprising because of the policy of central government since the early 1980s to create conditions that made Ghana an attractive investment destination.

Foreign capital business acquisitions or combinations through M&As do not have to worry about any legal requirement that obligates them to retain profits in foreign currency in Ghana, either in part or in whole. The Foreign Exchange Act 2006 (Act 723) and the GIPC Act[7] permit unfettered expatriation in foreign currency of dividends and net profits after tax profits by foreign investors in the country, subject only to the qualification that such transfers should be made through a number of authorized banks. Unconditional transferability of payments from loan servicing in cases of foreign loans, royalties and fees

[5] Ghana Securities and Exchange Commission Annual Report, 2013.

[6] I use ' legal regime' to refer to not just actual statutory provisions but the lack of them, the regulatory practices by enforcement agencies and the general investment climate. This article also treats only statutes that have relevance to the topic.

[7] The Ghana Investment Promotion Centre Act, 2013 (Act 865), section 32.

in respect of technology transfer transactions are additional incentives for foreign capital operating through M&A investments in Ghana.

Capital gains accruing from assets sale or liquidation events by a company which is a product of a merger or amalgamation are exempt from tax.[8] This is remarkable for a country that considers tax income as key to the survival of its economy in the absence other sophisticated diversified sources. Further, this underscores central government's desire to create conditions for foreign capital to function and create mutual benefits.

The Ghana Investment Promotion Centre (GIPC) Act makes it obligatory for all foreign investors to register their investments with the GIPC[9] . The purpose of these mandatory registration requirements is to identify foreign investors and to single them out for certain waivers and benefits. These include automatic work permit waivers and free repatriation of profits. This has been the case even when capital flights have threatened the stability of the local currency, the *cedi*.

The central government campaign to remove previous restrictions imposed on foreign participation in certain businesses and the passing of a number of local content legislations to encourage local/foreign business partnership has not only acted as a fillip for M&A activity in Ghana. It has encouraged foreign capital investments in new areas with fresh potential for handsome returns on investments.

The benefits of such local content legislations have been made possible by the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204) for instance, which requires a foreign entity incorporated in Ghana to partner an indigenous Ghanaian company to qualify such a foreign entity for the grant of petroleum lease. Further, the GIPC Act permits joint venture enterprises between foreigners and Ghanaians in commercial areas previously exclusively reserved for Ghanaians with a minimum capital of two hundred thousand United States Dollars (USD$200,000).[10]

There are also broad constitutional guarantees against expropriation of property which apply to foreign investments and acquisitions. The constitution of Ghana prohibits expropriation except where this is necessary for public safety and order.[11] This constitutional injunction is also reflected in the GIPC Act.[12]

The country's judiciary has also seen reforms. The establishment of the Commercial High Courts by the Chief Justice was in response to delays in the adjudication of commercial cases with serious implications for business brand and capital. The procedures in the court require the parties to undergo compulsory pre-settlement conference which offers a chance for them to resolve the dispute without the procedural rigours and prohibitive expense of the court room. Thankfully, the era of undue delays in the settlement of commercial disputes is behind us.

The legal framework for foreign capital through M&A activities enumerated above coupled with a stable democracy riding on the back of many years of peaceful elections and changes in governments make Ghana look good as a safe haven for foreign capital. Far from thinking that Ghana's democracy has little credentials above routinized elections, a

[8] The Internal Revenue Act 2000 (Act 592)
[9] Section 24.
[10] See section 28 of the GIPC Act.
[11] The Constitution of Ghana, article 20.
[12] Section 31.

robust media and vibrant civil society groups have delivered strong governance institutions with a firm promise of a great nation serving as one of the best destinations for foreign investment in the world.

However the legal regime for M&A activities is far from perfect, particularly for a country that has implemented a deliberate policy encouraging foreign capital in-flows.

The country's only anti-trust legislation, Protection Against Unfair Competition Act 2000 (Act 589) remains woefully inadequate in content and reach to address anti-trust concerns that often arise in Mergers and Acquisitions. Beyond the paucity of its provisions that address generally unfair practices in the course of commercial and industrial matters, there is hardly any institutionalized anti-trust review framework for M&A events contained in the Act. There are still no clear-cut investigation thresholds, anti-trust notification filings and deadlines.

The petroleum sector has been opened to foreign involvement but significant bottleneck remain. Under the Petroleum (Exploration and Production) Law 1984, where a merger results in the formation of a new company, no petroleum agreement can be assigned to the new entity without the consent of the Minister of Petroleum. The Minister's consent is also required to transfer control of at least 5% of shares in a petroleum company.

Similar requirements under the Fisheries Act, (Act 625) by which licenses granted owners of local vessels are not subject to transfer unless the consent of the Fisheries Commission has been sought and obtained has the same chilling effect on foreign capital which is principally reliant on speedy administrative processes to maximize gains.

These legal strictures are burdensome especially because of the slowness and next to inefficient manner in which the civil service continues to operate in Ghana. And the legal requirements for licensing and assignment of petroleum agreements remain a key avenue for corruption and abuse of office.

Foreign capital and the local businesses into which they are invested either by way of a merger or an acquisition depend on the integrity of the regulatory environment in which they function. Key among these institutions is the judiciary that holds the promise of delivering justice in fairness to legitimate claims of commercial parties before the court. Although largely, Ghana has reason to be proud of a judiciary that is independent and court processes which are comparable to any civilized judicial system of the world, the recent corruption scandal involving some members of the bench must be deeply worrying.

Institutional bureaucracy remains a deep malaise plaguing business generally in Ghana. This is more evident in cases where regulatory approvals are required to be obtained from public agencies. You have to consider the several regulatory approvals involved in the consummation of a business combination or acquisition to appreciate the red-tape problem and the implication for a foreign investor. Admittedly, several institutional reforms have been undertaken to improve the situation but more needs to be done.

Some of the major acquisitions by foreign capital have involved state assets.[13] This has always evoked ultra-nationalist feeling which have not been healthy for those acquired entities initially. Ultra-nationalist sentiments remain high and it is not easy to convince many people that often such acquisition are in the best interest of the country.

To conclude, there is no doubt that Ghana remains a competitive destination for foreign capital in spite of the inherent problems. Going forward, it is desirable to improve

[13] Ghana's non-controlling interest of 7.5% in Ashanti Goldfields was sold to Anglogold Ahanti Ltd and Ghana Telecom was also sold to British investors.

the overall business environment in order to make it more conducive for business. Delays in getting regulatory approvals have to improve and there is the need for more education for more ready public acceptance of foreign involvement to enhance the efficiency of state institutions.

Further, the crisis of confidence generated by the judicial corruption scandal has to be fixed, and quickly too. This is because the assurance of speedy and fair adjudication of disputes lies at the heart of investor confidence and ultimately holds sway when investment destination decisions are made.

While requiring that the sector ministers approve the transfer of petroleum agreements may be desirable to retain executive oversight over the process, the Petroleum Law should be amended to mandate the minister to give his consent not more than seven day after an application has been received. And in all such situations such as under Act 625 where a government official's approval is required, the relevant statutes should be amended to ensure that approvals are given within days of the requests having been officially received.

This is how to remove the ugly from Ghana's legal infrastructure for Mergers and Acquisition and to entrench Ghana as a haven for foreign capital.

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TERMS OF REFERENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (COMPARATIVE STUDY)

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ABSTRACT:

'Terms of reference' is one of the main procedures in international commercial arbitration. It plays an important role in the arbitration process, in which it determines all the contents of the process; as language, place of arbitration, terms and means of notifications. Ignorance of terms of reference causes serious legal implications, such as nullification of the whole arbitration process, which is stated in 'the New York Convention 1958' on the recognition and enforcement of foreign arbitral awards and most of comparative laws. Thus, the paper concerns with clarifying the concept of 'terms of reference', its legal nature and its implications, and how to cope with it in order to save the arbitration process in its journey.

The paper relies on the comparative method in dealing with the problem, particularly in both Egyptian and Emirati laws, and the other relevant laws and regulations whenever the legal treatment need.

KeyWords: Terms of reference, Arbitration agreement, Nullification.

INTRODUCTION:

'Terms of reference' represents the scope of arbitration mission, or the executive agreement of arbitration, and this show the difference between arbitration agreement and terms of reference, which many legal persons such as lawyers, judges, arbitrators, do not differentiate between both of them, and fall in faults affects on the recognition and enforcing the arbitration award they decided. This result assured in cassation judgments in most countries especially in UAE and Egypt.

In order to deal with the problem, the paper shall highlight the answers of the following questions:

- What is the meaning of terms of reference in comparative commercial arbitration law?
- What are the contents of terms of reference?
- What is the importance of terms of reference in the arbitration process in comparative law?
- What is the difference between arbitration agreement and terms of reference?
- Is it enough to rely on only one of them to validate the arbitration process?
- What are the legal implications caused by terms of reference absence in law and judicial decisions?
- What is the legal treatment to deal with the partially or fully absence of terms of reference?

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TERMS OF REFERENCE SCOPE

Definition

Terms of Reference in general means the scope of a mission, project or elsewhere in which describes the purpose and the structure of it. In addition it provides a documented basis for making future decisions and for confirming or developing a common understanding of the scope among stakeholders (Strong, 2012). This meaning transferred in international commercial arbitration as a technique used in its procedures, that most of top international arbitration centers in the world accredited it as international arbitration center in international chamber of commerce (ICC) and the Belgian Centre for arbitration and mediation (CEPANI).

ICC arbitration rules defines terms of reference, that it is a document signed by parties and the arbitrators, in order to encompasses by the arbitration process from the beginning by representing the parties and the arbitration agreement, through all the arbitration procedures, as: organizing arbitration sessions, hearings, and evidences, till the final claims in order to take the final and binding award.[2]

While CEPANI rules states in art.22, that prior to the examination of the file case, the arbitral tribunal shall, on the basis of documents received or in the presence of the parties and on the basis of their latest statements, draw-up a document defining its terms of reference, this document plays as an agreed route map for the arbitration process, and it must be signed also by the parties and members of the arbitral tribunal.

In comparing with Anglo- American top arbitration centers, we can notice in the American Arbitration Association (AAA), the use of term "Administrative Conference" which takes place in arbitral procedures, as its rules state that at the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and /or their representatives (Strong, 2012). The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.[3]

London Court of International Arbitration (LCIA) differs from AAA system in dealing with this issue, as it states that the parties may agree on joint proposals for the conduct of their arbitration for consideration by the tribunal. They are encouraged to do so in consultation with the arbitral tribunal and consistent with the arbitral tribunal's general duties under the arbitration agreement[4].

While the International Centre for Dispute Resolution (ICDR) refer to the "Preparatory Conference " in conducting arbitration, that art.20.2 states that the tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the procedures.[5]

As ICDR goes in taking by the preparatory conference, the Singapore International Arbitration Centre (SIAC) follows the same path, in conducting procedures, that as soon

[2] See art. 3 in ICC Regulations of Arbitration and Mediation (2012), p.5.
[3] See, Rule. 10 in Commercial arbitration rules and mediation procedures, American Arbitration Association, 2013.
[4] See, art.14.2 LCIA arbitration rules, Arbitration and ADR worldwide, 2014, p 14.
[5]- International Centre for Dispute Resolution, International Dispute resolution procedures, 2014, p.25.

as practicable and after the appointment of all arbitrators, the tribunal shall conduct a preliminary meeting with the parties, in person or by any other means to discuss the procedures that will be most appropriate and efficient for the case[6].

