

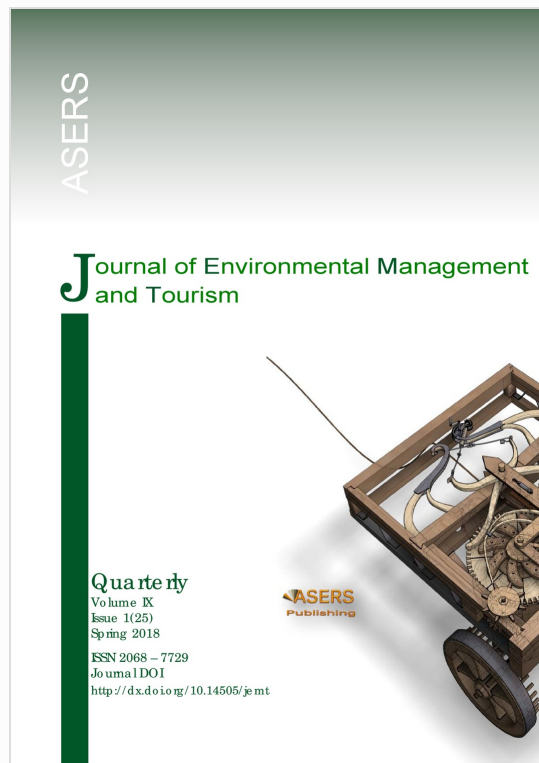


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Investment and Liability on Oil Palm Land Use and Environmental Sustainability

