

**Tongzhi Joint Community Meeting / Pink Alliance
of Hong Kong:**

**Submission to the 107th session of the Human
Rights Committee in response to the Third Report
of the Hong Kong Special Administrative Region
of the People's Republic of China in the light of the
International Covenant on Civil and Political
Rights:**

**Sexual Orientation and Gender Identity in Hong
Kong**

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1. Introduction and summary

1. This shadow report is written in response to the Third Report of the Hong Kong Government to the Human Rights Committee (“**Report**” and “**HKSARG**” respectively) (CCPR/C/CHN-HKG/3) which is due to be considered at the Committee’s 107th session on 12 – 14 March 2013. It is provided to the Committee and to the HKSARG and is available online.¹

2. This shadow report is prepared by the Tongzhi Community Joint Meeting / Pink Alliance (*tongzhi* or 同志 is Chinese for ‘comrade’ and is commonly used to refer to members of the LGBTI community), a registered non-profit society in Hong Kong which exists pursuant to its constitution to:
 - (a) Link all the *tongzhi* organisations operating in Hong Kong.
 - (b) Provide a forum for discussion of issues.
 - (c) Provide a resource for *tongzhi* information and expertise and a network to acquire it from outside.
 - (d) Provide a focal point with which others (the Government, etc) may liaise on *tongzhi* matters.
 - (e) Develop policies on *tongzhi* issues.
 - (f) Implement and support campaigns.
 - (g) Develop public relations to mobilise the community and to influence opinion.

3. TCJM / Pink Alliance brings together some 16 LGBTI organisations. It is the largest and most active coalition concerned with sexual orientation and gender identity issues in Hong Kong.

4. Our Central Committee Outreach Officer William Roy Leung will be in attendance at the 107th session in Geneva.

5. By way of summary, in this shadow report we ask the Committee to:

¹ At the TCJM / Pink Alliance website <http://tcjm.org/>.

- (a) Express deep regret that the HKSARG has ignored the recommendations of the Committee to **legislate for protection against discrimination on grounds of sexual orientation** in the private sphere, and has by its actions **thwarted progress toward** the enactment of such legislation, and urge the HKSARG to take immediate steps toward enacting sexual orientation and gender identity discrimination legislation.
- (b) Express regret that the HKSARG **does not treat same-sex dependants and their different-sex comparators equally for the purpose of residence** and urge the HKSARG to offer resident status to same-sex dependants of Hong Kong residents who have formalised their relationships abroad, by marriage or civil equivalent.
- (c) Express regret that the HKSARG **refuses to allow transsexuals to marry in their acquired gender that is recognised by the HKSARG** and urge the HKSARG immediately to allow transsexuals to marry in their acquired gender.
- (d) Express concern that the **HKSARG requires construction of some form of penis before recognising female-to-male transsexuals identified as male by medical practitioners**; and urge the HKSARG to take immediate steps to recognise medically certified female-to-male transsexuals in their acquired gender.
- (e) Express concern **at police harassment of organisers of a lawful LGBTI demonstration utilising obscure legislation far beyond the scope of its purpose**; and recommend that the HKSARG stop using entertainment licence laws and regulations as a secondary means of controlling lawful assemblies and demonstrations.

2. Articles 2 and 26: Sexual orientation discrimination legislation and “other measures”

6. The Committee asked the HKSARG to protect homosexuals against discrimination in the private sphere 14 years ago, by its Concluding Observations in 1999 (CCPR/C/79/Add.117).²
7. Discrimination against LGBTI individuals in the private sphere is a continuing problem in Hong Kong. The Hong Kong LGBT Climate Study – conducted November 2011 through January 2012 by an independent member-based non-profit organisation – found³ that almost 80% of the Hong Kong working population felt that homosexuals currently faced discrimination in the workplace. LGBTI individuals may lawfully be fired or refused employment on the grounds of their sexual orientation (though they may not be on grounds of their sex, family status or disability).
8. The HKSARG has nevertheless failed to enact legislation protecting LGBTI individuals from discrimination and its actions **have in fact thwarted progress toward such legislation**. As recently as 7 November 2012 a call by non-government legislator Cyd Ho for public consultation on sexual orientation discrimination legislation was rejected. Immediately before the decision to reject the consultation, the Secretary for Constitutional and Mainland Affairs on behalf of the HKSARG said in session:⁴