The same thing in Dubai International Arbitration Centre (DIAC), the preliminary meeting plays a procedural role in arbitration process, that Art. 22 states that within thirty days from the date of the transmission of the file to the tribunal, the later shall notify the parties of the date of a preliminary meeting with them and the venue thereof. The tribunal shall fix a timetable for the submission of documents, statements and pleadings.[7]

Nevertheless, some arbitration centers don't attaché importance to terms of reference technique, as Cairo Regional Centre for International Commercial Arbitration, (CRCICA), which gives the tribunal, after its constitution and the parties express their views about dispute, the powers and competencies to establish a provisional timetable of arbitration process[8].

Also, Abu Dhabi Commercial Conciliation and Arbitration Center, (ADCCAC) doesn't include terms of reference as a procedure in its regulations and gives the tribunal the all powers and responsibilities on the arbitration procedures.

In analyzing the previous comparative practices of international arbitration centers, in different schools of law around the world, the Latin and the Anglo- American, we can notice the following points:

1. Notwithstanding of legal system, the international arbitration centers differs in acting with terms of reference to conduct arbitration mission, some of them state it as an obliged procedure as ICC and CEPANI, and include it in the procedural rules, other takes the frame of terms of reference and its function , but under different name such as preparatory conference and preliminary meetings terms. The third trend doesn't take this technique and leave the issue to the tribunal to deal with and be the exclusive responsible of arbitration process, which discords with the voluntary character of arbitration agreement, especially choosing the arbitral procedures, and the tribunal must confirm this issue.
2. We may say that terms of reference is the product of the preliminary meetings, which held and signed by the tribunal and both parties.
3. Some of arbitral institutions which follow terms of reference technique limit its scope in planning and fix a provisional timetable for arbitration procedures, which is not the aim of terms of reference.

Contents of Terms of Reference

ICC draws up the frame of terms of reference in arbitration process, and determines its contents in order to define all the particular issues and the duties and responsibilities of the parties, as follow[9]:

[6] See Rule 16.3, in Arbitration rules of the Singapore international Arbitration Centre, SIAC, Rules, 5th edition, 1 April 2013 , p. 10.
[7] See. Art.22. DIAC Arbitration Rules 2007, Dubai international arbitration Centre, 2007.
[8] See, Art. 17.2, in Arbitration Rules, the Cairo regional Centre for international commercial arbitration, March 2011, p.21.
[9] See art. 23, ICC regulations, op cit p.21.

a. The full names and descriptions of the parties, both the claimant and the respondent, address and other contact details and of any person representing party in the arbitration.
b. The arbitrators' full names, descriptions and addresses and all their contact details.
c. Summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and to the extent possible, an estimate of the monetary value of any other claims.
d. List of issues to be determined, which may include those issues resulting from the parties' submissions, and are relevant to the adjudication of the parties' respective claims and defenses.
e. Place of the arbitration.
f. Particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral to act as amiable compositeur or to decide ex aequo et bono.

Characteristics of Terms of Reference:

Terms of reference has numerous characteristics and traits, the most important as follow:

1. It is usually the first procedure after the tribunal assigned and received the case file, it have to fulfill the TOR procedure in a determined grace period; as ICC rules grant the tribunal two months of the date on which the file has been transmitted to it, in order to finalize terms of reference and transmit it to the court.
2. Terms of reference must be in written form, in which the tribunal have to put down on a document all the agreed particulars and elements of the arbitration process, to be the guide for the tribunal in carrying out arbitration procedures and signed by both parties and arbitrators whether sole arbitrator, or more arbitrator.
3. Signing TOR as previous gives it a binding character, for all elements of arbitral process, whether the parties or the arbitrators themselves, and from other side the national court which will ratifies the arbitration award issued by the tribunal.
4. Terms of reference solve any jurisdictional problems, if any it serves as an important tool to evaluate this question, and to find an acceptable and agreed solution for all parties involved (Welser and Berti, 2010, p. 83).
5. Usually attached by timing table in order to organize times of procedures, to be obliged by all elements of arbitration process.

THE LEGAL NATURE OF TERMS OF REFERENCE

Arbitration agreement and its forms

As noticed terms of reference is an agreement between parties and the tribunal whether sole arbitrator or multiple, in order to assure and determine all procedures of arbitration process, herein the question arises; is terms of reference considered as an arbitration agreement? To answer this question we must define arbitration agreement and determine its elements, aim, and time.

In general, arbitration agreement provides the basis for arbitration. It is defined as an agreement to submit present or future disputes to arbitration. This generic concept comprises two basic types (Caivano, 2005, p. 7):

a. A clause in a contract, by which the parties of a contract undertake to submit to arbitration the disputes that may arise in relation to that contract (arbitration clause).
b. An agreement by which the parties to a dispute that has already arisen submit the dispute to arbitration (submission agreement).

The arbitration clause therefore refers to expected disputes (not existing) when the agreement is executed. Such disputes, it must be noted, might never arise, while the submission agreement refers to conflicts that have already arisen. Hence, it may include an accurate description of the subject matters to be arbitrated (Brower, 2008, p. 259).

As most of arbitration legislations around the world depend on UNICTRAL's definition for arbitration agreement, which defines it in article 7 as follow; it is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

This means that arbitration agreement refers to a full agreement between competent parties, whether natural or moral persons have the legal capacity which gives them the ability to hold an agreement (Moses, 2008, p. 25). And the proper subject matter is to submit all or certain disputes which arose or may be arise to resolve by arbitration. These disputes are related to a defined relationship between the parties.

In addition art.7, in UNICTRAL, stipulates that arbitration agreement shall be in writing and mention the meaning and forms of a written arbitration agreement in the following:

a. Document: this form refers that the arbitration agreement shall be written in a document whether in a clause form included in a contract for a defined relationship or a separate agreement and signed by the competent parties of this relation.
b. Exchange of Correspondences: that the competent parties exchange letters, telex, telegrams, e-mails, or other means of telecommunications, these correspondences must refer clearly parties' intent to submit any disputes before arbitration.
c. Referral provision: that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.
d. Exchange of statements: this form refers to the case in which one party alleges that there is an agreement for arbitration, exchanges with the other party statements of claims and defenses, without denying from the other party.

Terms of reference and arbitration agreement

If we apply the previous forms of arbitration agreement on terms of reference, we notice that terms of reference does not replace the arbitration clause or submission agreement, for two reasons; the first is that terms of reference conclude after going to arbitration institute, not before the dispute as arbitration clause, and this what CDC stated in its defense statement; when mention that Terms of Reference were only created in the course of the arbitration and that the agreement to arbitrate could only be found in the master agreement (Greenberg and Secomb, 2002, p. 4). While the second reason; is although terms of reference seems to be as same as arbitration submission draw after the dispute arose, but according to ICC rules, it isn't compulsory on parties to put or sign it that it is a must for

the arbitral tribunal to put terms of reference as a procedural act.[10] If the terms of reference doesn't signed by either parties, the international court will approve it and continue in arbitration procedures. This means that it is not as arbitration agreement which form the corner stone of arbitration.

Court judgments in some cases upheld this view, in considering terms of reference not an arbitration agreement, as the case of the appeal made by Southern Pacific Properties LTD(SPP) from a decision of the Paris Court of Appeal to set aside an arbitral award rendered in an arbitration between SPP and the Arab Republic of Egypt, the French Cour de Cassation upheld the court of Appeal's decision that the Terms of reference did not constitute a binding arbitration agreement, and noted that the main purpose of the terms of reference was to define the issues and the arbitrator's mandate, and that the ICC rules then in force made a clear distinction between the terms of reference and agreements to arbitrate. The Cour de cassation, confirmed that the only arbitration agreements were those in contracts or in a separate arbitration agreement between both parties after the dispute arisen (Greenberg and Secomb, p. 6).

This view, which based on rejecting the consideration of that terms of reference deals as an arbitration agreement, is widespread in judicial courts of France, Germany, United Kingdom, and Russia; that the Moscow District Court, has noted that terms of Reference is not considered as a substitute for an arbitration agreement, nor is an evidence of consent to the jurisdiction of the arbitral tribunal, despite the fact that it contains the signatures of the parties (Greenberg and Secomb, p. 7).

However, there is another opinion, considers terms of reference may constitute a new arbitration agreement, especially when it elaborates the arbitration agreement, to determine all arbitration process details, as we mentioned it before in the contents of terms of reference, that sometimes the parties didn't determine in their agreement some issues as language or place of arbitration and others. Moreover sometimes the parties agreed to change their language or the applicable law and included this in the terms of reference.

Here, we can notice that, the agreement is not limited to both parties, as it extends to comprise and include arbitrators also, the agreement is seemed to have triple parties, that when arbitrators sign terms of reference, they don't sign it as witnesses but as parties because they are obliged to follow all the contents of route map and if there is any gap in their master arbitration agreement they have to verify it with both parties in order to complete their mission framework.

In some times, terms of reference may plays as a master arbitration agreement, considering the fourth form of arbitration agreement (Exchange of statements); when a party alleges that there is an arbitration agreement without submitting a written document and the other party does not deny the arbitration agreement, in the same time the parties exchange their statements of claims and defenses. This case may accrue under the French law especially it isn't require any form or stipulations for the arbitration agreement[11]. This means that in French arbitration law, an arbitration agreement is valid even if it is not in writing. Courts have found that an arbitration agreement may result from the conduct of the parties at the time of negotiating and performing the contract or from a party's submission to the jurisdiction of an arbitral tribunal (Hosseraye et al., 2008, p. 338).

[10] See art. 23.1, in ICC regulations
[11] See article 1507, Decree NO. 2011-48, Le nouve au droit francais de l'arbitrage interne et international, recueil, Dalloz.

In this field, we can say, terms of reference is much more than this, to consider it as arbitration agreement, that moreover the parties sit together with the arbitration tribunal and agree on all its details, it must be signed by both parties and the tribunal too. Thus all the elements and stipulations of arbitration agreement must be fulfilled in terms of reference. This may be supported by what New York convention1958[12] states that arbitration agreement shall be in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, and added that the term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement. This means that the agreement not limited by the two parties only and deprive others, to be included and sign the agreement, particularly the arbitration tribunal which may play its role in the arbitration process.

Herein a question arises; as we consider that terms of reference is a form of arbitration agreement, if there is any difference between terms of reference and arbitration agreement, which of them will be effective, valid and applied? As an example if both parties chose a defined language for arbitration process and they changed to another one, when they put down terms of reference, which language the tribunal carries out by it? Logically, and as terms of reference is considered as a later arbitration agreement, and in accordance to voluntary dominion principle in contracts, we believe that the terms of reference will be the valid and effective agreement to be applied than that included in arbitration agreement.

This view is upheld by the recent English case law which suggests that if parties wish to grant the arbitral tribunal jurisdiction additional to that contained in the original arbitration agreement, they must do so clearly and expressly Greenberg and Secomb, p. 7). Also the Court of appeal in CDC case found that the terms of reference were sufficient for the purpose of article 2 par. 1 of the New York convention.

