Governance of Contemporary Japan

ISS/Shaken International Symposium

Edited by
Symposium Committee, Institute of Social Science

Contents

Preface

Akira Suehiro
Director of Institute of Social Science

First, on behalf of Institute of Social Science (ISS) or Shaken of the University of Tokyo, I would like to express my appreciation to all the people who joined the international symposium held on the 1st of December in 2010. In particular, this symposium has greatly benefited from six speakers who came from abroad to provide us with their insightful ideas on "Governance of Contemporary Japan." They include Mr. Roland Czada of the University of Osnabruck (Germany), Ms. Margarita Estevez-Abe of Syracuse University (U.S.A.), Mr. Colin B. Picker of the University of New South Wales (Australia), Ms. Hiroko Takeda of the University of Sheffield (U.K.), Mr. Kasian Tejapira of Thammasat University (Thailand), and Ms. Yupana Wiwattanakantang of the National University of Singapore. ISS members who also contributed include Mr. Wataru Tanaka who spoke on corporate governance, while both Mr. Iwao Sato and Mr. Junji Nakagawa provided comments on Tanaka's paper and Picker's paper respectively. Mr. Kenji Hirashima was fully responsible for managing the two time-consuming tasks of organizing the symposium and editing the symposium proceedings.

As our logo, the so-called "throwing knife with four blades," illustrates, the research scope of ISS extends across four of the social sciences—law, political science, economics and sociology—and a geographic scope that stretches beyond Japan to include East Asia, Europe and the Americas. The mission of ISS is to carry out empirical studies of an interdisciplinary and international nature from various theoretical, historical and comparative perspectives to develop a more comprehensive understanding of the social, political and economic issues facing Japan and the world.

In the 1990s, the ISS began to internationalize its activities. Under the slogan of "*kokusaika*," we have attempted to reorganize ISS into an international hub for research on contemporary Japan through inviting distinguished foreign researchers and the publication of a peer-reviewed English language journal (*Social Science Japan Journal*) in collaboration with the Oxford University Press. At the same time, we also launched international academic exchange programs with major universities and institutes across the world. As a part of these activities, we have periodically organized ISS/Shaken

international symposiums to promote interaction between Japanese and international researchers.

The 2010 conference was the 24th ISS/Shaken international symposium. Among fifteen international symposiums over the past decade, the largest one was held in November 2006 with the title of "Current and Future Trajectories of Social Science Research on Japan." We invited eleven distinguished scholars from leading universities and institutions in East Asia (Korea, China, Thailand, Indonesia), Europe (Italy, Germany, France, U.K.), and the United States (see *ISS Research Series*, no. 29, August 2007). Apart from this major symposium, we also have organized a variety of international workshops which focused on topics such as regionalism, gender problems, the lost decade of the Japanese economy, and the social sciences of hope.

The 2010 conference was designed to explore the concept of governance from two approaches: empirical studies of governance in Japan and cross-national comparisons of Japan and other regions. The first group of presenters focused on various aspects of governance in Japan in its food supply, welfare provision and corporate ownership, while the second group clarified several characteristics of governance in contemporary Japan and elsewhere by discussing governance in the WTO, EU migration policies and the politically contested localization of the concept of governance (thammarat) in Thailand.

The papers and responses compiled in this research report are closely connected with topics undertaken in ISS's recently launched, institute-wide "Joint Research Project on Reconsidering Governance." This joint research project consist of three teams specializing in studies of corporate governance, livelihood security governance and local governance, that are now working with a sense of renewed purpose to produce academic works beneficial to the restoration and reconstruction of Japanese society after the Great East Japan Earthquake of March 2011. I hope readers of this current report will also give their attention to the activities of our Governance Project teams.

Lastly, ISS is greatly indebted to three non-profit organizations that provided us with financial support: the Murata Science Foundation, Nomura Foundation and the Resona Foundation for Asia and Oceania. It would be very difficult for us to achieve successful outcomes without the generous support of these organizations.

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ISS/Shaken International Symposium
Program

Governance of Contemporary Japan

December 1st 2010
The University of Tokyo, Hongo
Faculty of Agriculture, Yayoi Auditorium, Ichijo Hall

9:30 Opening and Introduction
Akira Suehiro (Director, ISS)
Kenji Hirashima (ISS)

10:00~ 11:30 Session: Welfare Governance
Margarita Estevez-Abe (Syracuse University, USA) *"The Future of Japanese Welfare State"*
Hiroko Takeda (University of Sheffield, UK) *"Towards a New Food Governance? : Food Policy Reform in Contemporary Japan"*
Discussant: Iwao Sato (ISS)
Moderator: Mari Osawa (ISS)

11:40 ~ 12:50 Lunch

13:00 ~ 14:00 Session: Corporate Governance
Wataru Tanaka (ISS) *"Corporate Ownership and Governance"*
Discussant:, Yupana Wiwattanakantang (National University of Singapore)
Moderator: Masaki Nakabayashi (ISS)

14:00 ~ 14:15 Coffee Break

14:15 ~ 16:15 Session: Governance in Asian, European, and Global Context
Roland Czada (University of Osnabrück, Germany) *"Migrations and European Traditions of Governance"*
Kasian Tejapira (Thammasat University, Thailand) *"Governance in Thailand"*
Colin Picker (University of New South Wales, Australia) *"The Interaction of WTO Governance and Legal Culture"*
Discussant: Junji Nakagawa (ISS)
Moderator: Kaoru Iokibe (ISS)

16:30 ~ 17:30 Podium Discussion: Governance Approaches and

Contemporary Japan, Closing Remarks

M. Osawa, M. Estevez-Abe, K. Tejapira, R. Czada

Moderators: K. Hirashima, Naofumi Nakamura (ISS)

Introduction

Kenji Hirashima

Few words h*ave su*ch wide currency in the contemporary world as 'governance'. Only 'globalization' likely equals 'governance' in terms of rapid ascendancy over the past two decades. Governance has not only come to be widely used among practitioners but has also firmly established itself as a technical term in the social sciences, especially political science and economics. However, its wide acceptance is concomitant with conceptual confusion. Indeed, the term's vagueness seems to be one reason that it has acquired such prevalence. Taking stock of past academic debates on this highly contested concept, the "Governance of Contemporary Japan" symposium held in December 2010 aimed to elucidate various challenges contemporary Japan faces from the governance perspective, and to add theoretical contributions to this new approach.[1]

First, let me briefly sketch the historical background of government crises that led to the emergence of the governance approach in political science.[2] After WW II, governments of the advanced industrialized countries rapidly expanded their scope of activities for the purpose of solving societal problems. Although substantial differences developed later among regime types, governments commonly built up welfare state regimes. However, with the stagnation of economic growth beginning in the mid-1970s, governments were forced to cut back or restructure their welfare arrangements. Neoliberalism was the primary driving force behind this movement. Criticizing big governments as problems in and of themselves, neoliberalism advocated privatization, market deregulation, and fiscal restraint. Finding this argument persuasive, voters in some countries chose neoliberal governments that renounced postwar Keynesian approaches.

However, even in countries where robust economic growth resumed, social inequality was intensified considerably. Nor were the 'Third Way' governments of the 1990s better able to alleviate societal difficulties. Hence, the capacity of government itself – no matter the political strategy animating it – came under question. In fact, individual governments were increasingly circumscribed by the economic globalization that has accelerated since the end of the Cold War.

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1 For overviews of the approach, see Pierre (2000), Benz (2004), and especially Benz et al., (2007) for a review of central concepts such as markets, hierarchy, networks, and for analyzing governance mechanisms in concrete cases. One of the earlier works is Rhodes (1996), which applied the network concept to the case of British intergovernmental relations.

2 As is evident below, I take a state-centric perspective of the governance approach (Pierre and Peters 2000) as contrasted with a more society-oriented, horizontal perspective represented by Kooiman (2000).

Against this backdrop, the governance approach emerged in political science. This approach assumes that the government of a nation-state should not impose its will hierarchically on society for the purpose of controlling or steering society from above, nor should the government leave societal problems to be solved by market forces. Instead, this argument continues, governments can only solve problems effectively when they undertake horizontal negotiations with societal actors. As demands for environmental protection began to affect economic policy and as employment policy was increasingly formulated in tandem with social and education policies, the deepening functional interdependence of different policy areas drew greater attention to the range of societal actors with which government was expected to cooperate.

The centrality of government was relativized not only from within but also externally.[3] Traditionally, governments of sovereign nation-states have collectively created intergovernmental organizations for coping with transnational problems that they cannot handle individually or bilaterally. However, as the Commission of Global Governance (1995, p.3) noted, '[governance] must now be understood as also involving non-governmental organizations (NGOs), citizens' movements, multinational corporations, and the global capital market'. International governance is no longer to be realized solely by national governments. Especially in Europe, where an ever wider range of policies are formulated by European Union institutions, there has been much debate over 'multi-level governance' across sub-national, national, and regional levels. Involving various kinds of actors, the EU, a polity without a single central authority, has developed complex style of governing, provoking broad discussions over 'new modes of governance'.[4]

In fact, it was not in political science but in economics that the governance perspective originally emerged from theorizing about firms (Coase 1937; Williamson 1985). Hierarchical organization was first discussed as an institutional locus for another mode of economic transactions than that of markets. As the idea of transaction costs stimulated theorizing about the economic institutions of capitalism, firms were analyzed as organizational actors seeking to establish appropriate relationships internally with employees and externally with a range of other actors such as clients, suppliers, trade unions, business associations, and governments. 'Corporate governance', a specific type of principal-agent problem narrowly defined as investors' controls and monitoring of managers, has been actively debated, especially in the

[3] This description is based on Rosenau's (2000) review of trends in international politics study in relation to the governance perspective.

