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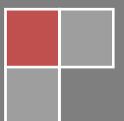

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ENFORCEMENT OF CHOICE OF COURT AGREEMENTS: THE HAGUE CONVENTION *VIS-À-VIS* INDIAN PRIVATE INTERNATIONAL COMMERCIAL LAW

SALONI KHANDERIA[1]

ABSTRACT

The Hague Convention on Choice of Court Agreements (the HCCA) that came into effect on 1 October 2015, fundamentally regulates forum-selection clauses in international civil and commercial agreements and the manner in which, the courts of Contracting States shall enforce them. This paper demonstrates that although India has neither signed nor ratified the HCCA, there are sufficient judicial dicta to indicate Indian courts would enforce forum-selection clauses in international civil and commercial agreements, so as to suspend or dismiss proceedings in circumstances where the parties have made a choice in favour of an international court. Nonetheless, the country's ratification to the HCCA would bring about enhanced certainty and predictability that Indian courts *will* decline jurisdiction when they are not the chosen court.

Keywords: choice of court agreement, exclusive jurisdiction, Hague Convention on Choice of Court Agreements, Indian private international law.

INTRODUCTION

The Hague Convention on Choice of Court Agreements (the HCCA) was signed on 30 June 2005 (HCCA, 2005) but only came into effect on 1 October 2015 (Article 31 (1)). At present, Mexico[2] and the EU (excluding Denmark)[3] have ratified the HCCA, while the US, Singapore, and Ukraine have merely signed it, but is yet to ratify it. While validating the notion of party autonomy (Teitz, 2005), which permits parties to an international contract to choose a law that would govern the disputes arising from such an agreement, the HCCA endeavors to pave the way for a more harmonized and predictable approach to the choice of court agreements in international civil and commercial matters (Schulze, 2007; Brand, 2005). Consequently, the HCCA aims to, *inter alia*, 'promote international trade and investment through enhanced judicial cooperation,' (Preamble) and therefore lays down the pre-requisites that each Contracting State's chosen court would be mandated to assess before it gives effect to a choice of court agreement (Article 5). Correspondingly, the HCCA also obligates the courts of the Contracting States that are not chosen to suspend or dismiss the proceedings in favour of the chosen forum (Article 6).

Although India is a Member of the Hague Conference, it is yet to sign and ratify the HCCA. This paper rummages to find whether Indian courts similarly enforce forum-selection clauses in international civil and commercial agreements, and thereby suspend or dismiss proceedings in circumstances wherein parties have made a choice in favour of another forum. The rest of this paper is structured as follows: Section 2discusses the regulation of choice of court agreements under the HCCA, while focusing on the obligation of the court to suspend or

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[2] Mexico acceded to the HCCA in 2007.

[3] EU deposited its instrument of approval of the Convention for 27 of the 28 EU Member-States (i.e. excluding Denmark), via the Latvian Presidency. Also see, Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements /* COM/2014/046 final - 2014/0021 (NLE) */, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014PC0046> accessed 23 April 2017, for the relationship between the Brussels Convention and the HCCA.

dismiss proceedings when it has not been chosen as a forum. Section 3then examines the basis on which, Indian courts have been upholding forum-selection clauses in international civil and commercial matters, to draw the complementarities if any that exist in this respect between the HCCA and Indian private international commercial law. Section 4 provides the concluding remarks.

THE ENFORCEMENT OF CHOICE OF COURT AGREEMENTS AND THE HCCA

In recent times, choice of court agreements – that are also known as forum-selection clauses, have permeated international agreements at a large level. They connote agreements wherein two or more parties agree upon the place of *litigation* (Article 2(4); Hartley, 2013, p. 4-5)and the courts within whose jurisdiction such disputes must be referred to (2013, p. 4). As a result, choice of court agreements mandate an express submission insofar as the parties incorporate a specific clause in the contract to confer jurisdiction on a court in a particular country (Oppong, 2012, p. 36).

Although parties to international contracts may either bestow permissive/non-exclusive jurisdiction (Fawcett, 2001; Merret, 2006), or mandatory/exclusive jurisdiction on a court by employing a forum-selection clause, the HCCA limits the scope of its application to exclusive choice of court agreements (Article 2(1)(a))[4] in international civil or commercial cases (Article 1(1)-(2)).[5] Accordingly, the HCCA endeavors to do for litigation, what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958) has done for arbitration (Hartley and Dogauchi, 2007, p. 27, 31 and 61; Brand, 2009).

In particular, Article 3 (c) of the HCCA mandates that these agreements should be 'concluded or documented in writing, or by any other means of communication, which renders information accessible…for subsequent reference'.

Furthermore, Article 3(a) of the HCCA stipulates that such choice of court agreements should 'designate, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, one or more courts of one Contracting State to the exclusion of jurisdiction of any other Courts.'

Against this backdrop, the HCCA creates a presumption that all choice of court agreements in an international contract that has been entered into by the parties belonging to its Contracting States would be 'deemed to be exclusive', unless it has been indicated otherwise (Article 3(d)). Correspondingly, it imposes two fundamental obligations on the courts of its Contracting States on jurisdiction,[6] which must be taken into account of in an international agreement pertaining to a civil or commercial matter, containing an exclusive choice of court clause. These obligations, which represent the two pillars of the HCCA,[7] have been espoused in Articles 5 and 6, and are by-and-large two sides of the same coin. Therefore, while a court in a Contracting State is under a mandate *not to* decline jurisdiction 'on the ground that the dispute should be decided by a court of another State' (Article 5; Hartley and Dogauchi, 2007, p. 55), all forums situated in other the Contracting States are likewise mandated to *stay* the proceedings on account exclusive jurisdiction being conferred to the former (Article 6).

In particular, Article 5 (3) *prohibits* a chosen forum to dismiss proceedings save in certain circumstances, insofar as it provides that

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[4]see also, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, (Brussels I*bis*), which similarly regulates only exclusive choice of court agreements.

[5] But see, Art. 2 of the HCCA for matters that are outside the scope of the HCCA.

[6] Note that the HCCA rests on three pillars as enunciated in Arts. 5, 6 and 8.

[7] ibid. The third pillar being recognition and enforcement of judgments - as stipulated in Arts. 8 and 9 of the HCCA.

> 'A court that has jurisdiction … shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State' (Article 5(2); Hartley and Dogauchi, 2007, p. 55-57; Brand and Herrup, 2008).

Consequently, the HCCA (Article 5(1)) renders it impermissible for the chosen court to refusejurisdiction on the grounds of *forum nonconveniens* (Brand and Jablonski, 2007) or *lis pendens* (Hartley and Dogauchi, 2007, p. 57) unless the exclusive choice of court agreement is null and voidunder its law (Hartley and Dogauchi, 2007, p. 55).

Article 6 of the HCCA correspondingly obligates any other non-chosen court situated in another Contracting State, which has been seized of the matter to 'suspend or dismiss proceedings to which an exclusive choice of court agreement applies' unless:

- the exclusive choice of court agreement is null and void according to the domestic law of the chosen court (Article 6(a); Hartley and Dogauchi, 2007, p. 61; Pertegás, 2010, p. 24-25)[8] or
- any party lacked the capacity under its law, to conclude the agreement which contains the forum-selection clause (Article 6(b); Hartley and Dogauchi, 2007, p. 61); or
- the enforcement of the agreement would lead to manifest injustice to any party (HCCA: art. 6(c)). A common instance would include circumstances wherein a party would be prevented from getting a free trial, such as due to bias or corruption prevailing in the jurisdiction of the chosen court (Hartley and Dogauchi, 2007, p. 61); or
- the enforcement of the agreement would be manifestly contrary to the public policy of the State where the seized (non-chosen) court is situated (Article 6 (c)). A common instance would include circumstances wherein the enforcement of the exclusive choice of court agreement would violate a mandatory rule of that State (Hartley and Dogauchi, 2007, p. 61); or
- the exclusive choice of court agreement is incapable of performance due to a reason that is beyond the control of the parties (Article 6(d)). This would include circumstances caused by a fundamental change in circumstances, *vis major* or *force majeure* (Hartley and Dogauchi, 2007, p. 61-62); or lastly
- if the chosen court refuses to hear the case (Article 6 (e); and Hartley and Dogauchi, 2007, p. 62).

THE ENFORCEMENT OF CHOICE OF COURT AGREEMENTS IN INDIAN PRIVATE INTERNATIONAL LAW

At present, India has not ratified the HCCA consequent to which, the country's courts are not *per se* under an obligation to *inter alia*, suspend or decline jurisdiction as enunciated in Article 6 if they have not been chosen as a forum pursuant to an exclusive choice of court agreement. If India decides to accede to the HCCA, the latter would only govern the exclusive choice of court agreements that have been entered into by parties after such ratification (Article 16). In the meanwhile, although there has been a general trend on the part of Indian courts to uphold the parties' agreement as regards the choice of governing law in an international contract,[9] whether or not a forum-selection clause in favour of an international court would similarly be upheld, remains to be examined.

At present, although domestic disputes pertaining to jurisdiction are governed by sections 9 to 20 of the Code of Civil Procedure 1908 (CPC) in India, there is no specific provision to regulate the enforcement of choice of court agreements *ininternational matters*. Apropos, the rules stipulated in the CPC would only be applicable when the parties to the contract are

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[8]see also, Art. 5(1) of the HCCA.

[9] See, the Indian Supreme Court's decisions in *National Thermal Power Corporation v. Singer Company*, [1992] 3 SCC 551; *Modi Entertainment Network and Anr. v. W.S.G Cricket PTE Ltd*. [2003] 4 SCC 341.

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resident in India and all the elements of the contract are also connected with the country.[10] That being said, these parties would only be permitted to conclude a choice of court agreement for a domestic contract provided there exists more than one (national) court with inherent jurisdiction for the purpose of which they have agreed to initiate proceedings in one forum, to the exclusion of the other (Agarwal and Singh, 2010, p. 233).[11]Nonetheless, it appears that these (two) grounds of jurisdiction have mostly been misconstrued to apply to both domestic and international matters (Agarwal and Singh 2010), with there being substantial evidence in the form of judicial dicta to prove otherwise.

In the context of Indian private international commercial law, the Supreme Court's decision in *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries*[12] sowed the seeds for party autonomy as regards the choice of court. *In casu*, the contract evidenced a bill of lading and contained an express stipulation that English courts would be the chosen forum. Upholding the choice of court agreement, K N Saikia J. accentuated that irrespective of the mandate of Section 20 (c) of the CPC, which provides that

> '…every suit *shall* be instituted in a court (in India) within the local limits of whose jurisdiction…the cause of action, wholly or in part, arises'

it shall not be applicable if the parties to an international commercial contract have conferred exclusive jurisdiction *to a foreign forum*, in this case being the courts in England.[13]

Appreciating that the decision in *British India Steam Navigation Co. Ltd.* fell short of delineatingthe precise parameters within Indian courts would stay or dismiss the proceedings in favour or a chosen court in an exclusive jurisdiction agreement, this aspect continued to be nebulous until the court's subsequent decision in the case of *Modi Entertainment Network and Another v. W.S.G. Cricket PTE Ltd*[14]. *In casu*, although the international commercial contract between the parties had conferred non-exclusive jurisdiction on the courts in England, the Supreme Court laid down clear guidelines for the enforcement of exclusive jurisdiction on foreign courts.

The dispute in the *Modi Entertainment Network* case pertained to a contract evidencing the respondent's agreement to grant a license to telecast a tournament organized by the ICC in Kenya to the appellant (2003, para. 25). Pursuant to the respondent's threat to discontinue the telecast of the tournament, the appellant, in breach of the choice of court agreement, filed a suit in the Bombay High Court. The respondent then filed a parallel proceeding in the agreed forum, *viz.*, the Queen's Bench Division to claim arrears for the consideration amount payable under the contract.

Rejecting the anti-suit injunction subsequently filed by the appellant in the Supreme Court on the ground that the courts in England were *forum nonconveniens* and that the continuation of the proceedings as per the choice of court agreement would be vexatious and oppressive (2003, para 24, p. 361), Syed Shah Mohammed Quadri and Arijit Pasayat JJ., emphasized that even though the parties to a contract

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[10] See in this respect, decisions of the Supreme Court, supra in *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries,* 1990 (3) SCC 481; *Modi Entertainment Network and Another v. W.S.G. Cricket PTE Ltd*, [2003] 4 SCC 341, which underscore that Sec. 20 of the CPC is inapplicable to international commercial disputes. Cf, Art. 1(2) of the HCCA, which defines an international case.

[11] The authors refer to *G.M. ONGC, Sibsagam v. M/S Raj. Engg. Corporation* AIR 1987 Cal. 165, and states: 'when no more than one Court has jurisdiction, this kind of agreement cannot be entered into'. Also see, Patel Roadways v. Prasad Trading Co. AIR 1992 SC 1514.

[12] 1990 (3) SCC 481

[13] Also see, *Rhodia Ltd. and Others v. Neon Laboratories Ltd*, AIR 2002 Bom 502, upholding the Supreme Court's decision in British Steam India Navigation.

[14] [2003] 4 SCC 341.

'cannot confer jurisdiction where none exists on a Court to which the CPC applies…this principle *does not apply* when the parties agree to submit to the exclusive (or non-exclusive) jurisdiction of a foreign Court…' (2003, para. 11).

The court, *in casu,* relied on the grounds stipulated in the common law decision of *Spiliada Maritime Corporation v. Cansulex Ltd.*[1987] A.C. 460, read along Rules 31(5) and 32(4) Dicey and Morris' principles on granting anti-suit injunctions.Consequently,it clarified that such injunctions could only be awarded irrespective of a choice of court agreementwhen the proceedings in a foreign court are vexatious, oppressive or on account of *forum nonconveniens* (2003,para. 24; Collins, 1999).[15]Hence, choice of court agreements would be respected 'except when strong reasons justify such disregard of the contractual obligations of the parties' (2003, para. 24, p. 361).

Appreciating the lack of clear-cut guidelines in the private international commercial law of India as regards the enforcement of exclusive choice of court agreements, the Supreme Court further placed reliance on the common law position enunciated in *Donohue v. Armco Inc*.,[16] to clarify the circumstances in which the parties' selection would accordingly be disregarded. The court *in casu* confirmed that such agreements would be enforced in India *unless* there are 'good and sufficient reasons' (2003, para. 27) to disregard the parties' choice on the basis that it involves the interest of other (i.e. third) parties, or that it imposes a risk of parallel proceedings and inconsistent judgments (2003, para. 27). Consequently, it is only in the event that the parties to the exclusive choice of court agreement were able to prove that it is arduous to prosecute the case in the chosen foreign forum 'because the essence of the jurisdiction of the court did not exist[17] or because of a *vis major* or *force majeure* or the like,'[18] that the Indian court would consider the same to be a 'good and sufficient reason' to violate the terms of the contract (2003, para. 27).

Towards this end, for the reason that exclusive jurisdiction had been conferred on a foreign court and disregarding the same would result in the breach of such a contract, the Supreme Court further emphasized that Indian courts should not aid in such a violation (2003, p. 345, 363). Hence, the mere fact that the English court had no nexus with the parties or their dispute would not lead to the inference that the selected forum was oppressive or vexatious (2003, p. 341).[19] Accordingly, the Indian courts would be obligated to suspend or dismiss such proceedings in favour of the chosen forum.

The Supreme Court's decision in the *Modi Entertainment Network* has marked a significant milestone in the jurisprudence of the private international commercial law of India. For most, the decision clarified the country's stance as regards party autonomy in the choice of courts and is therefore based on international best practices as envisaged by the HCCA. In particular, while the HCCA obligates a non-chosen court to suspend or dismiss proceedings notwithstanding of the fact that it possesses jurisdiction under its national law - on the ground that the parties have by an agreement chosen another international court, one can infer that the Indian private international law operates on similar lines. Therefore, insofar as the HCCA forbids a non-chosen court situated in the Contracting State to assume jurisdiction unless it has cogent reasons to do so - such as, *inter alia*, in the interest of justice towards a party (Article 6 (c)),[20] or because of circumstances beyond the control of the parties (*vis major* or *force*

[15] referring to L Collins (eds), (1999) *Dicey and Morris onThe Conflict of Laws*. 13th ed., United Kingdom: Sweet and Maxwell Publications.
[16] [2002] 1 All ER 749 (HL).
[17]see also, Art. 6(e) of the HCCA.
[18]see also, Art. 6(d) of the HCCA.
[19]see also, Art. 19 of the HCCA.
[20]see also, [2003] 4 SCC 341, para. 27.

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majeure) (Article 6 (d)),[21] or because the chosen court lacks jurisdiction (Article 6 (e)),[22] the decision in *Modi Entertainment Network* clarifies that Indian private international commercial law is corresponding in all these aspects.

The decision in *Modi Entertainment Network* represents the judicial opinion in India by the mandate of the Constitution of India as envisaged in Article 141,[23] and all Indian courts are subsequently bound to enforce a choice of court agreement when the same confers jurisdiction on a foreign forum. It has found favour in several other judgments pertaining to the enforcement of exclusive choice of court agreements conferring jurisdiction on international (even neutral) forums.[24]

Following this decision, the Delhi High Court in the *Moser Baer India Ltd. v. Koninklijke Philips Electronics NV,*[25] also dismissed the proceedings initiated by the plaintiff, on account of the parties' exclusive choice of court agreement, which conferred jurisdiction on the courts of Hague, the Netherlands. The international commercial contract was evidenced in several Disc Patent License Agreements (DPLAs) pertaining to the licensing of patents, and the consequent amount of royalty to be paid by the plaintiffs, to the defendants.[26] *In casu*, Badar Durrez Ahmed J. re-affirmed that even though the grant of exclusive jurisdiction in a choice of court agreement was not a 'determinative' but a 'relevant factor' as to the nature of jurisdiction, the court would normally dismiss the proceedings before it 'save in an exceptional case for good and sufficient reasons' (2008,para. 6). That being said, simply because the continuation of the proceedings in the chosen international forum would be expensive and inconvenient for most of the witnesses that are from India, would not in itself imply that it is oppressive or vexatious to the parties (2008, para. 6).[27] Consequently, the fact that the parties expressly stipulated that all disputes pertaining to the licensing agreement 'shall' be initiated before the court in Hague, the Netherlands, itself concluded that the choice of court agreement conferred exclusive jurisdiction on that court (2008,para. 21),[28] so as to obligate the Indian forum to dismiss the proceedings before it.

Likewise, the decision of the Delhi High Court in *Piramal Healthcare Ltd. v. Diasorin S.P.A*172,[29] also deserves mention insofar as it corresponds with the HCCA which espouses that the parties may additionally choose a forum which is completely neutral to the State or the dispute, except when a declaration to the contrary has been made by the Contracting State to which they belong (Article 19). *In casu*, the parties had agreed to confer exclusive jurisdiction on the courts of Milan, Italy in a distributorship agreement for the sale of diagnostic products, between the plaintiff - in India and the defendant – a company registered in Italy (2010, para. 2.6, 4). Re-affirming the inapplicability of Section 20 of the CPC, the court dismissed the proceedings initiated by the plaintiff. It emphasized that even though the principles stipulated

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[21]see also, [2003] 4 SCC 341,para. 27.

[22]see also, [2003] 4 SCC 341,para. 27.

[23] Article 141 of the Constitution of India, 1950, provides that 'the law declared by the Supreme Court shall be binding on all courts within the territory of India'.

[24] See, the decisions of the Delhi High Court in *U. Can Migrate Consultants Pvt. Ltd v. Canadian Connections Groups Ltd*, [2007] 144 DLT 863; *Max India Ltd. v. General Binding Corporation, FAO (OS) No.193/200;*and *Swatch Ltd. v. Priya Exhibitors Pvt. Ltd,* 2008 (101) DRJ 99.

[25] 2008 (102) DRJ 713.

[26]see also, Article 2(2)(o) of the HCCA, which provides that the HCCA does not govern the 'infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract'. Accordingly, insofar as the *Moser Baer* decision pertains to the breach of a contract between the parties, relating to intellectual property rights, it complements the HCCA provision, in this regard.

[27] referring to the conditions precedent as set forth in *Modi Entertainment Network* [2003] 4 SCC 341, para. 24.

[28] referring to the Supreme Court's clarification on the scope of ouster clauses as stipulated in *A.B.C. Laminart v. A.P. Agencies* (1989) 2 SCC 163.

[29] (2010) DLT 131.

in the *Modi Entertainment Network* case essentially pertained to 'non-exclusive jurisdiction', its principles would additionally extend to an exclusive choice of court agreement that confers jurisdictions to a neutral forum that has no connection with the parties or their transaction whatsoever (2010, para. 5.3). This decision is significant regardless of the connection that prevailed between the chosen forum and the parties – and in particular the defendant, insofar as it clarified that Indian courts would respect and uphold choice of court agreements in all circumstances unless the dispute fell under any of the exceptions stipulated in *Modi Entertainment Network*.

In a related vein, the decision of the Telecom Dispute Settlement and Appellate Tribunal (New Delhi) (the Tribunal) in *Kumarina Investment Ltd. v. Digital Media Convergence Ltd and Anr*,[30] has further illustrated complementarities between the HCCA and Indian private international law. In particular, the Tribunal's decision has delineated situations wherein courts in India would be permitted to assume jurisdiction irrespective of an exclusive choice of court agreement in favour of another (foreign) forum when the same is 'manifestly contrary to the public policy...'[31]*In casu*, the Tribunal suspended proceedings on account of an exclusive choice of court agreement in favour the English Courts, between two registered companies situated in Israel (the petitioner) and India (respondent). It re-affirmed that neither the common law of India, nor any Parliamentary Act prohibits the choice of forum of any other country, by the parties (2010, p. 15). The contract pertained to an agreement to transmit certain channels on television, from India to Israel. While dismissing the proceedings initiated by the respondent, the Tribunal reiterated that the courts in England would have jurisdiction 'having regard to the principle of party autonomy' (2010, para. 14) and the same would not be presumed to be *per se* against the law or the public policy of the State (2010, para. 13). That being said, the only circumstances wherein a choice of court agreement will be construed as being against the public policy of India is when the agreement violates the mandatory rules[32] of Indian law - as stipulated in Sections 23, 27 and 28 of the Indian Contract Act, 1872. Consequently, it is only when the choice of court agreement thatconfers jurisdiction on a foreign forum operates a) in restraint to trade (2010, p. 11, 18),[33] b) restricts any party from enforcing its rights under the contract by means of the usual proceedings, or c) extinguishes or discharges the liability of any party (2010, p. 11),[34]that the Indian court would disregard the same and continue to hear the matter.[35]

CONCLUSION

The HCCA is indeed a remarkable step in ensuring predictability and certainty as regards the enforceability of choice of court agreements that have been concluded in the course of international trade.[36] This is primarily because its application would not be limited to the

[30] 2010 TDSAT 73.

[31]See also, Art. 6(c) of the HCCA.

[32] For a detailed discussion on the operation of mandatory rules in private international law, see, J J Fawcett, J.J. (1990) Evasion of Law and Mandatory Rules in Private International Law. *Cambridge Law Journal*, 49(1), 44-62; and Chong, A. (2006) The Public Policy and Mandatory Rules of Third Countries in International Contracts. *Journal of Private International Law*, 2(1), 27-71.

[33] referring to Sec. 23 and 27 of the Indian Contract Act, 1872, and Setalvad, A.M, (2007) *Conflict of Laws.* 3rd ed., New Delhi: Lexis Nexis Publications, p. 203, para. 8.13. Sec. 23 provides that agreements in contravention of the public policy of India are unlawful. Accordingly, Sec. 27 states that agreements in restraint of trade are against the public policy of India. Also see, *Taprogge Gesellschaft MBH v. IAEC India Ltd.,* AIR 1988 Bom 157, wherein the Bombay High Court disregarded the parties' choice of German law to govern their international commercial contract because the agreement was in restraint to trade.

[34] referring to Sec. 28 of the Indian Contract Act, 1872, which provides that all agreements in restraint of legal proceedings are void.

[35]see also, Art. 6(c) of the HCCA.

[36]see also, Preamble to the HCCA.

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Members of a certain region - like the Lugano Convention (Lugano Convention, 1988) or Brussels I (Brussels I*bis*, 2012), which contain similar provisions for forum-selection in the course of international trade.[37]

At present, although India has neither signed nor ratified the HCCA, there are sufficient judicial dicta to indicate that international agreements concluded by parties to confer exclusive jurisdiction on a foreign/neutral court would be enforceable as per the principles of Indian private international law. In this respect, the principles on the basis of which the Indian courts have been enforcing exclusive choice of court agreements in favour of a foreign forum to dismiss proceedings before them, corresponds with the mandate of Article 6 of the HCCA in most ways. Nevertheless, the country's ratification to the latter would indeed bring about enhanced certainty and predictability that Indian Courts *will* decline jurisdiction when they are not the chosen Court. In a related vein, depending on the prospects of the UK leaving the EU – as a result of Brexit, the HCCA will have an additional advantage for India insofar as it would improve international trade with EU, which is at present, a Contracting State. This is because English Courts seem to be a popular choice of forum in international agreements with an Indian party,[38] as a result of which, the country's ratification to the HCCA will provide certainty (especially for the English Courts, in this case) that Indian Courts will not exercise jurisdiction when they have not been chosen as a forum pursuant to an international agreement.

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[37]see also, Arts. 25 and 23 of the Brussels I*bis* and Lugano Convention, respectively.

[38]see for instance, the cases of *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries* 1990 (3) SCC 481); *National Thermal Power Corporation v. Singer Company* [1992] 3 SCC 551; *Modi Entertainment Network and Another v. W.S.G. Cricket PTE Ltd*, [2003] 4 SCC 341; *Rhodia Ltd. and Others v. Neon Laboratories Ltd* AIR 2002 Bom 502; and *Kumarina Investment Ltd. v. Digital Media Convergence Ltd and Anr* 2010 TDSAT 73.