by Ramlani Lina Sinaulan, Hamdi, Abdul Rahmat

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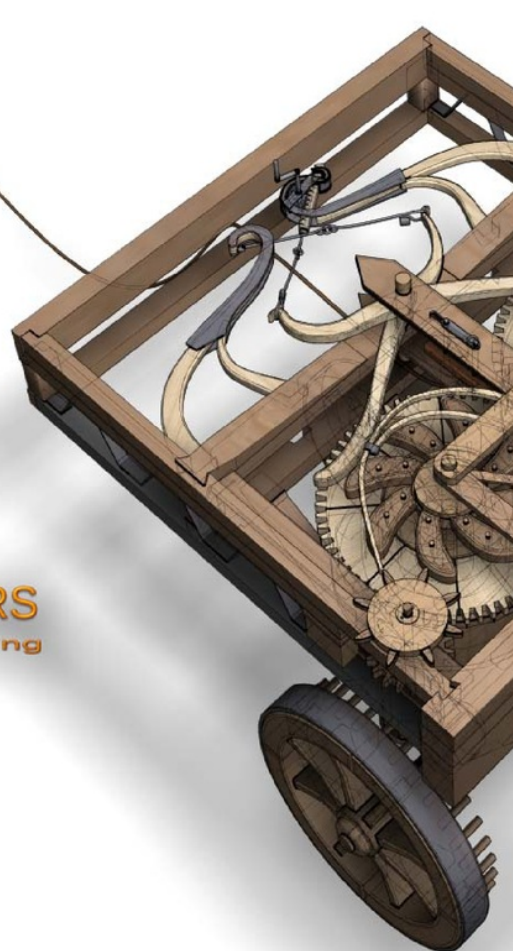
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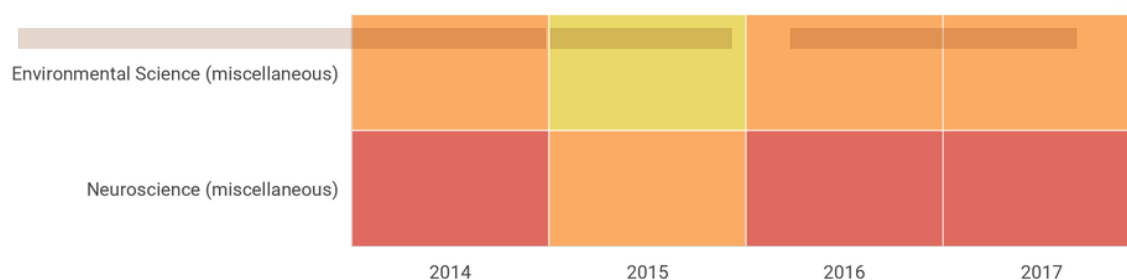
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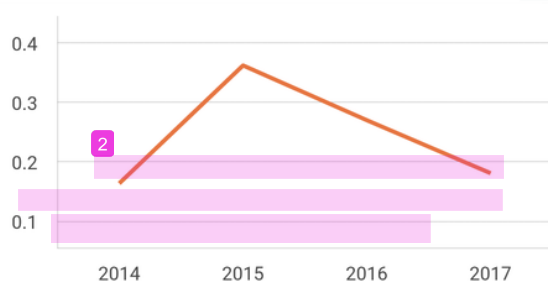
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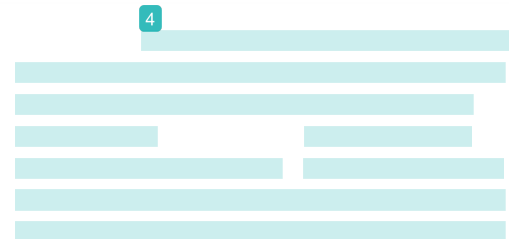
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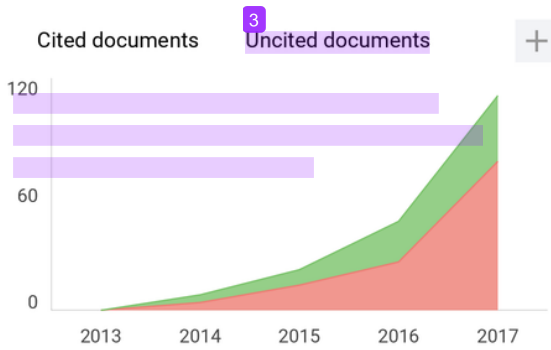
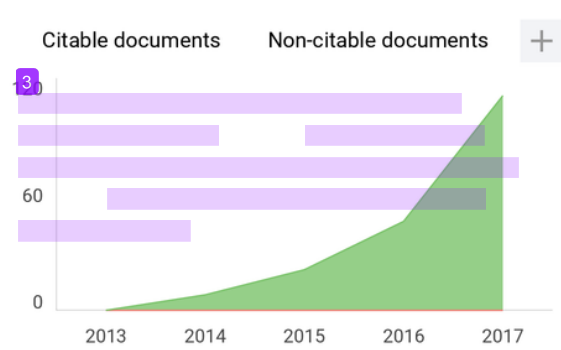
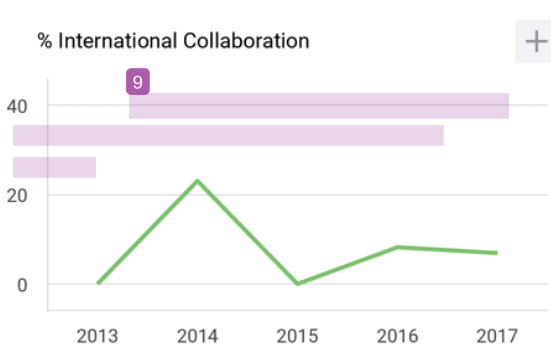
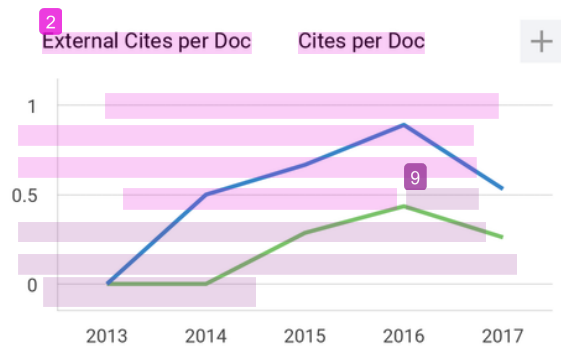
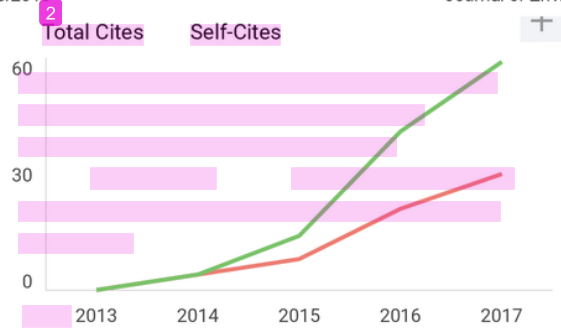