Terms of reference in UAE law

It can be said that, after making a survey on comparative laws, especially in Arabian countries, that none of laws state Terms of reference literally except the Emirati legislation. It had been stated in civil and commercial procedures in arbitration chapter, particularly in art.216, which states reasons of nullification of arbitration award, that the award shall be null if the award was issued without, or was based on invalid terms of reference. But the question what is the meaning of TOR in Emirati Law? Is the legislator intent the ICC concept or other meaning?

Unfortunately there isn't an explanatory note, for the said law to declare legislature's intent, and the meaning of terms of reference. But when we saw cassation court decisions in UAE for this matter, we noticed that judiciary decide that the award must include a copy of terms of reference whether it included in a separate paper or in arbitration clause, and consider that the legislator aimed from proving this statement in the award is to verify that arbitrators takes their award within their mission and authorities, for this it consider that terms of reference is an important statement, that it is a must to be included in the award and it is not enough that the parties submit a copy of the agreement before the court in attesting the award to be reinforced. [13]

[12] See art 2, convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York,1958)
[13] - Cassation decision no 213, of 2014 (Commercial Arbitration), The Federal Supreme Court, UAE.

Thus we can say that the Emirati law doesn't consider the ICC's meaning on terms of reference, as it gives the core importance to the arbitration agreement itself whether clause or submission agreement, and details may be included or comes after that, and consider that the arbitrator have the authority, in the case of agreed arbitration details absence, to subject the dispute to the institution procedures or the procedure applicable law the parties agreed upon it, or law of arbitration place, as case may be.

ABSENCE OF TERMS OF REFERENCE AND ITS IMPLICATIONS

As noticed from aforementioned, the aim of terms of reference is to crystallize the dispute and the procedures, which the tribunal will go through it, in order to determine the mandate or the mission of the tribunal in its way to reach the award on agreed basis and herein all comparative laws consider the objective meaning of terms of reference as in the Emirati law shown before. We can say that all the comparative laws have one rule included in its provisions states that the award in which go in beyond the mission of the tribunal or doesn't get all the mission, may be subject to nullification or set aside (Hwang, 2013). And this may be clarified in the following comparative provisions.

The new law on arbitration in France; Decree no 2011-48, art. 1520 states that; an award may be set aside where the arbitral tribunal without the arbitral tribunal without complying with the mandate conferred upon it (Gaillard, 2011). This article shows the importance of the mandate and the mere obligation of tribunal to be aligned with the mandate.

On the same track the arbitration law in Germany provides that an application for the award to be set aside can only be made within three months from the date on which the party making the application received notification of the award, such an application can only be based on a limited number of reasons, one of these; the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration (Lorcher, 2011, p. 384).

Switzerland private international clarifies the breaches that may catch the compliance of the mandate, the law states that the award can be challenged if the arbitral tribunal ruled on matters beyond the claims submitted to it, or if it fail rule on one of the claims[14].

This be assured in the English law which consider the case of, the tribunal exceeding its powers or failure by the tribunal to deal with all issues that were put to it, is a serious irregularity that form a ground that the award may be subject to challenge before the court.[15]

On the same path but in detail, the Egyptian law states that if the arbitral award may annulled; if the award dealt with matters not falling within the scope of the arbitration agreement or exceeding the limits of this agreement. However, in the case when matters falling within the scope of the arbitration can be separated from the part of the award which contains matters not included within the scope of the arbitration, the nullity affects exclusively the latter parts only.[16]

[14] See art. 190.2 in Switzerland Federal Code on private international law

[15] See sec. 68. 2.B,d. in UK 1996 arbitration act.

[16] - see, art 53.1.f, Egyptian arbitration law, no 27of 1994 and its amendments.

CONCLUSION

There are two perspectives in order to define terms of reference; the Subjective meaning, and this deal with what had been taken in ICC, and CEPANI, which points to a document prepared by the tribunal to draw up the road map of the arbitration process, elaborates all details of the arbitration agreement, and signed by both parties and the tribunal. And the Objective meaning is that the arbitration agreement particularly the submission agreement must include the mission of tribunal to frame out the determined dispute.

Terms of reference; as ICC regulation consists of main information related to the parties themselves, the differences between the parties to define the dispute , which it will be the mission of the tribunal, and lastly information about procedures in which the tribunal shall comply with it.

Jurisprudence and Judiciary varied in their views, with regard to terms of reference, it into two perspectives. The first denies it as an arbitration agreement, and consider it just a procedure in arbitration process. Consequently the tribunal may ignore it, without any implications. But in the same time, this view points to the importance of the terms of reference contents, and confirm that it must be included in arbitration agreement. While the second perspective consider terms of reference as an arbitration agreement especially in the case of nonexistence of a written arbitration agreement, or the arbitration agreement depends on an arbitration clause only, without any details of the arbitration process.

All comparative laws tended to give the possibility for the interested party to submit a plea or demand of nullification in the case the arbitration tribunal breach the scope of terms of reference whether in exceeding or missing tasks. And often the treatment is that nullity affects only that parts not all the award.

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SOVEREIGN DEBT-CEILING RULES IN THE SPANISH AND HUNGARIAN CONSTITUTIONS AND THEIR INTERPLAY WITH THE RELEVANT EU LAWS

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ABSTRACT

The paper builds upon the findings of Julia Black (2010) about the constitutional dimension of managing the financial crisis, and applies those findings to the context of Spain and Hungary. In particular it focuses on one of the recent quintessential EU agenda items, the constitutional debt-ceiling rules, and answers the question; how these rules interplay with the forming EU rescue mechanism for failing banks. It interprets the Spanish and Hungarian developments not only as a response to the requirements set out on a supranational level, but also as part of the post-crisis architecture of economic governance and the forming bank union. Either it is a Eurozone country like Spain or a non-Eurozone country like Hungary, these new constitutional provisions contribute to the strengthening of the EU and support the creation of a common economic policy. The sooner this happens the better it will enhance the global competitiveness of the EU.

Key Words: *Eurozone, European Stability Mechanism, financial crisis, sovereign debt, bank bailouts*

INTRODUCTION

Bank bailouts have been one of the main reasons for the drastic increase of sovereign insolvencies as a consequence of the 2007 financial crisis. Governments bailed out banks failing under their supervision in order to protect the stability of their financial sector, to avoid bank runs, protect the savings deposited at those banks, the interests of investors and creditors, and, indirectly, to maintain the value of the Euro (European Commission, 2010, p. 24). But bank bailouts were mostly paid from money that governments borrowed (predominantly from other European countries and their banks) and covered from central budget revenues, in other works: from taxpayers' money. From late 2009 Ireland, Portugal and Greece began to have problems with financing their debts. This has led to a sovereign debt crisis. One of the key lessons of the above events the EU has deducted is that the monetary union cannot be successfully maintained without an economic union in the long run (Tirado, 2013a, p. 1, Lamfalussy, 2014, p. 160). At the moment there is a monetary union - at least for Eurozone member states - the setting of central bank interest rates and monetary easing is in the sole domain of the European Central Bank, while there is no fiscal union; taxation and government expenditure remain mostly under the control of national governments, within the balanced budget limits imposed by the Stability and Growth Pact - an umbrella term for several EU laws - aiming fiscal stability and the implementation of a fiscal and a full economic union in the long run. Sustainable, sound and transparent public finances are a key factor in being able to establish an economic union. Therefore, the EU and its member states have responded with extensive regulatory measures. One of them has been the introduction of constitutional debt-ceiling rules, which are limitations imposed on political decision-making bodies and require at least the consent of the parliament in case of excessive spending from the state budget. This road also leads

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to reshaping the concept of monetary sovereignty, the structure of central banking and the methods of supervision and regulation of the financial sector (Lastra, 2015, p. 4).

The paper analyses how these rules have been implemented in Spain and in Hungary, and how they interplay with the existing regulatory framework of the EU. Spain and Hungary are in the focus of this paper, because they represent a Eurozone and a non-Eurozone country respectively, both of them have been heavily hit by the financial crisis, therefore their regulatory systems have been extensively tested in the past years, these two countries both introduced debt-ceiling provisions in their Constitutions in 2011-2012, and they have chosen somewhat different debt-ceiling methods. Still, the findings of this paper stand for both countries.

THEORY

Unprecedented state intervention in the financial sector and the increase of state debt

As a consequence of the 2007 financial crisis there has been an unprecedented amount of state intervention in the financial sector. In order to protect state interests threatened by the instability of the financial sector the US, the EU and its member states injected more than 4,89 trillion USD (Black, 2010, p. 2) directly into financial institutions. In the UK an executive decision-making type of management of the crisis has developed (Black, 2010, p. 24 and 37). In spite of the different legal environment a similar tendency has taken place in Spain and in Hungary too. In all of these countries the executive branch of the state have strengthened significantly. In the UK there are several legal constraints on the government, such as the notice of the Parliament, the prior authorization of the Treasury, the Financial Services Authority and the Bank of England, the possibility of judicial review or, - through the administration of the EU state aid and competition law rules - the prior authorisation of the European Commission (Black, 2010, p. 35, 37-38 and 40). Also, the Stability and Growth Pact includes a target as to the level of the state debt: the gross public debt should be below 60% of the GDP. There has been a debate about the introduction of a state debt cap too (Sajid Javid, 2011; Intergenerational Foundation, 2013) but there is not such cap in the UK at the moment.

Sovereign indebtedness has been increasing without parallel in the past decade. The EU average of gross state debt is around 86% of the GDP (88% in the UK, 99% in Spain and 76% in Hungary). At the moment there is ongoing Excessive Deficit Procedure against 16 of the 28 EU member states including the UK and Spain. After nine years of ongoing scrutiny the Excessive Deficit Procedure against Hungary was ended in 2014 (European Commission, 2014). The next section focuses on the existing legal framework of the EU aiming financial stability, because this is the legal environment the selected jurisdictions - Spain and Hungary - and their constitutional debt-ceiling rules operate in. It is a most dynamically changing area, not only because of the need for economic stabilisation, but also because of a continuous and accelerated evolution towards a fiscal, banking and economic union in the EU.

Financial stability rules in the EU and the limitation of public money spending

Financial stability rules in the EU

The area of financial stability rules is a dynamically changing area in the EU. There is not a uniform EU legal framework; different rules apply as to Eurozone and non-Eurozone member states, plus, a multi-speed approach has been adopted in order to respond differences among EU member states, therefore, further fault-lines exist in the regulation among member states. The laws related to this

legal framework are only partly EU law; there are also complementing intergovernmental treaties.[1] Additionally, there are separate rules for the "business as usual" periods and crisis situations. Furthermore, one can note a multi-layered characteristic of the institutional structure too: the Council, the Commission, the Parliament and the European Central Bank all take part in the policy making, the implementation and the supervision together.