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JUNKER'S FIVE SCENARIOS TO BREXIT AND THEIR IMPACT ON SOCIAL SECURITY COORDINATION

ANNA PRZYTULA-PIENIAZEK[1]

ABSTRACT

Current debates around the issue of United Kingdom leaving the EU are escalating due to the fact that there is a lot of uncertainty about the direction of negotiations. We must remember that the UK, EU as a separate entity and other 27 Member States can, and will, have different priorities in terms of various areas that are important to them, for example trade, immigration, single market etc. Most publications deal with trade and immigration issues whereas there are problems that individual migrants may encounter and with which they need real help and assurance. Brexit will have an impact on principles of coordination of social security depending on the result of negotiations. It is important thatthose interested parties consider available options and to be preparedfor the future after Brexit in relation to social welfare regulations.

Key Words: Brexit, social security, coordination, Junker, European Union

INTRODUCTION

Social security coordination is an important mechanism of the European Union that ensures that people's rights are respected and that risks, for example aging, injuries, ill-health, are secured. Coordination does not obviously mean that there is a harmonisation of legal principles in all Member States of the European Union, and therefore it gives some leeway for each country to have their own regulations as long as they are governed by principles of social security coordination. The purpose of this paper is to analyse five scenarios that are proposed by Jean-Claude Junker, in which he is predicting what can happen to the EU and remaining Member States after the United Kingdom seizes to be a member. After careful analysis of those scenarios one would be able to consider their possible impact on social security coordination mechanism. As Junker's White Paper is written from the perspective of the European Union and its remaining Member States this paper will look for most probable option in consideration of those five scenarios as well as to underline options open to the United Kingdom and its welfare system after it will leave the EU.

SOCIAL SECURITY COORDINATION

General aspects

Social security coordination is currently being governed by the EU Regulation (EC) No 883/2004on the coordination of social security systems, which came into force on the 1st May 2010. Cases that arose prior to that date are still being considered by courts under the old Regulation 1408/71on the application of social security schemes to employed persons and their families moving within the Community. There are few changes brought by the new legal instrument to the personal scope as well as to the material scope i.e. benefits, however the pressure of both regulations lies on principles of social security coordination. It is important if to consider this area in light of Brexit and especially in terms of what will happen to principles of current social security coordination mechanism. Some of those principles are directly mentioned within the Regulation (like equality of treatment and aggregation of periods) and

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some of them are implied. Various theories show a different number of principles and authors seem to group them in a different way. This paper will emphasise that there are six main principles of social security coordination, namely protection of acquired rights, reasonable expectations, equal treatment, single legislation applicable, aggregation of periods and exportability of benefits. Those principles are applicable to all migrants and their families that moved between Member States acquiring rights to social security. It must be taken into account that migration level in the United Kingdom is high (Office of National Statistics: Migration Statistics Quarterly Report May 2017) and the UK still is a Member States to which coordination applies.

Therefore, it is important to examine the impact of Brexit not only on the United Kingdom, European Union and individual Member States, but also mainly on migrants that relied on social security coordination regulations. Possibly method chosen by UK when leaving the EUwould show whether there is a chance that principles would be observed by Member States and the UK after Brexit. It is also vital because the European Commission underlines that coordination applies not only to Member States of the EU but also Iceland, Switzerland, Norway and Liechtenstein. These countries are members of the European Free Trade Association, which suggests that if the United Kingdom would leave the EU but would become a member of EFTA the country would still have to observe principles of social security coordination and migrants would benefit from such a possibility. The only question remaining is whether or not the United Kingdom will choose, and would be allowed through negotiations, to go that way. It might be that another way would have to be chosen that might badly impact migrants' social security rights through ignorance of principles.

Free movement of workers

Free movement of workersmechanism allows a person to move freely between Member States through art. 45 of the Treaty on the Functioning of the European Union. It therefore allows migrants to rely on social security coordination principles. Generally, all above-mentioned principles are based on the free movement of workers rule. It can be seen through cases such as *ZUS v Tomaszewska* [2011][2]. Migrants are only willing to move between Member States (including countries of European Economic Area and European Free Trade Association, namely Iceland, Norway, Liechtenstein and Switzerland) if they can be sure that contributions they have made in relation to their employment will be available when they reach retirement age or become ill. Migrants must be ensured that if a risk will occur the country that they are based in will be able to help with that risk's implications, also in terms of the social security coordination. It can be done through exportability of benefits and aggregation of periods mechanism that will allow a migrant to move to another Member State and to use that social welfare system whilst not loosing previously acquired rights. This paper considers whether the UK will accept social security coordination principles after Brexit if negotiations with the European Union and other Member States will end in so called 'hard Brexit'. After leaving the EU without willingness to observe social security coordination, those that move freely between Member States may have a problem in executing their rights to contributions they have made in the United Kingdom, for example because exportability of benefits will not be possible. On the other hand, bilateral agreements that UK could sing with other Member States may create unequal treatment of citizens coming from different States due to individual arrangements with those countries. Social security coordination principles are operating when there is free movement of workers and therefore this situation is dependent on the result of negotiations to see whether or not those principles will still be in place in relation to the United Kingdom. One

[2] [2011] C-440/09 (CJEU)

must also remember that these principles and regulation do not only apply to migrants that move on the basis of art. 45 TFEU but also to their families.

Principles of social security coordination- overview

This paper shows that there are six principles of social security coordination, namely protection of acquired rights, reasonable expectations, equal treatment, single legislation applicable, aggregation of periods and exportability of benefits. These ensure that the future of those migrating is secured in terms of problems with their employment or pensions, also taking into account their families' welfare. Acquired rights, discussed by the European Court of Human Right in cases such as *Moskal v Poland* [2010][3] or *Stec and others v United Kingdom* [2006][4], are protected through this coordination, which means that if a migrant has paid contributions towards a social welfare system, he will be entitled to use those acquired rights if a need arises. All rights that have been acquired by legitimate means are must be available and they always must be ready to secure the welfare of that interested person. Migrants can also reasonably expect that if they have fulfilled certain obligations imposed by a Member State, they will be entitled to benefits either in this or in another EU country (Slingenberg, 2015).

Equal treatment however is a two-fold argument. As suggested by Cornelissen in 2009 migrants and their rights are treated equallytaking into account migrants' characteristics but also men and women, being in the same position, are treated equally. There is a strict non-discrimination rule applying to all citizens of Member States as they are considered as citizens of the European Union and therefore on this basis they must be treated equally (Myszke, 2006). At any given time there is a single legislation applicable that excludes problems arising in choosing which legal system should be applicable when a person accrues rights when travelling from one country to another within the EU. Mostly it is decided by the principle of *lex loci laboris*, explained by the Court of Justice of the European Union in cases such as *Bosmann v Bundesagentur fur Arbeit- Familienkasse Aachen* [2008][5] or *Gemeenschap v Baesen* [2010][6], meaning that the appropriate system is the one where the worker is based or where the main office of employer is located, if the worker was delegated.

Last two principles that form the base of social security coordination mechanism in some respects work together. Aggregation of periods principle works mainly in situations where one would move between Member States and then claim retirement. On the other hand there is exportability of benefits, which allows for periods to be considered in a Member State other than the one in which they were acquired, due to the fact that they can be moved from one system to another within the EU. This brief overview of social security coordination system shows how important it is for individuals to know what they can expect after Brexit, to allow them to plan their future. If they can be sure that rights acquired in the United Kingdom will be considered in another Member State after Brexit, they can plan to stay in the UK and contribute to its welfare system. If on the other hand that may not be possible, migrants may want to work in another Member State from whichacquired rights will allow them to claim benefits after their return to the home country.

[3] [2010] 10373/05(ECtHR).
[4] [2006] 65731/01(ECtHR).
[5] [2008] C-352/06 (CJEU).
[6] [2010] C- 296/09(CJEU)

JUNKER'S WHITE PAPER

'Drivers of Europe's Future'

Junker started his White Paper with a basic introduction, going through different aspects of living and working in the European Union. He focused on ideas based on single market and trade issues looking from the perspective of the EU. Junker does not go through possible scenarios for the United Kingdom after Brexit, as his five scenarios do cover only the interest of Member States and the European Union as a separate entity (Junker, 2017).

On first eight pages of the document, the president of the European Commission acknowledges that population in Europe is lower than in other parts of the world as well as that it is aging fast. He touches upon the euro currency that has a global share in the market, but also stating that defence expenditure has been maximised. Junker also questions security and defence measures as well as trust and legitimacy of the EU.

For the purposes of this article the most important information from the introductory part to the White Paper is that the population is getting older with low levels of life expectancy. In terms of the risks that EU citizens may expect, Member States must be ready at any time to secure citizens' rights in retirement, ill health and other possible problems that are covered by social security system. Unfortunately, Junker mention problems of the society only in the introductory part to his White Paper, focusing on trade and single market areas in the main body of the document.

Five possible scenarios

Junker mentions five scenarios but they are all written from the perspective of the European Union and 27 Member States. The purpose of the White Paper was to create more vivid debate about possible outcomes. Unfortunately, there is no clear indication as to which scenario is the most probable and which would be the most beneficial. This is therefore the purpose of this paper.

The first scenario titled 'carrying on' is about the preservation of the status quo. It means that the European Union, without the United Kingdom, will continue programmes that were created by 'New start for Europe' document in 2014. It means that the single market will be strengthened, coordination of migration security will be improved and what is most important- free movement between Member States for the EU citizens would be respected. This might suggest that in terms of art. 45 of TFEU free movement of workers will still be possible and therefore there will be no issue as to the use of social security coordination principles. These principles will remain as they are, with no possible change due to the lack of focus in this area. This option looks as a possible scenario however the impact on those that have already migrated to the United Kingdom as well as UK's citizens living in other Member States must be considered, as those principles may, and probably will, not apply to them. This could mean that their rights are not protected unless bilateral agreements will come in to play.

'Nothing but the single market' is the second scenario, focusing on strengthening the single market, however it would not guarantee free movement of workers and services. Junker commented that he would not opt in for this scenario, but it isopen to the EU. Again, if social security coordination is based on the free movement between Member States then making the free movementharder would also impact on social security coordination. Following on it would mean that if one becomes ill abroad, medical bills would be much higher. Also, exportability of benefits, like pensions, may not be possible at all. By working on making a better single market, the EU would have to abandon work on some of the other priorities, which could make the EU weaker in areas such as defence. This would be a disastrous scenario not only in relation to social security coordination but also in general for the European Union's actions.

The third scenario 'those who want more do more' focuses only on certain areas of EU work. The only beneficial aspect is that there would be harmonisation of various regulations, enhanced security and justice actions. It is the idea of two-speed Europe, in which countries that want to participate in certain fields can do that while others can opt-out due to, for example, lack of financial resources. We would have to bear in mind that a similar mechanism currently exists. It works on a much smaller scale, however making its scope wider would not bring anything more beneficial in the area of social security coordination. This is due to the fact that some countries would be able to strengthen this area and other would have to be left behind, creating an unequal treatment of citizens. On the other hand, the relationship with third countries could be managed by the European Union (a separate entity), and therefore United Kingdom could deal not with Member States individually in creating separate agreements, but could make an arrangement with the EU as an institution. This looks as a viable option, however it would still depend on terms of social security agreement and whether such agreement would preserve coordination's principles. It could be safer for the United Kingdom to negotiate separate bilateral contracts with possibility of most arrangements being beneficial for country's welfare system.

Completely different tone is presented in the fourth scenario titled 'doing less more efficiently', in which Junker foresees that quicker actions could be taken in established priorities mentioned and agreed by Member States. However, those priorities would have to be very specific and could not concern general issues. Junker sees less work being done in areas such as public health, employment and social policy, which Member States would have to regulate individually (Piec sciezek do Europy, 2017). On the other hand, actions would be taken in fields such as migration, defence, trade and innovation, whilst the single market is being strengthened. This seems like a less viable option in the context of preserving principles of social security coordination. On the other hand, it is also true that Member States have the competency to decide their rules and regulations in respect of social security as we deal with coordination and not harmonisation of social security systems. The only criterion is following coordination's principles. Therefore, in applying this scenario there would be not much change to the situation that we currently have. Also from the perspective of the United Kingdom as a third country, making bilateral agreements with other Member States separately can be beneficial for both parties. In relation to social security and principles of coordination this scenario seems to preserve current situation, although if the UK would be signing bilateral agreements we cannot be sure that they will be observing all, or any, of principles of current coordination of social security systems.

Junker's fifth scenario called 'doing much more together'sees Europe as one entity in the international scene. European Union could be one large federal state, which would take in more national competencieswith EU embassies in all Member States and other third countries. Therefore, it would the EU with which the United Kingdom would have to negotiate bilateral agreements in relation to social security. It is impossible to make such a united state as all Member States have different interests and they want to protect their citizens. As with the third scenario it would be in the interest of each Member State, as well as the United Kingdom, to have separate agreements and to try to observe principles of social security coordination. It would not be beneficial to negotiate on the platform EU v UK as the European Union would force UK to make an agreement according to principles of coordination, and in effect it would mean that the UK would be dragged back to the mechanism that is similar to the EU. It seems even more unrealistic if we think that UK would like to have a 'hard Brexit' distancing them from everything related to EU.

OTHER MODELS AVAILEBLE TO THE UNITED KINGDOM

Scenarios presented by Jean-Claude Junker in his White Paper are showed purely from the perspective of the European Union. Junker's view is being contrasted with possible outcomes for the United Kingdom. However, as it was mentioned at the beginning of this article, there are countries that are not members of the European Union but are still enjoying benefits of social security coordination, for example Iceland or Liechtenstein. Similar ideas are operating in Norway and Switzerland and those two countries could serve as examples as to how United Kingdom can finalise their negotiations with the EU.

Norwegian model

Norway is a member of the European Free Trade Association but also European Economic Area, which allows this country to be part of the single market without being a Member State of the European Union. In this model, a country preserves the status of free movement of goods, services, people and capital, however not only between the EU countries but wider with members of the EEA. This allows a country to be part of the social security coordination as well as observing all principles of this coordination. The main downside, for the United Kingdom, in applying this model would be payments that must be made to the budget whilst participation in other activities of the EU would be excluded. UK would also have to strictly follow EU rules and regulations.

Even though a country is paying to the fund of EEA and must follow EU rules it cannot have any decision-making powers in the European Union, which means that all EU legislation must be observed. This is the question of having sovereignty as a country and whether the United Kingdom would like to have it.

As United Kingdom's Prime Minister Theresa May stated that she would like to follow 'hard Brexit' option and would like to separate UK from the EU it is unrealistic that Norwegian model could be followed as UK would have to pay into the budget, follow EU law and have no influence in law-making mechanisms. This could be seen by UK citizens as a simple swap from EU to EEA to preserve the current status quo (nearly fully) and then not follow the voice of the people. Therefore, it seems that this model is not the one that could be chosen by the United Kingdom, although it would be beneficial in terms of following the social security coordination and principles.

Swiss model

Switzerland has a slightly different status than Norway, as this country is only a member of the European Free Trade Association and not the EEA. Not being a member of EEA means negotiation of various bilateral agreements with Member States of the European Union will look like negotiations with third countries. Usually each treaty does account for one EU programme. In the context of social security this means participation in pension programmes, insurance policies etc. EFTA allows Switzerland to have a free trade of non-agricultural goods with EU states.

This model looks like a viable option for the United Kingdom as the country can choose which EU initiative to participate in. This provides a country with greater sovereignty than Norwegian model does. Although Switzerland chose not to be part of the single market in relation to services, there is currently free movement of people in place, which awaits revision due to the negative vote in referendum in 2014.

Similarly to Norway, Switzerland has no power in decision-making processes but makes financial contributions to the EU's budget. In choosing this model the UK would have no guarantee that the EU would want to negotiate with them, also about social security systems. EU offered such negotiations to Switzerland but whether they would do so to the UK is a matter for the EU to decide. Therefore, this model is also not ideal for the UK, as they would pay into

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the budget, adopt the EU law and have no say in decision-making actions (if members of single market). The only benefit is the possibility of choosing areas and regulating them through bilateral agreements, if the EU would like to negotiate those with the UK.

World Trade Organisation

Becoming a member of the World Trade Organisation is a viable option that the UK could want to follow as the free movement of workers would be a non-existent mechanism. Bearing in mind that this option focuses on trade and less on other policies (and cooperation between countries in other areas like defence, migration, integration etc.) we must note that UK would be able to trade with EU as the capital can be moved freely, unlike workers and their families. In this instance, United Kingdom would have to negotiate separate bilateral agreements with various countries, acting as a third country. However, it can be claimed that the observance of principles of social security coordination will not be ensured. There would be no single market, no paying in to the EU budget and not following the EU legislation that could potentially impose a duty to secure social security coordination principles. Therefore, the UK would be free to negotiate whatever they would want to, if the other country would agree to that, otherwise there would be no agreements and no regulation in respect of benefits, pensions and security of other rights. This looks like a dangerous option, however if the United Kingdom will leave EU on strict terms they would want to preserve their sovereignty, therefore this option seems to be possible, although draconian in respect of social security and its principles.

CONCLUSIONS AND RECOMMENDATIONS

If one can imagine that Brexit negotiation happen at the three-side table where we have European Union, Member States and the United Kingdom negotiating terms of leaving the EU, one would be able to potentially imply from the above analysis what can be claimed by each party in respect of their interests.

The most possible scenario that could be used by the European Union and Member States in negotiations is Junker's fourth scenario. This is because in some aspects competencies of Member States will be preserved in relation to passing own legislation about social security according to coordination's principles. The EU would be able to focus on other issues and do less in a more efficient way, because of their direct focus on agreed priorities. The United Kingdom would obviously be treated as a third country (although dependent on the final outcome of negotiations) and therefore the EU as a representative of Member States could impose the observance of social security principles in a negotiated bilateral agreement, also if each country would have a separate one signed with the UK.

If however we look at the choice that the United Kingdom is most likely to make the UK is likely to leave negotiations without an agreement. Following from that is the membership of the World Trade Organisation, which would mean no free movement of workers and therefore no social security coordination for the UK. This is 'hard Brexit', which is a reflection of the referendum and the voice of UK citizens. The United Kingdom is less likely to want to pay into the budget, to want to follow the EU legislation, especially if they would be unable to have a say about its shape.

Those negotiations are able to end with no agreement as EU together with Member States have a completely different view as to how Brexit should look like, especially in getting the money into the budget. Unfortunately, the most likely consequence is the creation of separate bilateral agreements in relation to social security systems, and therefore some of the main principles of current coordination may not be preserved, making it less beneficial for migrants to work in countries other than Member States. The main problem however would be preservation of rights already acquired. This is because social security benefits are usually long

term and people, for example by paying contributions make plans for their futures, expecting those benefits to help them if such need arises. However this is now uncertain.

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LOSING THE TAG OF 'INDEPENDENT DIRECTOR'- ROLE PLAYED BY NOMINEE DIRECTORS IN DETERMINING FIRM PERFORMANCE

MANJULA SHUKLA[1]

ABSTRACT

Before the enactment of Companies Act, 2013, the provisions related to the inclusion of independent directors in boards of Indian companies were mentioned only under Clause 49 of Listing Agreement. While the Listing Agreement stated that the nominee directors appointed by an institution are deemed to be independent directors, Companies Act, 2013 states that a nominee director cannot be an independent director. The present study analyses the role of independent directors and nominee directors in determining firm performance. The study has been conducted on the 30 BSE SENSEX companies listed on the Bombay Stock Exchange as on March 31, 2016, for a period of six years from financial year 2011 to financial year 2016. The results indicate that the ratio of independent directors on boards has a positive influence on the firm performance, though not significant. Whereas, the ratio of nominee directors has a significant negative impact on firm performance.

Keywords: Board of Directors, Independent directors, Nominee Directors, Firm Performance

INTRODUCTION

The importance of independence of directors has long been proved and implemented by various regulatory organizations in India as well as abroad. Although Sarbanes-Oxley did not expressly address the concept of independent directors, the main objective of the act was to increase the independence of the boards of public companies. The listing requirements as stipulated by the New York Stock Exchange and NASDAQ, required that independent directors make up a majority of the board of listed companies. In India, the importance of Independent Directors (referred to as "IDs") was established with the introduction of corporate governance. The Companies Act, 1956 did not provide any regulation regarding the appointment of independent directors on company boards. It was Clause 49 of the Listing Agreement, as mandated by the capital market regulator SEBI, which first introduced regulations regarding appointment of independent directors on the board. The Clause defined an independent director as a non-executive director of the company who does not have a pecuniary relationship with the company, apart from receiving director's remuneration. The Clause required the companies to appoint an optimum combination of executive and non-executive directors with at least 50% of non-executive directors on Board. However, Clause 49 stipulated that the nominee directors appointed on board to be considered as independent directors. The Indian listed companies have, since the enactment of Clause 49 of Listing Agreement, maintained the required number of independent directors on their Boards, i.e. at least one-third of the board to comprise of independent directors where the Chairman of the board is a non-executive director and at least half of the board to comprise of independent directors in case the Chairman of the board is an executive director. However, recently a need was felt to update the Companies Act of 1956, and therefore, the Companies Act, 2013 came into action as Act no. 18 of 2013 after obtaining the President's assent on August 29, 2013. The Act specifically mentions regulations regarding the appointment, qualifications, and the importance of independent directors for good corporate governance under Section 149. The Act also stipulates the roles, duties and liabilities, manner

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of selection of independent directors, etc. on the board of the companies as well on various board committees. The Act also mentions that the nominee directors appointed on corporate boards will no longer be considered as independent directors, under Section 149(6). The definition of independent directors as given by Companies Act, 2013 says that an independent director in relation to a company means a director other than managing director or whole time director or a nominee director. Although independent directors are always linked with good corporate governance and are considered as one of the driving factors of success of the corporations, nominee directors also have a role to play towards betterment of governance and performance of the companies. However, the motives of the two group of directors might not be the same. The independent directors are not supposed to have any pecuniary relation with the company and thus they act with total independence, but the nominee directors act and take decisions with the benefit of their nominator in mind. Notwithstanding the nature of appointment of the nominee directors, they are also expected to act in the best interest of the shareholders and the company as a whole. (Narasappa, Doraswamy and Raja, 2011)

Extensive studies have been done to analyze the role played by independent directors and the way they influence various facets of firm performance. Previous studies done on independent directors in Indian context would have considered nominee directors as independent directors in their study due to the regulations stipulated by Clause 49 of Listing Agreement. However, as Companies Act, 2013 does not recognize nominee directors as independent directors, it is imperative to revisit the concept of independence of the board and the effect it has on performance of the companies. The rationale behind the study is that although the boards of Indian companies have maintained the required number of independent directors since enactment of Clause 49, the actual number of 'independent' directors was different than disclosed in the annual reports of the companies considering that the nominee directors cannot be considered totally independent.

LITERATURE REVIEW AND HYPOTHESIS

Increasing number of researches have been done over the years on the importance of independent directors in determining performance of corporations. However, mixed results have been found about the role played by independent directors, where some studies show a positive association between share of independent directors and firm performance, other studies have shown no or negative relation between independent directors and firm performance. Although limited studies have been done on role played by nominee directors in determining firm performance, here also mixed results can be seen where some studies provide evidence of nominee directors beneficially affecting firm performance, whereas some studies show nominee directors to have a negative effect on various aspects of firm performance.

INDEPENDENT DIRECTORS AND PERFORMANCE

Hillman and Dalziel (2003) studied the effect of Board characteristics on firm performance in the light of Agency theory and Resource Dependence perspective and suggested that board independence has a negative effect on provisioning of resources and that equity compensation aligns board interests with shareholders, and thus has a positive effect on firm performance. On the other hand, Musalli and Ismail (2012) studied the effect of various board of directors' features like nationality, education, size of the board, etc. on intellectual capital performance of the companies. The study was conducted on a sample of 147 banks in Gulf Cooperation Council (GCC) countries for the period 2008-2010. It was concluded that intellectual capital performance of GCC listed banks is low. Number of independent directors has a significant negative relationship with intellectual capital performance of the banks. Veklenko (2016) investigated the relation between composition of board and firm performance and confirmed the hypothesis that boards with higher ratio of independent directors have a higher level of

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ROE. In the Indian context, Chatterjee (2011) attempted to describe the relation between composition of the board and performance of Indian firms. The study classified Indian firms into four categories- public sector undertakings, stand-alone firms, private business group affiliated firms and subsidiaries of foreign firms. Results indicate that the independent directors on the boards of Indian corporates have no significant influence on the performance of the firms. Kumar and Singh (2012) examined the efficacy of outside directors on boards of Indian non-financial companies. The study examined if the presence of non-executive non-independent directors and independent directors influence firm performance. Findings suggest that while the proportion of non-executive non-independent directors have marginally deteriorated effect, the proportion of independent directors has an insignificant positive effect on firm performance.

However, various regulations governing the composition of board of Indian companies have mandated inclusion of independent directors on boards with a notion that such directors tend to bring out positive results for the firms. The Companies Act, 2013 mentions the duties and liabilities of an independent director towards the shareholders and stakeholders of the company. The independent directors are expected to work in the best interest of the company and to better the performance of the company in varied respects. Thus, as independent directors are seen as a bridge to success of the companies, the first hypothesis states that there should be a positive relation between firm financial performance and proportion of independent directors on boards.

H_1: There exists a positive association between proportion of independent directors on boards of companies and firm performance.