“Deputy President, Ms Cyd HO's motion mentions equal opportunities and basic rights. However ... In Hong Kong, many laws and policies such as those on application [*sic*] for public housing, tax concessions, employee medical benefits, and so on, are based on a heterosexual marriage system. There are still many views in society that once same-sex marriage is permitted or if homosexual couples are allowed to marry or enjoy the rights and benefits like heterosexual

² The same request or concern has been made by the Committee on the Rights of the Child (CRC/C/CHN/CO/2, at para 31) and twice by the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.107 at para 78(a) and E/C.12/1/Add.58 at para 15(c))

³ See: Community Business *Hong Kong LGBT Climate Study 2011-12, Key Findings*, page 7. Retrieved from <http://www.communitybusiness.org/images/cb/publications/2012/LGBT%20Climate%20Study%20Key%20Findings.pdf>.

⁴ Legislative Council (2012) *Official Record of Proceedings* at 1545-6. Retrieved from <http://legco.gov.hk/yr12-13/english/counmtg/hansard/cm1107-translate-e.pdf>

couples, extensive and far-reaching effects will be caused. The Administration must handle this issue very carefully ... We do not want to see that this issue will arouse disputes in society and lead to confrontation.”

(Emphasis added)

9. The Gender Identity and Sexual Orientation Unit (“GISOU”) and the Sexual Minorities Forum (“SMF”), which were the HKSARG’s proposed “most appropriate means of addressing discrimination [against homosexuals]” (Report para 363) and which were “welcomed” by the Committee in 2006 (CCPR/C/HKG/CO/2 para 4) have in fact failed to “educate” or “regulate” society **and now stand in the way of progress**;⁵ specifically:
 10. The GISOU has proved wholly ineffective and is now the subject of an investigation by the Ombudsman for its failure to fulfil its mandate in any meaningful sense:
 - (a) Its "Code of Practice Against Discrimination in Employment"⁶ is not legally binding and is drafted expressly in terms of "encouragement" and "recommendation"; LGBTI individuals are still routinely dismissed and denied work and promotion because of their sexual orientation;
 - (b) It is statutorily precluded from directing private individuals or organisations to comply with its directions;⁷
 - (c) The “Enquiries and Complaints Hotline”⁸ has handled only 43 complaints in its 6 years of operation. In only one year (2006-2007) has it handled more than 7 complaints, though in that same year it *received* 5018 enquiries. No information on the details or resolve of the complaints is available (and we note that 25 of the complaints were levied against *public bodies of the HKSARG*). Only 24 complaints have ever been conciliated;

⁵ Amnesty International Hong Kong (2013) *Submission to Panel on Constitutional Affairs on the Third Report of the [HKSAR] in light of the [ICCPR]* at para 4. Retrieved from <http://www.legco.gov.hk/yr12-13/chinese/panels/ca/papers/ca0218cb2-649-1-ec.pdf>

⁶ Available at <http://www.cmab.gov.hk/en/issues/sexual.htm>

⁷ Constitutional and Mainland Affairs Bureau, *Enquiries and Complaints Hotline – Guide to Complaint Procedures*.

⁸ Data available here: http://www.cmab.gov.hk/en/issues/equal_hotline.htm

- (d) One explanation for the light work required of the hotline may be that the Complaint Form – which is listed ⁹ as hosted at http://www.cmab.gov.hk/doc/en/documents/public_forms/racedoc/Complaint_Form_eng.doc – is not available as claimed.