The initial declaration of the extensive regulatory responses to the financial crisis was the "Europe 2020" growth strategy (European Commission, 2010), the following legal documents all refer to this political action plan for 2010-2020 at first place. The crisis environment it was elaborated in highly affected its content: this action plan aims to reach a sustainable social-economic system, even for the expense of economic growth (European Commission, 2010, p. 3). This latter characteristic is of utmost importance.[2] The two main pillars of the strategy are the stability and reform of the financial sector and found, transparent and sustainable public finances and budgetary consolidation (European Commission, 2010, p. 25-27). Bank bailouts are in the crossroads on these two pillars as being one of the consequences of an unstable financial sector and an impediment of transparency of public finances. This strategy was created for the entire EU, which created a basic regulatory issue: how to accommodate both Eurozone and non-Eurozone member states in the system?[3] As it has been underlined above, the economic and monetary union go hand in hand. But the monetary union - the Eurozone - is limited to 19 of the 28 EU member states.[4] This discrepancy is a consequence of the multi-speed EU, and it has led to a banking union which does not cover the whole EU. The economies of the EU member states are highly interdependent (European Commission, 2010, p. 5). This has been one of the main reasons for the severe effects of the crisis and public spending on failing banks (European Commission, 2010, p. 8). Crisis-related governmental financial support measures were labelled as unprecedented and justified, but also as temporary and unsustainable in the long run (Europe 2020, 4 and 24).[5] Still, in the short run, "given remaining uncertainties about the economic outlook and fragilities in the financial sector, support measures should only be withdrawn once the economic recovery can be regarded as self-sustaining and once financial stability has been restored." (European Council, 2009) - In other words, future bank rescue packages are not excluded.

The first building block of the EU financial stability is the Stability and Growth Pact (ESM Treaty, 2012, preamble (4)).[6] This is the "business as usual" dimension of the post-crisis

[1] An important example is the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (in force as of 1 April 2014 for 25 signatories). Despite being an international treaty outside the EU legal framework, all treaty provisions function as an extension to existing EU regulations.

[2] This thought is also reflected in the paper, The Crisis of the Euro as a Eurocrisis: A Polyhedral View of the Problem. Tirado (2013).

[3] The solution has been that non-Eurozone member states have been left out from the fiscal and banking union in the first circle.

[4] A list of member states using the euro and not using the euro and an interactive map is available at https://www.ecb.europa.eu/euro/intro/html/map.en.html (last accessed on 27 October 2015).

[5] "Liquidity was provided to the financial sector in an unprecedented way. Governments gave massive support to banks, either through guarantees, recapitalization or through "cleaning" of balance sheets from impaired assets; other sectors of the economy were supported under the temporary, and exceptional, framework for State aid. All these actions were, and still are, justified. But they cannot stay there permanently. High levels of public debt cannot be sustained indefinitely."(Europe 2020, point 4, pg. 24).

[6] See the detailed regulations in **Article 136** (applicable only for Eurozone member states), **121 (6)** and **126(14)** of the Treaty on the Functioning of the EU and the **Protocol on the excessive deficit procedure** annexed to the Treaty, **Regulation 1175/2011** amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, **Regulation 1177/2011** amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure and **Regulation 1173/2011** on the effective enforcement of budgetary surveillance in the euro area. Additionally **Directive 2011/85/EU** on the requirements for budgetary frameworks of the Member States is also relevant.

architecture of the legal framework. The process of bringing the deficits to below 3% of GDP and State debt below 60% of the GDP and having a declining trend of State debt (with some special provisions as to structural debts), have been a cornerstone of the pact in combination with a gradual withdrawal of temporary crisis support and fiscal consolidation (European Commission, 2010, p. 26). Lack of sufficient agreement the next major building block of financial stability came into existence in the form of an intergovernmental treaty, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.[7] Though it is not part of the EU law, some of its important provisions have been already implemented in EU law in the form of regulations.[8] The third, crisis-related building block is needed not only to make a possible, future crisis management smoother, but also to manage the measures already taken in response to the financial crisis. In this crisis-related regulation one can find both *ex ante* and *ex post* rules. Besides a strengthened supervision of the capitalization and lending activity of the banking sector and the financial market coordinated by the European Central Bank, the European Stability Mechanism (ESM Treaty, 2012) has been designed in the form of a separate institution operating under international law (European Council, 2011). This body manages the emergency fund that has been created by and for Eurozone countries that temporarily cannot borrow money on the financial markets or need money for the recapitalisation of their failing banks. The ESM builds upon the international lending and monitoring best practice of the International Monetary Fund (IMF) too (By-Laws of the ESM, 2012, p. 9 and 11).[9] This permanent bailout mechanism can offer much more economic liquidity assistance as compared to the IMF. This can contribute to the control and efficient management of state debts. But it is only available for the Eurozone member states, what might cause discrepancies and tensions within the EU as the political and economic integration continues.

The limitation of public money spending in the EU

The primary state debt limiting rules can be found in Article 126(1) of the Treaty on the Functioning of the EU: "Member States shall avoid excessive government deficits."[10] Article 1 of the Protocol No. 12 of the Treaty on the Excessive Deficit Procedure defines the "reference values" referred to in Article 126(2) of the Treaty as well: the planned or actual government deficit shall not exceed 3 % of the GDP and gross government debt[11] shall not exceed the 60 % of the GDP. These obligatory targets are applicable to both Eurozone and non-Eurozone EU member states. As to Eurozone member states Article 136 of the Treaty stipulates additional coordination and surveillance of budgetary discipline.

[7]This treaty is also called the European Fiscal Compact. It is in force as of 1 April 2014 for 25 signatories (Czech Republic, the United Kingdom, and Croatia are not parties to this treaty).

[8]These two regulations are also called the "two-pack" and they are applicable only for Eurozone member states: first, the **Regulation 473/2013**: On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area and, second, the **Regulation 472/2013**: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

[9] See also the paper, Reprofiling Sovereign Debt (Buchheit, Lee C. and Gulati, G. Mitu and Tirado, Ignacio, November 30, 2014). Available at SSRN: http://ssrn.com/abstract=2532158 or http://dx.doi.org/10.2139/ssrn.2532158. This paper mentions some important, undesirable aspects of the usage of funds during the Eurozone debt crisis.

[10] Article 121(6) authorises the European Parliament and the Council to enact regulations in order to advance economic convergence within the EU.

[11]Article 2 of the Treaty defines debt: it "means total gross debt at nominal value outstanding at the end of the year and consolidated between and within the sectors of general government as defined in the first indent."

METHODS

Debt-ceiling rules in a comparative context

Fiscal policy is "the use of government spending and taxation to influence the economy." (Weil, The Concise Encyclopedia of Economics, 2008). Besides Spain and Hungary several EU member states have introduced debt-ceiling in their Constitutions, for example Germany and Poland. These stipulations fit in the above mentioned framework of the EU Treaty and the regulations and directives of the Stability and Growth Pact. The Spanish Constitution makes express reference to the EU (Articles 135.2 and 135.3 of the Spanish Constitution),[12] but not to the specific EU regulations and directives or the Fiscal Compact. The relevant provisions of the Hungarian Constitution neither make any reference to EU law nor mention the EU as such, though Hungary is equally bound by the provisions of the EU Treaty, by the Stability and Growth Pact, the regulations and the directive mentioned in footnote 6.

Sovereign debt-ceiling in Spain

Spain has been heavily hit by the financial crisis, several financial institutions were bailed out by the government. The country responded to the crisis with extensive regulation. Besides the reform of Constitution (Article 135, 2011) which established a limit on public debt and strengthened its payment guarantees, profound changes have taken place in many laws.[13] Spain provided the fourth biggest paid-in capital (9.52 billion EUR) for the ESM and its government received a loan of 41.3 billion EUR specifically for bank recapitalisation) in late 2013 (ESM Factsheet, 2015).

Article 135(1) of the Spanish Constitution prioritises the principle of budgetary stability and promotes legality by requiring prior authorisation by law before the State can undertake financial responsibility. Article 135(3) declares absolute priority for paying state debt and declares that public debt shall not exceed the EU reference value (at the moment 60 % of the GDP). There is not a concrete numeric limit in the Constitution, but a reference is made to the EU rules. However, Article 135(4) sets an exception: in case of "natural disasters, economic recession or extraordinary emergency situations that are either beyond the control of the State or significantly impair the financial situation or the economic or social sustainability of the State" the limits of the structural deficit and public debt may be exceeded.

In accordance with Article 135(5) of the Constitution the Organic Law No. 2/2012 of 27 April 2012 was enacted about the public debt limit. It aims a sustainable fiscal policy (Article 4(2)), breaks down and shares the state debt limit among the central administration, the autonomous communities and local governments. Article 11 deals with structural state deficit and Article 13 deals with state debt. It made a reference to the EU Treaty and its Protocol No. 12, mentioned above (60 % of the GDP). It also determined the distribution of the limits of deficit and debt among the different public administrations, and the responsibility of each public

[12] Article 135.2: "The State and the autonomous communities may not incur a structural deficit that exceeds the limits established by the *European Union* for their member states. An Organic Law shall determine the maximum structural deficit the state and the autonomous communities may have, in relation to its gross domestic product. Local authorities must submit a balanced budget." Article 135.3: "The State and the regions must be authorized by law in order to issue Public Debt bonds or to contract loans. Loans to meet payment on the interest and capital of the State's Public Debt shall always be deemed to be included in budget expenditure and their payment shall have absolute priority. These appropriations may not be subject to amendment or modification as long as they conform to the terms of issue. The volume of public debt of all the public administrations in relation to the State' gross domestic product may not exceed the benchmark established by the *Treaty on the Functioning of the European Union*."

[13] Namely, 69 decree-laws were adopted during 2007-2011.

administration body in case of breach of budgetary stability objectives. This decentralised method means that the autonomous communities take part in the implementation of the principle of stability in their rules and budgetary decisions too. Article 13(1) shares the state debt limit (60% of the GDP) among the central administration (44% of the GDP), the autonomous communities (13% of the GDP) and local governments (3% of the GDP). Article 14 gives an absolute priority to the payment of state debts.

Sustainability, preventive and corrective measures and transparency are the most important characteristics of the implementation of debt-ceiling rules in Spain. However, there is an important limit of the legal efficiency of the new Spanish constitutional rules is that Structural deficit limits set forth in Article 135.2. (quoted in footnote 12) will enter in force only in 2020, because Spain claimed that it could not comply with the relevant EU regulations earlier. This postponement (transitional period) is not only expressed in the Constitution but also in the Organic Law No. 2/2012 of 27 April 2012. Still, the new debt-ceiling provisions express the strong commitment of Spain and the autonomous communities to respect the debt targets of the EU. The Spanish constitutional debt-ceiling model goes (or will go as from 2020) beyond the German debt-ceiling model, because this latter was confined to a ceiling on the deficit, but not on public debt.

Spain is obliged by the provisions of the Stability and Growth Pact, and also of its stricter version, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.[14] At the moment Spain is involved in an Excessive Deficit Procedure, therefore stricter reporting requirements apply, such as quarterly reporting instead of half-yearly reporting. Beyond the rules applicable to all EU member states two important additional, Eurozone-specific regulations apply to Spain which deal with the monitoring and assessment of draft budgetary plans and the strengthening of the economic and budgetary surveillance of member states (European Parliament and European Council, 2013).