[4] In the EU case, governance is also of a common usage that constructs an ideational dimension of reality. The Commission once presented its own idea of an ideal state of EU governance during the run-up phase to the constitutional convention in a less prescriptive way than that by the IMF (Commission of the European Communities 2001). For possible analytical strengths of the approach in integration studies see Peters and Borras (2010).

US where it originated. However, a macro-level perspective of 'varieties of capitalism' (Hall and Soskice 2001) has also developed, focusing on how firms coordinate their relationships with 'stakeholders' in their national contexts. Thus institutional economics has contributed to theorizing about different modes of governance from the opposite end of the scale.

Now, let us come back to the governance approach in the political science. Some preliminary cautions are in order when we apply this framework. First, the governance approach focuses on negotiations and coordination among actors rather than on their conflicts or power struggles.[5] However, in reality governance is exercised through hierarchical institutions or electoral competition. Conflicting interests in society and institutional biases that favor some interests against others should not be ignored. Second, even when governance is successfully achieved, it must be democratically sanctioned. As the debates concerning the EU show, democratic legitimization is indispensable for governance. Third, particular recipes of governance have often been postulated from specific ideological points of view.

During the Asian financial crisis in the late 1990s, the World Bank and IMF required borrower nations to impose 'good governance' measures as one of its loan conditions. Another example might be the 'new public management' propounded by neoliberal governments in the 1980s which introduced market mechanisms in public services and created 'agencies' detached from traditional bureaucracies. Yet governance imposed from outside seems most unwise. Governance towards problem solving can be achieved only through autonomous coordination among relevant actors representing diverse interests and ideas in their own proper conditions.

With these caveats in mind, the first three chapters below approach contemporary Japan from the governance perspective. What are the structures and mechanisms specific to the micro, meso (regional or sectoral), and macro level governance of contemporary Japan?[6] In chapter 1, Margarita Estevez-Abe discusses the welfare state of contemporary Japan and its future. After a number of institutional reforms during the lost decade of the 1990s, and the neoliberal reforms undertaken during the Koizumi administration and after, Japan faces unprecedented challenges of social inequality, aging, and the crises of work and welfare. We discuss the conditions and possibilities of successful governance towards achieving a viable welfare state. In chapter 2, Hiroko Takeda presents the ongoing search for a new mode of food governance which will go far beyond traditional agricultural policy and meet basic requirements for our

[5] Mayntz (2004) pointed out this problem solving bias most clearly.

[6] To our regret, we could not include a session on local governance in the symposium. In Germany, the study of local politics ('lokale Politikforschung'), which explicitly breaks the traditional frameworks of public law studies, dates back to the 1970s (Heinelt 2004). The local perspective of governance is likewise well established in British and French studies, see for example Cole and John (2001).

societal reproduction in the future. Wataru Tanaka provides a comparative look at corporate governance in contemporary Japan in chapter 3. Tanaka explains the particular challenges Japanese enterprises face given their ownership structure of stable cross shareholdings.

In the remaining chapters, the discussion will be extended to governance problems in the European, Asian, and global contexts. Roland Czada focuses in chapter 4 on how the European countries are trying to deal with immigration by assessing what type of governance is required whether there any traditions to fall back on for constructing effective immigration governance. In chapter 5, Kasian Tejapira sets out how Thailand's political elites coped with external demands for governance, and how they modified and adjusted foreign governance models to their domestic realities. Lastly in chapter 6, Colin B. Picker assesses whether we are witnessing the emergence of governance as a legal culture within the WTO in spite of its apparently reiterated malfunctions. Taking these diverse foreign experiences and lessons into account, we search for practical suggestions and strategies for Japanese society, and hopefully make some contributions to theories of governance.

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1

The Future of the Japanese Welfare State[1]

Margarita Estévez-Abe

Introduction

In thinking about the future of the Japanese welfare state, it is necessary that we first consider the structure of policy making and implementation in Japan. We can think of this structure as part of the governance system in Japan. A governance system consists of: (a) specific actors who are allowed to take part in either policy-making or implementation processes or both; and (b) the rules and routines that dictate the interactions between societal and political actors in a given issue area. Ultimately, the governance structure determines how policies are enacted and implemented.

This paper focuses on the rules of the game and their implications for the Japanese welfare state. Any system of governance is based on a certain set of rules that govern the interactions among all stakeholders. In the case of a welfare state, the list of potential stakeholders is long: citizens (both as beneficiaries and tax payers), for-profit and non-profit service providers, politicians and bureaucrats at the local and national levels. Not only does the specific nature of its governance structure affect the quality of a welfare state, but it also affects its capacity to adapt to changes. The long rule by the LDP and the dominance of the national bureaucracy shaped the governance structure of the Japanese welfare state for decades. And, this governance structure has left a very visible foot print in the way the Japanese welfare state developed.

Back in the 1990s, as the geopolitical and socio-economic environment changed dramatically, Japanese politicians began to tinker with the rules of the political game. The Electoral Reform in 1994 was the first major reform followed by many others. Generally speaking, the rules were changed in the direction of the

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[1] This paper summarizes the arguments and evidence presented in my book (Estévez-Abe 2008). For a complete list of citations for related scholarly work and evidence, please consult the book.

Westminster-style democracy. That is to say, the ruling party's accountability has been strengthened, and, institutionally speaking, political power has become more concentrated in the hands of party leaders—especially, in the hands of the Prime Minister. The idea was to create a competitive party system and a government capable of bold decisions.

Has the Japanese governance structure changed? Has the new structure enabled bold policy changes? Has the shape of the Japanese welfare state changed as a result? The result is mixed. Certainly, today, the ruling party is more accountable to popular sentiment in ways that it never was 20 years ago. A landslide electoral victory by Koizumi's LDP in 2005 and another landslide victory by the Democratic Party of Japan (DPJ hereafter) in August 2009 offer testimonies to the enhanced voice of voters. The DPJ's victory in 2009—the first shift of power as the result of an election—raised expectations for a dramatic departure from the long rule by the LDP. What followed the DPJ's landslide victory defies all these expectations. Most policy efforts of the new DPJ government—welfare and other policies—have been stalled by the opposition from within and without the party. The failure of the DPJ government to carry out its own policy agenda, I argue, comes from the incomplete transformation of the rules of the game. Until the transformation of the political rules is complete, Japan will not be able to introduce bold reforms necessary to solve problems in its welfare state.

The rest of the paper is divided into four sections. Section I identifies the characteristics of the Japanese welfare state and its problems. Section II explains the link between the rules of the political game and the shape of the welfare state. Section III explains the development of recent major welfare reforms on the basis of the incomplete transformation of the rules of the game. Section IV briefly concludes.

I. The Japanese Welfare State

Welfare states can be differentiated on multiple dimensions. When compared to other advanced democracies, the welfare state in Japan stands out for three characteristics: (i) its work-based benefit eligibility; (ii) its reliance on targeted functional equivalents; and (iii) its savings-orientation (Estévez-Abe 2008). Let me first describe each of these characteristics, and then discuss how each of them contributes to Japan's problems.

Three Characteristics of the Japanese Welfare State[2]

By work-based benefit eligibility, I mean the underdevelopment of universalistic programs and the occupationally fragmented nature of social protection in Japan. Japan developed only few universalistic benefits and services. The few universalistic benefits that exist are for the elderly. Japanese welfare state thus is not very generous when it comes to cash benefits and services for working-age population—wage earners and their families, in particular. As Table 1shows comparatively speaking, Japan's unemployment benefits and children's allowance are meager. Similarly, Japan lacks active labor market policy, which is also primarily for wage earners. Most of the welfare programs for wage earners come in the form of company-based statutory social insurance schemes and corporate fringe benefits. Corporate fringe benefits can be considered as functional equivalents of the more orthodox social welfare programs. For instance, corporate housing and corporate children's allowance provide good and well-known cases of work-based welfare provision.[3] When a specific benefit was statutory-mandated—i.e. a social insurance scheme, the Japanese government allowed large companies to opt out of the broader statutory social insurance schemes to set up corporate social insurance schemes. All this led to high levels of fragmentation in its social protection programs.

Moreover, Japan provided what I call "functional equivalents" to orthodox welfare programs include more than corporate fringe benefits. Instead of generous unemployment benefits, for instance, the Japanese government used to provide wage subsidies for companies so that they could hold onto their workers during the market downturn. Even structurally depressed industries received such subsidies. These are all functional equivalents of the more orthodox ways of safeguarding the working population from income loss due to unemployment.(Table 1)

By reliance on targeted welfare programs, I refer to an important distributional bias in Japan's orthodox welfare programs and their functional equivalents. "Targeted" means that the benefit eligibility is restricted to particular sub-groups within the country. In other words, a targeted benefit is just the opposite of a universalistic program whose benefit eligibility is very broad—such as covering everyone in the country. In Japan, many programs were targeted at specific occupational groups or

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[2] For a fuller discussion, see Estévez-Abe 2008, Chapter 1.

[3] It is important to note that most corporate fringe benefits enjoy special tax arrangements, and, hence, are *de facto* subsidized by the government in terms of the foregone tax revenue (tax scholars use a term *tax expenditures*).

residents of certain geographical areas. For instance, despite the fact that Japan's People's Health Care is a municipally administered universalistic welfare program, the government has allowed various occupational groups to opt out and set up their own schemes. These schemes— subsidized by the government—offered much better benefits than the People's Health Care. The list of occupational groups that were allowed to opt out from includes groups such as construction workers and physicians. Many of the functional equivalents were targeted too. Examples include Japan's reliance of agricultural policy and public works projects as income maintenance and job creation programs instead of public orthodox family allowance or unemployment benefits.[4] It is well known that the price and sales regulations over rice long served as an income maintenance program for rice farmers. Public works projects also served as job creation schemes in specific areas and as income maintenance programs for small construction firms—many of which were small family owned businesses (see Table 2 for a list of functional equivalent programs to unemployment insurance program). It should be emphasized here that the Japanese government rarely used its general revenue to subsidize welfare benefits and services for wage earners. The government usually targeted at specific occupational groups and geographic areas that were electorally important to the ruling party politicians.