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Investment and Liability on Oil Palm Land Use and Environmental Sustainability

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Abstract:

Indonesia as developed country which possesses abundant natural resources has potential as producer of oil palm plantation due to its climate and the support from oil palm plantation investors. Oil palm plantation development has to guarantee the sustainability of surrounding environmental condition based on article The Law Number 39 of Year 2014 Concerning Plantation the Law Number 31 of Year 2009 Concerning Protection and Management of Environment. Infringement against the law - such as logging the forest irresponsibly by employing land combustion method in order to create a new oil palm plantation without spending too much cost and in order to accelerate the oil palm growth process - continuously happens. Such fact has been found out through court verdicts as well as academic researches. As the result, it created deteriorated ecosystem as shown by lack of soil nutrient, land infertility, erosion and flood. Due to massive impact resulted from such action; crime against environment might be categorized as extra ordinary crime. Therefore, crime against environment requires special concern from Indonesian Financial Services Authority by imposing financial control on the Plantation Company, profile assessment and supervision from central government as well as local government.

Keywords: investment; liability; land use and environment.

JEL Classification: Q15; R11; K32.

Introduction

Indonesia is responsible to provide opportunity to any people or any legal entity in order to support development of national economy as stated on article 33 of letter (4) Indonesian 1945 Constitution. Such aspiration is manifested through investment in any sector including plantation sector. Plantation is any business that generates goods and services of plantation sector.

This business activity is legal if such activity has gained plantation business license and rights over state land use. There are types of plantation business, which consists of plant cultivation business; the processing industry of plantation products and the hybrid industry which integrating plantation cultivation industry and its product processing industry.

Oil palm cultivation industry which produces crude oil palm and its palm kernel is quite popular plantation business in Indonesia. Its popularity is boosted due to its value as the most profitable non-oil-gas exported product for Indonesia. This promising vegetable oil trading business has encouraged the government to accelerate the expansion of oil palm plantation area across Indonesia. Due to rapid growth of oil palm plantation business in Indonesia, the government initiated the creation of Badan Pengelola Dana Perkebunan (BPDP) Kelapa Sawit. It is

government bureaucratic organ which has purpose to provide incentive on Biodiesel consumption for PSO and non-PSO markets. BPDP offers business scheme that helps oil palm industry which export-import company is required to provide export fee for helping biodiesel consumption and alleviating state fund from financial burden. By creating new market and demand through biodiesel mandatory program as supported by BPDP Kelapa Sawit, the government has successfully stabilized CPO price and its fresh fruits bunches during 2015-2016 as enjoyed by the entire stakeholders. The government oil palm supporting program as conducted by Commission of Advisory Secretariat for BPDP Kelapa Sawit has composing a guidance book in order to preserve the historical, philosophical and main objective of BPDP Kelapa Sawit establishment as well as to draw people's understanding.