Spain included debt-ceiling rules in its Constitution and enacted several laws and decrees to support the effective implementation and enforcement of those rules. In accordance with its decentralised state administration it broke down the state debt limit (60% of the GDP) among the central administration, the autonomous communities and the local governments. By underlining the absolute priority of paying its debts the state has sent a clear message to its investors and creditors, but, in the same time, postponing the effectiveness of some of the most important new constitutional provisions to 2020 diminished the strength of this message. As the 2015 Country Report of Spain (European Commission, 2015) concluded, the overall high stock of public debt poses risks for growth and financial stability (European Commission, 2015, p. 1). Given the high degree of decentralisation in Spain, a combined effort by all levels of administration is a key element of a successful fiscal consolidation (European Commission, 2015, p. 38).

Sovereign debt-ceiling in the Hungary

Hungary has been heavily affected by the financial and economic crisis. The IMF and the EU provided a financial stabilization package of 20 billion EUR for Hungary in 2008, which was paid back in 2010, but since 2011 there has been still a „standby agreement" with IMF and EU (providing a "safety net"). State debt has been traditionally high, over 57% of the GDP in 2003 and it reached 80% of the GDP by 2011. From 2012 gross state debt has increased gradually to 76%. After nine years of scrutiny the ongoing Excessive Deficit Procedure against Hungary was

[14]Signed on 2 March 2012 and entered into force on 1 January 2013. As of 1 April 2014, it had been ratified and entered into force for all 25 signatories.

ended. At the moment the Public Budget Balance is -2,5% (in Spain it is 4,5%) and it is decreasing, and the Gross Public Debt is 75% and it is decreasing (in Spain it is 99,3%) (Eurostat, 2014).

On 1 January 2012 a new Constitution entered in force with new debt-ceiling rules in Hungary. In the same time, there have been strong and frequent governmental interventions in the economy (CESifo Group, 2012)[15] that have influenced investors' confidence in an adverse way. Articles 36-44 deal with Public Finances. The previous Constitution did not contain similar provisions.[16] The new Constitution aims a sustainable balanced and transparent budget management (Varnay, 2011). Articles 36 and 37 include the most relevant provisions as to public debt-ceiling.

Articles 36(4) and (5) of the Constitution stipulates that the parliament may not adopt an act on the central budget as a result of which state debt would exceed 50% of the GDP. As long as state debt exceeds this 50% limit, the parliament may only adopt an act on the central budget which provides for state debt reduction in proportion to the GDP. This model is similar to the German constitutional debt control. In Germany the debt break does not cap the aggregate debt, but the idea behind it is that if the government does not generate huge deficits every year, the national debt won't grow in the long run (Randazzo, 2013). In accordance with Article 36(1) of the Constitution the act on the annual central budget for 2013 already included the planned amount of the gross state debt (73,7%) reduced as compared to the previous year (74,6%). However, the factual gross state debt was 76,8% of the GDP in 2013 (Eurostat, 2014).

The Public Finances chapter of the new Constitution - similarly to the Spanish Constitution - includes the principles of legality and transparency. Article 37(2) stipulates that only in case of exceptions based on the above mentioned Article 36(6) may such borrowing or financial commitment be undertaken which would allow the state debt to exceed 50% of the GDP. Though the Excessive Deficit Procedure against Hungary was ended after nine years in 2014, there is extensive scrutiny and reporting to the European Commission as Hungary is bound by all relevant EU financial stability laws mentioned earlier except for those with apply only to Eurozone member states. Similarly to Article 135(4) of the Spanish Constitution the Hungarian Constitution also allows only exceptional derogation from the provisions of Articles 36(4)-(6) during a special legal order.[17] The high level of government debt remains an important source of vulnerability in Hungary (Country Report Hungary, 2015, p. 1), therefore the new constitutional debt-ceiling rules represent a positive regulatory direction in terms of strengthening the country's commitment to comply with the relevant EU and constitutional provisions. Hungary's public debt is below the EU average, but there is a need for sustaining fiscal consolidation and pursuing growth-friendly economic policies (Country Report Hungary, 2015, p. 12).

FINDINGS

The paper compares and analyses the debt-ceiling rules laid down in Article 135 of the Spanish Constitution as amended in 2011 and Articles 36 and 37 of the Hungarian Constitution in force as from 2012 and argues that either it is a Euro-zone country like Spain or a non-Euro-zone country

[15] Moody's downgraded Hungarian government bonds below investment grade on 25 November 2011, which was followed by a downgrade by Standard & Poor's on 22 December 2011.

[16] Act 75 of 2008 on economical state administration and budgetary responsibility (in Hungarian: "a takarékos állami gazdálkodásról és a költségvetési felelősségről") and its Article 3 introduced statutory limits on public debt from 2009, but there was not constitutional debt-ceiling before 2012 in Hungary.

[17] Special legal order means State of National Crisis and State of Emergency, State of Preventive Defence, Unexpected Attack, State of Danger (Articles 48-54 of the constitution).

like Hungary, the new constitutional provisions directly contribute to a greater fiscal discipline and indirectly to the strengthening of the EU and hereby support the creation of a common economic policy. Though these constitutional provisions have been criticized in both countries for the lack of prior, usual consultation and their vague and uncertain or too rigid language respectively, one can also note several common, positive features of them, such as the focus on balanced, transparent and sustainable budget management, a commitment to respecting the limit of the structural deficit established by the EU and limiting the playfield of the legislature and the executive to engage in excessive public money spending. Though these rules are still too recent, it is possible to identify some of their advantages, such as the maximalization of State spending or the additional democratic control by requiring the prior parliamentary authorization of state spending. Constitutions should not hinder governmental measures, but they should protect financial stability, as the crisis has shown how utmost importance this bears for the economy and the whole society. Constitutional debt-ceiling rules can decrease democratic deficit from which many EU member states suffer. They also contribute to a greater transparency and accountability of public finances.

DISCUSSION

The paper applies a comparative legal analysis to the constitutional debt-ceiling provisions of the Spanish and Hungarian Constitutions. It proposes a theoretical explanation of sovereign debt-ceiling rules. The Spanish and Hungarian constitutional developments are not only responses to the requirements set out on a supranational level, but also form part of the post-crisis architecture of economic governance and the forming bank union in the EU. Constitutional debt-ceiling rules are very important and beneficial, because authorities and courts of the member states are provided with an authorisation to call governments to account as to public money spending. If debt-ceiling rules are clear and they are taken seriously, they can support the fiscal healing of an indebted state. However, one can note that policy decisions, such as the strength of austerity measures, the prioritisation of improving macroeconomic indices or of the stimulation of the real economy influence importantly the tendencies how the level of state indebtedness changes and how efficiently constitutional debt-ceiling rules are transplanted in practice.

CONCLUSIONS

Building on the findings of Julia Black (2010) as to the constitutional dimension of the financial crisis the paper interprets the Spanish and Hungarian constitutional developments not only as a response to the requirements set out on a supranational level, but also as part of the post-crisis architecture of economic governance, the forming fiscal and bank union in the EU. The creation of a permanent, supranational rescue mechanism for failing banks and the new, constitutional sovereign debt-ceiling rules both contribute to the creation of a common economic policy in the EU.

IMPLICATIONS

The monetary union cannot be successfully maintained without an economic union in the long run. It is in the best interest of the EU member states to maintain and strengthen the EU**.** The new constitutional debt-ceiling provisions contribute to the economic convergence of member states and to the strengthening of the EU. The sooner this happens the better it will enhance the global competitiveness of the EU.

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L33-2128

DATA PRIVACY LAWS AND ITS IMPACT ON INTERNATIONAL TRADE

SINTA DEWI ROSADI[1]

ABSTRACT

The development of information and communication technologies and the wireless business environment including mobile technologies which link to the internet and other information networks, still remain one of the most vibrant and dynamic global markets as more and more people are getting connected. New applications and services are being developed and users' online experiences are expanding throughout the world. Living in a networked society certainly brings exciting prospects for global businesses and international trade since these developments offer advantages and economic benefits. Notwithstanding the foregoing, these developments have made possible for business to collect, store, access and disseminate the information from anywhere in the world. This technology offers great potential for social and economic benefits for businesses, individuals and government, including increased consumer choice, market expansion, productivity, education and product innovation.

While this technology makes it easy and cheaper to collect, link and use large amounts of information, however, they are pose new threats to data privacy individuals, particularly consumers. Data privacy refers to the right of individuals to have control on how the information about them is communicated and prevent its abuse. As the data in online become a driving factor in the international trade where the business requires to input and access data 24-hours a day, at the same time consumers have an expectation that business will protect their data privacy. Therefore, in promoting international trade, it needs to develop regulatory systems for protecting data privacy of consumers in facing the global environment.

Given the importance of the above, APEC as one of influential economic regional trade organization trying to balance between international trade and data privacy protection by regulating data privacy principles in APEC's Privacy Framework 2004, and trying to adopt common data privacy standards with the ultimate goal in creating harmonization in the regulation in APEC member states.

Keywords: Data Privacy , Impact, International Trade Law

INTRODUCTION

The globalization era and the advances of information technology that has led to convergence, hence, most individuals in the world has become familiar with the internet. Internet as a primary platform for e-commerce that increase the transaction across different countries, thereby driving additional gain to international trade , as the internet enables cross-border data flows and as a driver of international trade. For instance, cross-border data flows are now intrinsic to e-commerce, from internet-based communications like email and platforms such as eBay and Face book that bring buyers and sellers together, from the financial transaction to purchase the product in other countries to the downloading of the goods and services (Meltzer, 2013, p. 1-2). Now digital global trade will take more than $ 2 trillion in annual spending on information technology and services such as mobile, cloud computing and big data. This trend has brought a very significant effect not only for the IT sector but for the world economy as a whole and improve productivity, streamline operations and have created jobs and boost

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economic growth (BSA, 2015). This trend is also called Digital Trade where all the international trade is supplied by digital information, product, services and infrastructure. A broad range of industries and organizations rely extensively on digital trade and global flows of information, including manufacturers, retailers, wholesalers, services firms, universities, labs, hospitals and other organizations and entrepreneurs. According to one study, more than three-quarters of the economic value of the internet is captured by manufacturing, financial services and industries other than pure internet or e-commerce companies. Digital trade presents important new opportunities for small businesses and entrepreneurs. Small businesses can use internet-enabled platforms and services to boost productivity and efficiency and to export and reach more markets than offline companies (BSA, 2015, p. 2-5).

However, this development contain potential risks, modern technology provides access in seconds to limitless quantities of data privacy of the users and the possibility of creating personality profiles knows as profiling through the combination of different data files (Saad, et al., 2005, p. ix) Over the past few years, people realize there has been a large-scale data collection by governments and companies including personal data through the use of information technology such as through mobile devices, electronic payment systems, and cloud computing services. Personal data for business has tremendous value. Unfortunately, private companies and government agencies that hold personal data are not always put the appropriate safeguards to prevent the violation of privacy intentional or unintentional. Sometimes this is because of gaps in their internal policies, or because they misjudge the risks or their ability to reduce it. But sometimes it's because these organizations do not have a data management system (Meltzer, 2013) and the lack of institutional capacities and the speed of change have undermined data privacy protection. The collection and dissemination of personal data without consent is a violation of data privacy, since data privacy includes the right to determine whether or not to provide personal data. In this information age, information has a vital role in human life. Personal data is also an asset or commodity of high economic value. In addition, there is a correlative relationship between the level of trust with the protection of certain data from private life.