By the savings-orientation of the Japanese welfare state, I refer to the Japanese government's predilection for contributory programs that build up reserves. The Japanese government not only helped private saving plans and insurance policies by means of favorable taxation but also opted for public program designs that accumulated funds. Highly targeted benefits aside, generally speaking, the government was averse to creating tax-financed entitlement programs. As a consequence, Japan built vast reserves of what I call "welfare funds" (Estevez-Abe 2001, 2008). Some of these funds were private money such as funds in life insurance accounts or corporate savings programs. Others were in public accounts: postal life insurance, the Unemployment Insurance Account, and Employees' Pension Funds. It is one thing to build reserves in a long-term insurance scheme such as old-age pension, but it is another thing to build big reserves in a short-term insurance such as the Unemployment Insurance. Funds in public accounts were managed by bureaucrats—the lion's share going into the Fiscal Investment and Loan Program (FILP), which channeled funds to public corporations.

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[4] Japan is not the only country that uses these functional equivalents. Adam Sheingate (2001), for instance, has examines the use of agricultural policy as a social policy in Japan and the US.

That said, ministries that had jurisdiction over the funds always enjoyed discretion over the use of, at least, part of the money. Governmental influence over welfare funds went beyond those funds in public accounts. Life insurance industry insiders also recall many instances whereby they channeled the funds to projects at the request of the government (Estévez-Abe 2001, 2008, Table I.6).

During the economic growth era, Japan's work-based welfare programs provided large firms with a very cheap and effective way of molding the incentive structure of their workforce.[5] Company loyalty was amply rewarded via the generous system of fringe benefits as well as social security programs that actually served as corporate fringe benefits. These programs also allowed large firms to much higher life-time earnings to attract good workers while keeping the nominal wage structure relatively compressed. Contrary to being altruistic and paternalistic, Japanese large companies saved and made money by offering work-based benefits. Tax arrangements, for instance, made building of corporate housing a very profitable way for companies to accumulate assets. Being allowed to opt out of the bigger social insurance pool meant that large corporations, whose workers were young and healthy, could enjoy great savings: they could offer their workers superior benefits while paying less than otherwise.

In other words, work-based welfare provision made it possible for large companies to offer significantly higher efficiency wages while maintaining a relatively compressed nominal wage structure. Employees could enjoy their corporate perks as long as they worked for large firms. The under-development of public income support programs reinforced the importance of work-based benefits for the core workforce. Losing a good job thus was extremely costly in Japan. Japanese unions, which organized core workers enterprise by enterprise, instead of fighting for universalistic public programs, opted for protecting their members' perks. The Japanese cooperative industrial relations, therefore, stood on such material incentives (Swenson 2001; Estévez-Abe 2008). In the early 1960s, the income gap between urban households and rural households began to widen rapidly. In this context, even those orthodox social welfare programs and their functional equivalents that were targeted at farmers did not seem like a bad idea.[6]

Similarly, the savings-oriented aspects of the Japanese welfare state appeared

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[5] See Estévez-Abe 2008: Chapter 6 for the link between the Japanese welfare system and its model of capitalism.

[6] In fact, Kent Calder (1998) has discussed the LDP's commitment to equality.

as an innovative way of financing both corporate and government activities. Welfare funds in private hands such as life insurance companies provided Japanese large firms with long-term capital with barely any strings attached, while the welfare funds in public schemes made it possible for Japan to combine its small tax state and high infrastructural spending. Thus many scholars considered this savings-orientation as an important feature of the Japanese developmental state.[7]

In short, these three characteristics of Japan's welfare state constituted an integral part of the so-called Japanese model of capitalism and its success. It is ironic that, what appeared to be part of the" virtues" of the Japanese model of capitalism, eventually became the source of its troubles. Let me now turn to this unfortunate transformation.

II. Japan's Problems[8]

Three socio-economic changes—the slowing down of the economy, the demographic aging and the financial liberalization—seriously impacted the viability of the old welfare arrangements.[9] The Japanese welfare state made the matter even worse. The combination of work-based welfare provision and the under-development of universalistic programs meant that there was no real safety net if one lost his or her job. Under the system where everything hinged on one's employment, employment security was one issue that otherwise cooperative enterprise unions would fiercely fight for. For this reason, manpower adjustments typically happened by reducing the number of young new recruits rather than by means of lay-offs. All cohorts hired after the Oil Crisis were smaller than the "economic growth era" cohorts. Decades later, top-heavy demographic pyramids emerged in well-established large Japanese companies. Because the Japanese companies linked wages and welfare benefit levels to the workers' age and seniority, the rise in the average of age of the workforce directly affected the overall labor costs. In addition to the rising wage and non-wage costs caused by the demographic aging within the firm, societal aging also increased the employers' overall welfare costs. In sum, work-based welfare benefits, instead of being economical, became expensive ways for large companies to provide welfare.

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[7] Stephenson (1990) and Calder (1990) talk about how the Japanese government used savings programs to finance its policy programs.

[8] This section is based on Estévez-Abe 2008: Chapter 7.

[9] As far as export-sector is considered, the rapid appreciation of the yen in the mid-1990s added another layer of hardship.

Japan's numerous functional equivalents offered limited solution. For wage earners, as discussed already, most of the functional equivalents were employer-provided, so if anything, they, too, contributed to the rise in employers' costs. For the self-employed, the occupationally targeted programs produced perverse incentives to cling onto to business that was not economically viable. In this sense, many of the functional equivalents became subsidies for economically inefficient sectors of the economy. The real price of occupationally-targeted welfare provision gradually became evident.

Savings-based programs, too, became a source of trouble. When the national economy was growing every year and the population was relatively young, no one paid more attention to the returns on the welfare funds. Furthermore, the Japanese accounting method made it difficult to gauge the scope of capital gains and losses even in privately managed welfare funds. The burst of the Bubble, demographic aging and the financial liberalization all removed the premises which Japanese savings-oriented welfare state had relied upon. The bankruptcy of Nissan Life Insurance in 1997 epitomized the end of an era of easy financing using private welfare funds. Welfare funds in public hands fared no better. It became apparent that they had not been managed properly: much of the money had been lent to non-profitable activities of public corporations. The days of public financial corporations such as Japan Development Bank being the king of industrial financing were long over. What remained of the public corporations was a system of public financing fraught with moral hazards.

Importantly, financial liberalization created a pressure for large Japanese firms to change its accounting practices. This affected one of the solutions Japanese companies used in ridding themselves of redundant workers. In the years following the Oil Crisis, many Japanese manufactures created subsidiaries whose sole purpose was to hire away old and expensive redundant workers from their parent companies. Since the Japanese accounting rules in those days did not require them to include losses recorded by their subsidiaries, large companies could legally and safely tack away their costs. The situation in the late 1990s was different. Under the new "international" accounting standards, it was no longer possible to hide subsidiaries' losses. Another blow was the new accounting standards, which introduced a new concept of "pension liabilities." Generous retirement payments that Japanese large firms promised their core workers came to be assessed as corporate financial liabilities.

Japanese corporations began unwinding their welfare commitments by shifting the portfolio of their workforce. Instead of hiring regular workers, they began hiring more irregular workers—often illegally. In the 1990s, the Labor Standards Law

prohibited short-term contracts except for few very specialized professions. Blue collar workers and clerical office workers, in other words, could not be hired on short-term contracts. Nonetheless, many manufacturers did hire new workers on short-term contracts under disguise. These workers often worked alongside regular workers doing the same job, but received lower pay and no benefits. The fact that neither the government nor the enterprise unions require the equal treatment of irregular workers created a strong incentive for employers to hire new workers as irregular workers. The relative share of irregular workers—who had no social safety net—grew rapidly. Not coincidentally, the overall wage levels in Japan started to decline.

Cohorts of young people who joined the labor force during the economic downturn ended up being under-employed with scant hope for getting the kind of secure jobs with benefits that their fathers had. The relative lack of income support for working age people meant that the under-employed youth and the unemployed had no safety net aside from the highly stigmatized public assistance. It sounds too macabre a story, but even for middle class families, in the event of a long-term unemployment of the male breadwinner, his life insurance policy was the last resort for the family's financial well-being.[10]

III. Japanese Governance Structure—the Old and New

The specific ways in which the Japanese welfare system developed has had a lot to do with the incentives embedded in the postwar political system. Two factors are particularly important: the electoral rule; and the rules of human resource management practice in the bureaucracy. The importance of these factors also necessarily suggests that the incentives behind welfare politics in Japan may have changed after the Electoral Reform of 1994. This section talks about how and why the electoral and bureaucratic rules affected Japanese politics, and to what extent the situation may have changed or not under the new electoral rules.

The Old System of Bottom-Up Politico-Bureaucratic Alliance

Japan's old electoral rules used to consist of multi-member districts and SNTV

[10] It is thus no coincidence that middle-age men are the most likely group to commit suicide in Japan—a trend not observed in other advanced industrial countries. Not surprisingly, when the economy worsened, the rate of suicide climbed up.

(single non-transferable vote). SNTV means that voters cast their single vote for a specific candidate, and that the vote for a specific candidate is not transferable to her fellow party candidates in the same district. In other words, unlike in proportional representation systems, there was no vote-sharing among candidates from the same party. Under these rules, candidates from the same party were pitched against one another at the poll. For this reason, it became imperative for the ruling party politicians to seek and consolidate their personal political machines. Meanwhile, the medium-sized electoral district reduced the electoral threshold in such a way that made it a winning strategy for politicians to cater to the needs of narrow organized groups at the sake of all the other voters. In this institutional context, electorally speaking, politicians gain nothing from expending their political capital to advocate generous universalistic welfare benefits. Instead, it makes more sense for them to push for benefits targeted at specific occupational groups and locations—i.e. their political machines. In the old Japanese electoral context, therefore, being able to deliver occupationally and geographically differentiated benefits was critical. Whenever there was more than one conservative politician in the district, they had to carve out conservative support evenly among themselves. As Tatebayashi (2004) has demonstrated, LDP politicians from the same district typically either geographically or functionally divided up the district. Targeted benefits served as highly effective means to consolidate such a division of labor.