Meanwhile on the lower course, oil palm plantation business actors in Indonesia are divided into three types. They are private oil palm plantation owners, state oil palm plantation owners and oil palm smallholders. The smallholder one is typically managed by employing partnership model between smallholders and with private owned or with the state-owned oil palm plantation (core-plasma partnership model). Oil palm plantation field expansion has been developed in Indonesia due to convenient climate and fertile soil that support the oil palm growth. Nonetheless, oil palm plantation companies shall look for eco-friendly oil palm growth method which is able to guarantee environmental sustainability as stated on article 28 H of letter (1) of Indonesian Constitution of Year 1945, The Law Number 39 of Year 2014 Concerning Plantation and The Law Number 31 of Year 2009 Concerning Protection and Management of Environment.

The law expressed that plantation establishment and land use on certain size for plant cultivation plantation shall follow any method and measure which prudently may avoid any damage on environment and ecosystem. Therefore, plant cultivation plantation must also follow any regulation and method that can prevent environment from pollution. However, some academic researches and court verdicts show undesirable facts that establishment of oil palm plantation is conducted by employing land combustion method in order to reduce production cost and to accelerate oil palm growth. As the result, this condition creates disparity on ecosystem, such as depleted soil nutrient, infertile soil, erosion and flood. Moreover, human being also receives environmental damage directly as shown by forest fire and its smog which continually had swept Indonesia's forest away since 1979 which attacked any living being health and the worst consequence is mortality.

This calamity also brings greater consequence on economy, education, land and aviation transportation and governance sectors. International community even has to suffers from these disasters as displayed by international protest against Indonesia's oil palm policy which conducted by people from neighboring countries. Such fact clearly creates disruption against Indonesia's diplomatic relationship with her neighboring countries and furthermore with International communities worldwide. Therefore, this paper has main objective to explore state role in maintaining and protecting plantation field and its surrounding environment from forest fire disaster which caused by oil palm investment.

1. Literature Review

Investment is a business activity which included invested capital or possession over capital resources in the long run in order to yield the return after some accountant period passed. Meanwhile in term of liability, investment is a freedom to accomplish tasked works yet such freedom is limited to *pacta sunt servanda* principle, such as fulfilling order feasibly. An oil palm company as business actor possess rights and liability to do something in accordance with existing regulation and conference on environmental law. One of legal instruments on environmental law is The UN Conference on The Human Environment in Stockholm 5-16 June 1972. The principle 8 Declaration of The United Nations Conference on The Humans Environment Stockholm on 1972 expresses: "*Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life*".

Moreover, Scott Fulton on 1st Asia Pacific International Colloquium on Environmental Rule of Law: Defining a New Future for Environmental Justice, Governance and Law, explains that environmental law enforcement or *environment rule of law* is *actualization of those expectation, a state of existence, in which the law in fact prevail*. His statement means that *environmental rule of law* is a pursuit to achieve environmental legal norms into reality and to implement them on empirical level. In relation to oil palm plantation and environment, an investor shall maintain sustainable environment decently. Article 2 of letter b of Law on Environment explains that conservation and sustainability principle is any people possess responsibility as well as liability to conserve and to sustain ecosystem and its supporting elements in order to improve environment quality from a generation to next generation continually. (Kerr, G., Way, S.A., Thacker, J. 2017).

The quality of environment would be deteriorated if damage on environment happened. Such damage on environment which commonly associated to forest fires and/or land devastation is influenced by the change on

environment caused by devastation, pollution due to any human business and/or activity. Establishment of oil palm plantation which using slash-and-burn the forest method causes horrific damage on environment. Therefore, there is an urge to categorize such method into extra ordinary crime which also falls under similar category with another worst crime such as corruption. According to Eddy O.S. Hiarij: *"Extra ordinary crime criteria on corruption cases are –first, corruption is systematically organized crime; second, corruption commonly employs sophisticated modus operandi in order to avoid any legal measures to prove its existence; third, corruption is close related to power and privileges; and fourth, corruption is inseparable with its massive effect on people since it causes big loss on state finance and people's wealth"*.