11. The SMF, which the HKSARG considers “promot[es] equal opportunities for people of different sexual orientation” (Common Core Document at para 112), **has proved to be nothing more than “window dressing”**:

- (a) It held what were widely regarded to be sham meetings wherein civil servants attended and repeated government by-lines and sound-bites;
- (b) In the nine years and five months since its inception it has met only 11 times; the last meeting was over two years ago on 22 December 2010, the minutes of which are not – contrary to the assertion of the HKSARG in the Common Core Document, para 86 – available online.¹⁰ Members have not been informed of the next meeting;
- (c) It invited and hosted the attendance of entirely inappropriate organisations including, for example, the New Creation Association (“NCA”), an organisation that is expressly opposed to the recognition of LGBTI rights and which exists to “help people who have experienced unwanted same-sex attractions resolve their psychological self-contradiction of the mind”¹¹ and which begins its most recent “prayer letter” of April 2011 with:¹²

“Pray for the homosexuals: even if they choose to live a homosexual life, we hope that they can establish a relationship with God, understand the truth and be able to love themselves”

⁹ *Ibid.*

¹⁰ Constitutional and Mainland Affairs Bureau, Sexual Minority Form Meetings. Retrieved from http://www.cmab.gov.hk/en/issues/equal_forumdoc.htm.

¹¹ <http://www.newcreationhk.org/eng/ministry.html>

¹² http://www.newcreationhk.org/downloads/OLD/2011PrayerLetter_April_Eng.pdf

12. As a consequence of the SMF's failure to do anything to promote the introduction of sexual orientation discrimination legislation, the following member organisations of the LGBTI community, which previously attended SMF meetings, have now expressly withdrawn from participation in protest:

- | | |
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| 1. International Social Services, Hong Kong Branch | 8. Chi Heng Foundation |
| 2. Amnesty International, Hong Kong Section | 9. Gender Concerns |
| 3. Office of the Hon. Emily LAU Wai-hing, JP, member of the Legislative Council of Hong Kong and Chairwoman of the Democratic Party. | 10. Gender Rights Research Group |
| 4. Transgender Resource Centre | 11. HORIZONS |
| 5. Transgender Asia Research, Education and Advocacy Centre | 12. Hong Kong Ten Percent Club |
| 6. AIDS Concern | 13. Nuton Xueshe |
| 7. Association for the Advancement of Feminism | 14. Queer Sisters |
| | 15. Satsanga |
| | 16. Transgender Equality and Acceptance Movement |
| | 17. Association of World Citizens |
| | 18. Hong Kong Christian Institute |
| | 19. TCJM / Pink Alliance |

13. The HKSARG has **further acted in ways that entirely undermine and cast doubt on the truth of the assertion at para 363 of the Report** that it will “continue to address discriminatory attitudes and promote equal opportunities on ground [*sic*] of sexual orientation through public education and administrative means, with a view to fostering in the community a culture of mutual understanding, tolerance and mutual respect.” Specifically:

- (a) The Social Welfare Department in June 2011 hired a consultant lecturer to train its staff who was and remains a public practitioner of ‘conversion’ or ‘reparative’ therapy, a pseudo-medical science that aims to “cure” persons of their homosexuality and which has been denounced as dangerous, wholly lacking in evidence and ethically dubious by psychiatric, psychological and paediatric societies worldwide.¹³ The consultant lecturer, Dr. Hong Kwai-wah was and

¹³ Including the Hong Kong Psychological Society, the American Psychiatric Association, the American Academy of Pediatrics, the American Association of School Administrators, the American Counselling Association, the American Federation of School Teachers, the American Psychiatric Association, the American Psychological Association, the American School Counsellor Association, the American School Health Association, the Australian Psychological Association, the British Association of Counselling and Psychotherapy, the British Psychological Association, the National

remains Chairman of the aforementioned NCA which describes homosexual desire as an “addiction cycle”.¹⁴ His appointment provoked widespread concern in the mainstream press¹⁵ as well as outrage in the LGBTI community.¹⁶

- (b) In 2005 the Education Bureau awarded a contract to produce teaching materials for teachers of human rights and non-discrimination, to the Society for Truth and Light (“STL”). The STL is a faith-based organisation **that actively lobbies against legislation prohibiting discrimination on grounds of sexual orientation**. The STL’s General Secretary Choi Chi-sum has said that “[t]o equate gay rights and human rights is just wrong”.¹⁷ The STL’s July 2010 handbook “Acceptance – Caring for Homosexuality” contains the following in the opening chapter:

“A homosexual lifestyle indeed has a strong connection with physical and psychological illnesses. This is not based on moral or religious bias, but it is scientifically proven theory.”