As far as the Liberal Democratic Party (LDP) ruled Japan, therefore, LDP politicians ensured that their constituent groups would be the only ones to enjoy tax-financed benefits. This meant that, their most preferred measures to deal with economic downturns would be public works and industry- and region-specific subsidies rather than unemployment benefits. Public works and subsidies enabled geographical and sector-specific targeting, while anyone, who satisfied the benefit eligibility, would be able to claim generous unemployment benefits. LDP politicians saw little pay off in providing tax-financed benefits for urban wage earners. Urban wage voters were not organized in the best of circumstances. When organized, they voted for Socialists or Democratic Socialists. The ruling party's electoral calculations hence explain Japan's highly work-based orthodox social security and their functional equivalent programs.[11]

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[11] It is not coincidence that the few universalistic programs that Japan has—health care for the elderly and children's allowance—came about as popular municipal-level programs. The institutional context for elections of governors and mayors resembled that of single-member districts. As I will explain in the

Bureaucrats, in turn, also developed very specific policy preferences of their own (See Estévez-Abe 2008: 93-96). Japanese bureaucracy adopted an intriguing practice of early retirement among career bureaucrats (Colignon and Usui 2003). When someone gets promoted to the ranks of bureau chiefs or vice-minister, everyone else from the same cohort or above who did not make the cut would "retire" well before reaching the retirement age. These "retirees" needed post-retirement jobs, but it was not easy to find good jobs in Japan, where all good jobs were horded inside rigid internal labor markets. To overcome this difficulty, each ministry developed a system whereby they found and allocated post-retirement jobs to their "retirees" according to their final ranks within the ministry. Ministries used policy and regulatory resources available to them to increase the number of post-retirement positions. In heavily regulated sectors of the economy, it was worthwhile for private sector companies to "welcome" former-regulators as a way of currying favor with the ministries. This system thus stood on a mutually beneficially quid quo pro (Calder 1989; Schaede 1995). Nonetheless, such an arrangement was not enough. Typically, well-paid positions in public corporations were used as a holding pen for the retirees before their ministry could find them appropriate jobs in the private sector. It was for this reason that bureaucratic organizations preferred contributory programs that accumulated funds over tax-financed benefits and services. Funds accumulated within their own jurisdiction were used to finance bureaucratic pet projects such as public corporations that created post-retirement positions.

None of this bothered the LDP politicians. As stated earlier, under the SNTV system, LDP politicians engaged in functional and geographical specialization. The LDP system of policy tribes—*zoku giin*—institutionalized such functional specialization. The LDP's Policy Affairs Committees had sub-divisions along ministerial lines. LDP members belonged to specific sub-divisions depending on their electoral specialization. This was a bottom-up way of articulating policy demands within the party. Each policy tribe worked very closely with their bureaucratic partners. The LDP thus delegated most of the legislative activities to the bureaucracy. Bureaucrats, in turn, came up with ways of distributing benefits to LDP's various constituent groups and thus helped LDP incumbents. The scope of delegation granted to each ministry de facto gave them agenda setting power over the policy area they oversaw. This enabled

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following section, single-member districts will favor more universalistic programs. See Campbell 1979, 1992 and Estévez-Abe 2008, Chapter 6.

ministries to promote specific policy designs that generated rents for themselves.[12]

IV The New System: A Stunted Road to a Westminster System

The institutional environment of Japanese politics began to change drastically in the 1990s. It all started with the Electoral Reform and the Reform of the Campaign Finance Law in 1994, which set in motion a chain of political reforms. The Electoral Reform of 1994 replaced SNTV and medium-sized multi-member districts in the Lower House with the so-called "majoritarian mixed system" that combined proportional representation and single-member districts (Reed and Thies 2001, Estévez-Abe 2006, 2008). Under the new system, three hundred Diet members were to be elected from single-member districts (SMDs hereafter); and the remaining two hundred Diet members from the eleven regional proportional representation (PR hereafter) districts[13]. Under the new system, a voter would have two votes—one for the SMD and another for the PR-tier. At the SMD-tier, although voters cast their ballot for a specific individual candidate, all candidates are the sole official candidates of their respective parties. At the PR-tier, voters can only vote for a party. The new electoral system was fundamentally different from the old one in two ways. First, there was no longer any intra-party competition at the poll. Each of the SMD candidates was the sole party candidate, and candidates on the PR list "shared votes." Second, electoral results became much more volatile. Because the SMD-tier is a winner-take-all system, political parties' vote shares do not translate into seat shares. This creates big swings in the seat allocation from one election to the next.

The nature of the political game changed accordingly—both at the level of rank-and-file politicians and at the level of party leaders. For the rank-and file politicians, their party became more important—both financially and electorally. Under the old system, conservative candidates could run for office without any official endorsement from the LDP. They would run as independents against the LDP incumbents; and joined the LDP if they won. Under the new system, this was no

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[12] It is not clear how much the LDP politicians knew about the bureaucratic rent seeking. Under the old system, it is quite possible that the bureaucratic rent was perceived as the price of their cooperation.

[13] The number of seats allocated to the PR-tier was later reduced to one hundred and eighty.

longer feasible, as all potential candidates needed the official party nomination *ex ante*. Even the SMD candidates could not ignore the effect of their party popularity in gauging their electoral odds. Given the volatility of SMD-tier, voters can use their votes to choose the new government (i.e. new prime minister) in ways that it was not possible before. Moreover, because many SMD candidates were also listed on their parties' PR lists, their electoral fortunes were tied to their parties' success to a much greater extent than never before (McKean and Scheiner 2000; Estévez-Abe 2006, 2008). In addition to these changes, the Campaign Finance Reform, which introduced the public financing of political parties, enhanced the financial power of the party leadership relative to its members as factions (*habatsu*).[14]

The winning electoral strategy necessarily changed under the new electoral system. The old-style functional specialization among conservative politicians was no longer necessary as there was no intra-party competition. Moreover, the higher electoral threshold in a SMD meant that 'buying votes' of the well-organized minority in their district was no longer a winning strategy as was under the old system. Instead, as the sole candidates of their parties, SMD-tier candidates became more dependent of their party leaders' popularity as well as of their party's policy platforms. If the policies put forth by their party and their leader are popular, their chance of (re-)election would increase.[15]

The new rules affected the strategic calculations of party leaders—especially the Prime Minister. Electorally speaking, it became vital that the party leaders be skillful communicators vis-à-vis ordinary voters—something that was never considered as part of the necessary skill set under the old rules. Ability to effectively communicate to voters became an indispensable quality of the leader under the new system. The payoff was great for a successful political leader. Such a party leader, in principle, would find it easier to control the policy agenda once in power. A landslide victory under Japan's majoritarian mixed system would produce a huge seat share advantage for the winning party. The new ruling party thus would become the dominant majority in the Lower House. Moreover, a popular party leader capable of winning a landslide victory enhanced his power within the party, as many of his party members—especially those on the PR-list—would owe their seats to the popularity of the party leader and his policy platform. The Prime Minister's political fortune now

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[14] Takenaka (2006) demonstrated how the financial importance of factions (*habatsu*) has declined. See Krauss and Pekkanen (2010) for a different position.

[15] Talk about SMD candidates and PR list.

rested on his ability to articulate a coherent and popular policy message and also to deliver on that message. Unpopular policies and policy failures, in turn, would directly punish the Prime Minister and his ruling party. (We witnessed this happen to Prime Minister Aso's LDP in 2009.)

The new institutional environment changed the calculations of the party leadership in fundamental ways. The party leadership would have a stronger desire to concentrate decision making process to control strategic positioning of the party. Functional specialization among conservative politicians and a bottom-up decision making process within the party was no longer the efficient policy making mechanism. Politically, it made more sense to appeal to the median voter generally—and especially to those in swing districts. Because the party label matters more under the new system, it also became very important for the leader to strategically craft a popular policy platform in order to gain more votes and seats. The drafting of such a party platform requires a more top-down rather than a bottom-up decision making process. For the first time, leaders of the large parties had a strategic interest in advocating some universalistic policy issues.[16]

Importantly, party leaders' view of the ideal type of bureaucratic delegation changed accordingly. Under the old system, the functional specialization among the rank-and-file coexisted very effectively with an ample scope of delegation to bureaucrats. There was what I call a politico-bureaucratic alliance at the ministerial level (Estévez-Abe 2008).[17] The LDP's internal policy making structure basically took care of aggregating demands arising from each of the ministerial politico-bureaucratic alliances.[18] The old system was thus more of a bottom-up decision making process. The political leaders under the new institutional environment, however, wanted a tighter control at the top.

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[16] When Prime Minister Kakuei Tanaka promised to expand the Japanese welfare state back in 1973, the promise was made because of the electoral competition at the local level. Progressive governors were providing popular universalistic benefits threatening the electoral fortune of conservative gubernatorial candidates. The conservative national government took up the issue of universalistic welfare policies as a way of removing the issue from the race at the local level (Campbell 1979; Estévez-Abe 2008, Chapter 5). Under the new system, institutionally speaking, for the first time, advocating universalistic programs became a good electoral strategy for the sake of national elections.

[17] Michio Muramatsu (2010) calls it a "politico-bureaucratic scram."

[18] See Campbell (1977) and Ramseyer and Rosembluth (1993).