Land combustion method is executed systematically well organized by making a land clearing deal prior the land purchase agreement or by employing third party do job as land clearer professionally. Meanwhile, a cliché reason or modus operandi which is used by most companies to avoid from its liability on forest fire disaster and its aftermath they created is to blame over extreme climate change and long extreme dry season. Researchers from *Center for International Forestry Research (CIFOR)* revealed their research result that 90 percent of forests have been combusted in order to establish plantation field, instead of long extreme dry season due to *El Nino's* effect solely. Another important reason for the companies employing such forest combustion is to multiply land sale price. If the forest has been burnt out successfully, the sale price will go rocketing up to Rp 3 million per acre from its initial sale price. It means if the initial land sale price is Rp 8 million per acre, then the land sale price will be Rp 11 million per acre after the forest combustion done successfully. Forest fires and the notorious method which the companies usually do to clear the forest are not secret underground issue since the local government including regencies; districts; villages as well as local non-profit NGOs are well informed over such issue. (Becker, B., and Gerhart, B. 1996).

The average cost that the companies has to spend solely on forest combustion for land clearing is approximately only Rp 600 thousand up to Rp 800 thousand per acre. By contrast, if the companies employ legal method for land clearing, they have to spend Rp 3 million per acre. Should a company possess a parcel of land 1000 acres to be cleared, then the cost that company is required to spend Rp 3 billion. It is more expensive if compared to Rp 1.8 billion the cost that a company has to spend for land clearing by using forest combustion method. The third party who is usually paid to execute forest combustion is farmer community, land seller, land seller intermediary and palm oil investors. Forest combustion is also associated with big investor interests as well as pragmatic interests of head of local government for personal gain without even pay concern on local people's wellness and condition as well as international community wellness as explained on introduction part. Based on such explanation, crime against environment can be categorized as extra ordinary crime which requires extra concern and strict legal enforcement.

Law enforcement on environment is related to legal apparatuses and people's obedience on regulation which consists of three disciplines of law. They are administrative law, criminal law and private law. G.A Blezeveld explained about environmental law enforcement, as follows: *"Environmental law enforcement can be defined as the application of legal governmental power of ensures compliance with environmental regulation by means of:*

- administrative supervision of the compliance with environmental regulations (inspection) (mainly preventive activity);
- administrative measures or sanctions in case of non-compliance (corrective activity);
- criminal investigation in case of presumed offences (repressive activity);
- private action (law suite) in case of (threatening) non-compliance (preventive or corrective activity)"

Therefore, environmental law enforcement is a legal effort to achieve people's obedience on law and order by enforcing strict supervision and administrative and criminal sanction and private compensation on legal entities and individual.

Preventive measure for controlling environmental damage excess must be enforced by employing supervision and licensing instruments maximally. Administratively, a company which wishing to gain plantation business license is required to fulfill certain conditions, as follows:

- Environmental license
- Spatial Compatibility license
- Plantation planning Compatibility

Plantation licence consists of two types. They are plantation licence for cultivation (IUP-B) and plantation licence for management (IUP-P). IUP-B is a written licence from authorized government officials which every plantation company is required to possess first. Therefore, the company must file a written IUP-B application to the regent or mayor by fulfilling some necessary requirements. During this step, company profile assessment as initial

selection is conducted by the head of local government in order to make sure if the company has fulfilled some conditions and proper planning mechanism to establish plantation which in accordance to laws and regulation. (Yastremskaya, O.A. 2014).

Legal enforcement through administrative instrument has objective to stop any action that violates the law or anything that failed to fulfil requirements and ultimately it also has purpose to restore law and order back to normal. In other words, the focus of administrative sanction is action, while the focus of criminal sanction is the offender or the subject. Furthermore, criminal sanction also put concern on any subjects which possess potential to be offender besides the main offender solely. Moreover, article 108 of Law number 32 of years 2009 regulates that any people who commit forest combustion as explained on article 69 of paragraph 1 of letter h shall be penalized by imprisonment for at least 3 years and maximum for 10 years as well as getting fined at least Rp 3 billion rupiahs and maximum for Rp 10 billion rupiahs.