NOMINEE DIRECTORS AND PERFORMANCE

Bubna and Gopalan (2010) investigated the impact of presence of bank nominee directors on board on the performance of the Indian firms. The study was conducted on listed and unlisted Indian public sector companies. The study concludes that firms with bank nominees on board have lower investments and profit. These firms have greater leverage and are more likely to be in financial distress. The firms having bank nominee directors on their boards exhibit slower sales growth and are more likely to exhibit bankruptcy. Jayadev M (2016) examined whether firms having bank nominee directors on their boards perform better in terms of accounting measure (ROA) and market measure (Tobin's Q). The results of the analysis suggests that presence of nominee directors on boards significantly and positively affect both ROA and Tobin's Q. Dwivedi (2007) studied association between various board characteristics and firm performance using data from large listed Indian firms. The study revealed that the presence of nominee directors on bank boards would adversely affect the decisions made in favor of long term shareholder value maximization and thus would have an adverse effect on firm performance. Nachane, Ghosh and Ray (2005) used a Probit model to study the impact of bank nominee directors on firm performance. The study was conducted on Indian manufacturing firms for the year 2003. The results indicate that bank nominee directors on board exert a healthy impact on the companies. Large public limited companies tend to appoint bank representatives on board so as to benefit from their financial expertise.

In India, nominee directors can be appointed by certain shareholders, third parties that have entered into contract with the company, public financial institutions and banks that have lent to the company, by Central Government and by Reserve Bank of India in case of public sector banking institutions. The extent of roles and duties to be played by the nominee directors is contained in the contract through which the nominee directors are appointed or according to the relevant statute applicable in case of public sector financial institutions and banks. However, it is expected of a nominee director to not only act in the interest of the nominator but to act in the best interest of the company as a whole. According to Ministry of Corporate

Affairs, Government of India Master Circular No. 1/2011, dated 29th July, 2011, a nominee director, whatever interest he/she protects, must take the responsibility of proper discharge of his/her obligations and fiduciary responsibilities under the statute in the same manner as done by an ordinary director. Therefore, considering that the nominee directors are expected to act in the best interest of the company, the second hypothesis states that there should be a positive association between the proportion of nominee directors on board and firm financial performance.

H_2: There exists a positive association between proportion of nominee directors on boards of companies and firm performance.

RESEARCH METHOD

DATA COLLECTION AND ANALYSIS

The study has been conducted on the 30 BSE SENSEX companies listed on the Bombay Stock Exchange as on March 31, 2016, for a period of six years from financial year 2011 to financial year 2016. The 30 component companies of SENSEX are some of the largest and most actively traded stocks, and are representative of 16 industrial sectors of the Indian economy. The total firm year observations were 180, however, after correcting for outliers with the help of box-plots, the final number of firm year observations totaled to 176. Relevant data on board of directors and the measure of firm performance have been extracted from the annual reports of the companies

VARIABLE DEFINITION

Return on Assets (ROA) has been used as a proxy for firm performance, the proportion of independent directors and the proportion of nominee directors on the boards of companies have been taken as independent variables for the study. Various other variables that determine firm performance, like log of age (Bulan, Sanyal and Yan, 2009), log of firm size (Bulan, Sanyal and Yan, 2009; Bhagat and Black, 1999) measured by total assets, chairman-CEO duality (Sukumaran, 2013), board size (Bhagat and Black, 1999) and government ownership (Cheng and Courtenay, 2006) have been used as the control variables in the study. Description of variables used in the study has been provided in Table A-2. Multiple regression analysis has been used to analyze the impact of the independent variables viz. (i) the ratio of independent directors on boards and (ii) ratio of nominee directors on boards of the companies on the dependent variable viz. the Return on Assets. While calculating the ratio of independent directors, the number of nominee directors on boards have been excluded.

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Table A: Description of Variables

VARIABLES	*DESCRIPTION*
DEPENDENT VARIABLE	
Return on Assets (ROA)	Measure of firm performance. Calculated by dividing net income by average total assets of the company.
INDEPENDENT VARIABLES	
1. INDEP_RATIO	Ratio of independent directors on board and total number of directors on board.
2. NOMINEE_RATIO	Ratio of nominee directors on board and total number of directors on board.
CONTROL VARIABLES	
1. LOGAGE	Log of the age of the company from the year of its formation.
2. LOGSIZE	Log of size of the company, size of the company being measured by the total assets of the company in a year.
3. DUALITY	Dummy variable that takes 1 if Chairman-CEO duality exists for a particular company in a particular year, 0 otherwise.
4. GOVT	Dummy variable that takes 1 if the company is government-owned, 0 otherwise.
5. BSIZE	Total number of directors on board of a particular company in a particular year.

ANALYSIS AND INTERPRETATION

The hypothesis(s) of the study have been checked by applying Ordinary Least Squares regression technique, wherein the forced entry method of regression has been used. The descriptive statistics of the variables used in the study are as provided in Table C. The mean ratio of independent directors on the boards of the 30 BSE SENSEX companies was 0.51, with a maximum of 0.80 and a minimum of 0.14. The mean ratio of nominee directors on the boards of the companies was 0.06, with a maximum of 0.38 and a minimum of 0.00 indicating absence of nominee directors on board. According to Companies Act, 2013, every company is required to have at least 1/3 of the directors of the board to be independent directors. However, according to Clause 49, every company having an executive non-independent chairman on board must have at least 2/3 of the directors as independent directors. If we look at the proportion of independent directors appointed by the companies (after removing the nominee directors), the total number of firm observations before FY 2015 (Companies Act, 2013 was applicable from April 1st, 2014) where the chairman was non-independent executive director was 70. Out of these 70 firm year observations, there were only 11 observations (15.71%) where the proportion of independent directors was more than or equal to 2/3. Similarly, before FY 2015, there were 49 observations where the chairman was a non-executive independent director. Out of these 49 observations, there were 47 observations (95.91%) where the proportion of independent directors was more than or equal to 1/3 (as per Clause 49). Thus, it can be seen that the position of companies having independent chairperson was better regarding required number of independent directors on board, as the requisite proportion was low i.e. 1/3 as compared to 2/3 to be maintained by companies having non-independent executive chairperson. After the enactment of Companies Act, 2013 it was made mandatory for the companies to have at least 1/3 of the directors as independent directors. From October 1st, 2014, the amended Clause 49 was applicable to companies, which states that companies having an independent non-executive chairman must have 1/3 of the directors as independent directors

and at least ½ of the directors must be independent in case a company has an executive director as chairperson. Therefore, the total number of firm observations where the chairperson was an executive director (from FY 2015) was 34. Out of these 34 observations, the total number of observations where the proportion of independent directors was less than ½ were 14 (41.17%). However, it is the Companies Act 2013 that states that nominee directors are not to be considered independent directors. Thus, going according to the Companies Act, 2013, the total number of observations (out of 58 observations from FY 2015) where the proportion of independent directors was less than 1/3 were 8 (13.79%). Thus, it can be seen that the position of independent directors in the companies was not satisfactory, especially in the case of non-independent executive chairperson where 2/3 of the directors must be independent in order to significantly affect the governance of the companies.

Table C: Descriptive Statistics

VARIABLES	MINIMUM	MAXIMUM	MEAN	SD
ROA	*-9.48*	*36.10*	*11.52*	*9.19*
INDEP_RATIO	*0.14*	*0.80*	*0.51*	*0.12*
NOMINEE_RATIO	*0.00*	*0.38*	*0.06*	*0.09*
LOGAGE	*2.77*	*4.69*	*3.76*	*0.51*
LOGSIZE	*7.06*	*15.68*	*11.03*	*1.49*
BSIZE	*7*	*25*	*13.23*	*3.23*

Table D: Proportions of Independent Directors

OBSERVATIONS BEFORE FY 2015			
Non-Independent Executive Chairperson	Total Observations = 70	Proportions more than 2/3 = 11	Percentage = 15.71%
Independent Chairperson	Total Observations = 49	Proportions more than 1/3 = 47	Percentage = 95.91%
OBSERVATIONS FROM FY 2015			
Non-Independent Executive Chairperson	Total Observations = 34	Proportions less than 1/2 = 14	Percentage = 41.17%
Independent Chairperson	Total Observations = 26	Proportions less than 1/3 = 11	Percentage = 42.30%

As can be seen from Table E, the number of firm observations where the independent directors were a majority was just 19 (10.79%). There were around 28.5 % (100-71.5) of cases were the independent directors did not even cover half the proportion of board of directors.

Table E: Position of Independent Directors during the Period of Study

INDEPENDENT DIRECTOR RATIO OF BOARD OF DIRECTORS	NO. OF FIRM OBSERVATIONS	PERCENTAGE OF FIRM OBSERVATIONS
≥ 1/3	158	89.77%
≥ ½	126	71.5%
≥ 2/3	19	10.79%

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In the case of nominee directors, the total number of firm observations having no nominee directors were 103 (58.52%). The number of companies which never appointed a nominee director during the period of six years was 17 out of 30 companies (56.67%).

MODEL SPECIFICATION

In order to test the first hypothesis assuming a positive association between proportion of independent directors on the board of directors of companies and firm performance, the measure of firm performance ROA was regressed on the independent variable INDEP_PROP and control variables LOGAGE, LOGSIZE, DUALITY, GOVT and BSIZE.

$$ROA = \alpha + \beta_1 INDEP_PROP + \beta_2 LOGAGE + \beta_3 LOGSIZE + \beta_4 DUALITY + \beta_5 GOVT + \beta_6 BSIZE + \varepsilon \quad (1)$$

To test the second hypothesis assuming a positive relation between proportion of nominee directors on the board of directors and firm performance, the measure of firm performance ROA was regressed on the independent variable NOMINEE_PROP and control variables LOGAGE, LOGSIZE, DUALITY, GOVT and BSIZE.

$$ROA = \alpha + \beta_1 NOMINEE_PROP + \beta_2 LOGAGE + \beta_3 LOGSIZE + \beta_4 DUALITY + \beta_5 GOVT + \beta_6 BSIZE + \varepsilon \quad (2)$$

Multicollinearity test was performed with the help of correlation matrix and Variance Inflation Factor (VIF). The Table F presents the correlation matrix of the variables, where none of the correlations are more than ±0.80. (Field, 2009) To test the multicollinearity, the VIF was calculated for each independent variable. As suggested by various studies (Cho and Kim, 2007; Jackling and Johl, 2009), the results indicate that all the independent variables have VIF less than 10. Therefore, it can be said that the variables are not orthogonal, however the multicollinearity among the independent variables are within acceptable limits. The results of regression analysis as shown in Table G suggests a positive relation between ratio of independent directors and firm performance, though insignificant. This result can be attributed to the low percentage of independent directors on boards. Due to such low numbers, it would become difficult for these directors to significantly influence the board discussions and decisions. The results also suggest a significantly negative association between the proportion of nominee directors on the board of directors and firm performance. As is evident from the study that in majority of observations (89.21%) the proportion of independent directors was less than 2/3. There was approximately 28% of cases in which the independent directors not even covered 50% of the board of directors. Therefore, it can be said that this insufficient representation of independent directors on boards resulted in lack of significant influence of independent directors in board decisions consequently resulting in failure of such directors to determine the performance of the companies. Thus, in conformity to the suggestions by Kumar and Singh (2012) it can be said that greater representation of independent directors in lieu of other non-executive outside directors is needed on Indian boards.

Table F-1: Pearson Correlation for Variables

	N	1	2	3	4	5	6	7	8
1.ROA	*176*	*1*							
2.INDEP_RATIO	*176*	*0.14*	*1*						
3.NOMINEE_RATIO	*176*	*-0.41*	*-0.48***	*1*					
4.LOGAGE	*176*	*0.29*	*0.00*	*-0.14*	*1*				

5.LOGSIZE	*176*	*-0.63*	*-0.18**	*0.50*	*-0.24***	*1*			
6.GOVT	*176*	*-0.15*	*0.15**	*-0.19**	*-0.21***	*0.27***	*1*		
7.DUALITY	*176*	*-0.06*	*0.09*	*-0.13*	*0.09*	*0.07*	*0.26***	*1*	
8.BSIZE	*176*	*-0.05*	*-0.22***	*0.23***	*0.10*	*0.27***	*0.026*	*-0.15**	*1*

**Significant at the 0.01 level (2-tailed) *Significant at the 0.05 level (2-tailed)

There are other arguments as well that can explain the insignificant effect of independent directors on firm performance. Independent directors are appointed on the board with the primary motive of reducing agency cost with the expectation that such directors would be having high monitoring ability. In India, promoters being the dominant shareholders of the company is a common phenomenon. Such promoters usually occupy a significant management position or have the power to influence the management of the company. Promoters having the power to influence the management tend to allow their own people on the board as independent directors. In such a situation, the role and position of independent directors becomes a formality and is adhered to just for regulatory compliance purpose. (Kumar and Singh, 2012). This would pose a big question on the significance of the independent directors in affecting firm performance considering the actions and decisions taken by such directors is no longer independent. Similarly, in case of family controlled firms, outside directors, especially independent directors may not be able to provide their services with full commitment to their monitoring role. (Chen and Jaggi, 2000). Lack of training that should be provided to the independent directors in order to help them in performing their task efficiently has also been said to be one of the reasons why no significant influence on performance by independent directors is witnessed. (Garg, 2007) In India, the independent directors are only provided with the fixed sitting fees in accordance with the number of board meetings they attend. No additional incentive is provided to such directors in case a better performance is observed. This may result in lack of motivation for the IDs to act towards betterment of the company. They would attend board meetings regularly, as is seen by several studies (Pande and Ansari, 2013; Jackling and Johl, 2009), though not paying much heed to the affairs of the company and leaving it on the executive directors to make decisions about the company.

Table G: Results of OLS Regressions

	MODEL 1	MODEL 2
Intercept	7.377***	7.318***
	(0.781)	(0.712)
INDEP_RATIO	0.339	-
	(0.495)	
NOMINEE_RATIO	-	-1.591**
		(0.780)
LOGAGE	0.265**	0.242
	(0.120)	(0.119)
LOGSIZE	-0.414***	-0.365***
	(0.044)	(0.050)
DUALITY	-0.060	-0.078
	(0.129)	(0.128)

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GOVT	0.156	0.022
	(0.202)	(0.212)
BSIZE	0.033*	0.034*
	(0.020)	(0.019)
N	176	176
F-Ratio	21.30***	22.380***
R^2	0.431	0.443
Adjusted R^2	0.410	0.423

***Significant at the level of 0.01 (2-tailed) **Significant at the level of 0.05 (2-tailed) *Significant at the level of 0.10 (2-tailed)

Regarding the role played by the nominee directors, the results of the study corroborate with the findings of the previous studies that provided evidence of a negative relation between the presence of nominee directors on board and firm financial performance. The nominee directors are expected to positively affect firm performance by taking a more broad view of the working of the company as they are the external member on the board and are unaffected by internal influences of daily functioning of the companies. The nominee directors representing the financial institutions and banks are expected to enhance the quality of corporate governance of the companies by bringing in their profound knowledge of the financial system. (Jayadev, 2016) However, the present study finds that the presence of nominee directors on boards has a negative influence on the performance of the companies. Various arguments have been presented by previous researches explaining such effect of nominee directors on the company. Bubna and Gopalan (2010) put forward their view on bank nominee directors on boards and explained that such representatives of banks and financial institutions tend to degrade the agency problems between debt and equity as their motive is to safeguard the interests of their nominators at the expense of the interests of the equity-holders. Dwivedi (2007) states that financial institutions, which are controlled by the Government of India, hold a large amount of equity in Indian firms and also lend to such companies. Directors tend to keep the price-sensitive information private which leads to conflict of interest in case of nominee directors having equity exposures. Presence of such directors on boards has a hostile effect on the decisions made in favor of maximizing shareholder value, thereby adversely affecting firm performance. Regarding the appointment of Government nominee directors on board of Indian corporations, Agarwal and Kaul (1972, p. 164)opine that such directors are responsible to the Government and would not be able to protect public interest or control mismanagement in the company as their shares are not at stake. Moreover, these directors usually belong to the civil services and thus do not have the required knowledge and knowhow to govern a company. It becomes difficult for the Government to find suitable representatives and the ones selected are often unwilling to become the nominee of the Government on the boards of the companies they have little familiarity with. Also the intrusion by these directors in the matters of the company encounters resentment from other directors on the board.

CONCLUSION AND LIMITATIONS

The present study examined the relationship between the proportion of independent directors on board and firm performance. The study was conducted on a sample of 30 companies included in BSE SENSEX on March 31, 2016, for a period of six years ranging from financial year 2011 to 2016. The Return on Assets of the companies was taken as the measure of firm performance. The hypothesis(s) of the study was tested with the technique of OLS regression. The findings of the study show an insignificant relation between the proportion of independent directors on boards of the companies under study and firm financial performance. The proportion of independent directors on board was calculated by excluding the nominee

directors appointed on boards. The study also examined the relation between proportion of nominee directors on board and firm financial performance. The results suggest that presence of nominee directors on board adversely and negatively affects the firm financial performance. It can be concluded from the study that there is a need to enhance the representation of independent directors on Indian boards, in the process not considering nominee directors as independent. Not only must the number of independent directors on the boards be increased but the training and familiarization of these directors be given due importance. Merely increasing the share of independent directors will not be fruitful until and unless the directors are certain towards the role they have to play. Further, a better appointment procedure of independent directors is required to make certain that the independence of the directors is not compromised. The nominee directors must be trained to act in relation to the duties and responsibilities of the directors. Government must attempt to place such representatives on board that have thorough knowledge of the workings of a corporate body and is well-informed about the actions that will end in providing protection and benefit to the minority shareholders, without degrading the agency conflict prevalent in companies. It is by substituting the interest of the company as a whole for personal interests that desired results will be seen and benefits will be shared by interested parties. In a combat to protect their own interests separately, the investors will only lead the company towards decline, which will ultimately be hazardous to the interests of every stakeholder. The various limitations of the study are that it has been conducted on only 30 Indian companies for a limited period of six years. The study uses secondary data that brings its own disadvantages. Moreover, the study applies linear regression to study the association between independent and dependent variables. Various other analysis can be applied to study the problem in a different light and also other aspects of the relation can be studied. The present study only examines the effect that the independent variables may have on the dependent variable. However, the reverse causality of firm performance affecting the proportion of directors on board has not been studied. The performance of the company has been measured by only a single accounting measure i.e. the Return on Assets. Different results could be witnessed if other variables are used as a proxy of firm performance including the market-related variables like Tobin's Q and productivity variables like TFP (Total Factor Productivity). The proportion of directors can also be studies with the help of various indexes of heterogeneity.

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GENDER DIFFERENCES IN ENVIRONMENTALLY CONSCIOUS PURCHASING BEHAVIOUR OF GENERATION Y THAI CONSUMERS

PATRICIA ARTTACHARIYA[1]

ABSTRACT

It has been reported that the degradation of the environment is caused by practices designed to make human life easier but the same practices actually threaten the long-term health and prosperity of humans. The current study examined gender differences in environmental knowledge, concern, value orientations, mediainfluence, interpersonal influence, attitude, and environmentally conscious purchasing behaviour of Generation Y consumers in Thailand. A sample of 420 respondents (200 male and 220 female) was selected for the study. The findings revealed significant gender differences in environmental concern, interpersonal influence and the moderating factor of willingness to pay more. The study adds to the literature and also provide marketers and policy makers with better insights into the role of gender in environmentally conscious purchasing behaviour in the Thai context.

Key words: environmental consciousness, value orientations, environmental attitude, willingness to pay more.

INTRODUCTION

Several researchers have supported the argument that lack of proper environmental protection can cause an ecological crisis (Peattie, 1995; McCarty and Shrum, 2001; Jackson, 2005). Environmental development and ecologically-destructive policies have left humans vulnerable to multiple challenges ranging from water scarcity, rising temperatures, more frequent droughts, rising sea levels to increased flooding and deaths from natural disasters. Previous research by UNEP (2010) claimed that over 60 percent of environmental impacts are caused by household consumption, most of which occurs during the stage of end-usage. Thus the problem of human activities causing environmental damage cannot be overlooked, making environmental protection one of the most crucial challenges for many governments and international agencies.

The case of Thailand

Thailand has been hit hard by climate-related disasters over the past decade. The Global Climate Risk Index by Germanwatch released in 2016 which outlined countries affected by weather-related events from 1995-2014 showed that Thailand was the 9th country most devastated by climate related disasters during this period. Surprisingly, Thailand was the only "upper-middle income country" to figure on the list of top ten countries facing the most long-term climate risk (GCRI, 2016). The apparent effects of deterioration of the environment can be felt in all aspects of daily lives making it all the more important for every citizen as well as the government to do their part in rejuvenating the ailing ecosystem. One of the ways in which Thais can help mitigate such climate-related calamities is by focusing on environmentally conscious purchasing behaviour.

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Generation Y Consumers in Thailand

The phrase Generation Y first appeared in a 1993 Ad Age editorial to describe the teenagers of the day. A global generational study conducted by PwC in association with the University of Southern California and LBS (London Business School) defined Generation Y as those born between 1980 - 1995 (PwC, 2013). Kershaw (2005) defined Generation Y as those born between 1981-2000. Many authors have used the term "Millennials " to describe people born in this generation (Strauss and Howe, 2000).

Generation Y is already a significant presence in Thailand making up approximately 32 percent of the Thai population of about 68 million people. They are today's largest consumer group and are likely to be the biggest Thai consumer group ever. Gen Y's average monthly income of THB 30,000 (USD 1,000) already compares to that of the two generations before them, which is THB 35,000 for Gen X and THB 32,000 for Baby Boomers (SCB Economic Intelligence Centre (2014). Draves and Coates (2004) argued that Generation Y have markedly different behaviour, values, and attitudes from previous generations, much of which is influenced by technological and economic implications. Nevertheless, there are mixed findings on whether this generation is more environmentally conscious than the previous ones were. The SCB Economic Intelligence Centre recently conducted a study on Thai Generation Yers which identified five key traits that have important implications: Gen Y are tech-savvy, social, information-driven, selective and financially literate (SCBEIC, 2014).

Gender Differences and Environmentalism

Although there have been some studies on consumers and pro-environment purchasing behaviour in the Thai context (Maichum, Parichatnon and Peng, 2016; Nuttavuthisit and Thogersen, 2017; Arttachariya, 2012; Soontonsamai, 2001), there has been no such study conducted exclusively on gender differences and more specifically, on Generation Y consumers.

The aim of this paper is as follows:

- To examine gender differences in the Internal Factors (environmental knowledge, environmental concern, value orientations), External Factors (interpersonal influence, media influence) and environmental attitude of Generation Y Thai consumers.
- To examine gender differences in the moderating factors (willingness to pay more and personal benefits) and environmentally conscious purchasing behaviour of Generation Y Thai consumers.
- To examine the gender difference in environmental attitude and environmentally conscious purchasing behaviour of Generation Y Thai consumers.

LITERATURE REVIEW

Environmental consciousness has been defined as an element of the belief system which refers to specific psychological factors related to an individual's likelihood to engage in pro-environmental behaviour (Zelezny and Schultz, 2000). Individuals vary in their degree of environmental consciousness ranging from a general concern for the environment to more specific product-related behavior (Sharma and Bansal, 2013).

Gender Differences in Factors underpinning environmental conscious purchasing behaviour

Several factors have been known to impact the environmental conscious purchasing behaviour of consumers. Among these have been "Internal" factors (environmental knowledge, environmental concern, and values orientation), "External" (interpersonal influence and media

influence), and "Moderating" (willingness to pay more, and personal benefits). Each factor will be discussed in greater detail in the following sections.

Internal Factors

Environmental Knowledge

Environmental Knowledge can be abstract or concrete. Abstract knowledge pertains to knowledge concerning environmental issues, problems, causes and solutions, whereas concrete knowledge emphasizes behavioural knowledge that assists in decision making and implementation (Schahn and Holzer, 1990). Previous research has shown that women express more concern about the environment and intend to do more about environmental problems, however, men are more knowledgeable about such problems (Arcury and Christianson, 1993; Levine and Strube, 2012).

Environmental Concern

Dunlap and Jones (2002) defined environmental concern as **"**the degree to which people are aware of problems regarding the environment and support efforts to solve them, and/or indicate the willingness to contribute personally to their solution**"** (p. 485). Blocker and Eckberg (1997) reported that women show greater concern for environmental degradation, show more respect for the rights of others and follow a more environmentally-friendly lifestyle.

Value Orientation

Value has been defined as an enduring prescriptive or proscriptive belief that a specific end state of existence or specific mode of conduct is preferred to an opposite end state or mode of conduct for living one's life (Kahle, 1996; Rokeach, 1986). Previous studies have found environmental activism to be strongly linked to values regarding the importance of the environment in a person's life (Steel, 1996). Luchs and Mooradian (2012) argue that more agreeable consumers are more likely to hold stronger social and environmental concerns, with agreeableness a personality trait more common among women. Stern, Dietz and Kalof (1993) in discussing three value orientations proposed that women have stronger beliefs about the harmful consequences of environmental degradation on others, the biosphere and self, and these values resulted in more pro-environmental behaviour.
Based on the above discussion, the following hypotheses are formulated:
$H_{1:}$ There is a significant gender difference in Internal Factors and Environmental Attitude of Generation Y Thai consumers
$H_{a1.1:}$ There is a significant gender difference in environmental knowledge and environmental attitude of Generation Y Thai consumers
$H_{a1.2:}$ There is a significant gender difference in environmental concern and environmental attitude of Generation Y Thai consumers
$H_{a1.3:}$ There is a significant gender difference in value orientations and environmental attitude of Generation Y Thai consumers

External Factors

Interpersonal Influence

It has been found that significant others have a strong impact on consumer behaviour. Bearden, Netemeyer and Teel (1989) argued that the influence of others is a significant determinant of an individual's behaviour. Social norms assess a consumer's feelings as to what significant others would think of an action being contemplated and also concerns the perceived social pressure to comply or not comply and the likelihood of social approval for performing the behavior (Ajzen and Fishbein, 1977; Ajzen and Madden, 1986). Previous gender studies have

reported that because women are caregivers for families and others, they stress more on equality, harmony and connections (Zelezny, Chua and Aldrich, 2000). Hence women are more susceptible to conformity pressure (Chen-Yu and Seock, 2002) and peer influence compared to men.