The new calculations by the top political leaders set in motion the subsequent political reforms—all intended to increase the Prime Minister's control over the policy agenda (Estévez-Abe 2006; Takenaka 2001, 2006). Prime Minister Ryutaro Hashimoto—the first Prime Minister who experienced the Lower House elections under the new rules—tried to centralize the policy making procedure by streamlining the government, strengthening the Cabinet Office and creating a new device such as the Council of Economic and Fiscal Policy. Such an attempt to centralize concerned much more than the Prime Minister's desire to reign on his own party. It also sought to recalibrate the terms of delegation between the LDP—as the perpetual ruling party—and the bureaucracy. Ever since the Hashimoto Cabinet, almost all the Cabinets that followed tried to implement an overhaul of the bureaucracy. To this day, no overhaul has taken place. As the following section shows, this incompletely of the chain of delegation that might explain part of the reason why we are yet to see bold policy shifts.

V Reforms Stalled: The Case of Children's Allowance ("Kodomo Teate")

Prime Minister Junichiro Koizumi was the first prime minister to assume power when all the additional political reforms legislated by his predecessors, Hashimoto and Obuchi, were actually implemented. He used the new system very effectively (Estévez-Abe 2006, 2008; Takenaka 2006). For instance, he used the Council of Economic and Fiscal Policy to control the agenda setting process, and redirected the LDP's policies from the previous highly targeted ones to more universalistic ones.[19] The policy changes made in the unemployment program illustrated such redirection. Koizumi did away with targeted "functional equivalents" such as subsidies to declining industries so that they could maintain employment. He also eliminated generous perks that existed in the current unemployment programs that only benefited workers in large firms who faced very little chance of lay-off. Instead, benefit coverage was expanded. This kind of policy shift would have been unthinkable under the old electoral rule (see Estévez-Abe 2008, chapter 9 for more details).

Similarly, we observe that the Democratic Party of Japan, the opposition party

[19] Gregory Noble (2010) observes a decline in particularistic spending in Japan.

at the time, was pitching for universalistic programs. The DPJ fought the 2004 elections with the promise of greater public subsidies for pension. At the same time, as it would be predicted from the electoral incentives under the new institutional context, the DPJ leadership also offered policy promises intended to appeal to median voters in swing districts. These swing districts included some rural districts, and the DPJ promised universalistic income support for rural households. This, too, contrasts with the kind of targeted benefit under the old system such as price subsidies of rice and other products.[20]

The *Manifestos* issued by the DPJ and the LDP illustrate how the policy focus changed for both parties. In particular, the DPJ, as the main opposition party, promised numerous universalistic programs. The DPJ, for instance, promised to introduce a comprehensive non-means-tested children's allowance as well as an expansion of the unemployment insurance and benefits. The DPJ even promised to introduce unemployment programs for the self-employed people who lost their businesses. Indeed, when it finally won a landslide in 2009, the comprehensive children's allowance was one of the first major universalistic programs it tried to legislate. However, even with its landslide victory, the DPJ government encountered enormous difficulties: one was a bureaucratic resistance against the allowance program, and the other was highly critical news coverage in all major newspapers and TV networks.

The Ministry of Health, Welfare and Labor was very skeptical about the DPJ's plan for Children's Allowance from the very beginning. The DPJ argued that the Japanese welfare state lagged behind other countries in its support of working families with children. Given the rapidly falling fertility rates, the DPJ reasoned that income support for families with children was a badly needed policy. This view was, however, not shared by the Ministry. As noted earlier, the Japanese bureaucracy continued to face the same organizational preferences as all attempts to reform the incentive structure of the bureaucracy had failed. Bureaucrats still retired early, and thus continued to need "good post-retirement' jobs. As far as securing post-retirement jobs was concerned, funded welfare programs were much more preferable. Bureaucrats, in their capacity as overseers of the programs, always had a leeway to use the funds to finance pet projects that generated post-retirement positions. This could be anything from creating and financing non-profit organization to building some facilities to be staffed

[20] Greg Noble (2010) makes a similar point and argues that there has been a decline of particularistic spending in Japan.

by the retirees. Cash benefits that went directly from the government treasury to individual beneficiaries' pockets generated no such perks. In other words, organizationally speaking, the Ministry of Health, Welfare and Labor had no interest in endorsing a big ticket item such as Children's Allowance, which would divert resources from other programs.

Aside from the opposition from within the Ministry of Health, the Children's Allowance faced other kinds of opposition. The mainstream media along with the LDP repeatedly attacked the program and the new Welfare Minister, Hiroshi Nagatsuma. It became clear during one of the Diet meetings that the benefit eligibility criterion of the new Children's Allowance was flawed. It allowed parents to claim benefits for their children who resided abroad. This meant that foreign workers in Japan could claim benefits for their children back home. Rather than calling for the modification of the proposed bill, the mainstream media and the LDP used this flaw to run a negative campaign. In their view, the Children's Allowance was not simply a bad idea but was a terrible waste that benefited malicious foreigners. When Minister Nagatsuma demoted the bureau chief responsible for the flawed legislative bill, the mainstream newspapers accused him of taking out his anger and frustration at a promising civil servant (*Asahi Shimbun*, July 23, 2010). Although it is beyond the scope of this paper to investigate the personal relationships between the Minister and the demoted bureaucrat, it is fair to say that there is nothing outrageous about a minister who demotes an official whose error had embarrassed the Cabinet. It is thus noteworthy to emphasize the overall hostile tone in the newspapers against the new DPJ government so soon after its landslide victory. It contrasts sharply with the media's embrace of Koizumi after his landslide victory in 2005.

In addition to the opposition from the welfare bureaucrats and the negative campaign from the media, the DPJ faced problems of its own. It failed to secure appropriate revenue to fund the ambitious Children's Allowance. It had initially planned to fund the new program on the basis of the savings to be made by trimming down on wasteful spending. Such savings, however, never really materialized. As a result, the new program only started as a provisionary program. All the talk and fanfare about "policy-making based on political leadership (*seiji shudo*)", therefore, failed to produce real policy outcomes

The failure of the DPJ government to legislate its "flagship" cash benefit as a permanent program reveals the inability of its leaders to effectively control the governmental budget. While this might be partly due to the lack of ability on the part of the Prime Minister and his Cabinet, the incomplete transformation of the policy

process is also culpable. Three factors are particularly relevant. First, the terms of the delegation between the elected officials and the unelected officials had not been recalibrated. Second, the DPJ had not yet developed an adequate internal policy making mechanism. Third, the electoral cycle facing the Prime Minister was too short for him to concentrate on and carry out a real policy reform. As a consequence, Prime Minister Hatoyama's Cabinet became paralyzed. Let me elaborate on each of these points.

First, let us look at the relationship between the DPJ and the bureaucracy. The DPJ came to power with the old bureaucratic system intact. As far as the DPJ was concerned, the existing bureaucratic organization was part of the LDP's old regime. The bureaucratic organizations flourished under the politico-bureaucratic alliances and the bottom-up policy making process Given this context, the DPJ made a bid to rule without relying much on the bureaucracy—i.e. *seiji shudo.* Nonetheless, this soon proved to be impossible. No modern government can rule without its bureaucracy. The DPJ's hasty plan to overhaul the civil service changed nothing. If anything, the DPJ's plan made it easier for ministries to find and allocate non-government positions to their own. With the old bureaucratic incentives intact, it became very difficult for the DPJ leaders to persuade ministries to implement bold policy reforms intended to trim down their perks. In fact, when Prime Minister Hatoyama tried to set the policy agenda in a top down manner, his ministers did not even listen. Each ministry operated just as it had done under the old system, and, just like in the old days, each minister ended up representing the ministerial interest rather than the Prime Minister's goals. While Koizumi had made use of the Council of Economic and Fiscal Policy effectively to shape the policy agenda, Prime Minister Hatoyama had nothing equivalent. It is quite interesting to observe that Welfare Minister Nagatsuma was the only one who followed the Prime Minister's policy mandate, and also the one who was most criticized by the media and the bureaucracy.

Second, when we turn to the internal decision making process of the DPJ, we observe that they had not established any solid organizational basis yet. As soon as they seized power, Ichiro Ozawa, the DPJ's Secretary General, began centralizing all decision making within the party. Although this was done with the objective of starving the old LDP-style politico-bureaucratic alliances of their oxygen, it also turned other senior leaders and their groups against the Hatoyama-Ozawa leadership. Jealous of Ozawa's power, other senior leaders began to sabotage their own government. Naoto Kan, who was also entrusted with the task of building the DPJ's equivalent of the Council of Economic and Fiscal Policies, named the National Strategic Council (*kokka*

senryaku kaigi), did remarkably very little. One of the reasons why the Council of Economic and Fiscal Policies had worked under Koizumi was because: (i) he chaired the meetings himself; and (ii) brought in a right-hand man, Heizo Takenaka, who lacked any political capital of his own and relied on Koizumi's political capital. (Initially, Heizo Takenaka was just a university professor and not even a Diet member. Koizumi put him on a party ticket at a later date.) In contrast to Takenaka, Kan was Hatoyama's equal, and another potential contender to Prime Ministership. He clearly had no desire to expend his own political capital for his rival. In other words, there existed intra-party resistance to formally concentrate power in the hands of the party leadership.

Third, all of the previous two factors might have been overcome if the electoral cycle in Japan had not been too frequent. Japan rarely has three years in between elections. Typically, the interval between national elections is typically about two years, but it could also be just a year if the Prime Minister resolves the Lower House for whatever reason. In addition, both the DPJ and LDP schedule elections for their party leaders irrespective of national elections. The term for the LDP leadership is three years, while the term is only two years for DPJ's leader. Recall that I have pointed out how the popularity of the party leader became electorally important under the new electoral system. The combination of frequent elections and the electoral importance of the party leader has made the Prime Minister extremely vulnerable to popularity ratings. In a very perverse way, this has enhanced the power of the media while weakening the Prime Minister.