2. Methodology

This research uses two kinds of problem approach *i.e.* through research of the normative and empirical research conducted with the normative research examine and learn the books, reports, research, journals, related settings and learn and examine the theories of the law, the concepts of the law and the principles of law related to problems that will be answered. (Mercy 2017). Empirical research done with how to do research directly in the field to see the fact or facts through methods of *interview* and direct observation of the condition of the location that examined with as accurate as possible and can be held accountable.

Interview method is used as a way to obtain data with the way to do an interview with an expert or respondents. The type of data can be seen from the source can be differentiated between the data obtained directly from the community and the data obtained from the materials of the library. Good data collection primary data and secondary data researchers using the tools of library study data collection and field studies.

Data analysis organise and sort data into the pattern, category, and basic description units so that it can be found theme and can be formulated the hypothesis to work as recommended by the data and as an effort to provide assistance on the theme and work processes. This research uses inductive analysis techniques. Inductive analysis done with the withdrawal of the conclusions from the facts of the special events that concrete steps, then concluded in general.

3. Discussion

Criminal law enforcement on this Law introduces minimum and maximum punishments, extension of interpretation on evidence, sanction on quality standard infringement, harmony on criminal law enforcement and control over corporate crime action. District court Judge Verdict Number No.131/Pid.B/2013/PN.MBO Jo appeal judge verdict Number No.201/Pid/2014/PT.BNA explains that the defendant is proven to be guilty convincingly due to violation against the environmental law by destructing environment continually in order to establish oil palm plantation. The defendant did legal measure by filing cassation appeal to Supreme Court yet the Justice on Supreme Court rejected their appeal by issuing Supreme Court Verdict Number No.1554 K/Pid.Sus/2015 until it is officially in force. Meanwhile, on private law enforcement perspective, repressive measures such as effective, reasonable and consistent legal enforcement are required to be enforced over pollution and environmental damages which had deteriorated ecosystem and violated the law. District court verdict Number 12/Pdt.G/2012/PN.MBO jo Appellate Court verdict Number 50/PDT/2014/PT.BNA jo Cassation Appellate verdict 651 K/Pdt/2015 jo Supreme Court verdict Number 1 PK/Pdt/2017 which one of the awards on the verdict stated that the Justice punished the defendant by enforcing restorative measure over the damaged burned forest on the area of approximately 1000 acres by paying compensation price over Rp.251.765.250.000,00 (two hundred and fifty one billion seven hundred and sixty five million two hundred and fifty thousand rupiahs) in order to revive the damaged land back into normal in accordance with law.

Supreme Court Judicial Review Verdict Number 109 PK/Pdt/2014 concerning private issue between Minister of Environment as the plaintiff and PT. Selatnasi Indokwarsa as the first defendant and PT. Simpang Pesak Indokwarsa as the second defendant passed an award upon the case which stated that "Supreme Court fined the first defendant over restoration on damaged environment for Rp.18.190.720.000, (eighteen billion one hundred ninety million and seven hundred and twenty thousand rupiahs)". However, the execution of the case award experienced some obstacles on technical and procedural issues which have not been regulated on old Dutch Laws such as HIR/RBg as well as on Indonesian Laws of Environment. On the other hand, the state role on financial matters as manifested by Otoritas Jasa Keuangan (OJK) or Indonesian Financial Services Authority is conducted by selecting investors by using OJK's law instrument Number 51 /POJK.03/2017 concerning Sustained

Implementation Financial Management for Financial Services Institution, Issuers and Limited Liability Company. Basically, the core principle of Financial Services is to harmonize economic, social and environmental aspects sustainably. Article 1 of letter 8 regulates that sustainable financial management is a comprehensive support from financial service sector in order to create sustainable economic growth by harmonizing economic, social and environmental interests. (Delery, J.E., and Doty, D.H. 1996).