Privacy experiencing rapid growth that many countries have set up in the form of legislation either specifically or sectoral, especially at the beginning of the 20th century because of the influence of the use of information technology communications that threatens the privacy rights of a person. Since known as a right that must be protected, during 1890 until 2014, 101 countries have set the privacy of personal data and the rapid development of this does not escape the influence of the setting and cases that developed in the European Union (Graham, 2014, p. 5-6). After EU, APEC Privacy Framework, 2004 is the next significant international instrument to address data privacy which base on three pillars i.e. Trade and Investment, Liberalization, Business Facilitation and Economic and Technical Cooperation Munir et al., 2014, p. 54-55). The Privacy Framework are considered a success by such a diverse organization to address quite controversial issues such as data privacy due to different regulation approach between European Union and the United States that would hamper international trade. This trends will causing legal obstacle and undermined the today's globalised world where the laws become harmonized with international standards (Munir et al., 2014, p. 54-55).

This paper discusses the extent data privacy law that has been regulated both by international instruments such as APEC Privacy Framework in order to stimulated cross-border data flows for international trade. It proposes that governments should try to harmonized their laws to support cross-border data flows as driver of international trade.

THEORY

Data privacy law systematically regulate the use of information about people or people call personal data or personal information (Munir et al., 2014, p. 54-55). The trade in personal data is a massive business and it's one of the biggest contributors to nuisance calls, personal data can be easily accessed, stored, transferred, even disseminated to others. In fact, there are privacy rights that include the right to determine whether or not to provide personal data to other parties. Thus the things mentioned above is a violation of someone's privacy. Data and information have a vital role in human life and is an asset or commodity of high economic value. Protection of privacy rights thus become very (Meltzer, 2013, p. 5-6). Privacy is a concept that is still being debated in terms of both philosophy and jurisprudence as it has a very large dimensions depending on which side of the mean. Solove argued, privacy is a concept that is disarray and confusing because it is often interpreted broadly to mean to be ambiguous and vague e.g. privacy could be interpreted in some sense as freedom of thought, control over one's body, solitude at home, control over personal information, freedom of surveillance, protection of one's reputation, and protection from searches and interrogation (Chesterman, 2014, p. 8-9). Alan Westin argued, privacy is a concept that is universal means not only known by humans but animals even recognize a right to control certain areas that would later be defined as maintaining privacy in certain areas. All living things require an area of themselves and away from contact with other creatures, or so-called personal distance as the birds and monkeys that applies intimate distance in which region they live confined between spouses, parent and children so according to the anthropology of privacy recognized by animal and human (Westin, 1970, p. 8-9). The concept of privacy for the first time developed by Warren and Brandheis who wrote an article in the journal Science, Faculty of Law, Harvard University, entitled "The Right to Privacy". Furthermore, according to Warren and Brandheis that, "[p]rivacy is the right to enjoy life and the right to be left alone and this development of the law was Inevitable and demanded of legal recognition" (Waren and Brandheis, 1890, p. 3-25).

So privacy is the right to enjoy life and the law must protect the privacy. Reasons of privacy must be protected as follows: First, in developing relationships with others, one should cover part of his private life so that he can maintain his position at a certain rate. Second, someone in life need time to be alone (solitude) so that privacy is needed by someone. Third, privacy is a right that stands alone and does not depend on other rights but these rights will be lost if the person is publish things that are personal to the public. Fourth, the privacy also includes the right of a person to perform domestic relations including how someone fostering marriage, foster family and other people may not be aware of the personal relationship that subsequently Warren called it as the right against the word. Fifth, another reason why the privacy deserves legal protection because of losses is difficult to assess. The disadvantage is felt much larger than the physical loss, having disturbing personal life, so that when there are losses suffered by the victim shall receive compensation.

In the proposed concept also suggested Warren privacy is not absolute. However, there are limits as follows:

1. does not cover the possibility for an individual's personal information to publish the public interest;
2. there is no privacy protection if no losses;
3. no privacy if the person concerned has given that personal information will be disseminated to the public;
4. consent and privacy deserves legal protection because of losses is difficult to assess. The disadvantage is felt much larger than the physical harm because it has been disturbing personal life (Waren and Brandheis, 1890).

DISCUSSION

APEC

The Asia-Pacific is the second region in establishing the data privacy law after the EU that has been successfully develop binding regional instrument (Saad, et al., 2005, p. 45). For the first time, data privacy protection viewed from the international trade in developing electronic commerce and building the consumer trust and confidence in safe, secure and reliable communication particularly in maintaining information flows among APEC member states and develops government and business cooperation in preserving data privacy to ensure the growth electronic commerce and international trade[2]. The lack of consumer trust and confidence in the privacy and security of online transactions and information networks is one element that may prevent member economies from gaining all of the benefits of electronic commerce and eventually will hamper and causing trade barrier among the member states and its trading partners. APEC economies realize that a key part of efforts to improve consumer confidence and ensure the growth of electronic commerce must be cooperation to balance and promote both effective information privacy protection and the free flow of information in the Asia Pacific region[3]. APEC plays a critical role in the Asia Pacific region by promoting a policy framework designed to ensure the continued free flow of personal information across borders while establishing meaningful protection for the privacy and security of personal information In November 2004, Ministers for the twenty-one APEC Economies endorsed the APEC Privacy Framework**.** The agreement also triggered by the using of information and communications technologies, including mobile technologies, that link to the internet and other information networks have made it possible to collect, store and access information from anywhere in the world. These technologies offer great potential for social and economic benefits for business, individuals and governments, including increased consumer choice, market expansion, productivity, education and product innovation. However, while these technologies make it easier and cheaper to collect, link and use large quantities of information, they also often make these activities undetectable to individuals. Consequently, it can be more difficult for individuals to retain a measure of control over their personal information. As a result, individuals have become concerned about the harmful consequences that may arise from the misuse of their information. Therefore, there is a need to promote and enforce ethical and trustworthy information practices in on- and off-line contexts to bolster the confidence of individuals and businesses[4].

The Framework is comprised of a set of nine guiding principles and guidance on implementation to assist APEC Economies in developing consistent domestic approaches to personal information privacy protections. It also forms the basis for the development of a regional approach to promote accountable and responsible transfers of personal information between APEC Economies[5]. The Privacy Framework provides "a principles-based framework as an important tool in encouraging the development of appropriate information privacy protections and ensuring the free flow of information in the Asia Pacific region." Four of the purposes of the framework are to [6]:

1) Develop appropriate privacy protections for personal information, particularly from the harmful consequences of unwanted intrusions and the misuse of personal information;

[2] APEC Privacy Framework Preamble
[3] *Ibid*
[4] *Ibid*
[5] Part IV of the Framework dealing with (a) guidance for domestic implementation and (b) guidance for international implementation was completed and endorsed by Ministers in 2005.
[6] APEC Privacy Framework, Part I, Preamble, para 4, 2005.

2) Recognizing the free flow of information as being essential for both developed and developing market economies to sustain economic and social growth;
3) Enable global organizations that collect, access, use or process data in APEC Economies to develop and implement uniform approaches within their organizations for global access to and use of personal information;
4) Assist enforcement agencies in fulfilling their mandate to protect information privacy;
5) Advance international mechanisms to promote and enforce information privacy and to maintain the continuity of information flows among APEC economies and with their trading partners.

The Nine APEC Privacy Principles apply principles that normally found in international or national privacy principles: (1) Preventing harm: the data controller or organization that has a control is required to handle information and prevent causing harm to the individual or data subject ; (2) Notice : is the basic protection that provide in every International and National Instrument that give individual the choice whenever they want to share their personal information or not by given them the notice about the collection of their personal information; (3) Collection Limitation principles is correspondence with the second principles that given the individual choice to limit others to collect their personal information; (4) Uses of Personal Information; (5) Integrity of Personal Information; (6) Security safeguards is a key component of preventing harm is that the data controller must also put in place security safeguards to protect the data (7) Access and Correction are the principles that grant the individuals with access to information held about them and to correct any errors (8) Accountability is the principles that given the responsibility to the data controller for abiding the framework and (9) Due Diligence in Transfer as one of the important principles to assure that domestic data privacy rules apply consistent and transparent and will not hamper the e-commerce and international trade.

The Framework also provides guidance to Member Economies on implementing the APEC Privacy Framework. Section A focuses on those measures Member Economies should consider in implementing the Framework domestically, while Section B sets out APEC-wide arrangements for the implementation of the Framework's cross-border elements. The implementing on the data privacy international is very crucial element to built cooperation that can be viewed from several factors (Stewart, 2005, p. 1) :

1. Develops international standards that will ensure the two most important factor the protection of individuals – establishing rights that viewed variously as fundamental human rights, consumer protection and fair information practices;
2. A desire to avoid unnecessary barriers to trans-border data flows – providing compatible and meaningful privacy protections and diminishes the need at national level to hampers information flows at borders (Stewart, 2005).

The framework also provide several alternatives and option to the member to implement and for giving effect to the Framework and securing privacy protections for individuals including legislative, administrative, industry self-regulatory or a combination of these methods under which rights can be exercised under the Framework. In addition, Member Economies should consider taking steps to establish access point(s) or mechanisms to provide information generally about the privacy protections within its jurisdiction. In practice, the Framework is meant to be implemented in a flexible manner that can accommodate various methods of implementation, including through central authorities, multi-agency enforcement bodies, a network of designated industry bodies, or a combination of the above, as Member Economies deem appropriate (Stewart, 2005). However the Framework has been perceived by most expert as weak because unable to protect privacy as a result of such rapid technological developments and in fact the APEC Framework is weaker than OECD in respect of its implementation

requirement (Saad, et al., 2005, p. 49-50). The next development in APEC, since 2007 APEC developed CBPR (cross-border Privacy Rules as a system to implement the data privacy principles under Privacy Framework. These privacy policies and practices will evaluate by recoqnized accountability agent to measure the compliance with the Privacy Framewok and once an organization has been certified for participation in the CBPR System, these privacy policies and practices will become binding as to that participant and will be enforceable by an appropriate authority, such as a regulator to ensure compliance with the CBPR program requirements[7]

Implementation of the APEC Privacy Framework – Domestic

For some years now, an increasing number of Member Economies have implemented privacy law, many of them comprehensive and at the national level. Other economies have encouraged good practice codes in various ways (Crampton, 2006, p. 79) the developments that occurred after 10 years turned out that data privacy laws in member states very diverse and has not yet achieving harmonization:

Country	Data Privacy Law Status
Australia	Comprehensive national laws, National Privacy Principles (NPPs) and privacy codes and some state laws ; Companies can gain approval of a code to replace the NPPs, which are then enforceable as law; codes must be 'at least the equivalent' of the NPPs Independent Privacy Commissioner at federal level and some states enforces compliance
Canada	Comprehensive national laws, provincial and territorial laws Independent Privacy Commissioners at both federal and provincial levels enforce compliance
China	No comprehensive law/regulations Work on drafting has started
Hong Kong	Comprehensive laws and codes of practices Independent Privacy Commissioner enforces compliance
Indonesia	No comprehensive law Broad privacy right provision in the Electronic Transaction Bill Work on Drafting Law
Japan	Comprehensive national law, several guidelines and ordinances based on the law, prefectural and local laws Responsible ministries/agencies enforce based on guidelines published respectively
Malaysia	National data protection law The bill includes appointment of a Commissioner
Mexico	Data protection law only applicable to the government Currently drafting a data protection bill that includes an appointment of a Commissioner
Philippines	Comprehensive national laws Currently developing data protection guidelines for the private sector
Singapore	National Data Protection Bill Voluntary private sector model code

[7] APEC Cross Border Privacy Rules Systems, at p.4

South-Korea	Existing national law only applicable to certain industries Currently drafting a restrictive data protection bill applicable to all industries Currently compliance enforced by the Personal Information Dispute Mediation Committee which is supported by the Korea Information Security Agency
Taiwan	Comprehensive national law Bill with expanded scope submitted
Thailand	Draft comprehensive national data protection bill under inter-agency review No comprehensive national laws, but sector-specific laws, state laws, and Federal Trade Commission law/regulations
USA	No comprehensive national laws, but sector-specific laws, state laws, and Federal Trade Commission law/regulations
Vietnam	No comprehensive national laws Privacy provision in the Electronic Transaction bill

CONCLUSION

Despite many criticism as being applying weak principles and weak of implementation method compare to EU Direction, APEC Privacy Framework has successfully unite the member states on data privacy standards, and for the first time data privacy is reviewed from the trade and economic perspectives. All of the member agree that APEC member states should have a better and clear data privacy regulation; introduce privacy protection into their domestic law; avoid barrier to information flows; and will also provide benefit to consumer, business and government.