The demise of the Children's Allowance and eventually of the Hatoyama Cabinet itself can be explained in terms of these institutional features. For the reforms of the 1990s to really produce a Westminster-style political system, the electoral cycle needs to be lengthened in order to give the Prime Minister time to concentrate formal decision making process within the party, and to recalibrate the terms of bureaucratic delegation.[21] Unless this happens, Japanese politics will continue to middle through.

[21] Japan's strong bi-cameral system is another institutional hurdle Japan faces. Unfortunately, I do not have the space to discuss this issue in this paper.

Table 1. Benefit Generosity Ranking of 17 OECD Countries

Standard Pension	Unemploy-ment	Sickness	Family Benefits	Health-care
US	Denmark	Germany	Austria	Sweden
Belgium	Netherlads	Norway*	Belgium	UK
JAPAN	Belgium	Belgium	Norway	Denmark
Autria	Finland	Finland	Sweden	Norway*
France	Norwary*	Sweden	Netherlands	New Zealand
*ITALY**	France	Switzerland	Finland	Finland
Sweden	Austria	Austria	France	*ITALY*
New Zealand	Sweden	*ITALY*	*ITALY*	*JAPAN*
Canada	Canada	Netherlands*	UK	France
Denmark*	Germany*	Denmark	Switzerland	Germany
Finland*	Australia	Canada	Denmark	Canada
Germany	New Zealand	France	Germany	Austria
Norway	Switzerland	*JAPAN*	Australia	Australia
Netherlands	UK	New Zealand	Canada	Netherlands*
UK	US	Australia	New Zealand	Switzerland
Switzerland	*JAPAN*	UK	*JAPAN*	US
Australia	*ITALY*	US	US*	

(*) means that the country is ranked the same as the one just above.

Source: Appendix 1.A. in Estévez-Abe 2008.

Table 2. Functional Equivalents for Unemployment Benefits

(expressed as country rankings)

ALMP	Employment Protection	Public Sector Employment	Wage Subsidies	Public Works	Administrative Intervention
Sweden	*ITALY*	Norway	Finland	*JAPAN*	*ITALY*
Finland	France	Sweden	Belgium	Finland	France
Germany	Norway	Denmark	*JAPAN*	Norway	Belgium
Norway	Germany	Finland	Sweden	*ITALY*	*JAPAN*
UK	*JAPAN*	Canada	Norway	France	Switzerland
France	Austria	Belgium	Germany	Austria	Germany
New Zealand	Netherlands*	UK	New Zealand	Sweden	Finland
US	Sweden*	Australia	Austria	Netherlands	Sweden
Denmark	Belgium	US	Australia	Canada	Austria
Canada	Finland*	Austria	France*	Australia	Netherlands
Austria	Denmark	Netherlands	UK	UK	Norway
Netherlands	Switzerland	Switzerland	Denmark	Germany	Denmark
JAPAN	Australia	New Zealand	Netherlands*	Denmark	US
ITALY	New Zealand	Germany	US*	US	New Zealand
Belgium	Canada	*JAPAN*	Canada	Belgium	Australia
Switzerland*	UK				Canada
Australia	US				UK

Source: Appendix 1.B. in Estévez-Abe 2008.

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2

Towards a New Food Governance: Food Policy Reform in the UK and Japan

TAKEDA Hiroko

INTRODUCTION

The governing of food is a tricky policy area for the national government of any contemporary industrially advanced country. To start with, it is necessary for all human beings to keep consuming a certain amount of food every day for their survival. That is to say, food is the most vital and indispensable resource for every individual, and hence, the political consequences of a food shortage/crisis tend to be serious for national governments, as exemplified by a series of mass protests in the Middle East and North Africa in early 2011. Simultaneously, food is also a commodity, through which economic agents are striving to generate profit. Today, many foodstuffs reach our dining tables from the fields by going through a long, complex production and distribution process that stretches from the level of international political economy to that of everyday life and individuals' consumption of food. In this 'food chain' from 'field to folk', a multitude of actors are involved. As a result, the governing of food requires policy-making elites to deal with the different, often contradictory demands and needs of different agents and organizations, operating on these multiple levels.

On top of such complexity, today's political issues relating to food pose new challenges to food policy-making. According to Tim Lang, a British expert on food policy, and his colleague, Heasman, there has been a prevailing idea in the food policy-making of industrially advanced countries for the last 200 years, which he names the 'Productionist Paradigm'.[1] This paradigm, which emerged during the period of industrialization, vigorously introduced newly-available innovative technologies into food production and distribution, in an attempt 'to increase output and efficiencies of labour and capital for increasingly urbanized populations' (Lang and Heasman 2004: 18-20, quote on p. 20). A major example of a food policy based on the paradigm is the 'Green Revolution' of the mid-twentieth century, under which food production increased immensely through breeding improvements and the use of chemical fertilizers, which significantly lowered the price of grain. Muhammad Yunus recently pointed out that '(t)he high-yield grain production made possible by the Green Revolution has been credited with saving the lives of up to a billion people' (Yunus 2009: 151). Yet, food-related issues that we observe in contemporary industrially advanced countries indicate that the Productionist Paradigm has become outdated, or even

dysfunctional, causing various problems in the food system. In particular, the following three points need to be noted;

Firstly, the present level of food production is higher than at any other time in human history, and today, there is more than enough grain produced in the world to feed the entire population (Tokikoyama and Egaitsu 2008: 165; World Bank 2009: 11). Despite this, according to the Food and Agriculture Organization of the United Nations (FAO)'s annual report in 2010, 925 million people were in a state of undernourishment and 98 per cent of them resided in developing countries (FAO: 2010: 8). This means that undernourishment still exists in developed countries, where a large amount of food is wasted. Moreover, the issue of being overweight or obese, the opposite to the problem of undernourishment, is no longer monopolized by 'rich people' in developed countries. By comparatively analyzing the data for the OECD countries, Richard Wilkinson and Kate Pickett have pointed out that the prevalence of obesity tends to be higher in countries with larger income disparities (such as the US and UK). They argue that this tendency can be attributed to a higher level of stress and anxiety, as well as the unstable social positioning that people on lower incomes tend to face in more unequal societies, making them feel that they cannot 'afford to look too thin' (Wilkinson and Pickett 2010: 89-102). This implies that merely increasing food production, as food policies based on the Productionist Paradigm tend to be aimed at, will not solve the food-related issues that we are currently facing.

Secondly, and related to the first point, the causes of the current food-related issues are not limited to problems with the production process, such as poor harvests due to natural disasters. Rather, as the case of the 'Global Food Crises' in 2007-8 illuminated, the speculative interests of financial actors often influence food prices and, in this sense, the availability of food cannot be secured simply by managing and controlling the food production process. Last but not least, discussions on global climate change and recurrent food scares have shed light on a multitude of negative externalities of the food production system based on the Productionist Paradigm, which have resulted in the current environmental and health problems. Clearly, therefore, a replacement for the Productionist Paradigm is required.

Facing these challenges, many of the national governments of industrially advanced countries have been forced to engage in food policy reforms, searching for a new food governing system that fits the contemporary, globalized and complex food chain. The idea of 'food

governance' was proposed by a group of scholars who examined the British process of food policy reform starting in the 1990s, in order to understand the nature of ongoing political changes relating to food policy. Unlike the term 'food sovereignty', 'food governance' does not point to an ideal of what food policy should be. What it does is help us to understand the logic behind the food policy reforms in Britain, which Lang and his collaborators have described as 'such a fascinating "hotspot" for food policy' (Lang, Barling and Caraher 2009: 2). Indeed, as will be discussed later, the discussion on 'food governance' in the UK will provide us with some useful perspectives through which to elucidate what really happened in the food policy reforms in Japan, in the 2000s.

The discussion in the remainder of this article is, therefore, organized in the following way; the next section will explore the idea of 'food governance'. What is 'food governance'? How is it supposed to work? And more importantly, why was such an idea discussed in the process of reforming the food governing system in Britain in the late 1990s and early 2000s? Then, the third section moves on to the Japanese case, to examine the food policy reforms conducted in contemporary Japan, with reference to the idea of 'food governance'. Finally, the concluding section summarizes the whole discussion and considers the implications of the food policy reforms in Japan in the 2000s.

'FOOD GOVERNANCE'

Major food policy reforms were implemented in Britain after New Labour came into power in 1997, marked by a series of institutional changes such as the establishment of the Food Standard Agency (FSA) and the Department of Environment, Food and Rural Affairs (DEFRA) (Marsden, Flynn and Harrison 2000; Lang, Barling and Caraher 2001; Barling and Lang 2003b; Flynn, Marsden and Smith 2003: 39; Lang and Rayner 2003: 68-9). Prior to the 'regime shift' to the New Labour government, the need to reform food policies in Britain had been mounting for a number of reasons, namely, the liberation of the international agricultural trade system through the introduction of the GATT Uruguay Round Agreement on Agriculture (AoA), changes to the agricultural policy at the European level and, last but not least, a series of food scares, including bovine spongiform encephalopathy (BSE). The previous Conservative government's approach to food policy was characterized by being 'self-regulative' rather than 'de-regulative' (Barling and Lang 2003b: 9). As a result, the New Labour government faced a huge task in overhauling and updating a 'flawed food policy, with some serious problems in agricultural, environmental, health and social policy terms, generating substantial economic costs due to inefficiencies (some recognized; others

externalized and less readily recognized)' (Barling and Lang 2003b: 9), when they came into power.

Extant studies have pointed out that these structural constraints attributed to the compromised nature of New Labour's food policy reforms. For example, Barling and Lang describe New Labour's food policy as 'reluctant', being an outcome of negotiations between 'public demands for food safety' and the 'economic requirements of being competitive in a liberalizing international economy' (Barling and Lang 2003b: 9). Because of this, the approach of the newly established FSA to food policy was, according to Barling and Lang, 'a consumerist, market-based approach to many issues of food safety advice, often stressing the role of individual preference and choice, as opposed to a more fundamental, structural assessment of food safety and the food system' (Baling and Lang 2003b: 11-12).