Media Influence

Media is another important external factor impacting environmental consciousness as all forms of media provide the right information to consumers and help in developing individual and group environmental consciousness (Rios et al., 2006). Consumers, in order to make rational choices in their purchases of environmentally-friendly products, need information provided by media to form opinions and attitudes. In Sahin, Ertepinar and Teksoz's (2012) study, male students spent more time in outdoor activities (hunting, camping, fishing, resulting from the influence of media which show these as masculine hobbies) whereas female students took more pro-ecological actions which stemmed from their favourable attitude and values toward the environment.

Referencing from existing literature it is hypothesized that :

H_{2} : There is a significant gender difference in External Factors and Environmental Attitude of Generation Y Thai consumers

$H_{a2.1}$: There is a significant gender difference in interpersonal influence and environmental attitude of Generation Y Thai consumers

$H_{a2.2}$: There is a significant gender difference in media infuence and environmental attitude of Generation Y consumers

Moderating Variables

Willingness to pay more

H'Mida, Chavez and Guindon (2008) in their study, argued that if a consumer is environmentally conscious, he/she would show greater willingness to pay more for a green product. Previous research has shown that women have a higher willingness to pay more for green products than men (Fotopolous and Krystallis, 2002 for organic food; Roe, et al., 2001, for electricity). Laroche, Bergeron and Barbaro-Forleo (2001) also found that women are more environmentally concerned and are willing to pay more for environmentally-friendly products than men.

Personal Benefits

Identity theory explores the nature of humans and explain how the relationship between individuals and their social and physical surroundings influences the perceptions of who they would like to be and how they would like to be regarded by others. Self-identity is primarily motivated by the desire to achieve self-esteem, authenticity, efficacy and continuity (Breakwell, 1986, 1993). From this perspective, environmental behavior can be considered as self-defining activities because they are associated with the ability to buy meaningful goods or provide a good quality of life for self and family, which is a primary source of self-esteem for many people. Not much research has been conducted thus far on gender and the personal benefits gained from pro environmental behaviour.

Referencing from existing literature it is hypothesized that :

$H_{3.1}$: There is a significant gender difference in the moderating factor of willingness to pay more and environmentally conscious purchasing behaviour of Generation Y Thai consumers

$H_{3.2}$: There is a significant gender difference in the moderating factor of personal benefits and environmentally conscious purchasing behaviour of Generation Y Thai consumers

Environmental Attitude

Previous literature has confirmed that an individual's attitude toward problems pertaining to the environment in general, may impact on his/her willingness to engage in responsible environmental behavior. For instance, consumers with strong utilitarian values, were more likely to purchase recycled products (Bei and Simpson 1995). Tikka, Kuitunen and Tynys (2000) in their study on students' environmental attitude in Central Finland, reported that women expressed a more positive attitude toward the environment than men. These findings were supported by Torgler, García-Valiñas and Macintyre in their study of 33 Western and Eastern European countries. Indeed, in the majority of studies, women demonstrated stronger pro-environmental attitudes than men. Environment Attitude is a mediating variable in the current study.

Environmentally Conscious Purchasing Behaviour

One of the reasons why the extant literature has portrayed such a fragmented picture of environmentally conscious behaviour is because of its multidimensional perspective and difficulties in measurement. In terms of gender issues in environmentally conscious purchasing behaviour, previous studies have revealed conflicting results. Whilst some studies have shown that women have significantly higher rates of adoption of environmentally responsible behavior (Zelezny et al., 2000; Matthies, Kuhn and Klockner, 2002; Skerkat and Ellison, 2007), contrary results have been reported by Eisler, Eisler and Yoshida(2003) who argued that men engaged in more pro-environmental behaviours than women. Thus:
H4 : There is a significant gender difference in environmental attitude and environmentally conscious purchasing behaviour of Generation Y Thai consumers.

RESEARCH METHODOLOGY

The target population of this research is Thai consumers, both male and female, born between 1981 - 2000 (Kershaw's 2005 definition of Generation Y). Samples were recruited from universities, offices, sports and leisure centers as well as shopping areas in Bangkok. A self-administered questionnaire comprising nine sections was used. All items were measured on a five-point Likert scale ranging from 1= strongly disagree to 5= strongly agree. The questionnaire also included details on respondents' education and income.

An exploratory factor analysis with principal component extraction was performed to assess the construct validity of the measurement items. It was found that all items loaded on each construct as expected, no item loaded on any scale other than the one it was allocated to, hence none of the items were removed. In addition, the Cronbach-Alpha coefficients for these nine variables range from .602 to .891 (α = .886 for environmental knowledge; .712 for environmental concern; .891 for value orientation; .602 for interpersonal influence; .691 for media influence; .813 for environmental attitude; .697 for willingness to pay more; .810 for personal benefit; and .716 for environmentally conscious purchasing behaviour).

FINDINGS

A total of 560 questionnaire distributed, 436 were returned.Of this number, 16 were rejected because of non-response, bringing the total of usable questionnaires to 420.Table 1 shows the profile of respondents.

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Table 1 : Demographic Characteristics of Respondents

Gender	**Total**		**Male**		**Female**	
	n	**%**	**n**	**%**	**n**	**%**
Male	200	47.6				
Female	220	52.4				
Total	**420**	**100**				
Monthly Income	**Total**		**Male**		**Female**	
Less than 10,000 baht	92	21.9	40	20.0	52	23.6
10,000-20,000 baht	165	39.2	64	32.0	101	45.9
20,001-30,000 baht	103	24.5	53	26.5	50	22.7
30,001-40,000 baht	32	7.6	21	10.5	11	5.0
40,001-50,000 baht	19	4.5	16	8.0	3	1.4
More than 50,000 baht	9	2.1	6	3.0	3	1.4
Total	**420**	**100**	**200**	**100.0**	**220**	**100.0**
Educational Level	**Total**		**Male**		**Female**	
High school or lower	17	4.0	6	3.0	31	14.0
Vocational certificate /Diploma	98	23.3	32	16.0	46	20.9
Bachelor's degree	265	63.0	140	70.0	125	56.8
Master's degree or higher	40	9.5	22	11.0	18	8.2
Total	**420**	**100**	**200**	**100.0**	**220**	**100.0**

Table 2: Mean, Standard Deviation, and t-Statistics of Variables Classified by Gender

	Gender	**n**	$\bar{x}$	**S.D.**	**t**	**p**
Environmental Knowledge	Male Female	200 220	4.41 4.36	.662 .556	.466	.790
Environmental Concern	Male Female	200 220	4.02 4.48	.604 .529	-2.863	.004**
Value Orientations	Male Female	200 220	3.85 3.66	.870 1.142	1.889	.060
Interpersonal Influence	Male Female	200 220	3.15 3.93	.784 .913	2.871	.003**
Media Influence	Male Female	200 220	3.52 3.55	.677 .715	-.492	.623
Environmental Attitude	Male Female	200 220	4.25 4.20	.591 .752	.773	.440
Willingness to Pay More	Male Female	200 220	3.12 2.84	.994 1.023	2.832	.005**
Personal Benefits	Male Female	200 220	2.76 2.71	.950 .978	.527	.598
Environmentally Conscious Behaviour	Male Female	200 220	3.54 3.50	.694 .723	.528	.598

Remark: 4.50-5.00=Highly Agree 3.50-4.49=Agree
2.50-3.49=Neutral 1.50-2.49=Disagree
1.00-1.49=Highly Disagree
*Remark ** Significant at .01 level*

Hypotheses Test Results

Independent-sample t-tests were conducted to test whether any gender differences occurred in the specified variables identified in the study. The results are presented in Table 2. Hypothesis 1 tested gender differences in internal factors and environmental attitude. The results indicated that women scored significantly higher in environmental concern: t(= -2.86, p<.01) lending support for $H_a1.2$. Yet no evidence suggested a gender difference in environmental knowledge, value orientations and environmental attitude. Although the mean differences between men and women were not significant, men (m=4.41) reported a slightly higher score on environmental knowledge than women (m=4.36); men (m=3.85) also had a higher score on value orientations than women (m=3.66)

Hypothesis 2 tested gender differences in external factors and environmental attitude. Women scored significantly higher in interpersonal influence (t[= 2.87, p<.01). Hence, $H_a2.1$ was supported. However, no evidence of a gender difference in media influence was observed. Although the mean difference between gender groups was not statistically significant, women (m=3.55) had a slightly higher score on media influence than men (m=3.52).

Hypothesis 3 tested the moderating influence of willingness to pay more and personal benefits on environmentally conscious purchasing behaviour. The results indicate a significant difference in willingness to pay more in men t(= 2.832; p<.01). Thus, H3.1 was supported. Although, no gender difference in the moderating factor of personal benefits was evidenced, men scored slightly higher (m=2.76) compared to women (m=2.71).

The final hypothesis H4 tested gender differences in environmental attitude and environmentally conscious purchasing behaviour. Although the mean difference between gender groups was not statistically significant, men (m=3.54) had a slightly higher score on environmentally conscious purchasing behavior than women (m=3.50).

DISCUSSION

The findings revealed significant gender differences only in three variables, environmental concern, interpersonal influence and willingness to pay more, providing theoretical and practical implications. Consistent with studies in the West and Asia (Zelezny et al., 2000; Tindall, Davies and Mauboules, 2003; Lee, 2009) women in the current study possessed a higher level of environmental concern. Women also revealed a stronger influence of peers and others in forming their attitude toward the environment, which is consistent with the studies of Lee (2009) and Venkatesh and Morris (2000). Given the higher concern for the environment on the part of women, it would be logical to expect greater environmentally conscious purchasing behaviour from them. However, no such finding was observed in the study. A surprising finding was that Thai men were willing to pay more in their purchase behavior than women. This finding is inconsistent with many previous studies (Fotopoulos and Krystallis, 2002; Roe et al., 2001). A possible explanation for this could be that Thai men in the study had higher levels of education and income and a slightly higher level of environmental knowledge than women. Previous studies show that more highly educated individuals, and those with greater incomes tended to behave more pro-environmentally (Hines, Hungerford and Tomera, 1987). Furthermore, some studies have reported significantly higher participation in environmental behavior for men (Aoyasi-Usui, Vinken, and Kuribayashi, 2003; Eisler et al., 2003). The study found no gender differences between environmental attitude and environmentally conscious purchasing behaviour, which is consistent with the studies of Eagles and Muffitt (1990) and Samdahl and Robertson (1989).

Implications and Conclusion

By exploring gender differences in environmental conscious purchasing behavior, the study intended to provide policy makers, marketers, and consumer groups with empirical knowledge

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to help create more optimal marketing strategies, policies and promotional programmes. As Thai women showed higher environmental concern as well as interpersonal influence, marketers and policy makers could have women spearhead campaigns that promote conservation of the environment. Thailand is considered to be a highly collectivist as well as feminine culture (Hofstede, 1996) in which relationships and quality of life are important. In previous studies, in Thailand, Arttachariya (2012), and Hong Kong (Lee, 2009) found thatreference groups and their influence was more important than any of the other predictors of green purchasing behavior. For example, in a recent report, Ocean Conservancy claims that Thailand is one of the five countries spewing out as much as 60 percent of the plastic waste that enters the world's seas. In their role as caretakers, women could play a major role in driving public awareness about the harmful effects of plastics, especially shopping bags and water bottles, on the environment. The study found no significant gender differences in environmental knowledge, value orientations, media influence, personal benefits, environmental attitude and environmentally conscious purchasing behaviour. These findings imply that Thai marketers may not necessarily need to differentiate by gender when promoting environmentally friendly products. A more important focus should be on showing the importance of these products and their potential to protect the environment regardless of the gender of the person making the purchase decision. Based on the literature review and the mixed findings of many studies, it can be concluded that gender -based investigation in environmental studies is still far from conclusive and warrant future study.

Limitations and Future Research

The results of the study must be used with caution as the sample is composed of only Gen Y respondents, the majority of whom live in Bangkok. Subsequent research should include a cross-section of the Thai population. As gender roles vary from society to society, examining differences in environmentally conscious purchasing behaviour in other regions, might fetch significantly different results. The current study did not focus on any specific products; future study is required to examine gender differences in purchasing behaviour for specific eco-friendly products. Finally, the choice of factors in the study may not be exhaustive. It would be pertinent to add additional variables such as price and product quality and study the impact of these on the purchasing behavior of male and female consumers in various age cohorts in Thailand.

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ENVIRONMENTAL CRISIS AND SUSTAINABLE DEVELOPMENT IN INDIA: SETTING PRIORITIES RIGHT

RASHMIMALA SAHU[1]

ABSTRACT

In the present century, environment degradation has become a global phenomenon posing a serious threat to human life on this beautiful planet. According to the World Commission on Environment and Development, the future is to face an ever increasing environmental decay, poverty, hardship and an impending ecological crisis. The human species has over the years, effectively destroyed environment and the resultant consequence is global warming and climate change. The last few decades have seen many treaties and conventions for the cause of global environmental protection and sustainable development. The whole world is a stakeholder and this raises issues on the role of both the developed and developing countries to set their priorities right and cooperate at the global level to find out viable solutions. Sustainable development offers the greatest promise and requires the greatest individual sacrifice. India as a leader of the developing countries needs to play a proactive role in constructing a global agreement on climate change and global warming and frame proper policies of environmental protection and sustainable development at the domestic level.

Keywords: Environment, Global Warming, Climate Change, Stakeholder, Sustainable Development

INTRODUCTION

Human beings, the most beautiful creation of God on earth, have been constantly using their brain to invent, discover and make technological advancements to make their life more comfortable. In this process, they have completely neglected and destroyed the role of other species in the environment and caused irreparable harm in many regions of the earth.

Environmental problems such as loss of biodiversity, land cover changes, and records of climatic change are assuming gigantic proportions and still there is no halt to activities which accelerate environmental crisis. As the world's population increases and the per capita consumption of natural resources rise, we are sure to witness more environmental problems. Environmental issues have become global issues affecting both the development and developing countries and hence there is a dire need to redress global environmental issues in the larger interest of humanity. What does India need to do? As leader of the NAM countries, Dutt Radar (2001) is of the opinion that India needs to play a key role in constructing a global agreement on climate change.

The Kyoto Protocol was signed and ratified by India in 2002.The Kyoto Protocol exempted developing states like India and China since these states did not cause much of the emission of greenhouse effect believed to be caused during the era of industrialization leading to climate change and global warming. At the G-8 Summit (2005), India clearly stated that the per capita emission rates of developing states were only a fraction of the contribution of the Northern world. On the basis of the principle of 'common but differentiated responsibility 'that was agreed upon at the Rio de Janeiro or Earth Summit (1992).Indian stand relies solely on

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historical responsibility as enshrined in U.N.Framework Convention on Climate Change (1992).India is already an active participant in a number of programmes. It has also formulated the National Action Plan on Climate Change. This Action Plan clearly demonstrates India's concerns and its strategy to meet the challenges of climate change and other environment related problems .In India, at all levels of education, provisions have been made to incorporate the knowledge of environment and its conservation. Programmes of environmental awareness have been launched through media. Many centers are providing special training for environmental management. India is an active member of International Organizations concerning environment. Several programmes are going under UNEP. The Government has recently started emphasizing the combined use of regulatory and economic instruments for improving environmental quality. There is a need for co-ordination between government agencies, NGO'S and the public for the proper management of environment quality and to achieve sustainable development in the country (Ramakrishna and Jayasheela, 2010).

The study is focused on the environmental issues that have become global issues affecting both the development and developing countries and the role India needs to play in constructing a global agreement on climate change and global warming at the International level and the pro active role India needs to play at the domestic level for combating environmental problems through its different policies relating to environment protection and sustainable development.

ENVIRONMENTAL POLICIES OF INDIA

At present, the US is the largest carbon dioxide producer in the world. However, studies show that China and India' emissions will surpass present US figures by 2035 respectively. It is in this context that India's response to environmental problems assumes importance. India has been very slow to respond to environmental problems. In the post Independence period, India gave priority to industrialization and hence due attention was not given to environmental rules and regulations. In the late 1960's, gradually there was an awareness regarding the environmental problems. Some of India's policy response to environment crisis was as follows:

1. India's first national laws on the environment was the Insecticides Act, enacted in 1968 for regulating the import, manufacture, sale, transport, distribution and use of insecticides with a view to prevent risks to human beings or animals.
2. India's first national effort to address environmental issues occurred in 1972,when a National Committee on Environmental Planning and Co-ordination was established following a report prepared for the United Nations Conference on the Human Environment in Stockholm. This committee was mandated to advise the government on environmental problems and assess the environmental consequences of large development projects.
3. India also enacted the Wild Life (Protection) Act in 1972 to provide for the protection of wild animals and birds with the strong support of the then Prime Minister Indira Gandhi. This Act provided for the constitution of a wild life advisory board for each state, regulating the hunting of wild animals and birds, specifying the procedures for declaring areas as sanctuaries and national parks and animal products.
4. India also enacted the Water Prevention and Control of Pollution Act of 1974 which marked an important milestone in environmental legislation in India as the first national law for pollution control. But unfortunately it required twelve years of political negotiations for the law to be enacted due to conflicts between the central and state government. In 1976, the Constitution of India was amended in ways that provided for the first time a strong constitutional basis for the protection of the environment and strengthened the power of the state and the judiciary to intervene in environmental matters. The 42nd Amendment created a fundamental duty of environmental protection for the state and for individual citizens. Article 48-A declared, "The State shall endeavour to protect and improve the environment

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and to safeguard the forests and wild life of the country."Article 51-A (g) stated, "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wild life and to have compassion for living creatures." (Gyanaranjan, 2011a, p. 425-426).

5. The Indian Constitution also provided certain immunities from judicial scrutiny for environmental laws. In addition, the Act transferred forests and protection of wild life from the state list to the concurrent list of the Constitution, thereby giving the central government the power to act directly and to legislate measures.
6. In 1980, the central government amended the Indian Forest Act of 1927 to prohibit the state governments from declaring any reserved forest as non-reserved without prior approval of the central authorities.
7. During the 1980's, the government promoted a program of social forestry, which sought to balance the goals of economic development and environmental protection, but the program produced only limited success.
8. During Mrs. Gandhi's regime, a separate Department of Environment was established on 1st November1980.The major functions of the Department were environmental appraisal of development projects, administrative support, pollution monitoring and conservation. In 1985, the department became a full-fledged Ministry of Environment and Forests.
9. The next major law, the Air (Prevention and Control of Pollution) Act of 1981, used an innovative legislative approach within the Indian constitutional context. The Parliament used a constitutional provision (Article 253) that allows the center to pass legislation in order to implement decisions made at international conferences; the central government subsequently used the same constitutional basis for enacting other environmental legislation.
10. A series of new environmental laws were enacted in the wake of the Bhopal accident. The first, the Environment (Protection) Act of 1986, incorporated several important innovations based on a government review of the weaknesses of previous environmental laws. The Act vested new powers to the central government in contrast to the decentralized approaches of the Water and Air Acts. In addition, the Act provides for legal action by individuals against firms and extended the regulatory structure to cover hazardous substances and their disposal.
11. Another post-Bhopal improvement in environmental policy was the Factories (Amendment) Act of 1987, which provided significantly better controls than the Indian Factories Act of 1948 over the use and handling of hazardous substances in the workplace.
12. Enactment of the Public Liability Insurance Act of 1991 helped another gap in India's regulatory structure revealed by the Bhopal accident. The Act seeks to provide public liability insurance for the purpose of immediate relief to persons affected by accidents occurring while handling hazardous substances.
13. In 1992, the Government of India made an environmental audit mandatory for all industries covered by the Water and Air Pollution Acts as well as those covered by the Hazardous Wastes Handling Act. Every industrial unit is required to submit an environment audit before 15th May every year. The new policy is known as Environment (Protection) Second Amendment Rules 1992.
14. A new Forest Policy was also implemented by the Government of India in 2002 for conservation of forests, wildlife and biodiversity of forest resources. (Gyanaranjan, 2011 b, p. 428-430)
15. The next was the Marine Fishing Policy 2004. The policy objectives are: (1) To augment marine fish production of the country up to the sustainable level in a responsible manner so as to boost export of sea food from the country and also to increase per capita fish protein

intake of the masses. (2) To ensure socio-economic security of the fishermen whose livelihood solely depends on this vocation (3) To ensure sustainable development of marine fisheries with due concern for ecological integrity and bio– diversity.

16. This was followed by the National Environment Policy, 2006 .The first initiative in strategy-formulation for environmental protection in a comprehensive manner. It undertakes a diagnosis of the causative factors of land degradation with a view to flagging the remedial measures required in this direction. It recognizes that the relevant fiscal, tariffs and sectoral policies need to take explicit account of their unintentional impacts on land degradation. The solutions offered to tackle the problem comprise: Adoption of both, science-based and traditional land-use practices, Pilot-scale demonstrations, Large scale dissemination, Adoption of Multi-stakeholder partnerships, Promotion of agro-forestry, Organic farming, Environmentally sustainable cropping patterns and adoption of efficient irrigation techniques17) In the XIth five year plan (Government of India, Planning Commission,2007-2012) the government's main objectives were: - Increase Forest and tree cover by 5 percentage points, attain WHO standards of air quality in all major cities by 2011-12, treat all urban waste water by 2011-12 to clean river waters and increase energy efficiency by 20 percentage points by 2016-17.

Other major plan and programmes of the government according to the Report of the Working Group on Rivers, Lakes and Aquifers in Environment and Forests for the Eleventh Five Year Plan (2007-2012, Government of India Planning Commission, New Delhi April, 2007) are:

NATIONAL LAKE CONSERVATION PLAN • Objectives of NLCP were: (1) Prevention of pollution from point sources by intercepting, diverting and treating the pollution loads entering the lake.(2) In situ measures of lake cleaning such as desilting, deweeding, bioremediation, and constructed wetland approach etc. depending upon the site conditions. (3) Catchment area treatment and lake front Eco-development which may include bunding, fencing, shore line development, creation of facilities for public recreation and entertainment (Children Park, boating etc.) and public area. (4) Public awareness and, public participation.

NATIONAL WETLAND CONSERVATION PROGRAMME • Objectives: (1)To lay down policy guidelines for implementing programs of conservation and management of wetlands, mangroves and coral reefs in the country.(2) To identify priority wetlands for intensive conservation, management and research, (3) To prepare an inventory of Indian wetlands, mangroves and coral reefs. (4) Conservation and protection of the wetlands, Mangrove Ecosystem from further degradation; (5) Afforestation of degraded wetlands, Mangrove and coral areas; Restoration of degraded coral reef areas; Maintenance of genetic diversity especially of the threatened and endemic species and creation of awareness for environment conservation.

NATIONAL RIVER CONSERVATION PROGRAMME • The important works being undertaken under NRCP include: • Core Schemes: (1) Interception and diversion works to capture the raw sewage flowing into the river through open drains and divert them for treatment. (2) Sewage treatment plants for treating the diverted sewage. • Non Core Schemes: (1) Low cost sanitation works to prevent open defecation on river banks. (2) Electric and improved wood based crematoria to conserve the use of wood and help in ensuring proper cremation of bodies brought to burning Ghats. (3) River front development works such as improvement of bathing Ghats etc.

The National Green Tribunal Act was passed in 2010 .Its Objectives according to the Report of the Working Group on Research, Education, Training, Capacity Building and Information Management for the Environment and Forest sector for the Eleventh Five Year Plan (2007-2012, Government of India Planning Commission New Delhi) are: (1) The effective and speedy disposal of the cases relating to environment protection and conservation of forests

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and other natural resources. All the previous pending cases will also be heard by the Tribunal. (2) It aims at enforcing all the legal rights relating to the environment. (3) It also accounts for providing compensation and relief to effected people for damage of property. Besides the above, other policies for instance, India's National Auto Fuel Policy makes use of clearer fuels for vehicles mandatory. The Energy Conservation Act (2001) outlines initiatives aimed at improving energy efficiency. Likewise, the Electricity Act (2003) enhances the use of renewable energy. Efforts by India to import natural gas and adoption of clean coal technologies clearly indicate India's seriousness in this regard. India has even launched a National Mission on use of bio-diesel as an alternative fuel. India has launched big programme of using renewable energy resources. (Verma, 2014, p.117) Former Prime Minister, Manmohan Singh also formulated the National Action Plan on Climate Change. The Plan focuses on eight missions, which would be pursued as key components of the strategy for sustainable development. These include missions on solar energy, enhanced energy efficiency, sustainable habitat, conserving water, sustaining the Himalayan ecosystem, creating a 'Green India' sustainable habitat, conserving water, sustaining the Himalayan ecosystem, finally, establishing a strategic knowledge platform for climate change. The action plan clearly demonstrates India's concerns and its strategy to meet the challenges of climate change and other environment related problems.

CHALLENGES

But the challenges in this field are numerous and varied in nature. Without clear priorities or criteria for setting priorities, policy makers have tended to address the easy problems first and to adopt an end of the pipe line approach to pollution control. For example mobile pollution sources are yet to be covered by regulations, although vehicles are a major source of air pollution in most metropolitan cities. No attention has been given to the transport of hazardous substances. Similarly, wastes from urban settlements and misuse of disposed wastes have escaped regulatory attention, despite their significant health consequences for large populations. Related problems of policy design include ambiguous and ill defined objectives, inappropriate measures to achieve the stated goals, lack of politically feasible approaches and no effort to estimate the costs of policy alternatives.