APEC Privacy Framework were drafted in order to get agreements between diplomats, and diplomatic agreements tend to evade important issues. The result is that the principles are ambiguous as to their effect and are capable of a vast number of interpretations and implementations and due the degree of difference between the member state is very large, the implementation will be different for example Australia and New Zealand already develop rules compliant with European Directive Standards while other member states because of the flexibility to implement by the Framework , those countries will apply a minimalist approach to privacy compliance and consequently there will be differences in the level of protection in APEC region.

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1-L2-1329

INCLUSIVE CORPORATE LEGAL ENFORCEMENT FRAMEWORK IN RESPECT OF DERIVATIVE PROCEEDINGS IN COMPANY LAW

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It is indisputable that the foundations of the current corporate legal enforcement framework in Anglo-American jurisdictions are found in the 20th Century company law. Regardless of apparent reconsideration of the relevant company law principles in statutory enactments, judicial pronouncements and academic writings since the end of the twentieth century, corporate legal enforcement framework remains embedded in the twentieth century thinking which was influenced by those corporate law principles which are continually being reconsidered up to this very day. What remains readily accepted in corporate law circles is the inexorable link between the standing rules in derivative proceedings and the accepted role of fiduciary obligations, as accepted in the twentieth century. The twentieth century corporate law thinking unquestionably accepted the role of fiduciary obligations of directors as being the exclusive protection of shareholder interests. Research undertaken since the turn of the twentieth century began to question this accepted role and discovered that the primary role of fiduciary obligations is not the exclusive protection of the shareholders, but the restriction of directorial self-serving conduct. Since the corporate legal enforcement framework in the area of derivative proceedings has for a considerable length of time been associated with the conventional role of fiduciary obligations and the exclusive association of corporate voting with shareholders, the existing corporate legal enforcement framework in Anglo-American jurisdictions still focuses directorial duties on – and limits enforcement powers to – shareholders, particularly in so far as legal standing rules are concerned. Moreover, corporate law developments which highlight the extension of the right to vote in corporate decision-making to include a number of different corporate constituencies further reduces the significance of the continued linking of the corporate legal enforcement framework in derivative litigation proceedings with the twentieth century thinking on the role of fiduciary obligations and the exclusivity of corporate voting.

This paper aims to show that the abandonment of this thinking, at least within a plethora of modern corporate law enactments and within academic writings, justifies the need for legislatures in these jurisdictions to consider the necessary, and complementary, reform of the existing corporate legal enforcement framework. Using developments in South Africa as the basis for the recommendations, the paper will hopefully articulate that the retention of the conventional corporate legal enforcement framework in statutory enactments, such as the UK Companies Act, the corporate constituency statutes and the benefit corporation statutes in the USA, is terribly misplaced.

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27-L17-2217

EXTRATERRITORIAL APPLICATION OF EUROPEAN UNION INTELLECTUAL PROPERTY LAW

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The paper examines the provision on intellectual property rights that the Free Trade Agreements concluded by the European Union with strategic partners introduce. The paper also refers to the chapters on intellectual property that the draft free trade agreements under negotiation include. This stated, the paper considers whether the EU has effectively succeeded (or not) in exporting its standard of protection of intellectual property rights to third countries. The case of the draft FTA between India and the EU under negotiation since year 2007 deserves special consideration. Special consideration is given to the position of the parties with regard to the following issues: TRIPS-plus compromises, enforcement of IP rights, data protection, patents and public health, technology transfer and harmonization of IP national laws.

50-L24-2219

ANALYZING THE FEASIBILITY OF FINANCIAL FACTORS ASSOCIATED WITH INTEREST IN MENTORING ENTREPRENEURS

MS. DEEPALI MISHRA[3] PROF. S.K. JAIN AND DR. HARISH CHAUDHARY

This paper explores the factors associated with interest in mentoring entrepreneurs among 104 Indian mentors, actively involved in growth of entrepreneurs through mentoring and training. Mentoring interest is analyzed using social exchange theory, suggesting the mutual cost and benefits involved in the relationship. Two different sources of information were used in the study: Qualitative information related to alternative financial factors were gathered through interviews. Quantitative information was gathered through survey method, to see the feasibility of financial factors. A multivariate technique is used to see the causal relationship between the variables, followed by Post Hoc analysis. The empirical results are analyzed in the light of interviews and literature. Evidences from the study shows that financial factors are associated with interest in mentoring entrepreneurs and limited to professional experience. The results found that age level determines the financial factors as the antecedents of mentoring interest in entrepreneurship domain. A share between 2.5 to 5 percent in turnover of entrepreneur's firm is highly desired by the mentors and they argued that it needs to be extended to them for approximately four years. However, no other factor: professional experience, occupation and past mentoring experience have any association with mentoring interest which could ultimately held responsible for the growth of entrepreneurs. In entrepreneurship domain, mentors are always considered as volunteers and philanthropists yet their value is undermined, this paper studies the role of financial factors responsible for enhancing mentor's interest, making it novel specifically in Indian context. Nevertheless, this study argues that benefits to mentors through financial outcomes ask more accountability from the mentor's side and more stability for entrepreneurs. The findings of this study are useful and can be applied to the organizations that are engaged in mentoring entrepreneurs. The entrepreneurship development programs being supported by the government

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may encourage the mentors to undertake mentoring with accountability by sharing the returns of mentoring. Moreover, policy makers may use the findings of the study to frame the policies for entrepreneurship development not only for the entrepreneurs but in line with the mentors.
Key Word: Rewards, Mentors, India

2-L25-2224

THE IMPACT OF STATE POLITICS ON BUSINESS CYCLE CORRELATIONS ACROSS U.S. STATES

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To what extent are state outputs correlated? From both state and federal policymakers' perspectives, identifying economic and political factors that potentially impact state business cycle correlations is of substantial value when formulating policies designed to foster state economic growth. Using U.S. state-level income and expenditure data from 1960 – 2007, we find that the most important economic determinants of business cycle synchronization between states include state fiscal spending rates and geographic distances from one another; in contrast, sectoral compositions do not seem to have a noticeable impact. We also include political factors, extending the framework of Alesina (1987) and discover that states sharing similar political identities have more closely linked output fluctuations. These results hold across different political metrics, and for the sub-periods before and after the oil shock era, suggesting that state political affiliations continue to play a role in the co-movement of state business cycles.

51-L26-2233

INFRASTRUCTURE INVESTMENT IMPACT EVALUATION: CASE OF KYUSHU HIGH SPEED RAILWAY LINE (SHINKANSEN) IN JAPAN

MR. UMID ABIDHADJAEV[5] AND DR. NAOYUKI YOSHINO

This paper focuses on the impact of infrastructure investment on tax returns of the first order administrative divisions (prefectures) of Japan. We employed the start of the construction and operation of high speed railway line (shinkansen) in Kyushu region of Japan as randomized trial and estimated the difference in difference coefficients for outcome variables as observed by tax revenues.

Preliminary results of the study are comprised of followings:

Without connection to greater system of railway connection, impact of high speed railway line on tax revenue is positive but of diminishing nature across time. Tax revenue rises significantly during construction period and goes slightly down after operation. Though the impact on neighboring prefectures is also positive, emerging patterns indicate that further the prefectures from the high speed railway line, less is impact on tax revenue. However, this situation changes during the second phase of operation where newly built high speed railway line was connected to that of existing.

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Furthermore, the study finds statistically significant and economically growing impact is found in terms of connectivity effect, meaning that prefectures located along the high speed railway line, seems to be experiencing higher tax revenues in comparison to adjacent prefectures. Distinguishing tax revenues by their types, we found that difference in difference coefficients for corporate tax revenue were lower than those for personal income tax revenue during construction period, but higher during second phase of operation.

Key words: Japan, infrastructure, tax, spillover, connectivity. JEL codes: H54; O11; O23; R11

61-L27-2240

BUSINESS AND PROFESSIONAL WRITING -- AN INTERCULTURAL AND CROSS-DISCIPLINARY INTEGRATION: A CASE STUDY IN TRANSITION

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Irrefutably, the competitive global marketplace runs on Business English. With China taking center stage in the globalized business world, stellar communication skills is indispensable for China's global business graduates. Validated by business recruiters, industry leaders and alumni, business writing competency remains the overriding threshold litmus for business graduates aspiring to rich global careers in MNC's or overseas employment. Yet, too many majors in global business receive meager training from a single "Business and Professional Writing" course ("B&PW") that is taught segregated from the core business specialty classes.

This ongoing case study and research, analyze how and why (1) currently widely utilized pedagogical practices in B&PW, and (2) this course's positioning, are crippling students' efforts to learn bono fide professional writing. Among others, deficiencies under category (1) include the jarring shift from academic English writing discourse to workplace polished discursive texts involving complex combination of ideas appropriate to discipline-specific tasks. Other overlooked characteristics of business writing, not aligned with the socio-cultural, rhetorical styles, and linguistic background of Chinese students, cover the encompassing tone of "politeness" and "goodwill", the use of hedging linguistic devices, and the logos-based English rhetorical tradition of persuasive writing.

Under category (2), the practice of teaching B&PW as an academic discipline separate from business management courses renders a disservice to global business students. There is the unappreciated value to students who write in field-specific rhetoric that fosters critical thinking through complex negotiations with discipline-specific audiences, contexts and purposes.

This study draws on empirical research, author's own experience, literature review, other universities' curricula, and survey of business faculty members. It suggests alternative holistic pedagogical approaches to the B&PW course that factor in the thematisation of global business topics, the contextuality, intertextualization of task-based lessons together with a built-in familiarity with the disciplines. Others include methodologies in embedding writing instruction within disciplinary teaching via collaboration between writing and subject instructors to promote full integration.