- (c) The HKSARG has failed to repeal legislation criminalising homosexual buggery and ‘gross indecency’ otherwise than in private and for those under 21 (sections 118F(2)(a), 118J(2)(a), 118C and 118H of the Crimes Ordinance, Cap. 200), which was declared unconstitutional by the Court of First Instance and the Court of Appeal in 2005 and 2006 respectively.¹⁸ Without taking expensive legal advice it is therefore impossible to determine whether the criminal sanction of

Association of School Psychologists, National Association of Secondary School Principals, the National Association of Social Workers, the National Education Association, and the School Social Worker Association of America and the Pan American Health Organisation. See e.g.

new.paho.org/hq/index.php?option=com_docman&task=doc_download&gid=17703&Itemid. Homosexuality has not been listed as a “disorder” by the World Health Organisation since 1973.

¹⁴ <http://www.newcreationhk.org/eng/index.htm>.

¹⁵ Time Out Hong Kong (2011) *Behind the Time for Gay Rights*. Retrieved from <http://www.timeout.com.hk/gay-lesbian/features/43795/behind-the-times-for-gay-rights.html>; China Daily (2011) *The Last Straw*. Retrieved from http://www.chinadaily.com.cn/hkedition/2011-08/02/content_13028390.htm.

¹⁶ Rainbow Action (2011) *Press Release*. Retrieved from <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/1418.html>; Change.org petition. Retrieved from <http://www.change.org/petitions/stop-hong-kong-government-from-promoting-gay-cure-therapy>.

¹⁷ Time Out (2012), *Hail Mary, full of gays*. Retrieved from <http://www.timeout.com.hk/gay-lesbian/features/50272/hail-mary-full-of-gays.html>.

¹⁸ Crimes Ordinance, Cap. 200. Retrieved from: [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/46A02C9D714527F1482575EE004C2BC1/\\$FILE/CAP_200_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/46A02C9D714527F1482575EE004C2BC1/$FILE/CAP_200_e_b5.pdf).

life imprisonment will apply. The law is patently unclear. William Leung, the successful litigant in these actions,¹⁹ will present to the Committee at the 107th session in Geneva on behalf of TCJM / Pink Alliance.

- (d) The HKSARG refuses to allow foreign consulates in Hong Kong to undertake same-sex marriage or civil partnership registration of their nationals at consular premises. The UK government's requests have been repeatedly refused and Hong Kong remains one of the few jurisdictions where such services to UK nationals are prohibited.²⁰

14. **Consequently we ask the Committee to:**

- (a) Express deep regret that the HKSARG has failed to enact sexual orientation discrimination legislation as obligated under the Covenant and as recommended by the Committee over the last 14 years;**
- (b) Express concern that the alternatives to legislation put forth by the HKSARG and welcomed by the Committee in 2006 have in effect thwarted the introduction of legislation, rather than promote it;**
- (c) Express concern that the HKSARG has failed to show any political will in effecting changes necessary to guarantee equality for LGBTI citizens, as obligated;**
- (d) Urge the HKSARG to actively liaise with stakeholders in the LGBTI community whose purpose is to promote LGBTI rights and promote the introduction of sexual orientation discrimination legislation; and**
- (e) Urge the HKSARG to take immediate steps to enact legislation prohibiting discrimination on the grounds of sexual orientation and gender identity.**

¹⁹ Court of First Instance:

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=46129&QS=%2B&TP=JU and
Court of Appeal:

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=54227&QS=%2B&TP=JU.

²⁰ <http://ukinhongkong.fco.gov.uk/en/help-for-british-nationals/living-in-hong-kong/registering-civil-partnership>. See also Civil Partnership Act 2010, c.33, esp. section 210. Retrieved from <http://www.legislation.gov.uk/ukpga/2004/33/contents>.