These problems in policy design result from inadequate legal expertise in environmental administration at the center reflecting problems in resource constraints and the nature of federalism ,and from symbolic politics that emphasizes policy as an instrument to appease certain interest groups rather than policy, which is designed for effective implementation. Secondly, India's lack of key regulatory principles is a major flaw in its policy design. India as argued by Smith (2000) lacks an environmental impact law that would require environmental clearance of new projects, and has not succeeded in imposing high costs for non compliance with the regulations.

India has adopted a command and control strategy for effluent control, with tough regulations that are not easily implemented. India's current policy does not include any mechanism to ensure that the pollution control equipment is operated regularly after installation. In the State Pollution Control Boards, the professional staff has little available time for policy analysis due to time-consuming litigation and related proceedings. Although the RTI is in operation, the provisions are restrictive and would not allow disclosure of information considered detrimental to the interests of the government. Another area of inadequate analysis is the lack of an appropriate policy for the multiple small scale sources of both industrial and household wastes. India's industrial structure includes many small firms, both physical space, and skills needed for designing pollution control systems. These multiple sources create high costs and difficulty in administering the environmental regulations.

Another major problem of non-point source pollution is household sewerage, which has not been addressed by current environment policy, and the magnitude of the problem is increasing because of growing population pressures in urban areas. It is imperative to note that India must explore some alternatives in the policy design so that we can minimize the environmental damages. In 1997, a review of the agreements at Earth Summit was done. One key finding of this review was the failure of developed states to transfer environment-friendly technology and new financial resources to developing nations on concessional terms. The Indian think-tank thinks it imperative for developed states to make these transfers to fulfill the spirit of UNFCC .India as leader of NAM also enjoins the NAM and SAARC states to voice a common concern on global environmental issues and make their impact felt at the global level..

The year 2015 marked the 70th anniversary of the UN. It was also the year when countries came together to adopt the next generation of goals for our people and their only home-the planet Earth.2015 also saw the hosting of a Financing for Development Conference in Addis Ababa and the Climate Conference in Paris.

On the next generation of Sustainable Development Goals, with a new time horizon, the new sustainable development goals will build on the MDGs, which covered poverty, gender equality, health, education and environmental sustainability but in a way deeper, more integrated and relevant to policy. They also include nine more goals to cover the broader scope of the sustainable development agenda, which includes more economic issues such as growth, employment, infrastructure and inequality, environmental concerns that include water, energy, terrestrial and marine ecosystems, and most importantly a goal with targets promising more peaceful, better governed and inclusive societies.

In shaping this agenda, governments have been joined by the voices of millions around the world including women, children and business and industry. The new goals will take us into the second quarter of the 21st century. As more and more of the world's population join the global middle class, demands on the environment and our natural resource base will grow. Already we are consuming each year one and a half times the earth's annual capacity to regenerate it.

If the earth's inhabitants are to be able to enjoy a decent standard of living, the wealthy will need to shift to more sustainable patterns of consumption, and producers everywhere will need to move to more sustainable patterns of production. Thus, the agenda and goals are universal. There is a need for strengthening global efforts in mitigating and adapting to climate change.

Many worry about the price tag of the transition to the bold new goals. But this agenda is not about aid and concessional flows to developing countries alone. It is more about the transformation in all societies and economies. Resources have to be raised and spent primarily in countries themselves. All the important economic actors-governments, the business sector, etc-have to be part of the accelerated impetus for sustainability. Sustainable Development offers the greatest promise, but it is also the approach that demands the greatest change in current socio-economic and cultural patterns and the greatest individual sacrifice. Success or failure in slowing and then reversing environmental deterioration will depend on society's willingness to face these challenges and accept the sacrifices or ignore them and suffer the consequences. India needs a global solution to climate change. We need to play a key role in constructing a global agreement on climate change. We need the Paris Agreement in 2015 to be successful (Pratiyogita Darpan, 2016, p. 109). While the government continues to stress on principles like common but differentiated responsibility, we have not made any progress to put forward solutions or engage with ideas on the table at these global negotiations. We keep reiterating the need for technology transfer but we do not have any technology needs assessment at a national or sub national level. We have so much academic rigour and expertise and yet we have not put forward any solution to address the issue of equity or the issue of

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global climate finance which key demands are made by India at these negotiations. We only talk about what India needs but have not really chartered a pathway on how India believes those needs could be me (Hindustan Times, 18th June, 2015).

CONCLUSION

The landmark report of the World Commission on Environment and Development, entitled "Our Common Future", warned that unless we change many of our lifestyle patterns, the world will face unacceptable levels of environmental damage and human suffering. The Commission, echoing the urgent need for tailoring the pace and the pattern of global economic growth to the planet's carrying capacity, said that: "Humanity has the ability to make development sustainable and to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs."In the context of India, the latest survey of National Geographic Magazine mentions that Indians are the most environment friendly people. But this puts an additional responsibility on Indians, that is, not only to protect, preserve and promote Indian cultural heritage and traditional knowledge, but also to lead the world in environmental conservation through sustainable development through the ages. As opined by Gyanaranjan (2011), India can lead the way to save the Earth by adopting the following social option:

- We should focus on decentralized and regional development that would minimize long distance transport of food articles, consumer goods, minerals and industrial items.
- Dwellings must be located close to the work place, minimizing daily commuting.
- Residences must be designed to be energy efficient, needing minimum or no energy for cooling or heating.
- Both inter-city and intra-city transport should to a large extent be in well designed mass transport system.
- More importantly, manufactured articles should have long life, not requiring frequent replacement due to planned obsolescence.
- Lastly, adoption of appropriate policy instruments and compensatory mechanisms would definitely yield the desired result (Agrawal, Shah and Shivangi, 2015, p.189).

It is high time for Indian policy makers to look at alternative development models which are morally just, economically viable, and environmentally sustainable. The environmental crisis is qualitatively a different challenge from what we have confronted in the bygone days. It calls for responses that lie outside traditional modes of thinking. We need to extend our sense of fairness and justice to all people and to future generations. Human civilization wants higher standards of living, but they also want clean water to drink, fresh air to breathe and a green earth to walk (G,Narottam and Sesanjali, 2014).We need institutions that reflect this new ethical understanding. We need individual change and collective political action. It is a global problem and only global co-operation, understanding and action can resolve it and pave the way for a better tomorrow.

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ROLES OF URBAN PERIODIC MARKETS IN RELATION TO DRIVE LOCAL ECONOMY: A CASE STUDY OF MERCHANTS' PERSPECTIVE IN BANGKOK METROPOLIS

PAKORN MEKSANGSOUY[1]

ABSTRACT

This research aims to reveal how periodic markets in the Bangkok Metropolis promote the local economy as well as local entrepreneurs. The periodic market at Srinakharinwirot University (SWU) on Asokemontri Road, located in a Central Business District (CBD) in Bangkok, was chosen as a case study. Questionnaire administration was the main technique in this research. The questionnaire was conducted by a face-to-face interview with 250 respondents, who were running their business at the SWU periodic market. Results from this research can be discussed in three aspects. First, the operational pattern in the SWU periodic market brings about economic benefits not only for the merchants, but also for those working as store assistants or laborers in the market. Second, the key success for an urban periodic market is a good location. The good location of a market place draws a great number of consumers. As a result, a lot of entrepreneurs desire to run their businesses in the market as well. Third, the impact of the periodic market is discussed in this research in order to seek a plan to solve problems that stemmed from the market

Key Words: Periodic Market, Local Economy, Local Entrepreneurs, Bangkok Metropolis.

INTRODUCTION

Retailing is an economic activity that has emerged in human society since the post-industrial revolution era. This tertiary activity has gradually become one of the important activities that drive economy and society. In terms of space, this activity is normally seen in markets in an urban area. The market is the place where goods and services are bought and sold; this includes any convenient arrangement whereby people can buy and sell goods, services, and factors of production and is therefore not a particular site (Mayhew, 2004). However, retailing can be classified in many ways such as traditional retailing and modern retailing, or the informal retail sector and the formal retail sector.

Based on the International Labor Organization (ILO), three types of informal retailing can be identified: (i) "owner-employers of micro-enterprises", (ii) "own-account workers", and (iii) "paid or unpaid family workers" (Warunsiri, 2011). Chalamwong and Meepien (2013, p. 9) address the role of informal retailing in Thailand, saying that "the informal sector in Thailand is very dynamic; many new jobs are created and the distribution of this sector is also very high compared with other sectors. The view of many studies is that this sector plays a very important role in Thai society". In addition, Bangkok is the capital city as well as the major economic venue of Thailand. Due to its large number of population, Bangkok is a major venue for retail businessesin both the formal and informal sectors. Thus, this study aims to reveal how periodic markets in the Bangkok Metropolis promote the local economy as well as local entrepreneurs.

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LITERATURE REVIEW

Retail geography is a major field that studies an interaction of retail activities in a particular area. Wrigley (2009) explains that retail geography focuses on two aspects. First, the 'Orthodox' study approach focuses on the interrelations between the spatial patterns of retail location and organization on the one hand and the geography of consumer behavior on the other. Second, the new retail geography, which is characterized by theoretical engagement and by the appreciation that the transformation of retail capital and of its production and consumption spaces, offers some of the most fascinating and challenging areas of study in contemporary human geography. The two study approaches have different orientations. The former approach is interested in the dynamics of retail activity in each area, which might represent an interaction between retail activities and consumers. The dynamics of an urban growth phenomenon (particularly in Bangkok metropolis) brings about changes in retail activities within the capital city.

The periodic market is one of the informal trading patterns usually seen in developing countries. Wheeler et al. (1998) describe the periodic market as very commonly found in many traditional societies. The term 'periodic market' comes from the periodical movement from one place to another, to serve low-mobility and low-density consumers. In Thailand, Chaiboon (2006) explains the development of periodic markets, saying that the markets have existed in Thai communities for decades. A periodic market can be set up on a certain date and time by individual communities. Thus, the consumers in each area will have known the operational date and time of their local periodic market. The government officially initiated the first periodic market at Sanam Luang (the Royal Field) in 1948 in order to promote the local economy. However, the location has been moved to the 'Chatuchak Periodic Market' since 1982. For seven decades, the periodic market has become part of the market patterns for Thai society. In addition, Chavanavesskul (1997) explains that periodic markets in urban and suburban Bangkok are generally located in a highly populated area. Population density is inversely proportional to the distance from the market centre. In addition, the role of periodic markets in Bangkok was to fulfill the gap of market service areas. Periodic markets might develop into permanent markets in time.

It can be seen that the periodic markets in Bangkok have been evolved over time. Since the Economic Crisis in 1997, periodic markets have been more often considered as a shopping destination for low-order goods categories such as food, household products, as well as basic need products (e.g. clothes). Chaiboon (2006) notes that periodic markets have been increasing in Bangkok's CBD in order to serve 'white collar' consumers.

RESEARCH METHODOLOGY

The periodic market at Srinakharinwirot University (SWU) on Asokemontri Road, located in Bangkok's CBD, was chosen as a case study. This research applied a questionnaire as the main research tool. The main aim of the questionnaire design was to understand merchants' behaviors and attitudes towards doing business in the urban periodic market. The questionnaire consists of three sections.

The first part involves demographic data. This section was designed to understand demographic characteristics of local entrepreneurs in an urban periodic market.

The second part relates to operational characteristics in an urban periodic market. This section explains operation patterns of merchants in the urban periodic market such as distribution of merchants' journey from their place of residence to the periodic market, mode of transportation, average journey time, type of selling products and operational costs in the periodic market.

The third part deals with merchants' attitudes towards an urban periodic market. It consists of three major factors: location and physical characters, the urban periodic market management, and roles of the urban periodic market towards urban lifestyles.

This research selected the Srinakharinwirot University (SWU) periodic market as a case study. The SWU periodic market can represent an urban periodic market in three aspects. First, the market is located in one of Bangkok's central business districts, where habitants of the area are office workers, university students and staff, as well as expats. Second, the market operates at a certain time of week: every Tuesday and Thursday in the morning until afternoon. Third, the market is well-known for consumers in terms of the variety of products and the large service area.

The questionnaire was administered to 250 respondents, who were operating their businesses in the SWU periodic market. A face-to-face interview was applied to all merchants in the SWU periodic market on the survey date. Then, the questionnaire was decoded by using the SPSS programme. The statistical data from the programme were interpreted in three sections according to the questionnaire. The first section and second section were interpreted by using a prominent percentage of each variable. The third section, which relates to merchants' attitudes, was categorised by level of attitude. Then, the discussion and conclusions were made.

RESULTS

1. Characteristics of the SWU periodic market and its merchants

1.1 Process of Merchant Selection

Meksangsouy (2016) explains the process of merchant selection at the SWU periodic market as having six steps (as seen in Fig.1). It shows that the urban periodic market has a systematic procedure for merchant selection in order to be fair to all applicants wanting to operate business in the market place. All selected merchants have the right to do business on certain days for one year. At the end of contract, the process will repeat.

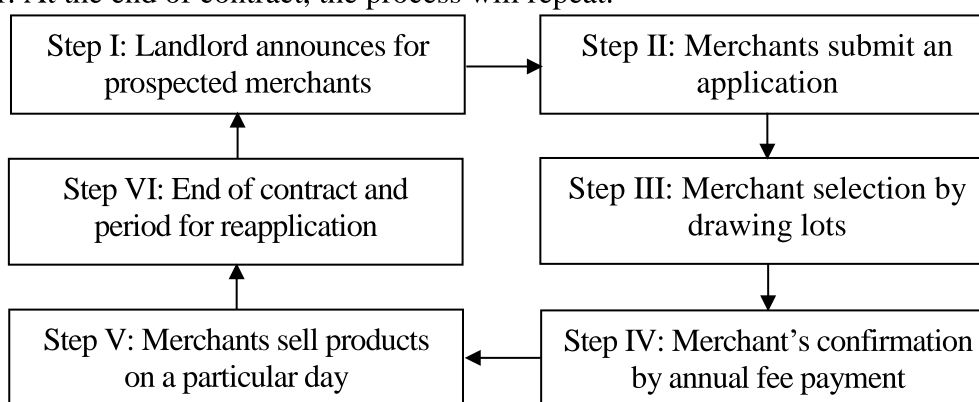


Figure 1: Process of merchant selection in the SWU periodic market.

Source: Meksangsouy (2016)

The number of shops and types of selling products in the SWU periodic market are determined by the SWU regulation for periodic markets, which is operated by the SWU properties management division. The SWU periodic market operates every Tuesday and Thursday from 6 o'clock to 15 o'clock. The market consists of 250 shops (Table 1).

Table 1: Types of goods and products in a periodic market at SWU

Categories	Number of Shop	Percent
Miscellaneous	81	32.40
Cloths	76	30.40
Food	76	30.40
Fruits	15	6.00
Tree plant	2	0.80
Total	**250**	**100.00**

Meksangsouy (2016) discusses that the periodic market sells products in a wide range from low-order goods (e.g. food, fruits) to medium-order goods (e.g. clothes, body care products, household products).

1.2 Merchants' Characteristics at the SWU Periodic Market.

As can be seen from the survey (Table 2), it is found that the majority of merchants at the SWU periodic market are women (68 percent). About one-third of all merchants are between 41-50 years old. 63.90 percent of all respondents are married. Almost 30 percent of all merchants hold a Bachelor's degree. About 70 percent of all merchants have a single family and 37.90 percent of all merchants have family members of between 4-5 people. In addition, the survey shows that 78.70 percent of all respondents live in house/townhouse, while almost three-fourth of all respondents (73.40 percent) live in their own house.

Table 2: Prominent demographic characteristics of respondents in the periodic market at SWU.

(N=250)

Demographic Characteristics		Percentage
▪ **Gender**	Female	68.00
▪ **Age**	41-50	32.00
▪ **Marital status**	Married	63.90
▪ **Educational level**	Bachelor's Degree	29.60
▪ **Family type**	Single family	70.40
▪ **Family members**	4-5 people	37.90
▪ **Type of accommodation**	House/Townhouse	78.70
▪ **House ownership**	Own house	73.40
▪ **Average monthly income**	More than THB 45,001	32.50
▪ **Proportion of Income Derived**	30-50%	34.70
from the SWU Periodic market	More than 50%	29.20

The economic aspect shows that about one-third of all merchants have an average monthly income greater than Thai Baht 45,001 (about GBP 1,000). In addition, it is found that almost 30 percent of all the respondents acquire half of their average monthly income or above from doing business in the SWU periodic market, while another one-third of respondents receive between 30-50 percent of their average monthly income from the market. It can be then said that the SWU periodic market supports local entrepreneurs.

2. Merchants' Operational Patterns at the SWU Periodic Market.

2.1 Operational Patterns at the SWU Periodic Market

Figure 2A represents staff who are involved in the businesses in the SWU periodic market. It shows that the SWU periodic market involves many people. About two-third of all merchants have assistants to help them to operate their business. Half of the merchants need 1 person to assist, and 41 percent need two staff to run business (Figure 2B). However, it is found that

about half of the store assistants in the SWU periodic are the merchants' family members, about a quarter of all merchants (23 percent) are relatives, and the rest are employees (Figure 2C). These figures show that the periodic market brings about economic benefits not only to the merchants, but to the other relevant people in the business.

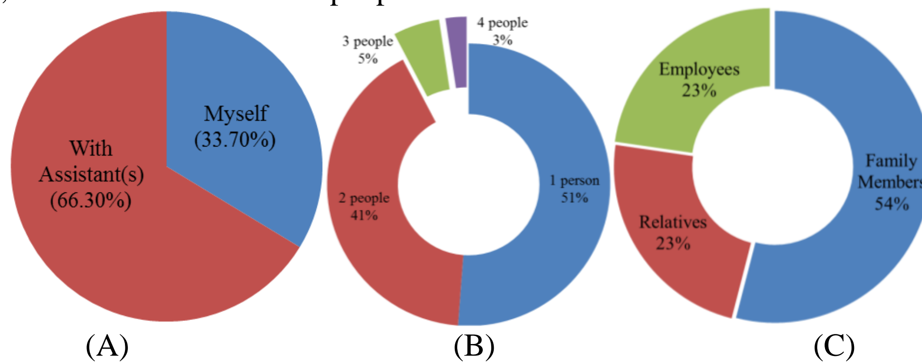


Figure 2: Merchants' operational patterns

In terms of the merchants' experience in operating business in urban periodic markets, it is found that the periodic market is the place for both new and experienced entrepreneurs. Figure 3 presents that more than half of the merchants in the SWU periodic market (58.60%) are new entrepreneurs, who have less than 5 years of experience, whereas about a quarter of them have been operating business in the market between 5-10 years. The experienced merchants at the SWU market are at 13.50 percent. It can be inferred that the SWU periodic market apply an 'open door' policy for all merchants.

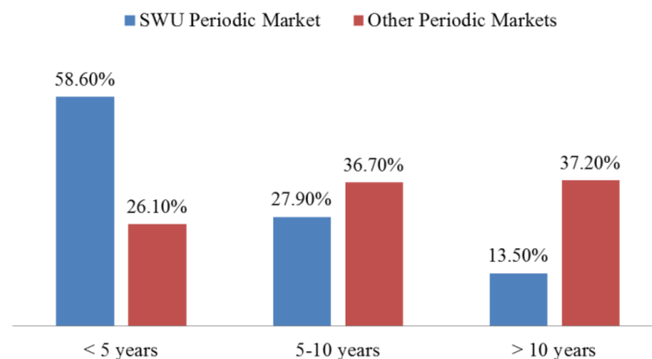


Figure 3: Merchants' experience in operation in the SWU periodic market and other periodic markets.

Furthermore, the landlord has set an operation time for the periodic market from 6 o'clock to15 o'clock. However, from the survey it is found selling products at the SWU market consists of 2 periods of primetime. The first primetime is indicated by the merchants at 8-9 o'clock in the morning (about 50 percent), while the second primetime is at 12-13 o'clock in the afternoon (57.40 percent). These two primetime periods should represent meal times of consumers, who are office employees, university staff and students, and dwellers from neighboring areas.

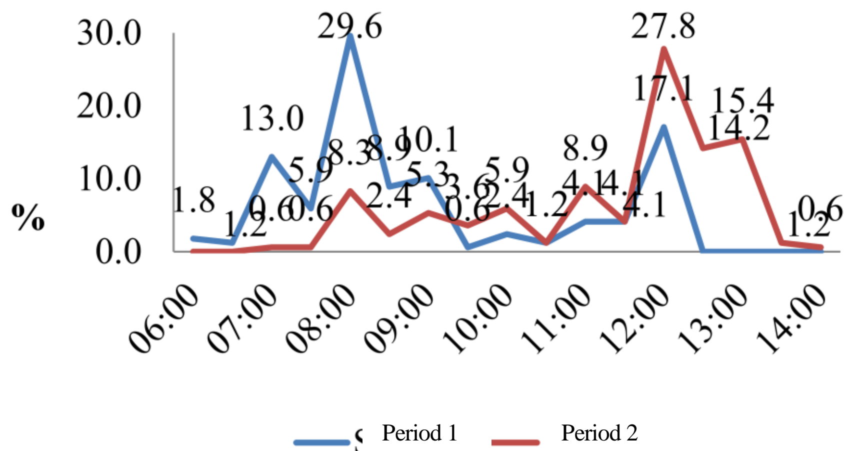


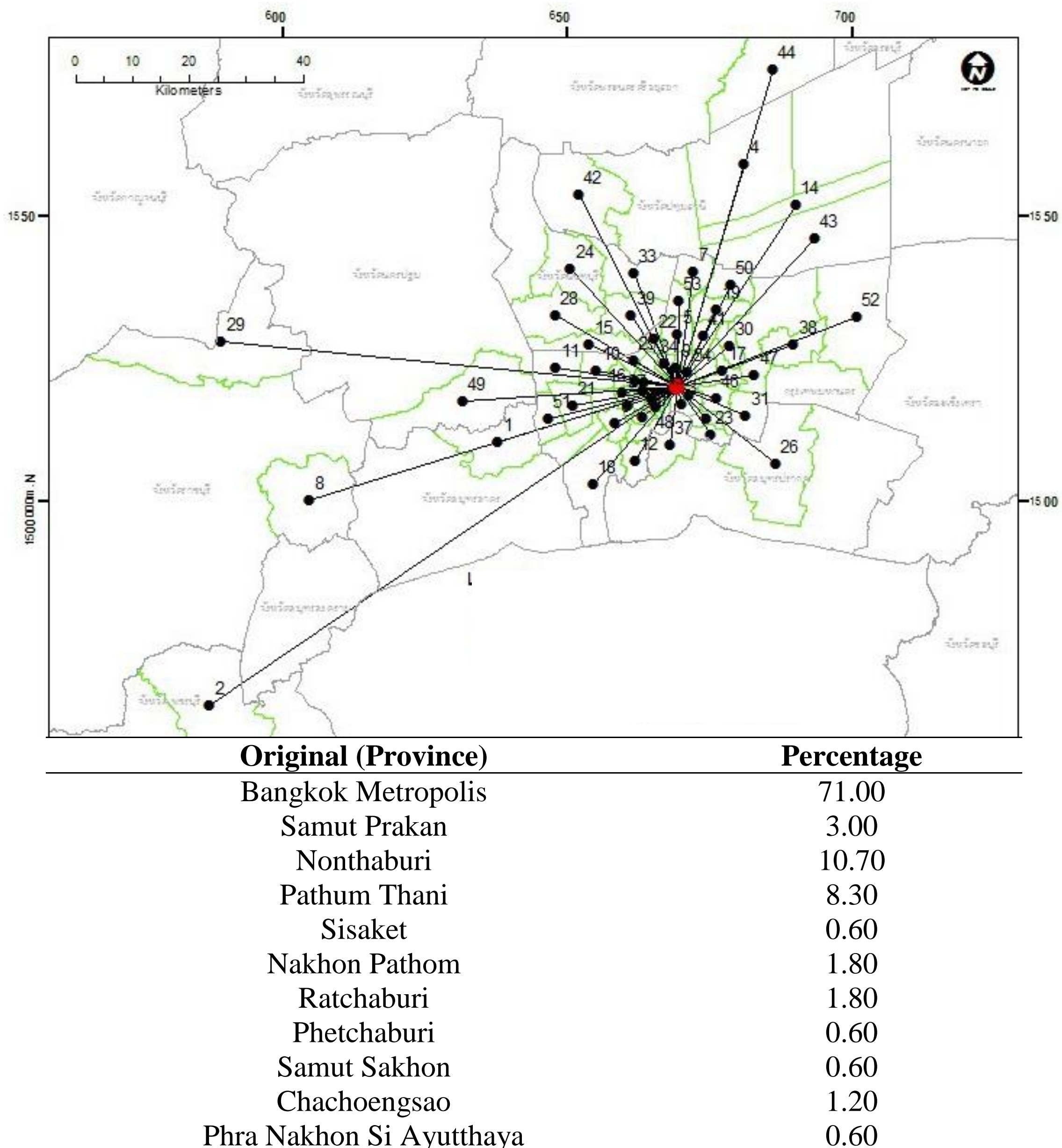
Figure 4: Primetime for selling goods at the SWU periodic market.

2.2 Merchants' Journey Pattern

As can be seen from Table 3 and Figure 5, it has been found that most of the respondents (93 percent) travel from somewhere in Bangkok Metropolis and the vicinity (Samut Prakan, Nonthaburi, and Prathum Thani) to the SWU periodic market. The maximum distance travelled to the market is 99.22 kilometers and the minimum distance is 2.48 kilometers. An average distance of merchants travelling to the SWU periodic market is 20.43 kilometers. These journey patterns show the urban periodic market's attraction to the merchants. Even though some of the merchants have to travel almost 100 kilometers for only an9-hour business operation at the market, they are still willing to do so.