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Lew further earned a Master's (M.A.in English Literature) from New York University, New York. This was followed by a Juris Doctor (J.D.) degree from Rutgers University, New Jersey, U.S.A., before she commenced practicing law for 15 years as a New York licensed Attorney specializing in American and international business and corporate law. She has published and edited in the fields of international law and legal research. Prof. Lew's last degree is a Master's at Arts in Teaching (M.A.T.) with a dual certification in English and TESL from Montclair State University, New Jersey, U.S.A. She currently teaches "English Oral and Written Discourse", "Grammar" "Academic Reading and Writing", "Business and Professional Writing" and "Business Law" in China.

32-L28-2259

THE BRIBE PAYMENTS PAID TO FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS IN THE LIGHT OF THE OECD WORK ON THIS MATTER: PROBLEMS ARISING FROM THE TAX PERSPECTIVE"

MR. ALBERTO QUINTAS SEARA[7]

In the context of international public procurement, until a few years ago, delivery of payments or gifts to foreign officials by companies in order to influence the award of a public contract was not only a widespread practice worldwide but also tolerated by some governments, even allowing for the tax deductibility of these payments as business expenses correlated with income or revenue generation.

This issue might be striking at first glance, since a mere logical reasoning would lead us to think that it represents a kind of "legal nonsense" devoid of any hint of actual feasibility. However, in practice, it is not possible to make such a categorical statement insofar as it is a very complex issue affected by many factors including: a) the legislative framework (especially concerning criminal law, administrative law, tax law and accounting regulations); b) the level of awareness and specific training of tax officials; or c) the information exchange instruments adopted by the different countries.

In this regard, the OECD has been working for more than fifteen years towards the prevention and elimination of such bribery practices due to its negative impact on international business transactions (distorting competitive conditions and undermining good governance and economic development), as shown by the adoption, among others, of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009), or the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009). Moreover, and in order to ensure the effective implementation of the Convention and the subsequent Recommendations by the OECD countries, a monitoring system divided into three different phases or stages was established. In the first phase, it would be assessed whether the domestic legislation adopted by the OECD countries in order to implement the Convention meet the standards contained therein. The second phase, would aim to identify if the internal legislation was being applied effectively. The third and final phase (recently completed in some countries), would focus on analyzing the progress and improvements made by OECD

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countries in relation to the weaknesses pointed out in the previous phase and the recommendations made by the OECD therein, as well as on identifying emerging issues arising from changes in the domestic legislation or institutional framework in order to issue new recommendations aimed at ensuring the implementation of the Convention and its results.

Therefore, the aim of this paper is precisely to highlight and provide some thoughts, from the tax perspective, about the problems arising from the possibility that certain payments or gifts given to foreign public officials in the context of international trade transactions can be considered as tax deductible expenses. In particular, the paper aims to analyse the recent work developed by the OECD in this field as well as the position adopted by the legislators and governments of different countries in order to assess its effectiveness in relation to the aims pursued by the OECD.

12-L29-2151

INVESTIGATION ON JOB EMBEDDEDNESS AND ITS RELATION TO TURNOVER INTENTIONS IN SMES OF SAUDI ARABIA

MR. SAIF ALHARBI[8]

The research study is highly significant to develop an understanding of the link between the factors that affect job embeddedness and its relation to employee voluntary turnover intentions in the SMEs in Saudi Arabia. This is particularly very important in the context of small and medium enterprises (SMEs) in Saudi Arabia, where the number of employees leaving the job is often very high. Job embeddedness is a key factor in understanding why employees stay on their jobs and its subsequent influence on employee propensities to stay in or leave a job. It also possess great ability to predict voluntary turnover and determine the reasons for leaving, so that an organisation could develop appropriate HR practices that enable them to keep their employees committed and engaged. The research study tries to develop an understanding about the concept of job embeddedness as the most influential factor responsible for causing turnover of employees in an organisation. For instance, the study considers the effect of family, community and culture on the employee voluntary turnover intentions. It plays a significant role in the context of SMEs in Saudi Arabia, where the national culture, family traditions and community values are deeply embedded within the work systems and affect workplace relationships. The main aim of the research study is to analyse the factors that influence job embeddedness and its relation to employee turnover intentions in the small-medium enterprises (SMEs) of Saudi Arabia. This research adopts a mixed methods strategy, where it uses both qualitative and quantitative methods to collect primary data. This research design is appropriate for this research study as it enables the researcher to analyse both qualitative and quantitative data relevant to the research study and analyse with the existing theories with an objective to obtain relationship between research variables such as job embeddedness and employee voluntary turnover intentions.

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19-L32-2114

CSR AND WORK ENVIRONMENT, THE DICHOTOMY: A SAUDI ARABIAN PERSPECTIVE

DR. SAMI KHAN[9] AND DR. KHALID MAIMANI

Corporate social responsibility (CSR) has emerged as a business idea, and companies worldwide are adopting CSR as a strategic choice. Middle East and GCC (Gulf Cooperation Council) are no exception to that. CSR philosophies and underlying principles go well with the Islamic principle, and most of the companies in the GCC have been practicing philanthropic CSR for long time. There is a renewed interest in CSR discussion and debate in Saudi Arabia in recent time, and it has been recognized as a provider of integrated economic, environment and social performance adding value for all stakeholders. CSR is being seen as a value addition in the process of portraying the positive image of the company, and it is being seen connected with the business strategy as well. Though, in Saudi Context, it is true that barring few big corporates like Aramco, SABIC, NBC, Savola etc., most of the CSR is still in its infancy and connected to the traditional philanthropic CSR.

With the increased acceptance of UN's Global Compact Principles, Global Reporting Initiative (GRI), Social Accountability 8000 Labour Standards, and ISO 26000 Guidelines for Social Responsibility among other CSR standards, the corporations are using these initiatives to project them as a model business provider and employer. UN Global Compact Principles carry ten principles related to human rights, labour, environment, and anti-corruption. It has been found that, though companies keep on boasting an image of CSR provider but they miss out to provide a fair and equity-based work environment free of biases and discrimination to their employees. The present study is an attempt to look on the people side of CSR within the company which is also referred as internal CSR. It is imperative that external CSR must be in line with the internal CSR to harness the strategic objectives of pursuing CSR.

The present research aims at evaluating the dichotomy exiting in Saudi Arabian companies, and how employees perceive about the internal CSR and issues related with their employment conditions such as fairness and equity at workplace, availability of employees' rights, effective communication and grievance handling system, safe and healthy work environment, diversity in the recruitment process, availability of a uniform learning and development opportunities to all, fair appraisal and reward system, and policy and practices regarding avoiding discrimination and wasta (nepotism) at workplace. The present study captures the Saudi employees' perspective on CSR and very specifically on internal CSR, and evaluates the dichotomy existing in CSR practices in Saudi organization. In this research, 172 Saudi employees were interviewed using a bilingual Arabic-English questionnaire, and their views were analysed. The research is exploratory in nature and throws lights on the existing state of CSR in Saudi Arabia, and the perceptions of Saudi employees about the internal CSR practices. It was found that there is big gap exists in terms of what is being preached and what is being practiced. It is important to bridge the gap by strengthening the internal CSR by adopting human resource policies and practices which are fair and equity-based promoting trust and able to engage its employees. This will truly create a more holistic and strategic CSR intervention in Saudi organizations, and help to portray their image as a model employer, and in achieving benefits for all stakeholders in the long run.

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26-L34-2261

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ROMANIA AND THE UNITED KINGDOM. COMPARISON BETWEEN ”CONTINENTAL” LAW AND COMMON LAW JUDGMENTS

MRS. GEORGIANA UNGHIANU[10]

The judgment is the central figure of the civil trial, precisely the objective of the initiation of the proceedings, its reason for being. It is not important only for the present case concerned and for the participants at that trial, but it is important in general as an effective means of restoring the rule of democratic law and of increasing the efficiency of substantive rules, maintaining the prestige of the judiciary and the confidence of society members in the authority of justice.

Maintaining and developing an area of freedom, security and justice, facilitating, among other things, access to justice, in particular through the principle of mutual recognition of judgments and extrajudicial documents in civil matters has been a desideratum, a goal ever since The European Community was established. Differences between national rules, set out in national laws, governing this area, hinder the smooth functioning of the internal market, a fact from which derives the indispensability of adopting provisions to unify the stipulations relating to conflict of jurisdiction in civil and commercial matters, in order to assure the recognition and a faster and simpler enforcement of judgments by a court of a Member State.

EU Regulation No. 1215/2012, known as the Brussels I Regulation Recast, in particular the new provisions on choice of court and on the abolition of exequatur, shows that European Community legislation is serious about the idea of creating a European area of justice, meaning that one of its main objective is the free movement of judgments, both in civil and commercial matters.

This article aims to draw a parallel between the civil procedure rules set out in the legislation of both Member States, namely the Civil Procedure Rules in the UK and the Civil Procedure Code in Romania, incident in matters of recognition and enforcement of foreign judgments in both legal systems, analyzing the particularities of the institutions in question in European regulatory context in terms of compatibility between national and European law. From this perspective, the paper begins with a comparison between the judgment delivered in "continental" law and the one specific to the common law system, by highlighting the similarities and especially the differences imposed by legal provisions of both Member States, having as main points of comparison matters relating to content and structure, res judicata and the elements to whom it applies, the attribute of being a final decision, as well as the manner and the conditions required in order to become one.

Also, this article presents the legal procedure that needs to be followed in Romania in order to recognize and execute a civil judgment delivered by a court in the United Kingdom and the procedure established by the Civil Procedure Rules regarding the recognition and enforcement in the United Kingdom of a judgment issued by a court in Romania. At the same time, this analysis reflects the relationship between Community, European provisions and relevant domestic law of the Member States when applying national rules in subsidiary.

In addition, the paper emphasizes a careful selection of relevant case law of national courts, such as The High Court of Cassation and Justice and The Constitutional Court of Romania, The Supreme Court of the United Kingdom and Court of Appeal in the United Kingdom, as well as

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European courts, namely Court of Justice of the European Union and the European Court of Human Rights.

Key words: Brussels I Regulation Recast, abolition of exequatur, "continental" law judgment, common law judgment, compatibility between national and European law, recognition and enforcement of foreign judgments

24-L35-2336

FREE TRADE AND THE RESPONSIBILITY TO PREVENT AND ALLEVIATE POVERTY

DR. MURUGA PERUMAL RAMASWAMY[11]

Whenever the WTO has been called upon to address various trade plus issues like environment or human rights, much of the underlying concerns has an inherent motivation to prevent trade distortion rather than securing the goals of environment or human rights. The rationale of the choice of trade plus issues raises an intriguing question whether WTO could be an effective platform for poverty alleviation? In pursuit of examining the viability of a trade related poverty agenda, the paper examines some of the theoretical foundations governing free trade and its nexus to poverty issues. The paper traces the developmental goals, of GATT and the WTO to examine the scope for seeking a specific mandate of poverty alleviation. The final part examines the international agenda on poverty alleviation in order to highlight the potential role of WTO could play in strengthening the global drive aimed at elimination of poverty in all forms.

Keywords: *Free Trade, Poverty Alleviation, Development, GATT and WTO, Trade Related Poverty Agenda.*

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