The one of basic principles in implementing sustainable financial management is to use social and environmental risk management. It means that state must ensure that economic interests such as investment on oil palm plantation have to be supportive towards the establishment of healthy environment as main objective. Therefore, in order to create such ideal condition, it requires a regulation that basically imposing "absolute liability" towards investors or corporations on oil palm plantation license consequence which they got from government. This idea is important if the damage on environment happened due to companies or investors reckless action. Imposing "absolute liability" on corporate or investors reckless action actually is not enough. It also needs "absolute liability" imposition towards reckless investors and companies on environmental restoration after the damage on environment happened. Damage on environment has to be prevented by employing good management and feasible preservation on environment function. Without this effort, whole human existence and earth future will be endangered automatically. Ecology disparity in fact has happened before us. Therefore, it is absolute human being responsibility on national, regional and international level to preserve environment.

Conclusion

Forest combustion for establishing oil palm plantation is categorized as extra ordinary crime since such crime is conducted organized neatly; bring massive negative effect on environment and people. Therefore, it needs to get special concern and enforcement by categorizing investors who gain financial service support, doing profile assessment, providing supervision from both central and local government, carrying out legal enforcement by imposing administrative, private and criminal sanctions as well as imposing absolute liability upon environmental restoration over the damages.

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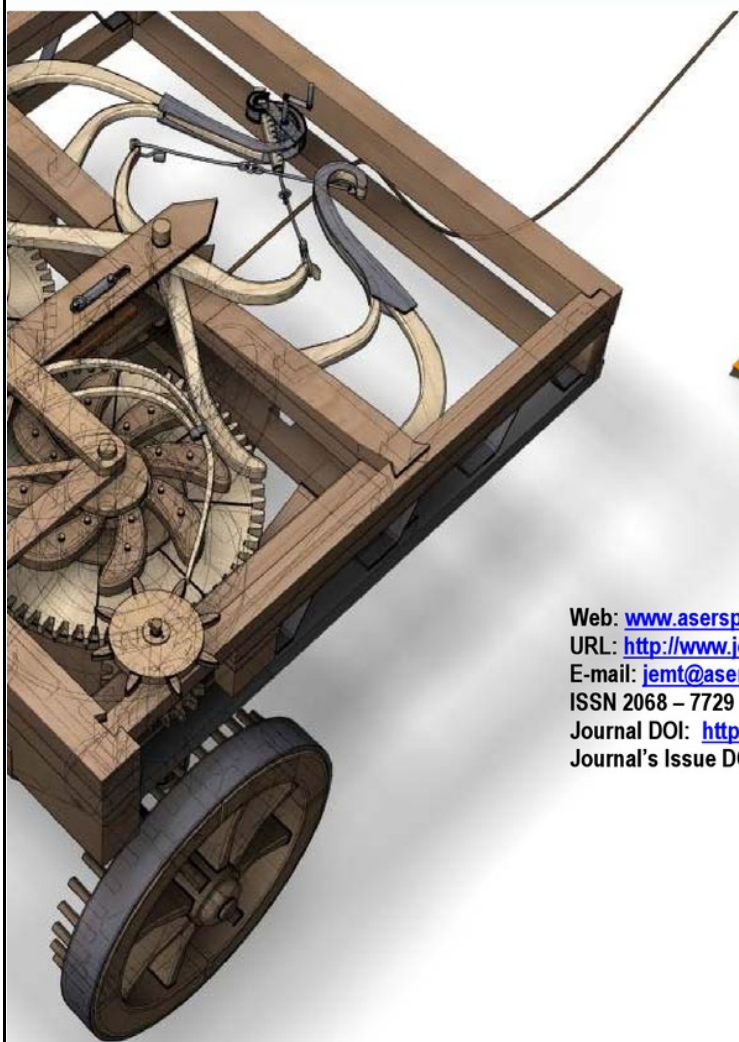
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