3. Articles 2 and 26: Resident status for same-sex couples

15. Unlike different-sex couples who have formalised their relationship by marriage or *pacte civil de solidarité*, same-sex couples who have entered in to lawful marriages and civil partnerships abroad are not permitted to remain in Hong Kong with their resident spouses as dependants, and are thereby deprived of the rights and benefits that accrue. Instead same-sex dependants must continually re-apply to enter Hong Kong as visitors in order to be with their partners. See the Report at para 364.
16. Non-Hong Kong “residents” are statutorily barred from landing in Hong Kong except with the permission of the Director of Immigration.²¹
17. Whether one is a “resident” or a “non-resident” is a matter of executive policy for the determination of the Director. The Director’s policy is to allow different-sex husbands and wives of Hong Kong residents to enter and remain themselves *as residents*, “dependant” upon the resident status of their spouse.²²
18. As a result, same-sex dependant spouses, in contradistinction to their different-sex comparators:
 - (a) Are unable to begin accruing “ordinary residence”, which after 7 years confers *permanent* residence and the right to vote and immunity from deportation;
 - (b) Are excluded from public services pertaining to health, housing and social security.
 - (c) Are unable to exit and re-enter Hong Kong at will within the specified term of stay (subject to the Director’s permission in individual cases, see Report at para 364);

²¹ Immigration Ordinance, Cap 115, sections 7(1) and 7(2). Retrieved from [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/ED717360D64A043E482575EE003DBF1A/\\$FILE/CAP_115_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/ED717360D64A043E482575EE003DBF1A/$FILE/CAP_115_e_b5.pdf)

²² Immigration Department, *Guidebook for Entry for Residence as Dependants in Hong Kong*, para 4(a). Retrieved from <http://www.immd.gov.hk/en/services/hk-visas/dependants/guidebook.html>; see also the Report at para 364.

- (d) Are forced to apply for an extension of stay as a visitor – notwithstanding that their purpose is clearly one of residence and not visitation – before leaving and re-entering Hong Kong every 180 days (residency is granted for 1 year, then 2 years twice, then 3 years and may be extended wholly within Hong Kong); and
- (e) Are unable to take up employment in Hong Kong.

19. We consider the Director's policy to be discriminatory without reason **and we ask the Committee to:**

- (a) **Express deep regret that the HKSARG / Director does not treat same-sex dependants and their different-sex comparators equally for the purpose of residence; and**
- (b) **Urge the HKSARG / Director to offer resident status to same-sex dependants of Hong Kong residents who have formalised their relationships abroad, by marriage or civil equivalent.**

4. Articles 17 and 23(2): Transgender marriage

20. The HKSARG refuses to allow post-operative transsexuals who are recognised by the HKSARG in their acquired gender, to marry in their acquired gender (Report at para 279).
21. The HKSARG does recognise gender dysphoria, and has in place publicly funded schemes that finance medical treatment, including sexual re-assignment surgery if necessary, and will re-issue identity cards and passports and even amend education certificates to show one's acquired gender.
22. The Registrar of Marriages however – despite the right of all residents to marry being constitutionally guaranteed²³ – refuses to marry such persons (Report at 279 and the case of 'W' v. Registrar of Marriages)²⁴ and the HKSARG's position is that such persons should, despite their heterosexuality, be able to enjoy their right to marriage only with persons of the same-sex as their acquired gender.
23. The HKSARG has failed to take any steps toward specifically providing for transsexuals' marriage in their acquired gender, despite calls from senior members of the judiciary to do so, as long as four years ago. **We ask the Committee to:**
 - (a) **Express regret at the HKSARG's refusal to allow transsexuals to marry in their acquired gender that is recognised by the HKSARG; and**
 - (b) **Urge the HKSARG immediately to allow transsexuals to marry in their acquired gender.**

²³ Basic Law of Hong Kong, article 37.