Table 3: Merchants' travel distance between original and the SWU market.

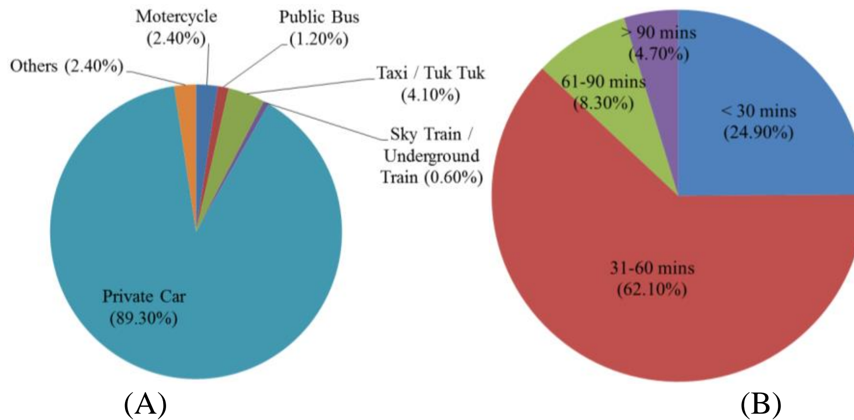
Distance	Euclidean Distance (km.)
Maximum distance (Khao Yoi District, Phetchaburi Province)	99.22
Minimum distance (Wattana district, Bangkok Metropolis)	2.48
Average distance	20.43



Original (Province)	Percentage
Bangkok Metropolis	71.00
Samut Prakan	3.00
Nonthaburi	10.70
Pathum Thani	8.30
Sisaket	0.60
Nakhon Pathom	1.80
Ratchaburi	1.80
Phetchaburi	0.60
Samut Sakhon	0.60
Chachoengsao	1.20
Phra Nakhon Si Ayutthaya	0.60

Figure 5: Breakdown of a distribution of merchants' journey between origins and the SWU periodic market.

For the transportation mode and journey time to the SWU periodic market, it is found that almost 90% of merchants at the market rely on a private car for travelling to the market (Figure 6A). A 61.20 percent of merchants spent between 31-60 minutes travelling to the market, while a quarter of them spent less than 30 minutes travelling to the market (Figure 6B). From the fieldwork it was found that most of the merchants choose to travel to the market by car because they need to carry all of their selling goods to the market. The market also provides rented parking space on the day they operate their business. In addition, about three-fourths of all the merchants spent less than an hour travelling to the market because they have to set up shops in the early morning (before 6 o'clock) in order to get ready to operate shops around 6-7 o'clock in the morning. The journey time to the market is not yet an rush hour in Bangkok.

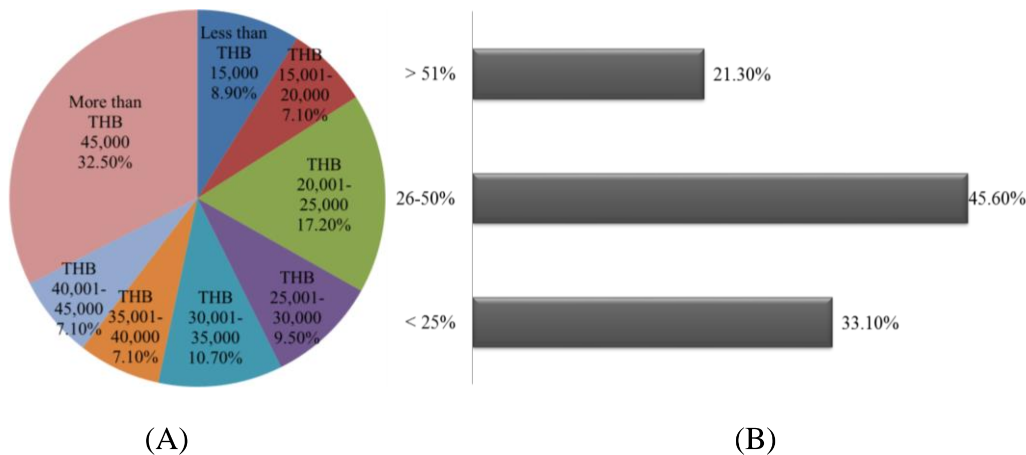


(A) (B)

Figure 6: (A) Mode of transportation, and (B) Journey time between origin and the SWU periodic market

2.3 Merchants' Income

According to the survey, it is found that almost one-third of all the respondents received a revenue of more than 45,000 Thai Baht per month from business operation in periodic markets.About a quarter of them have got a monthly income between 30,000 and 45,000 Thai Baht (Figure 7A). In addition, the survey also shows that 21.30 percent of merchants from the SWU periodic market have got more than 51 percent of their revenues from the SWU periodic market, while 45.60 percent of them have got between 26-50 percent of their income from the SWU periodic market. The remainder have obtained less than 25 percent of their income from the SWU periodic market (Figure 7B).



(A) (B)

Figure 7: (A) Merchants' monthly income from selling products in periodic markets, which (B) income proportion derived from the SWU periodic market.

From these figures can discuss that periodic markets are the place to drive local economy in terms of support merchants to have a place for doing business. However, from the fieldwork also found that the periodic market supports local economy not only for the merchants in the market, but also for the laborers and related staff. For instance, a merchant will pay about THB 800-900 every business day. This economic distribution will go to the landlord, laborers, and related staff (Table 4). As seen from Figure 8, labors who work to set up and clear out the market place, courier merchants' products from the market to the loading area, and the cleaning staff, have got paid from the merchants every operation day.

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Table 4: Sample of an economic distribution per operation day at the SWU periodic market.

Lists	Amount (Thai Bath)	Receivers
Annual administration fee	7,500	landlord
Shop rent fee	500	landlord
Dairy parking fee	100	landlord
Stall (Tent) assembly fee	120-140	labors
Courier's fee	Depend on agreement but in average about THB 100	labors

Figure 8: Laborers and related staff having economic benefits from the periodic markets.

3. Merchants' Attitude towards Store Operations at the SWU Periodic Market.

This research discusses the merchants' attitude towards store operation at the SWU periodic market in 3 topics: location and physical characteristics; market administration; and attitude of the urban periodic market towards urban lifestyle.

3.1 The Attitude towards the Market's Location and Its Physical Characteristics

Table 5 presents the merchants' attitudes towards the market's location and its physical characteristic factors. Overall, it is found that this aspect is ranked the highest ($\bar{x}$ = 4.05). According to the survey, it can be inferred that the location is a key success factor for operating business at the periodic market. Results from the survey show that good location for customers to do shopping is placed highest ($\bar{x}$ = 4.30) of all kinds, followed by good location as place of high purchasing power consumers ($\bar{x}$ = 4.24), easy to access for customers to buy products in the market ($\bar{x}$ = 4.20), and easy to access for business operation ($\bar{x}$ = 4.08).

Table 5: Merchants' attitude towards the location of the SWU periodic market and its physical characteristics.

Variables	$\bar{x}$	S.D.	Level of Attitude
Location and Physical Characteristic Factor	**4.05**	**0.79**	**high**
▪ Easy to access for business operation	4.08	0.76	high
▪ Easy to access for customers to buy products in the market	4.20	0.71	high
▪ Good location for customers to do shopping	4.30	0.65	highest
▪ Good location as place of high purchasing power consumers	4.24	0.74	highest

3.2 The Attitude towards the Market Administration

Table 6 shows merchants' attitude towards an administration of the SWU periodic market. It is found that this variable is taken into account by respondents at a high level ($\bar{x}$ = 3.83). This aspect shows that administration and management within the market are taken into account by merchants to select the market place for their business. From the survey it is found that suitable of business time operation factor is placed at the highest level ($\bar{x}$ = 4.07) from this category. The second is suitable of store's size and its construction ($\bar{x}$ = 4.06), and well-organised shops according to product category ($\bar{x}$ = 4.01) is at the third place. Because of the prime location of the SWU periodic market as well as the long experience of market's administration of the landlord, the SWU market is quite successful in its space management, particularly in the physical aspect.

Table 6: Merchants' attitudes towards the administration of the SWU periodic market.

Variables	$\bar{x}$	S.D.	Level of Attitude
Market Administration Factor	**3.83**	**0.75**	**high**
▪ Fair regulations from the tenant for all merchants	3.83	0.74	high
▪ Suitable of business time operation	4.07	0.71	high
▪ Fair system for store's selection	3.92	0.95	high
▪ Suitable of rent fee	3.79	0.82	high
▪ Well-organised shops according to product category	4.01	0.74	high
▪ Suitable of store's size and its construction	4.06	0.67	high
▪ Suitable of loading area	3.76	0.94	high
▪ Good management of properties security scheme	3.82	0.90	high

However, from the survey it is also found the bottom three attitudes towards this category are: suitable of loading area ($\bar{x}$ = 3.76), suitable of rent fee ($\bar{x}$ = 3.79), and good management of properties security scheme ($\bar{x}$ = 3.82). These factors show that the SWU periodic market is located in a prime location, which is surrounded by office buildings and residential buildings. Thus, the SWU periodic market has a higher rent fee than the other periodic markets in the same area. In addition, it is found that all merchants in the SWU periodic market commence and finish at the same time. Thus, the parking spaces for off-loading and loading areas cannot accommodate all the merchants. Last, the SWU market serves a lot of customers in the area, particularly in the morning time and lunch time (as discuss in topic 2.1 above). Therefore, a lot of consumers in the market sometime bring about security problems (particularly pickpocketing).

3.3 Attitudes towards the Periodic Market in Relation to Urban Lifestyle.

Table 7 presents the merchants' attitudes towards the periodic market in relation to urban lifestyle. It shows that this aspect is considered at a high level ($\bar{x}$ = 3.49). Taking the role of the periodic market in relation to urban lifestyle into account, the result shows that the respondents from the SWU periodic market strongly agree with this aspect. Two variables from this aspect have been addressed from respondents at the highest level. They are "the periodic market supports lively community in the area" ($\bar{x}$ = 4.24) and "the periodic market become a major market place for local" ($\bar{x}$ = 4.22). In addition, the respondents also state advantages of the periodic market as high level in many aspects as follows: the periodic markets help consumers to have more alternative shopping places ($\bar{x}$ = 4.18), periodic markets lifts up your quality of life as well as support local economy ($\bar{x}$ = 4.09), periodic markets bring about an increase in job positions ($\bar{x}$ = 4.04). Therefore, these variables support the important role of the urban periodic market in relation to urban lifestyle as well as driving local economy.

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Table 7: Merchants' attitude towards the SWU periodic market in relation to urban lifestyle.

Variables	$\bar{x}$	S.D.	Level of Attitude
Attitude of the Urban Periodic Market towards Urban Lifestyle	**3.49**	**0.71**	**high**
▪ Periodic markets lifts up your quality of life as well as support local economy	4.09	0.71	high
▪ Periodic markets bring about an increase in job positions (e.g. laborers)	4.04	0.70	high
▪ Periodic markets help consumers to have more alternative shopping places	4.18	0.59	high
▪ Periodic markets become a major market place for local	4.22	0.67	highest
▪ Periodic markets support lively community in the area	4.24	0.73	highest
▪ Periodic market cause chaos to the surrounding area	3.11	1.16	moderate
▪ Periodic markets result in traffic problem to the area	3.05	1.15	moderate
▪ Periodic markets cause waste problem in the area	2.82	1.21	moderate
▪ Periodic markets result in an increasing of road accidents	2.62	1.21	moderate
▪ Periodic markets deliver criminal problems (e.g. pickpocket, snatch thief) to the area	2.71	1.21	moderate

CONCLUSION AND DISCUSSION

This research shows the important role of a periodic market in an urban area in relation to local economy in three aspects as follows:

The first is benefits of periodic markets in urban areas. Periodic markets in Bangkok bring about advantages not only to local entrepreneurs, but also to staff and laborers who are related to the market operation. The results show that the merchants are willing to pay a higher rate of administration fee in order to sell products in the SWU periodic market in view of the high purchasing power consumers in the area. The administration fees are circulated to the other sectors such as laborers and related staff. In addition, urban periodic markets bring about vibrant dynamics in the market centre as well as the surrounding areas. People from surrounding areas come to the market not only for shopping, but also to relax from their routine work or dairy life (Soontharotoke, 2006; Marasu and Badenoch, 2013; Meksangsouy, 2016).

Second, location is also a success key. Section 3.1 shows that merchants in the SWU periodic market have a strong agreement with the location variable. It is found that this market is located in a prime location, which gathers a lot of consumers from various groups such as students and university staff, students' parents, housemaids and white-collar workers from the surrounding areas. According to the survey, some merchants point out that even though the SWU periodic market has a higher fixed payment rate (as seen from Table 4) than the other periodic markets in Bangkok, merchants are still willing to operate their businesses in this market due to the prime location, attraction to consumers, and various consumer classes. At the same time, Meksangsouy (2016) reports that consumers go shopping in the periodic market because of good location and easy access. Therefore, this research shows that good location is the key success factor for the periodic market.

The third is the impact of periodic markets on the area and society. The impact can be discussed in two aspects; positive and negative. The former involves driving local economy and changing spatial functions. Merchants' attitudes from the survey show that the periodic market lifts up their quality of life and supports local economy. Thus, the periodic market has a role in driving local economy. According to Warunsiri (2011); Chalamwong and Meepien (2013), the informal sector has played a significant role in supporting Thai labor market. In

addition, it is found that the spatial function benefits the periodic market in order to maximize profits from the area. Moreover, periodic markets also have a function as relaxing and consuming space for the public (Soontharotoke, 2006; Meksangsouy, 2016). On the other hand, the periodic markets may cause some problems to the area (e.g. traffic congestion, pickpocketing, an increase in solid waste). From the fieldwork, some of merchants in the market pointed out that they had heard about the pickpocket problem in the market, particularly at the midday period, when the market is crowded with consumers. After the market operation, solid waste (e.g. plastic bags, food containers) can be found throughout the area. Thus, the market administrators have to take these problems into account and sort out solutions to reduce the problems. For example, they may increase more security staff to patrol throughout the market at a peak time or promote a 'green shopper scheme' in order to reduce solid waste.

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RETAILER'S PERCEPTION ABOUT NON-CARBONATED DRINKS IN SELECTED CITIES OF GUJARAT

CHINTAN KOTHARI[1]

ABSTRACT

This research attempts to understand the perception of retailers on nine brands of selected Non-carbonated drinks in 3 cities of Gujarat; Ahmedabad, Surat, and Baroda. , the Primary survey was conducted on 210 retailers. The study listed the details of packaging, pricing point of different brands, retailer benefits, and available schemes. The research also depicts the product choice of consumers by demographic and geographic location. The conclusion derived is that in different cities of Gujarat people prefer different drinks due to the availability, pricing factor, and schemes provided.

Key Words- Retailers, Pricing point, Gujarat, Schemes

INTRODUCTION

The food and beverage sub-segment is the fourth largest sector of the Indian economy with an approximate size of 500 billion rupees. The average size of the beverage market in India is approximately 14000 crore (in rupees) with a growing rate of 30% per Annum. The beverage market in India is bifurcated into two segments the alcoholic and the non-alcoholic segment. The further segmentation of non-alcoholic beverages in the country comes out to be of carbonated and non-carbonated drinks. Non-Carbonated drinks are beverages that do not have added carbon dioxide dissolved in them. For instance milk, spirits, wine, spring water and fresh juice are non-carbonated drinks. Within the Non-carbonated segment, the category of the fruit-based beverages is one of the fastest-growing categories. It has grown at a CAGR of over 30 percent over the past decade. The market of packaged fruit juices can be further divided into three sub-categories: fruit drinks, juices, and nectar drinks. The category of fruit drinks, which have a maximum of 30 percent fruit content, is the highest-selling category, with a 60 percent share of the market. Frooti and Maaza are two of the most popular products in this category. Fruit juices, on the other hand, are composed of 100 percent fruit content and claim a 30 percent market share at present. The category of nectar drinks have a fruit content between 25 and 90 percent but account for only 10 percent of the market. The market leader in the Indian market of packaged juices is Dabur with two of its brands Real and Real Activ accounting for the highest market share i.e. 55 percent. Dabur's primary competitor is Pepsico, with a market share of 30 percent. Some of the other famous brands catering to the same segment in the country are Real, Tropicana, Frooti, Maaza, Patanjali, Paperboat, Yoga pulp and B-natural. These brands, however, have a relatively lower market share.

LITERATURE REVIEW

Existing theories state that an increased focus on "Health and Wellness" has already shaped general consumption habits across food and beverage categories and this emphasis will continue to have a significant impact on non-carbonated beverage trends.

Besides, sources suggest that Smart consumerism has also imparted profound implications on the growth of this trend. Smart Consumers are consumers who are informed buyers and who demand high levels of transparency in labeling and ingredients used. Brands

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that meet the expectations of such customers while also providing a great tasting yet functional product have a tremendous opportunity to take share and gain consumer loyalty.

Also, the increase in the millennial consumers (consumers who have a high digital and social presence) in the country has contributed towards the growth of the category. Since these consumers are constantly bombarded with facts and suggestions, they are inclining towards healthier soft drink alternatives.

Studies suggest that In the decade leading up to 2013, US per capita consumption, based on "consumer need states" of CSDs and traditional fruit juices (referred to as "Refreshment" in the chart below) decreased 2.3% annually. Alternatively, per capita consumption in the Hydration category grew at an annual rate of 2.9% during the same decade. In particular, plant-based products like coconut water along with alternative beverages such as kombucha and tea-based drinks are experiencing tremendous growth. Also, several new emerging categories are gaining traction including plant-based waters such as maple, aloe and cactus water.(FBG_Non-Alc-White-Paper_March-2015.pdf)

Noe (2000) says that the purpose of this paper is the study of factors responsible for brand preference in FMCG products, increasing competition, more due to globalization, is motivating many companies to base their strategies almost entirely on building brands. Brand preference means to compare the different brands and opt for the most preferred brand. This brand preference is influenced by various factors. In the identification of factors affecting the brand preference, it was concluded that brand persona is the most effective factor that affects the brand preference. This brand person a deals with the personality aspects or the external attributes of the brand, thus it can be said that consumer prefers any brand by looking at the external attributes of a brand.

Reddy Yella D and Ramesh A (2007) argues that with the rising popularity of packaged fruit drinks, the cola wars might extend beyond the traditional boundaries as they face fierce competition from the former. India is the second largest producer of fruits and vegetables in the world. There is enormous potential to be tapped which will also be advantageous for both domestic and export markets. The youth market and the middle class provide exciting opportunities for market penetration and development. It becomes imperative to examine the attitude towards packaged fruit drinks, as attitude influences buying behavior. The study identifies the key factors that reflect attitude using factor analysis and examines their managerial implications. The four factors identified through factor analysis provide an insight into the attitude towards PFDs which influences consumption. Consumers give importance to taste and benefits (health/nutrition). Therefore, marketers need to highlight these in advertisements using a mix of emotional and rational appeal. There is a need to increase promotional efforts to increase consumption and for market penetration and development. Usage occasion has to be increased. There is no individual inhibition for the consumers to drink PFDs, which indicates acceptance and popularity in the chosen segment.

OBJECTIVE

To understand the perception of retailers on Non-carbonated drinks in the Indian market.
Non-carbonated drink preference of consumers and the reason behind the same.

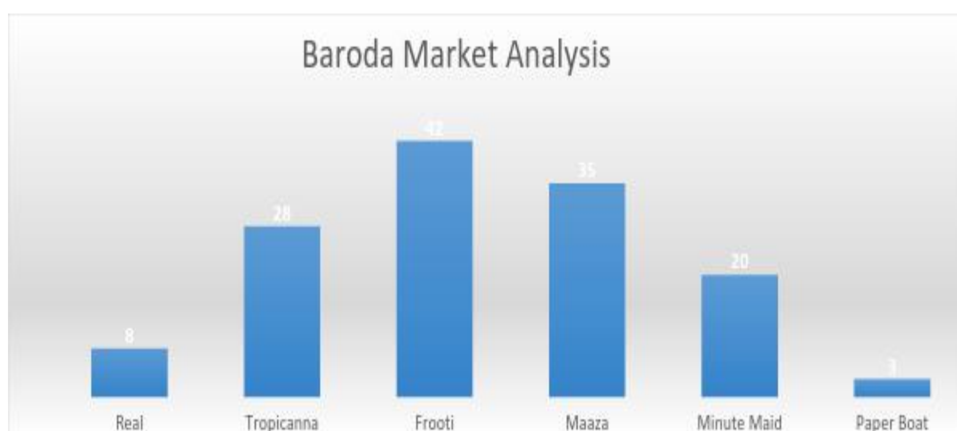
RESEARCH METHOD

A Questionnaire-based sample survey was conducted on retailers to understand their perception on non-carbonated drinks in three different cities of Gujarat. This study was conducted by personally visiting the retailer's place and asking the person in charge various questions regarding the same. The questionnaire comprised of different issues which covered all the aspects of the market analysis including the availability of non-carbonated beverages like which non-carbonated brand they have in their shop. In which quantity were the drinks

available? Which brand drinks were sold the most? Which category of people would buy the drink? Which was the best selling flavor. The survey was conducted keeping in mind the interest of the retailers. The study also included the details of the schemes provided by suppliers, the profit margin set by retailers and the discounts and schemes given to the consumer. Also the questionnaire covered minute details of the preference of non-carbonated drinks by different age groups.

DATA COLLECTION AND ANALYSIS

The research was conducted on a total of 210 shops, in three different cities of Gujarat namely Ahmedabad, Baroda and Surat. Among the shop owners, 91% were males, and 9% were females. Most of the businesses were privately owned and were operated on a small scale, so the market is restricted to the local area. Out of the total survey conducted on 210 retail shops 21% stores were located in Baroda, 50% in Ahmedabad and 29% in Surat. The detailed market analysis of all the three cities is described below.



Total Number of Shops 45

Firstly the survey was done in Baroda in which 45 shops were taken, and the question asked to the retailers was about the product range that they maintained in their inventory of noncarbonated drinks. The question was asked regarding which company they dealt with and what the products of that company were. The retailers were also enquired about the different quantity packing of the product and their respective maximum retail price. The survey of Baroda city is as under

The product available in Baroda market were Real, Tropicana, Frooti, Maaza, Minute Maid, Paper boat. Out of the products available Real was available in 17% of shops, Tropicana was available in 62% stores, Frooti was available in 93% stores, Maaza was available in 77% stores, the minute maid was available in 44% stores, and the paper boat was available in 6% shops.

As per, the survey conducted the report shows that the fruit juice brand Tropicana (1L) was the most sold non-carbonated beverage. The reason for such high preference for Tropicana is mainly due to the bulk purchase by the homemaker class of customers. Due to the hazardous effects of carbonated drinks, the housewife class has shifted their taste towards the non-carbonated beverage rather than the carbonated one. The second big class of customers purchasing Tropicana are the students. They are the second most significant customer base for Tropicana. The most sold flavor in Tropicana was Mix fruit, cranberry, and mango. The benefit provided to the consumer were that if they buy 1l of Tropicana fruit drink, they get a 200 ml tetra pack of Tropicana free which increased the sale of Tropicana in Baroda. The scheme provided to the retailers were

Buy 30 pcs Get 3 Free (200 ml).

Buy 24 pcs Get 3 Free (1 Ltr).

The margin provided to the retailers were 8 to 10%.

Maaza was sold the second most in Baroda in the packaging of 750 ml with the highest customer base of boys and the margin provided to retailers to was 10% with schemes like buy 24 pcs and get two free(750ml). Frooti was being sold in a large quantity with an active customer base of Students in 160 ml, 750ml and 1ltr but the most sold were in 160 ml. The schemes provided to the retailers were Buy 40 pcs Get 2 Free. Buy 24 pcs Get 2 Free. The margin given to the retailers were 13 to 15% an average Frooti tetra pack of 10 Rs cost to a retailer would be around 8.5 RS.