Other researchers, for example, Terry Marsden and his colleagues, also observe the emergence of a 'private-interest style of regulation' from the food policy reforms that have taken place since the 1990s (Harrison, Flynn and Marsden 1997: 473; Marsden, Flynn and Harrison 2000: 86-8). Referring to discussions in the disciplinary field of politics, which observe changes 'from the government to governance' in the state governing mechanism (cf. Jessop 1997; 1998), Smith et al. explain the rise of this type of food regulatory system as a shift to 'food governance' (Smith, Marsden, Flynn and Percival 2004: 544). 'Governance', in relation to the term 'government', refers to a flexible governing system in which the state has certain political functions within a coordinated network, through which they govern alongside other (domestic, international or transnational) actors. Here, the national government is an important 'facilitator', stimulating national economic development, but expected to function by coordinating with the other actors. In this sense, in the governing system of 'governance', the national government does not 'lead' but 'steers' (cf. Blair and Schröder 2000) the political process. Indeed, through shifting to the private-interest style of food regulatory system, the British government has started to engage in the 'governing' of food, in tandem with other international and domestic agencies (public and private, from the World Trade Organization (WTO) and European Union (EU), to food retailers and producers, to NGOs) as well as consumers. For example, a government report on food policy, released in 2008, describes the role of the national government as follows;

- To correct market failures where they arise (the food economy may be distorted by market failures caused by poor information, imperfect competition, the failure to price

externalities and the under-provision of public goods); and

- To ensure that social equity is safeguarded. Generally, this will be achieved through the tax and benefit system, but special measures may be needed in some cases to ensure that the more vulnerable in society have adequate access to nutritious food.

(Cabinet Office 2008: 38)

Following this, the report adds a note on the role of markets, regarding 'well functioning, open and competitive markets' as 'the best means of securing fair prices for consumers and fair dealing along the supply chain' (Cabinet Office 2008: 68, also 43-4). The report goes on to say that such markets are supplemented by 'enabled consumers', who make informed choices about food and their diet. For this purpose, the government plays a catalytic role, alongside business, by providing appropriate and integrated information through consumer 'social marketing', as exemplified by the FSA campaign on reducing salt intake and the NHS's 5 A DAY campaign, and other means such as food labelling (Cabinet Office 2008: 49-64). With such governmental support, it is hoped that consumers' decision-making abilities will improve, and this will help them to make cultural and behavioural changes regarding their food consumption (Cabinet Office 2008: 48-66). As such, the food governing system described in the 2008 government report, is organized as a hybrid, flexible and networked mechanism, in which the national government plays only a limited set of roles, in cooperation with other actors such as the food industry and consumers and it is in this very sense that Marsden and his colleagues describe the private-interest style food regulatory system as food governance in their studies on the food policy reform since the 1990s.

Examining the ways in which the 'food governance' regulatory system operates, a number of researchers further point out, importantly, that major food retailers, especially big supermarket chains, who enjoy a high proportion of overall grocery shopping in the UK, are required to play, and indeed have played in recent years, a leading role in managing and controlling food. Because of this, these researchers label the new food governance system the 'retailer-led governance system' (Flynn and Marsden 1992; Harrison, Flynn and Marsden 1997; Flynn, Marsden and Smith 2003: 42-5; Marsden, Flynn and Harrison 2000: 73-84). According to them, food retailers first began to play a role in the British food regulatory system in the 1980s. At that time, big supermarkets chains were expanding rapidly and, in order to fend off criticism against their fast and overwhelming growth, which was swallowing up and squeezing small food retailers out of communities, they actively responded to a request from the Conservative government, who were seeking a way to limit the state's governing function (Marsden and Wrigley 1996: 40-4). The off-loading of food regulation

onto food retailers was justified by the claim that they were 'representative' of UK food consumers. In the UK, food retailers form a highly concentrated and competitive market, and are constantly in a 'battle to attract and legitimate consumer "loyalties"' (Marsden, Flynn and Harrison 2000: 92). As a result, food retailers strive to offer food of an appropriate quality and price for their target customers. Put differently, food retailers need to have detailed knowledge of consumers' needs in order to beat the fierce competition. In this sense, they could claim that they are in a position to 'represent' consumer needs in the food policy-making process.

As discussed earlier, the New Labour government actively promoted the private-interest style of food governance, in which food retailers have played a major role in implementing regulations. Nonetheless, extant studies have already pointed out some negative implications of food governance. In particular, the following two points are noteworthy. Firstly, consumer movements tend to be marginalized by food governance, as consumers are, in theory, able to secure food of appropriate quality and price through their shop selection. In Marsden and his colleagues' words, 'those people who are likely to be most concerned about the quality of food have freedom to purchase it from the retail outlet of their choice' (Marsden, Flynn and Harrison 2000: 72). Thus, there is no need to engage in onerous civic movements for consumer protection. Secondly, while the competitive market formed by food retailers has superseded the civic consumer movements in the private-interest style of food governance system, the lower social groups tend to be excluded from the supposed advantages generated by the competitive food market, since they tend to have less spending power and car ownership. As discussed by Ellaway and Macintyre, people in the lower income strata, who often live in inner-city areas, may be more likely to shop locally for bread and milk, because many supermarkets are located on the outskirts of cities/towns, despite the fact that the price of basic foodstuffs such as bread tends to be higher at local corner shops (Ellaway and Macintyre 2000: 58*).* Importantly, research on public health has pointed out that the lower social groups tend to be most vulnerable in terms of health, due to poor dietary practices (Philip, James, Nelson, Ralph and Leather 1997). In other words, food governance neglects people who require more support to manage their diet and health.

Observing these negative outcomes of the food governance system, Caraher and Coveney argue that '(t)he underlying philosophy [of UK food policy] was and still is that of neo-liberal economics' (Caraher and Coveney 2004: 594). According to them, the UK government tends to opt for 'a focus on changing individual behaviours, such as increasing the consumption of fruits and vegetables' without addressing structural food issues such as 'food poverty' or

'wider environmental issues' (594). Most of the initiatives are 'downstream', 'encouraging local communities to set up self-help projects often to do with skills acquisition' (594). These attempts are, however, not supplemented by 'projects which focus upstream on the food supply chain within a framework of policy development' (594-5). Consequently,

> …the focus on skills may divert attention from the determinants of food poverty by offering short-term solutions to long-term problems and diverting attention from the real causes or determinants.
>
> (Caraher and Coveney 2004: 545)

All in all, a shift to food governance has redefined the role of the national government as well as that of food retailers in the food regulatory system in the UK, transferring the regulatory responsibilities from the former to the latter. As a result, consumers are supposed to be equipped with more and better choices to secure food of their preferred quality and safety in the competitive food market. Yet, as discussed above, some crucial structural issues in the food system have been disregarded without even being articulated, as exemplified by the exclusion of lower social groups from food governance.

FOOD POLICY REFORM IN JAPAN IN THE 2000s

The acute need to reform the food regulatory system emerged as a crucial political agenda in Japan in the early 2000s due to a number of factors, some of which were common to the UK case. Firstly, as in the UK, the changes in the international agricultural trade system incurred the need for agricultural policy reform within Japan, but in a much more intensive manner, because of the existing condition of its agriculture industry. As was well publicized by government bodies as well as by the mass media, Japan's food self-sufficiency rate was recorded at 39 per cent (in calories) in 2006, the lowest since 1965. The other side of such a heavy dependency on food imports was the decline of the domestic agriculture industry. According to a former bureaucrat of the Ministry of Agriculture, Forestry and Fisheries (MAFF), Yamashita;

> While agricultural output as a proportion of GDP has declined from 9 per cent in 1960 to its present level of 1 per cent, the proportion of farmers older than 65 has risen from 10 per cent to 60 per cent. The proportion of full-time farming

> households has declined from 34.3 per cent to 19.5 per cent, while the proportion of part-time farming households (for which other income exceeds income from farming) has increased from 32.1 per cent to 67.1 per cent.
>
> (Yamashita 2006: 3)

Secondly, closely related to the weak agriculture sector, the eating habits of Japanese people are changing, due to demographic and lifestyle transitions, such as the increase in the number of single households and married women in paid employment, and this has resulted in further increases in the consumption of imported food. Today's diet and culinary practices in Japan are more westernized than ever, with rice consumption comprising only 23.3 per cent of total calorie intake in 2005, compared with a figure of 48.4 per cent in 1960 (Naikakufu 2006: 17). On top of this, people in Japan today eat out more often, and use more manufactured or packaged foods, such as 'home meal replacements' or 'ready-made food', even when they do eat at home. According to the government, spending on eating out as a proportion of the total spending on food was 35.9 per cent in 2003. Total spending on eating out combined with prepared or ready-made food, makes up 44.5 per cent of total food expenditure (Naikakfu 2006: 2). Iwamura Nobuko, who conducted a long-term large-scale interview survey of housewives born after 1960, investigating the current situation for family meals, reports that dependency on externally-prepared/cooked foodstuffs is a widely-spread tendency among younger families in Japan. The efficiency and convenience offered by eating out or using prepared/ready-made food certainly appeals to contemporary housewives, who are generally in charge of the every-day organization of family meals. Moreover, Iwamura points out that the use of externally-prepared/cooked food provides housewives with some leisure or a sense of freedom from their families (Iwamura 2003: 137-48; also see Iwamura 2007). Meanwhile, data compiled by the Ministry of Health, Labour and Welfare (MHLW) shows that, in 2003, for women aged 30-39 and 40-49, respectively, 37.8 per cent and 32.1 per cent of the food they ate for lunch was externally-prepared/cooked (Naikakufu 2006: 3).