²⁴ The first-instance judgment is here:

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=73187&QS=%2B&TP=JU. The Court of Appeal judgment is here:

http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=79245&QS=%2B&TP=JU. The Court of Final Appeal (the highest court of Hong Kong) will hear the final appeal in April 2013.

5. Article 17: Recognition of medically certified gender of female-to-male transsexuals only after “construction of some form of penis”

24. The HKSARG will not amend the identity card of female-to-male transsexuals who are medically certified as male unless they have undergone the “construction of some form of penis”.²⁵ As a result persons certified as members of their acquired gender, that have (often upon medical advice) not had phalloplasty or metoidioplasty, must disclose their gender dysphoria and previous gender on a daily basis – and are thereby are subjected to repeated discrimination – including:
- (a) when seeking employment, which inevitably requires the production of (at least) an identity card (as non-permanent residents have no right to work in Hong Kong);
 - (b) when accessing the market generally, to open a bank account, to access credit, to become a member of a scheme, to use a facilities (including public facilities e.g. swimming pools and libraries) or institutions, to access insurance products (which in some situations are mandatory) and in many situations in Hong Kong, even to access residential, commercial and public buildings;
 - (c) when being asked to prove their identity to police or immigration officers (who are statutorily empowered to so require without reason);²⁶ and
 - (d) when using public toilets – for a female-to-male transsexual who is recognised by the medical profession but not the executive cannot lawfully use a male toilet (and yet he will appear of the male gender to all observers).
25. Construction of a penis is not always safe and in many cases is not medically recommended (and indeed is medically advised against) in treatment of a person’s gender dysphoria. Phalloplasty in particular is far from a complete science and has

²⁵ See the policy at Q21 here: http://www.gov.hk/en/residents/immigration/idcard/hkic/faq_hkic.htm.

²⁶ Immigration Ordinance, Cap. 115, section 17C (as regards those over 15 years of age). Retrieved from [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/ED717360D64A043E482575EE003DBF1A/\\$FILE/CAP_115_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/ED717360D64A043E482575EE003DBF1A/$FILE/CAP_115_e_b5.pdf)

been performed using over 10 different methods²⁷ that usually require more than one round of surgery. It involves lengthening the urethra which is a procedure that may cause life-threatening complications.

26. We consider the HKSARG's insistence on construction of some form of penis to be an unjustified restriction on female-to-male transsexuals' privacy where doctors have certified a person as being of their acquired gender, **and we ask the Committee to:**

- (a) **Express concern that the HKSARG requires construction of some form of penis before recognising female-to-male transsexuals identified as male by medical practitioners; and**
- (b) **Urge the HKSARG to take immediate steps to recognise medically certified female-to-male transsexuals in their acquired gender without the need for them to have undergone the construction of some form of penis.**

²⁷ <http://www.phallo.net/procedures/>.

6. Articles 19(2), 19(3), 21 and 26: interference with LGBTI public expressions and demonstrations

27. On 15 May 2011 police officers harassed the organisers of an LGBTI demonstration marking the 7th International Day Against Homophobia and calling for sexual orientation and gender identity discrimination legislation, and threatened them with arrest despite previous permission having been granted for the demonstration.
28. The police sought to rely on obscure entertainment legislation²⁸ to end the demonstration on the purported basis that the dancing of peaceful demonstrators' required an entertainment licence. The demonstration was thereby halted.
29. We do not consider it sufficient that the HKSARG “does not intend to suppress any activity” by use of the entertainment laws (Report at 247) **and we ask the Committee to:**
- (a) **Express concern that lawful LGBTI assemblies appear to have been hampered by obscure legislation utilised far beyond the scope of its purpose; and**
 - (b) **Recommend that the HKSARG stop using entertainment licence and regulations as a secondary means of controlling otherwise lawful assemblies.**
30. End.

²⁸ Places of Public Entertainment Ordinance, Cap. 172, section 4(2). Retrieved from: [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/FA3BF759A2007C8E482575EE0049406D/\\$FILE/CAP_172_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/FA3BF759A2007C8E482575EE0049406D/$FILE/CAP_172_e_b5.pdf).