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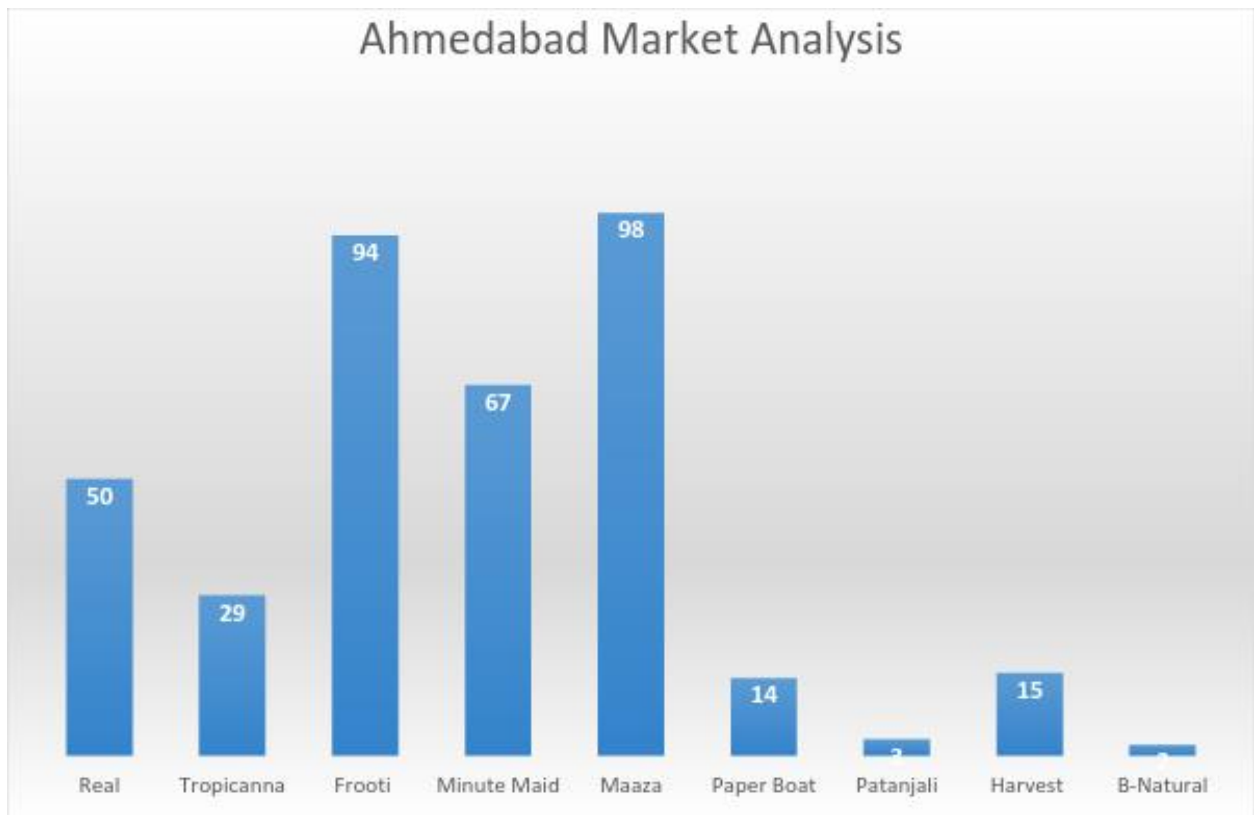
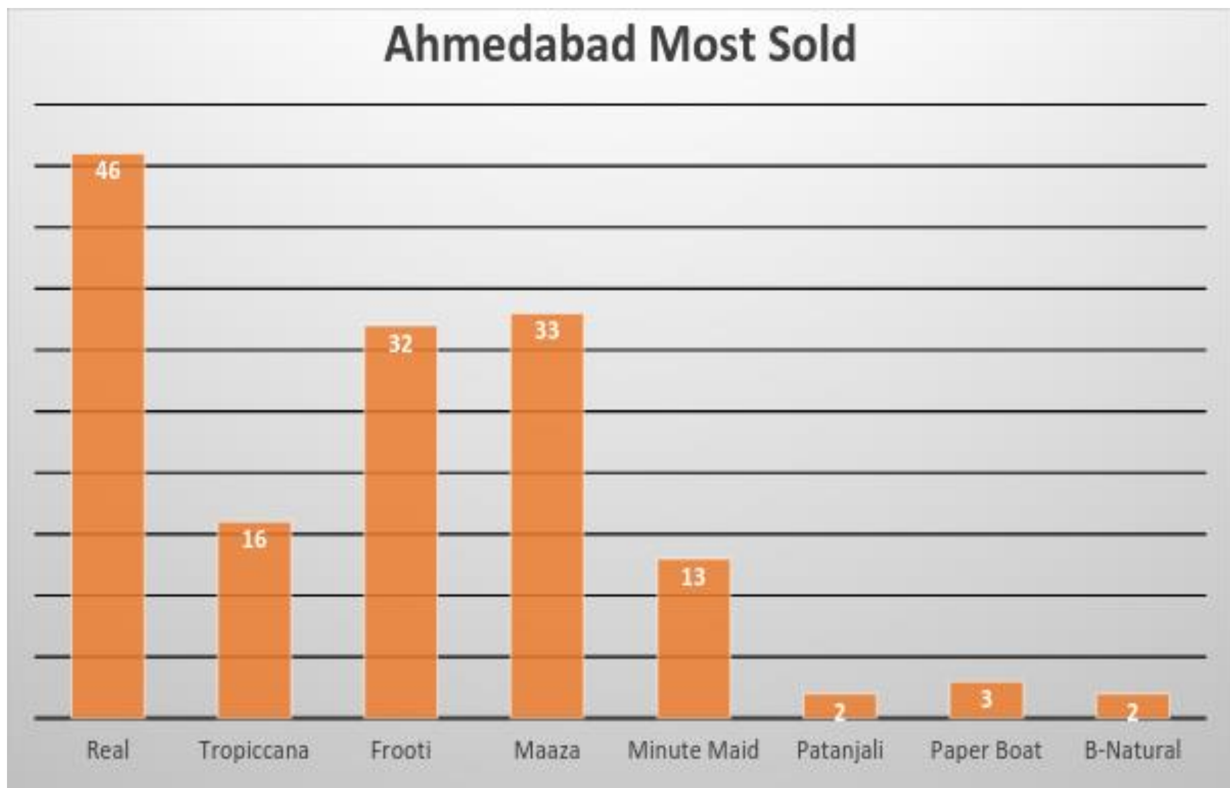
Ahmedabad survey report



Total Number of Shops 105

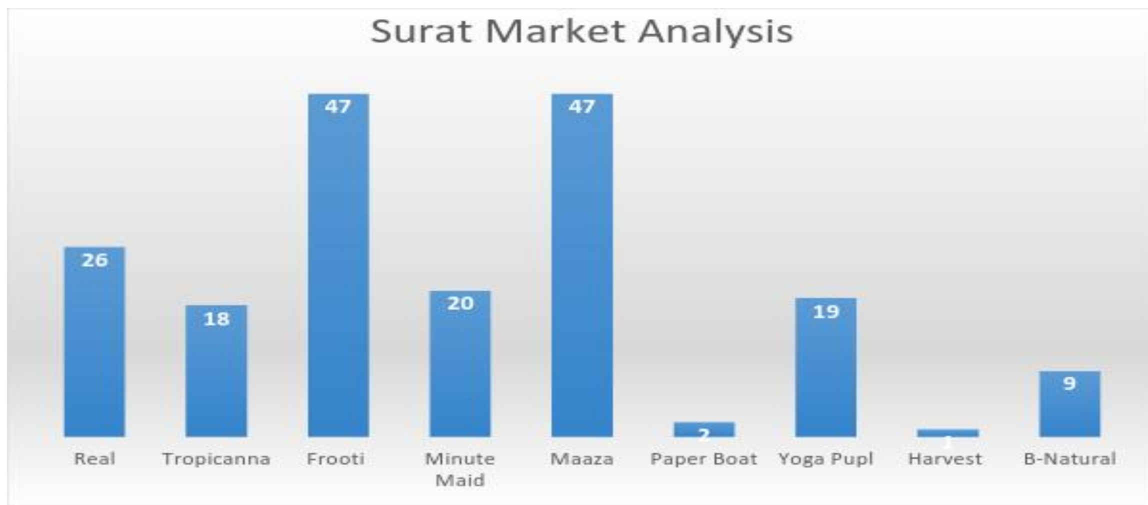
The study consists of 50% of the entire shop surveyed that is 105 retail outlets. As the geographical size of Ahmedabad is greater compared to Baroda and Surat, so a number of the sample taken into the study are more. The product available in Ahmedabad were Real, Tropicana, Frooti, Maaza, Minute Maid, Patanjali, Paper boat, Harvest, B-natural, 24 mantra.

The product availability in retail stores in Ahmedabad was as follows Real was available in 48% of the shops, Tropicana was available in 27% of the stores. Frooti was available in 89.5% of the stores, Maaza was available in 93% of the shops. The minute maid was available in 63% of the stores. Paper boat was available in 13% of the stores. Patanjali was available in 3% Of the shops. Harvest was available in 14% of the stores, B-natural was available in 2% of the shops. Patanjali had its stores so it was available in fewer places while B-natural was a new brand launched so its demand was not much high. Out of the total 105 shops, almost all shops had Frooti and Maaza because of its reasonable rate and brand image.



According to the survey, the most sold product In Ahmedabad was Real. People bought Real juice as it provides the taste of a real fruit juice and it does not have any artificial flavors in it.Real juice provides with two products in one-litre pack 1)Real fruit power 2) real active. Homemakers bought real fruit juices from the retail shops. The most sold product in Real fruit juice(1L) are mix fruit, apple, cranberry As compared to Baroda Tropicana sales is very less in Ahmedabad because of the supplier's problem as they would not provide the stock when needed and also would not take the expired drinks back from the retailers. The margin provided to retailers on Tropicana fruit juice was less than margin provided on Real fruit juice. The margin given to the retailers on Real fruit juice is also good in which 8-10% was given to small scale business which sells from 20-70 pieces of Real juice while 15 to 22% was given to a large-scale business which sells more than 70 pieces a month. In some places to gain popularity among customers Tropicana which is a company of PepsiCo provides Brand loyalty reward in which the company gives a certain amount of money to a retailer for using only the Pepsi brand in their shop and not using any Coca-Cola products. The second most sold non-carbonated drink was Maaza in the packaging of 750 ml with a stronger customer base of students who loved Mango flavor, and also its price was not that high. The margin provided to the retailers on Maaza were 12% on the product. Frooti was sold mostly in the tetra pack of 160 ml which had a higher customer base of children as it is cheap in price and its availability is also maximum there in retail shops. The scheme provided to the retailers are buying 24 pieces and get two pieces free. The margin available on Frooti is from 10-15% so an average tetra pack of 160 ml would cost the retailer around Rs 8.5.

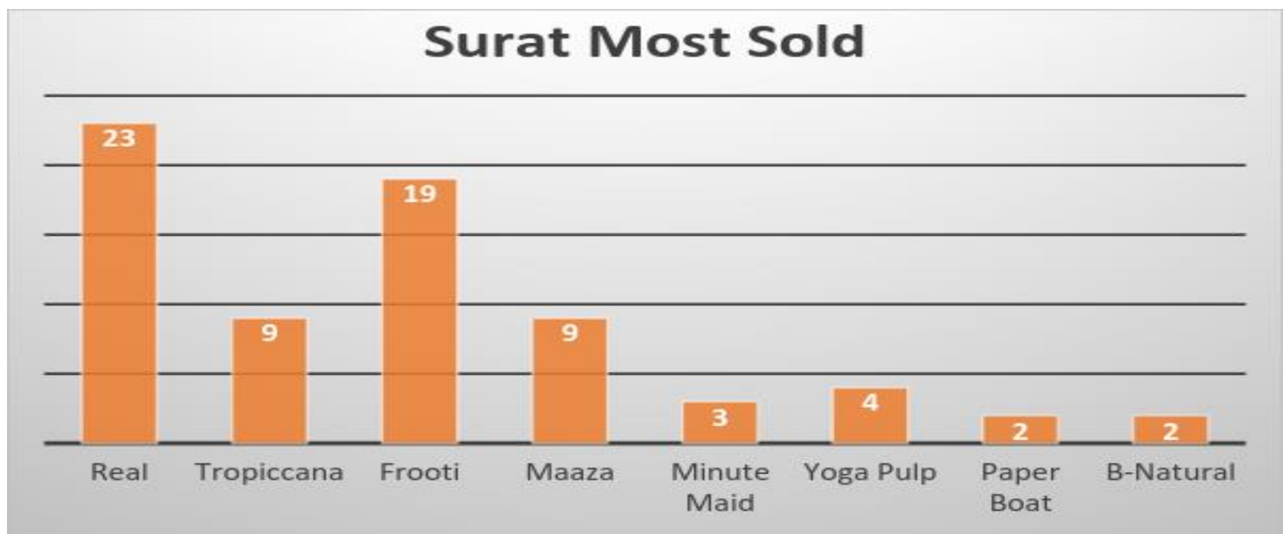
Surat survey report



Total Number of Shops 60

The study done In Surat consists of 60 retail shops. The Non-carbonated drinks available in Surat were Real, Tropicana, Frooti, Maaza, Minute Maid, Paper boat, Yoga pulp, Harvest, B-natural.

The product availability of retail stores In Surat was as follow Real was available in 43% of the shops, Tropicana was available in 30% of the stores.Frooti was available in 78% of the stores, Maaza was available in 78% of the stores, Minute maid was available in 33% of the shops. Yoga pulp was a new product launched first in Surat. The product availability in the market was good, and also customers tend to buy Yoga pulp in 300 ml quantity. As the product were new, different flavors were available in the market, but customers preferred non-carbonated flavor like litchi, mango, and limbu.



According to the survey, the most sold product in Surat was Real fruit juice in 1-litre category. House makers bought Real fruit juice for their family from retailers, and the most sold Real fruit juice products were mix fruit, guava, and cranberry. At that time guava was

launched new In the market so to increase it sales Dabur company had kept a scheme on guava fruit juice that on every Real guava juice bought the customer would get a mixed fruit 200 ml tetra pack free, so customers were attracted to purchase the guava real fruit juice. The schemes provided to the retailers were Buy 24 piece and got two pieces free and also 4% on the scheme. At the purchase of 12 pieces by the retailer, they would get 6% off on the scheme but no free piece. The margin provided to the retailers were 8-15% on the product. Many times the retailers would just buy the non-carbonated drinks from the mall and sell it to the customer to earn a good amount of profit. Frooti was the second most sold noncarbonated drink in Surat with an active customer base of youngsters who preferred to buy the tetra pack of 160 ml which was low in price and also of their favorite flavor Mango. The scheme provided to the retailers were Buy 24 pcs Get one piece free. Buy 48 pcs Get three piece free with a margin of 8% on the drink.

Overall comparison of Baroda, Surat, Ahmedabad shows that Frooti, Maaza, and Real are being sold most overall and the reasons for that are

Frooti is the most sold drink in tetra pack (160 ml) because of many reasons like its Brand name, Price, Availability. Also, Frooti was the first company to introduce the drink in PET bottles. Mostly teenagers prefer Frooti because it is available in most of the shops and the tetra pack costs just Rs 10 so they can buy it anytime at anyplace they want. Frooti is available in most of the retails store and also Frooti is available in 80ml TCA, 160ml and 200ml Tetra Packs, 250ml, 400ml,

500ml, 600ml, 1.2 tr and 2 LTR PET, 200ml RGB as well as 250ml Bottle Pack, so the customer has many options in which quantity to buy. Frooti is the second largest Mango drink in India. Frooti has emerged the country's second most popular mango drink with a share of 25.6% in India's Rs 6,300-crore mango drink category. We are all aware of Frooti slogan "Mango Fruity Fresh 'N' Juicy." Also, many schemes are being provided to the retailers like sales promotion letter, catalogs, and the point of purchase and demonstration free sample. Also, reasons for Frooti being sold most in tetra packs are its high brand equity, brand image. Frooti has customer retention, customer satisfaction. Frooti has maintained. Proper quality.

In the 750 ml category, Maaza is the most sold product. Maaza has being ranked at first position in non-carbonated drink market in India. Maaza has a share of 48% in India's Rs 6,300-crore mango drink category. Maaza has gained worldwide recognition because of its unique taste. The reason for Maaza being sold maximum in 750 ml is due to its color, thickness, and nourishing properties. The company has projected its drink as Wholesome Fulfilled Real Fruit Experience and has worked along this concept to promote it in the consumer market. Maaza has been positioned as all-season drink and targets mango lovers who crave it in off-seasons when it is no longer possible to eat mangoes. It's descriptive slogan Har Mausam Mein Aam gives mango loyalists the incentive to purchase it throughout the year. The consumer can experience the taste of mangoes in all seasons. The drink is also affordable with good quantity at a price of Rs 37 on 750 ml which is a good price as compared with carbonated drinks and other non-carbonated drinks in the 750 ml volume. Maaza has targeted families as its potential customers and has launched its products in different sizes and packages to suit the needs of its members as well as whole family. It has kept affordable and reasonable rates of its products to increase and retain existing customer loyalty.

In the 1-litre market Real juice was the most sold product with Mix fruit and Cranberry sold most. In India's Rs 2,000-crore packaged juices market Real has a value market share of 56.7%. The company also has Rs 1,000-crore in retail sales, Real is the single largest brand for Dabur in the country. Real is India's No. 1 Fruit Juice brand. It is voted by consumers as the most trusted fruit juice brand for four years in a row. Real fruit juice are divided into two parts. Today, Real Fruit Power has a range of 16 new variants of fruit juices - from the exotic Indian

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Mango, Mosambi, Guava, Plum and Litchi to international favorites like Pomegranate, Tomato, Cranberry, Peach, Blackcurrant, Apricot and Grape and the basic Orange, Pineapple, Apple and Mixed Fruit. Réal Activ is a range of unsweetened juices that contain No Added Sugar, Colour or Preservatives. Real Activ juices is being made from concentrated juice. The main reason for Real fruit juice sold most is because of its offering of 16 exotic fruit juice. The taste of real fruit juice is very refreshing and makes one feel energetic. The Real active fruit juice does have No added sugar • No added color or No added preservatives. Naturally rich in antioxidant and nutrients. The fruit juices provide one with fruit power and energy. In Gujarat, various cities mixed fruit and cranberry are sold more because of the availability of the product as well as the taste of the outputs which is liked by the consumers as it is a Fruit flavored health drink.

CONCLUSION

According to the bifurcation done in all three cities of Gujarat and after taking an average of non-carbonated drinks. The noncarbonated drink most sold in tetra pack 160 ml is Frooti, 750 ml is Maaza and in 1-litre Real fruit juice is there. Frooti was bought mostly by students because of its price and availability. Maaza was bought mostly by youngsters because of its taste and its tagline Har Mausam Aam. Real fruit juice was purchased mostly by housewife for their family.

Hence from the above data analysis, it can be concluded that noncarbonated drinks have real potential market influence compared to the carbonated drinks market. It is a fast growing market with increasing customer because of their preference for noncarbonated drinks over carbonated drinks with different products and different packing available which is healthy for their body. Noncarbonated drinks market will be at par with carbonated drinks market.

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REVIEW OF INDONESIA'S DRAFT NEW MODEL OF BILATERAL INVESTMENT TREATY: TOWARDS ECONOMIC NATIONALISM AND PROTECTIONISM POLICY?

FIFI JUNITA[1]

ABSTRACT

This paper analyzes the shifting response of the Indonesian government to International Investment Agreements (IIAs). The growing criticisms on the imbalance protection between public and private interests in the existing BITs and the increase number of foreign investors' claims against Indonesia had accelerated the government agenda to review its BITs. It is claimed that investment treaties tend to protect the private interests of foreign investors rather than public interest of the host states. This article finds that the government strategy in responding to the challenge of IIAs has been shifting over time. This shift may be found in two different strategies. Firstly, the government tends to limit its exposure to ISDS. Secondly, the new draft model of Indonesian BIT tends to preserve the state sovereignty and the right to regulate through the adoption of extensive regulatory flexibility. Does this mean that Indonesia adopt economic nationalism and protectionism policy? This paper will examine this issue by considering more specifically on the government policy in mining investment regime.
Keywords: BIT, Protectionism, Nationalism, Bilateral Investment Treaty (BIT), Indonesia.

INTRODUCTION

The global backlash against International Investment Agreements (IIAs) has triggered the Indonesian government to review its BITs. The Indonesia's increased exposure to BIT and a large number of foreign investors started to brought claims against Indonesia under different BITs for a number of regulatory measures resulted in a massive review of the existing BIT provisions. There are three definite outcomes of the review process: first, the decision to terminate 19 BITs which include the bilateral investment agreement between Indonesia with the following states: the Netherlands, Bulgaria, Italy, Malaysia, Egypt, Slovakia, Spain, China, Kyrgyzstan, Laos, France, India, Cambodia, Romania, Turkey, Vietnam, Norway, Hungary, and Singapore; second, the implementation of moratorium policy; third, the establishment of a new model BIT. (Investment Coordinating Board, 2015). However, the government has not yet prominently withdrawn from BITs or denounced from the Convention on the Settlement of Investment Disputes between States and nationals of Other States (ICSID Convention). Rather, it tends to review its bilateral and regional investment agreements to secure national interests. The vagueness of BIT provisions due to its open ended character has resulted in the increase claims against Indonesia.

Criticism grows over imbalance protection between the public and private interest in the existing BITs since they cannot boost investment inflow (Kononov, 2011). Most of BITs only give one-sided protection to foreign investors rather than the host states. BIT has been established on a take it or leave it basis, thus the developing states had no other choice and had to accept the conditions of the BITS in order to attract foreign investment inflow (Elkins, et.al, 2006) This growing backlash against BITs to some certain extent has resulted in the tendency of the Indonesian government to shift from using BIT model to regional investment model such as Asian Comprehensive Investment Agreement (ACIA). This means that investment law is

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significantly tailored by regional interest, notably through regional free trade and regional investment agreement providing a more balance competing interests of foreign investors and host states. (Trakman, 2013)

This paper begins with a discussion of the urgency of the review of the existing BITs. Secondly, it will further discuss the specifics and main principles of the substantive and procedural review of the new draft model of BITs. It is argued that the draft has shifted to a more protectionism and nationalism compared to the previous BITs. To what extent the Indonesian new draft model BIT adopts the new protectionism and nationalism policy will be identified. This trend also shows an ambiguous approach to investment liberalism, particularly in mining investment regime.

THE URGENCY OF THE REVIEW OF IIAS

The vagueness of the previous BITs can be identified from some aspects, including but not limited to (1) the extensive definition of investment in which case any forms of assets can be considered as part of investment; (2) broad notion of National Treatment and Most Favored Nations clauses, in particular with respect to the operation, management, maintenance, use, enjoyment and sale or disposal of the investment; (3) the vagueness of indirect expropriation clause; (4) the synchronization between the term of BITs and the survival clause; (5) the automatic consent to settle the investment dispute through international arbitration e.g. ICSID; and (6) the need to distinguish between contract claim and treaty claim.

Indonesia is currently undergoing a thorough review of its 64 BITs as well as 5 (five) Investment Chapters under various free trade agreements.(Jailani, 2015) The review envisages a critical evaluation of the impact of existing BITs on the Indonesian national economy and formulation of a new approach towards IIAs.The review is aimed at balancing between investor protection and national sovereignty, restricting investor's protection, overriding right to regulate of the host states and ISDS that increase Indonesia's exposure to investor claims in international arbitration. This situation illustrates the national protection policy of the government. The Indonesian government is fully aware of its strategic economic position and the world's largest source and destination of FDI. Therefore, Indonesia has a strong interest to facilitate and protect national interest in international investment agreement. The call for review of the Indonesian BITs has been commenced since 2012 due to Indonesia's increased exposure to ISA (Investor State Arbitration). This reform agenda has been commenced since 2012. Since 1990, a number of foreign investors brought their claims under different BITs such as *Amco Asia Corporation and other v. Republic of Indonesia* (1990); *Cemex Asia Holdings Ltd v. Republic of Indonesia (2007); Republic of Indonesia v. Newmont* (UNCITRAL 2009); *Government of the Province of East Kalimantan v. Kaltim Prima Coal and others* (ICSID, 2009); *Rafat Ali Rizvi v. Republic of Indonesia* (ICSID, 2011); *Hesham Al Warraq v. Republic of Indonesia* (UNCITRAL, 2011); *Planet Mining Pty Ltd and Churchill Mining PLC v. Republic of Indonesia* (ICSID, 2012). (Indonesia, Investment Coordinating Board, 2015). This review agenda was significantly accelerated by the case of *Planet Mining Pty Ltd and Churchill Mining PLC v Republic of Indonesia* in ICSID. In this case, the Churchill Mining successfully sued Indonesia under the UK and Australia BIT claiming over US 1.3 billion.(Heath and Grant, 2016) This has resulted in the restriction of the ISDS jurisdiction to disputes between foreign investor and the host country. Under the draft of new model BIT, only certain course of action that could be resolved through ISDS.

In terms of the substantive protection, the new draft excludes the concept of 'indirect expropriation' since it is beyond the minimum standard of treatment. Similarly, the concept of Standard of Treatment (SOT) is adopted rather than Fair and Equitable Treatment (FET). The draft also provides a clear definition of these terms and precisely define the content of the standard, thus it should not be depended upon the discretion interpretation of the tribunal.

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Furthermore, this also includes the investment pre-establishment strategy in order to restrict the minimum standard of investment protectionsuch as National Treatment (NT) and Most Favored Nations (MFN) principles. Another reform concerns with the limitation of the term of investment agreement and the restrictions of the applicability of sunset clause in order not to exceed the term of the investment agreement. By providing a limitation period, the extension of the investment agreement will not happen automatically. All of these reform proposals illustrate the shift of the government response to BITs in order to strike a balance protection of both private and public interests.

The review process of the Indonesian BITs commenced in 2012 which was conducted and coordinated by the Investment Coordination Board/BKPM. This process involved three stages within three consecutive years i.e. preliminary review (2012), the process of review (2013) and assessment of the review result (2014). In 2015, public dialog and Focus Group Discussion with academic society had been held by the BKPM for capturing ideas and aspirations of new model of BITs. This review has produced 15 basic principles or major clauses of draft new model of the Indonesian BITs. This includes (1) the Preamble; (2) Covered Investment; (3) Definition of Investment; (4) Investment License; (5) Definition of Investor; (6) Definition of Measure; (7) Scope of Application; (8) Treaty Claim and Contract Claim; (9) Treatment of Investment on National Treatment, Most Favored Nations and Standard of Treatment; (10) Compliance with International Obligations; (11) Compliance with Domestic Law and Regulations; (12) The Cause of Action under the Agreement; (13) Investor State Dispute Settlement; (14) Governing Law in Dispute Settlement; (15) Period in Force and Termination (Investment Coordination Board, 2015). This draft is still in a working progress and not yet been finalized until now.

By observing those above mentioned principles, it is argued that the government response to BIT has been shifting from treatment issues to protection issues. This draft likely premised on national control over admission of foreign investment and the protection of national interests and national development. The following sections will elaborate the principles that had been adopted and reviewed as the potential elements of reform.

MAJOR REFORMS OF THE INDONESIAN BITS

Generally, Indonesia tends to promote a balance protection between public and private interests in the new model of BIT. This can be noted from the following provisions: (1) compliance with domestic laws and regulations; (2) the right of the host state to regulate; (3) right to pursue development goals; (4) general exceptions; (4) security exceptions; (5) denial of benefits. All of these terms are basically directed to preserve the right of state to regulate in order to protect national interest of the host state as a sovereign state. Compared to the previous BITs, the draft model provides more restrictive approach to standard of treatment of foreign investors. More specifically, there has been a tendency to exclude Foreign Portfolio Investment (FPI) in the concept of covered investment. In this context, the government tends to restrict the covered protection of investment. The review process of the existing BITs is aimed to recall a broad definition of investment since it may lead to abusive practices.(Weiss and Steiner, 2013) In addition to this, the concept of expropriation is narrowed since it excludes the notion of indirect expropriation in order to preserve the host state's regulatory space.

These main body of the draft contained all the main protection standards that protect legitimate regulatory flexibility of the host state. The Preamble provides the goal of protecting the right to regulate with regard to the achievement of sustainable development and the protection of public interest. This will give guidance of how the treaty should be interpreted as a whole. Then, the main body of the draft incorporated all the main protection standards in order to protect regulatory freedom on the host state. In particular, the expropriation is no longer depart from the extensive formulation. It has been shifted to a narrower formulation that

only cover direct expropriation and it excludes indirect expropriation. The draft provided expansive general exceptions clause which includes the general exceptions, security exceptions and prudential measures. It also incorporated new form of clause that referred explicitly to the state's right to regulate, the denial of benefits, the minimum standard of environment and labor, right to pursue development goals and to corporate social responsibility. The new draft of BIT also provides greater control over the investor state dispute settlement mechanism to protect the right of state to regulate. In particular, ISDS is made subject to precondition requirements and the limitation jurisdiction of ISDS. Therefore, it is only certain course of actions that could be settled through ISDS mechanism.

GENERAL PROTECTIONIST TENDENCIES UNDER THE NEW DRAFT MODEL OF THE INDONESIAN BIT

Basically, the notion of protectionism can also be considered as part of reconciling state sovereignty and economic liberalism of the host state. The protectionism has a close linkage to nationalism and state sovereignty. Its basic function is to protect national interest of the host state. The issue of economic protectionism and nationalism become a serious matter if it is not not proportionally approached. The principle of proportionality will promote a balance protection between the interest of the host state and foreign investor. The tendency to put more weigh on the protection of national interests instead of the legitimate expectation of foreign investors may lead to injustice and unfairness. The proportionality principle involves a 'trade off' mechanism in order to achieve a proportional protection. The general protectionism tendency under the new draft is reflected from the extensive protection of national interest. This includes the adoption of an extensive notion of the right to regulate; broad notion of general exceptions; the goal to pursue national development; restrictive scope of application and covered investment protection; restrictive approach to ISDS and the use of domestic court as a investment dispute settlement body; extensive Performance Requirements measures. Compared to the previous BIT, this protectionist trend continues to rise.

Extensive Performance Requirements (PRs) Measures

Basically, PRs are inflicted to foreign investors, requiring them to satisfy specific performance with regard to their operation in the host state. In order to promote national development and achieve certain outcome, the host states impose measures that are requiring investors to conduct their business in a specific standardized performance. The new draft model of BIT tends to adopt more extensive performance requirements to achieve both economic and non-economic objectives. These include supporting the development of local entrepreneurs, seeking to enhance productive capacity, increasing employment, increasing human resource capacity and training, research and development, including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investor made at the time of the establishment or acquisition of the Investment and applied during its operation. (Nikiema, 2017) More extensively, this also includes PRs measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups or communities due to discriminatory or oppressive measures against such groups or communities prior to the signing of the investment agreement. As a contracting state of WTO Agreement since 1974, the adoption of the PRs or investment measures shall not restrict and distort trade. The TRIMs (Trade Related Investment Measures) provides that WTO members shall not apply any measures e.g. investment measures that discriminates against foreign investment that is contrary to WTO principles. This includes local content requirement, export prohibition, technology transfer requirement etc.

Extensive Regulatory Flexibility (the right of state to regulate)

The Indonesian draft model of BIT tends to adopt extensive list of exceptions leading to non-exhaustive restrictive investment measures. This carve out clause is directed to preserve flexibility in particular sector by excluding specific sectors from the coverage of the BIT. (UNCTAD, 2017) However, this broad coverage of exceptions which includes general, prudential measures and security exceptions may create legal uncertainty of the protection of legitimate expectations of investors. This situation goes further through the incorporation of non exhaustive notion of the right to regulate of the host state. This includes the the right to regulate for public interests, to formulate and implement policies, laws and regulations for the protection of public order, public safety, public health and to protect the environment, labor and human rights. This vague concept of exceptions and the absence of stabilization clause may lead to legal uncertainty with regard to the protection of legitimate expectation of investors. A closed list scope of exceptions is required in order to restraint over extensive interpretation.

Restrictive approach to ISDS

Compared to the previous BIT, the recent draft adopts a limitation access to arbitration. This limitation access consists of (1) the exclusion of certain categories of investment disputes or course of actions that can be resolved through arbitration; and (2) the procedural preconditions for and rules for arbitration. These preconditions include mediation, conciliation and negotiation as alternatives to binding dispute resolution, time limits on claim, international administrative review prior to arbitration, binding Joint Committee, prior exhaustion of local remedies, and domestic court. Accordingly, ISDS is not too easily accessible for foreign investors.

Exception to National Treatment (NT) Clauses

The adoption of MFN and NT principles under the IIAs is not absolute. Indonesia also excludes the application of NT on the protection of SMEs, natural resources sector and national security. What needs to be observed is the exception of NT principles in the natural resources sector. The exception of NT in mining sector needs to be pointed out. Basically, the exception of NT in the natural resources sector is greatly influenced by the shift from liberalism to resource nationalism regime. This includes restrictions on foreign ownership of mining industry through share divestment policy up to 51%. A number of claims which are brought by foreign investors is mostly associated with mining investment (mineral and coal mining). Therefore, this sector is then excluded from the NT principle in order to minimize claims. It also needs to be borne in mind whether this exception may lead to investment measures that can distort trade such as the limitation of raw mineral export and the increase of export raw mineral tariff in order to increase the added value of mineral domestically.

Restrictive scope of application and Covered Investment

The restrictive scope of covered investment also suggests greater reliance on internal measures affecting FDI. This includes the new measures in the field of government procurement, government related service supply, competition law, taxesin which case these measures are excluded from the protection under the treaty. In fact, Indonesia has issued the largest number of measures restricting government procurement. The draft provides that the investment treaty does not apply to the regulatory takings in government procurement, indirect expropriation, government supply services, state subsidize or grants, competition law and taxes. In addition, the general exceptions provide more wide lists of measures leading to high level of regulatory risk. (Newcombe, 2017) This also includes any measures which comply with international

obligations. Conformity with all of these measures may undermine the legitimate expectations of foreign investors doing business in the country concerned. (Subedi, 2008) This situation is more compounded by the absence of stabilization clause in the new draft of BIT. This trend shows the state's intention of providing greater regulatory flexibility to pursue public interest (non economic objectives). Accordingly, any regulatory measures designed to protect public interests will be deemed valid measures even if they have a detrimental impact on foreign investors.The continued protectionist trend in this area requires the importance of ensuring the largest possible coverage of the government procurement agreement and of the efforts in negotiating public procurement chapters in FTA, including regional treaty. It also shows the importance of moving ahead with the proposed international procurement instrument. (European Commission, 2017)

Extensive definition of measures

The new draft of BIT also specifically provides the definition of measures. The definition of measures is very broad. This broad notion of measures under the new draft of BIT will create regulatory flexibility for the government/host state to regulate (the right of state to regulate). The text explicitly states that 'measure means any form any form of legally binding governmental act directly affecting anInvestor or the Covered Investment. For Investment made in Indonesia, a Measure hasto be in a form of a law and/or a regulation as regulated under the Law No. 12 of 2011regarding Legislative Drafting, its amendment and/or any of its amendments and/or itsreplacement. From this definition, it is clear that it adopts a more extensive approach to measures. It covers any forms of legally binding governmental act directly affecting an investor or covered investment. As a juridical act, the measures must be in the form of law and/or regulation as provided in the Law No. 12 of 2011 regarding Legal Drafting including its amendments and/or replacement. Based on this Law, what can be considered as measures is any forms of government act which are based on the hierarchy of legislations consisting of the Constitution 1945 (Undang-Undang Dasar 1945); The MPR Resolution (*Ketetapan MPR*); the Law (*Undang-Undang*); Government Regulation Substituting a Law (*Peraturan Pemerintah Pengganti Undang-Undang*); Government Regulation (*Peraturan Pemerintah*); Presidential Decree (*Keputusan Presiden*); Regional Regulation (*Peraturan Daerah*). In addition, there are also other forms of delegated legislation such as the Presidential Instruction (*Instruksi Presiden*), Ministerial Decree (*Keputusan Menteri*) and Circular Letters (*Surat Edaran*). The term 'measures' also include 'other laws and regulation which are based on the higher law or they are established by legal authority.' This open ended definition of 'measures' is meant to be illustrative.

AMBIGUOUS APPROACH TO INVESTMENT LIBERALISM: PROTECTIONIST AND NATIONALIST TRENDS IN MINING INVESTMENT REGIME

The above section demonstrates that government has made major reforms to the BIT provisions in order to protect national interest. The tendency of nationalism is basically incorporated in the Investment Law (2007) providing that the implementation of equal treatment is subjected to national interest. However, there is no specific standard of what can be considered as national interest. Thus, the term 'national interest' can be interpreted extensively.This tendency is reflected from the adoption of substantive limitation such as extensive scope of investor's obligations, restrictive notion of covered investment and minimum standard of treatment as well as procedural limitation such as limited approach to ICSID and the adoption of binding Joint Committee and domestic court. Despite the fact that the regulatory measures taken in the interest of legitimate public policy objectives are not necessarily considered as FDI protectionism, Indonesia's attitude to investment liberalization in recent years has been characterized as ambiguous. On the one hand, the country is an active member and committed

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to ASEAN, AEC (Asean Economic Community) under the ASEAN Comprehensive Investment Agreement (ACIA) 2009 embracing investment liberalization and integration. Previously, Indonesia has committed to more than 60 BITs, which is included but not limited to the Free Trade Agreement (FTA) between ASEAN and China in 2010 and negotiated FTA with Japan in 2006. Such economic cooperation has encouraged domestic policy reform ensuring investment liberalization and integration. On the other hand, there is a growing trend towards nationalism and protectionism policy in mining investment regime.

The adoption of resource nationalism policy under the basic principle of *Calvo* doctrine and Permanent Sovereignty over Natural Resources (PSNR) is a basic example of economic nationalism policy. The promulgation of New Mining Law No 4 of 2009 on Mineral and Coal Mining aims to limit foreign ownership over mining resources. In the case of mineral mining investment, the government has introduced a range of resource nationalism policy. The mining policy has shifted from liberalism to protectionism and nationalism regimes. This tendency is reflected in the new Mining Law 2009 and its implementing regulations. The government has implemented a number of investment measures to limit foreign ownership and increase state equity over mineral resources. These include divestment policy by limiting foreign ownership on mining industries, and domestic value added policies such as ban on raw material export and high export taxes on raw material. All of these measures are directed to increase the value added of mining sector in order to increase state revenue from mining industries. The following restrictive investment measures in mining sector are interesting to be observed.

First, the Mineral and Coal Mining Law (2009) and the Government Regulation (2012) provide the obligatory share divestment policy in order to limit foreign ownership over mineral mining investment. This policy requires foreign investors to divest 51 percent of their shares to the Indonesian government, regional government, state owned companies, or national private companies after commencing five years of mining production. It reflects the protection of national interests in managing natural resources sector. This policy is also consistent with Article 33 of the Indonesian Constitution providing that the management of natural resources shall be made for the greatest benefit of the People. However, the government has not really consistent with this policy. The ambiguity remains exist with regard to the implementation of this divestiture obligation. (Junita, 2017) This can be noted from the adoption of 'trade off' system in which case the mandatory share divestment is traded off with the establishment of smelter in order to promote domestic processing and increase added value of raw mineral.

Secondly, the government also applies barriers to the export of raw materials of coal and mineral. This policy aims to promote the implementation of Article 103 (1) of the New Mining Law. This Mineral and Coal Mining Law (2009) provides that the holders of IUP (Mining Business License) and IUPK (Special Mining Business License) for operational production shall process and purify output of the domestic mining. The restriction of raw mineral export is expected to safeguard mining revenues and state's budget balance. This beneficiation policy also includes the acceleration of mineral added value and mandatory in-country processing and refining of raw mineral and coal. The exception to this policy remains apply for the protection of national interest as stipulated in Article 9 of MoEMR (Minister of Energy and Mineral Resources) Regulation (2014)with regard to local content requirement and domestic market obligation (DMO) in order to ensure a sufficient domestic supply of natural resources. However, the government remains inconsistent to the implementation of the export ban policy. Based on the Presidential Instruction on Acceleration of Mineral Added Value through Processing and Refining Domestically (2013), export licenses will be continued to be issued/provided for a number of mineral mining companies from 2014 until 2017. This, of course, violates the Mining Law 2009 prohibiting raw material export and requires mineral ore miner to have completed smelter development by 2014.

Thirdly, the shifting from contractual to licensing regime reflects another form of resource nationalism policy in Indonesia. The adoption of licensing regime is directed to safeguard the state sovereignty over national resources. This is marked by the abandonment of Contract of Work (CoW) in coal mining investment. Under the contractual regime, the government has less sovereignty over mining investment due to the implementation of the principle of *pacta sunt servanda*. There is no subordinate position since the contracting parties have the same legal rights. This also means that the renegotiation of the CoW shall be made by the consent of the contracting parties. This concept is significantly different compared to the licensing regime, in which case the state/government has more legal authority with regard to mining investment activities. In other words, the government has discretionary power to discontinue the mining license if the holder does not comply with mining law and its implementing regulation. From this context, the growing proliferation of resource nationalism policy also highlights the imposition of tighter control over foreign ownership in mining sector.

Notwithstanding the above, the new Negative List introduces a considerable number of further restrictions on future foreign investment for many of the key areas in the energy and mineral resources sector and support services in particular being dealt with increased regulatory approvals. The government control over foreign investment is also stipulated in the Presidential Regulation on No. 44 of 2016 re List of Business Fields that are Closed to and Business Field that are open with Conditions to Investment. Based on this Regulation, not all business lines are opened to foreign investment. The Presidential Regulation on Negative List (2016) provides ‘negative list’ specifying the business lines that are close to all investment and the business lines that are open for investment with requirements. Under this Regulation, basically all business lines are open to foreign investment except for those sectors specifically mentioned in a negative list and other laws and regulations. This negative list system provides a more transparency since it can foresee the adoption of two lists of business lines where investment is prohibited or restricted for domestic and foreign investors.

Although at a certain extent this Presidential Regulation (2016) provides liberalization on certain sectors, it does not qualify as eliminating existing barrier and restriction because it requires certain requirements. Restrictions include joint venture requirements, restriction on local content and administrative prior approval requirements. The Presidential Regulation on Negative List (2016) demonstrates that Indonesia is more open but also tightens national security review and requires prior requirements or approval for a certain threshold. Business lines where foreign investment is specifically restricted appear to have remained unchanged with new restrictions in some areas and consideration of national interest and security still take priority.

This list also introduced new limits for foreign investment in oil services, retail trade, horticulture, and small power plants. Despite the fact that the recent list under the Regulation reduces foreign investment restriction, the list also increases foreign ownership restriction in other areas in order to protect and facilitate local producers and SMEs (Small Medium Enterprises). The performance requirement also reflects from the demand that foreign investors seeking to do certain business in Indonesia take on a domestic partner that will have a significant ownership of the joint enterprise (or joint venture) as it operates in Indonesia. As part of this joint ownership, the foreign partner can also transfer much of its technology to national partner as a condition of forming the partnership.

CONCLUSION

To sum up, the ambiguous approach to investment liberalism in Indonesia is not sterile from the tendency to protect national interests and state sovereignty. Non tariffs protectionist measures such as export ban of raw mineral, local content, and share divestment in mining investment are mostly driven by economic nationalism policy. The rise of protectionist

investment policy is also triggered by the fact that Indonesia is no longer considered as capital importing state, but it has been a capital exporting state. Indonesia is now classified as newly industrializing economies (NIEs) by the World Bank. (Negara, 2015) The increase bargaining power of the state leads to the shifting response of the government to set high bargaining standard in its BIT in order to boost its national economic development. Despite the fact that economic nationalism has driven protectionist measures, its implementation remains inconsistent. It is argued that the Indonesian government tends to be more flexible and apply 'trade off' system in order to achieve mutual benefit. From this point, it can be argued that the rise of economic nationalism in Indonesia has not yet being absolute since there may still flexibility in its implementation. This inconsistency, however, can creates legal uncertainty for foreign investors.

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1-AN01-4662

MARKET ABUSE REGULATION IN AUSTRALIA: LESSONS FOR SOUTH AFRICA

PROF.HOWARDCHITIMIRA[1]

In Australia, the market abuse prohibition is generally well accepted by the investing and non-investing public as well as by the government. This co-operative and co-ordinated approach on the part of all the relevant stakeholders has to date given rise to an increased awareness and commendable combating of market abuse activities in the Australian corporations, companies and securities markets. It is against this background that this article seeks to comparatively explore the general enforcement approaches that are employed to combat market abuse (insider trading and market manipulation) activity in Australia and South Africa. In relation to this, the role of selected enforcement authorities and possible enforcement methods which may be learnt from both the Australian and South African experiences will be isolated where necessary for consideration by such authorities, especially, in the South African market abuse regulatory framework.

3-AN08-5028

INTERRELATIONSHIP BETWEEN MARINE CARRIER AND INTERNATIONAL SALE CONTRACT: CASE STUDY OF JORDAN

MR.DERARAL-DABOUBI[2]

The main purpose of this study is to scrutinising the legal effects of the interrelationship between Marine Carrier and International Sale Contract. This study will clarify the role of the Marine Carrier in determining the time at which the ownership and risk in the sold goods may transfer from a seller to a buyer and further, illuminating liability of Marine Carrier that might be endured in this regard.

The present research will apply a doctrinal method, through which the provisions of CISG (The Convention on Contracts for the International Sale of Goods), Hamburg Rules for Carriage by Sea and the relevant acts of Jordanian law will be analysed and assessed for the purpose of formulating a conclusion, being supported with documents that have been argumentatively tackled, so as to reach an answer to the research's questions. Accordingly, a black letter approach will be employed, where a critical analysis for CISG, Jordanian Law and case law will be carried out through a qualitative method.

This study has found that, in spite of its position as a third party to International Sale Contract, the Marine Carrier performs decisive role in the context of the passage of risk and ownership between contracting parties to international Sale Contract. However, a Marine Carrier might be negatively affected by the liability that could be borne in this respect.

The novelty of this research lies in the fact that the previous studies, which have been dedicated to address the passage of risk and property in international sale contract, have examined the position of the seller in affecting this passage, while this study will discuss the position of the Marine carrier.

The second aspect of novelty consists in the fact the previous studies have examined the Liability of the Marine Carrier for the damage to, loss of the goods and delay in delivery,

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whereas this study will address the liability that might be endured in the context of the passage of risk and property.

It can be concluded that, neither CISG nor Jordanian Law has illuminated the role of the Marine carrier in affecting a passage of risk and property and also, both legislations did not regulate the liability that may arise in this regard. Accordingly, the study will try to provide sound suggestions through which the shortcoming and lacunas of CISG and Jordanian Law be eliminated.

Key words: CISG, passage of risk, transferring of ownership, liability of Marine Carrier.

5-AN12-4920

IMPACT OF NATIONAL CULTURE ON THE GENDER DIVERSITY OF CORPORATE BOARDS

DR.CATHERINEWHELAN[3] AND DR.SARAHHUMPHRIES[4]

Gender diversity on corporate boards is believed to enhance the effectiveness of the board and potentially firm performance. Some countries impose quotas for female representation on boards while others promote self-regulation with the goal of voluntarily increasing gender diversity. This study investigates the relationship between national culture and the gender diversity of corporate boards. The sample consists of 175 international companies listed on US stock exchanges. As the US does not currently impose a gender diversity requirement for listed companies, it is anticipated that the board diversity of these companies may be influenced by the country of operation.

The percentage of women on the board was calculated for each of these companies. Scores from Hofstede's cultural dimensions – Power Distance, Individualism, Masculinity, and Uncertainty Avoidance – were gathered for the primary country of operation for each company. After controlling for board size and the presence of a female board chair, the regression results indicate that the percentage of women on boards is negatively related to Power Distance but positively related to Individualism. No significant relationships were found with Masculinity and Uncertainty Avoidance. Countries with high Power Distance scores tend to accept unequal distribution of power in its organizations. It could be argued that in such cultures, women may not have the social capital to earn a place on a corporate board. Consequently, the lack of female representation on corporate boards in high Power Distance cultures may be due to a tolerance of traditional male dominance in business settings. Individualism implies a commitment to the rights of the individual and therefore representation for all. As such, in high Individualism cultures, a board may appear to be more legitimate if it represented the interests of a broader range of individuals which could be achieved through greater female representation on the board.

The results of this study highlight the importance of understanding cultural influences on board diversity. If board efficiency and firm performance are improved with greater female representation on the board, then firms should consider increasing diversity voluntarily rather than waiting for a mandate from the regulators. This may be more acceptable to stakeholders in cultures with higher Power Distance and Individualism traits.

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7-AN09-4995

THE IMPACT OF RMB DEVALUATION AND CHAFTA ON THE AUSTRALIAN AGRICULTURAL SECTOR

DR.SAMMENG[5]

Using a multi-currency version of the GTAP model, this paper simulates the effects of the Chinese currency devaluation as well as the Australian-China FTA. The simulated macroeconomic results show that a 3% devaluation of Chinese currency can provide a mild improvement to the Chinese economy (0.008% increase in real GDP) and has little overall impact for Australia. The ChAFTA can benefit both Australia and China. The sectoral results are mixed. Most agricultural sectors will benefit from both the ChAFTA and a devaluation of Chinese currency, but some agricultural sectors will be worse off.

8-AN16-5089

PREFERRED HABITAT OR WINDOW DRESSING? EVIDENCE FROM FOREIGN EXCHANGE SWAP MARKET

DR.HAO-CHENLIU[6] AND DR. MARK WITTE[7]

In this paper, we revisit the cause of year-end effect observed in financial market. It has been a debate on what causes the return irregularity around year-end. The cause of the effect has been explained mainly by either window-dressing or preferred habitat. Window-dressing hypothesis argues that the market near the year-end shows a risk-shifting behavior because of disclosure requirement. Portfolio managers would hold low risk assets rather than high risk assets and therefore, the higher return of small stocks in January is observed in the market. Preferred habitat hypothesis focuses on the cash flow needs in the market at the peak of money demand. Under preferred habitat hypothesis, money managers would increase their cash reserve and decrease the investment on money market instruments. Since the needs for cash payment is not necessarily to be on the last day of the year, a decrease in yield should be observed days before the end of the year. Because both window-dressing and preferred habitat behaviors occur around year-end, it is not easy to disentangle these two hypotheses. In this paper, we use a unique dataset in the US dollar (USD) and New Taiwanese dollar (NTD) foreign exchange swap market to investigate the return irregularity around year-end. Foreign exchange swap market is the most traded instrument in the foreign exchange market which is popularly used by banks to fund their liquidity needs. This market has never been examined before due to the lack of public available data. A foreign exchange swap contract involves two currencies and the timing of liquidity needs for each currency can be different. Therefore, we can disentangle these two hypotheses. We study the return irregularity around Chinese New Year and Western New Year. The date of Chinese New Year varies every year based on the lunar calendar while the the date of Western New Year is fixed each year. There is increased liquidity needs for NTD but not USD around Chinese New Year while the needs for NTD and USD both increase around Western New Year. Therefore, by including Chinese New Year in the analysis, we provide further evidence to support the existence of preferred habit in the market.

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12-AN17-5091

ANALYSIS BETWEEN USAGE FACTORS OF SMARTPHONE: FOCUSED ON 2ND ORDER CONFIRMATORY FACTOR ANALYSIS OF INTERACTION

PROF.MINCHEOLKIM[8]

The development of Information and Communication Technology (ICT) has brought about many changes in everyday life, and new service models are emerging in various industries including tourism. Specifically, the use of a variety of smart devices has led to changes in the use of the system, such as selecting travel destinations, collecting information on travel destinations, and making reservations and payments related to travel (Wang et al., 2014). In addition to organizational factors from previous studies, this research model is based on the personal situation of smartphone service. Thus, this study proposes a research framework on flow, attitude, and usage intention intention with interactivity that includes the concept of contorl, 2-way communication and synchronicity (Okazaki and Mendez, 2013). In order to show the significnat relation among the usage factor, this study utilized PLS-SEM (Partial Least Squares-Structural Equation Modeling) (Hair et al., 2012). This study conducted an analysis after collecting data through survey of final 238 persons among smartphone users of South Korea in 2016. This study performed the analysis with Smartpls version 3.0 software and estimated through the bootstrap re-sampling method to measure the t-value of each path (Ringle et al., 2012). The results of analysis showed signficantly that the Interaction of smartphone usage affects flow, and the flow affects continous usage intention through attitude with the interactivity factor including all factors as contorl, 2-way communication and synchronicity using 2nd order confirmatory factor analysis. Through this study, it can be used as basic data related to the study of various factors that may affect the attitude of users in the future development of smartphone system.

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16-AN06-297

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