Thirdly, concerns about food-related risk were intensified by recurrent food scares in the 2000s, similar to those in the UK. In particular, the outbreak of BSE in September 2001, the same month as the 9/11 terrorist attacks occurred, posed a great deal of challenges to the then governing system for food. Prior to the outbreak, the Japanese government had received warnings from the EU and the World Health Organization (WHO) of the risk of BSE infection through meat and bone meal (MDM) imported from the UK, Denmark, Italy and Ireland in the period between 1980 and 1999, which had been identified as the cause of the outbreak in Europe (Murakami 2004: 155-60; Miyazaki and Ono 2004: 110-13). Thus, the failure to prevent BSE infection within Japan was viewed by some of the policy-making

elites, as well as the mass media and consumers in Japan, as a 'failure of governance' (*shissei*).[2]

Faced with these issues, the Japanese government started to implement reforms, firstly in the area of agriculture. Aurelia George Mulgan's exhaustive studies on Japan's postwar agricultural policies have illuminated a tightly-established structure of vested interests, formed by politicians, bureaucracy and interest groups (in particular, *Nōkyō*) in the area of agricultural policy-making, resulting in persistent state-led protectionism of the agricultural sector (Mulgan 2000; Mulgan 2005). Still, a series of administrative and regulatory reforms to the agricultural policy-making process were carried out from the late 1990s onwards. One of the major achievements of the 1990s reforms was the Food, Agriculture and Farming Village Basic Law, introduced in 1999 (Shōgenji 2008; Shibata 2007; Sasada 2008). Based on the effects of the Basic Law, the Cabinet approved the Food, Agriculture and Farming Village Basic Plan in the following year, and the second Basic Plan was set up in 2005. Also, under the leadership of Takebe Tōru, the Minister of MAFF under the Koizumi government in 2001 and 2002, the Revitalizing Plan for Food and Agriculture (*Shoku to nō no saisei puran*) was drawn up in 2002, in line with the overall government structural reform (*kōzō kaikaku*) policy, which, being embedded in the neoliberal doctrine, promoted the process of deregulation and privatization. One of the main objectives specified in the Plan was to facilitate the process of a 'structural reform' of agriculture, including reforming the *Nōkyō*.

Reviewing the policy changes since the late 1990s that have moved towards a more 'aggressive form' of agricultural policy, Sasada argues that the electoral reform of 1994, which placed a relatively higher weight on urban voters in comparison with the previous system, spurred the institutional change in agricultural policy towards a more consumer-centred approach (Sasada 2008). In contrast, agriculture and food policy experts, Shibarta, and Shōgenji, the latter of whom had been involved in the legislation process behind the 1999 Basic Law, both point out that the new policies were introduced in order to, firstly, comply with the international requirements set by the WTO and other agriculture agreements, and secondly, rebuild Japan's agriculture industry by nurturing competent producers and increasing the competitiveness of the industry (Shōgenji 2008: 108-26; Shibata 2007: 214-18). To look at these changes specifically, firstly, the ways in which subsidiaries are provided to farmers have been revised in line with the WTO agriculture agreements, by eliminating or reducing cases of financial support with trade-distorting effects. Secondly, in order to achieve the efficient and stable management of agriculture, the level of income for individual agricultural producers needed to be raised to the average standard for workers in other

industries. For this purpose, measures to enlarge the scale of farming, by concentrating farmland within the hands of competent producers, were included in the new regulatory system. Finally, the policy changes since the late 1990s suggest a shift in the policy-making perspective, from producers to consumers. Consumer-centred food policy-making is the mainstream approach today in industrially advanced countries, and the Japanese state has started to follow the global trend.

These developments in agricultural policy-making since the late 1990s certainly suggest that agricultural policy in Japan has started to show some signs of change, responding to both exogenous and endogenous factors. Nevertheless, the trajectory of reform has by no means been straightforward, requiring negotiation with anti-reform parties (national bureaucrats/politicians with vested interests, the *Nōkyō* and so on). In fact, reform-minded scholars specializing in agricultural policy-making regard the reform process since the late 1990s as unsatisfactory, in particular in terms of the failure to remove the rice acreage reduction policy. Some have called for further progress in the 'structural reform' of the agricultural policy (Yamashita 2010; Honma 2010).

In contrast to the difficult progress of the recent agricultural reforms, institutional changes in the areas of food safety and food education progressed without major obstructions. The Basic Law for Food Safety was promulgated in 2003, under which the Food Safety Commission was set up as an administrative body to supervise food-risk issues. The main roles of the Food Safety Commission are twofold: 1) to provide policy-making elites and the public with scientific assessments and 2) to inform the public of food-related risks. The Food Safety Commission was founded on the basis of the 'zero-risk' principle that regards all food as being potentially 'risky' when consumed by individuals. Food risks evaluated by scientific professionals within the Commission are passed on to the MHLW and MAFF so that they can set up policies, regulations and administrative systems to deal with the risks. Information on the risk assessments conducted by the Commission is also released to the public, through the 'risk communication' process. As well as the numerous publications on different food-related risks, and online materials, including homepages, the Commission also organizes public meetings at which any member of the public can participate and pose questions to scientific professionals from the Commission. In 2005 and 2006, topics such as BSE, residual pesticides, methylmercury contamination in fish, imported soya beans and genetically-modified foods, were discussed in public meetings across Japan (Naikakufu 2006: 103-117; Matsunaga 2005: 160-7; Inubushi 2005: 77-81). In this way, scientific risk assessments and

risk communication have been introduced into the administrative process of dealing with food-related risks in Japan.

Food-risk communication requires that the recipient of the information, in many cases the consumer, can process and leverage the information provided by the scientific experts. Thus, it needs to be supplemented with the dissemination of knowledge about food risks and healthy lifestyles in general. To this end, the Japanese government introduced a nationwide food education programme, *Shokuiku*, into the national political agenda in 2005 by legislating the Basic Law for Food Education (*Shokuiku*). The *Shokuiku* campaign had been initiated voluntarily by enthusiasts, led by a celebrity chef, Hattori Yukio, in the early 1990s, with the aim of improving Japanese people's knowledge about food and public health, including topics such as nutrition via healthy eating and cooking, and food education for children. The 2005 legislation officially conferred the campaign with the status of 'national movement' (*kokumin undō*), granting it budgetary support. According to the first *Shokuiku* White Paper, published in 2006;

> It is an urgent task to promote the *Shokuiku* campaign as a nation-wide movement, in which all Japanese people autonomously participate and play the lead role. In so doing, each Japanese person independently acquires pertinent and proper knowledge and decision-making ability that enable him or her to voluntarily practice a healthy lifestyle with healthy eating.
>
> (Naikakufu 2006: 20)

The emphasis placed on the importance of transforming individuals into autonomous and capable food consumers corresponds to a shift in the focus of consumer policy in the 2000s, which can be summarized as a shift from 'consumer protection' to 'respect for consumer rights' and 'providing support for consumers' independence'. One of the main principles of the Basic Law for Consumers, established in 2004, according to a commentary by the Cabinet Office, is that consumers need to participate in the market as 'independent consumers' and, in so doing, take the initiative to secure their own interests (Naikakufu Kokumin Seikatsu-kyoku 2007: 6). That is to say, the institutional changes in the area of consumer policy are premised on 'enabled' consumers operating in the market, and the *Shokuiku* campaign can be understood as a concrete device through which the Japanese state could educate/train individuals into autonomous food

consumers.[3] In this policy framework, individuals are expected to bear responsibility for independently and completely managing their everyday food matters, while the role of the national government is confined to that of provider of information and administrative support.

Specifically, through *Shokuiku*, a series of food education programmes were included in school curricula and offered through social education activities in local communities, thus targeting both children and adults. The *Shokuiku* policy also considers families to be a vital means of food education, and it both explicitly and implicitly expects mothers to exercise their role as food manager of the home.[4] Through the *Shokuiku* programmes in schools and homes, individuals are provided with the knowledge and skills to help them process food and health-related information successfully and make rational decisions about food and healthy lifestyles. In other words, what the *Shokuiku* policy aims to achieve is the optimization of the whole food system by influencing individuals' food preferences and behaviours. Importantly, it tends to posit food issues as individual matters, as can also be observed in the UK, and in so doing, it leaves the structural issues of the food system untouched.

In this way, the food policy reforms in Japan in the 2000s exhibit curious points of commonality and difference with the case of the UK. On the one hand, the institutional reforms in Japan introduced a more consumer-oriented approach into the policy-making process, emphasized the importance of the utilization of market functions in the food regulatory system, and encouraged the involvement of a variety of agents in food risk management and food education, as was also observed in the UK. Through these changes, it can be argued that Japan's food governing system has moved towards the model of 'food governance' since the 1990s. On the other hand, unlike in the UK, retailers in Japan have not been given a leading role in influencing and calibrating (termed 'editing' in the 2008 UK government's report (Cabinet Office2008), which was discussed above) consumers' interests. Instead, the national movement of food education was set up as a state-financed political body with an agenda to disseminate knowledge about food and healthy lifestyles directly among the Japanese people and urge them to be autonomous, competent food consumers. In this sense, normative pressures placed on individuals, in particular mothers as the food managers of homes, are more apparent in the Japanese case. In contrast, in the UK, individual consumers are softly managed within the hierarchically-organized space of food retailers, through the pretence of individual preferences. It is worth noting that the structural conditions

surrounding food retailers in Japan, within which the national government had to operate, led to this clear methodological difference between it and the UK. The food retailer market in Japan is not as concentrated and organized as it is in the UK, and various types of food retailers, for example, local supermarket chains and so-called 'convenience' stores, are still competing against each other. Moreover, household spending on food generally declined between the mid-1990s and the 2000s in Japan, limiting the influence of food retailers in the food system (Iimori 2007: 36-7). Due to these structural conditions, it would have been a much harder and more onerous task for the Japanese government to assign food retailers a leading role in 'editing' consumers' preferences and choices. As a result, the normative food campaign was utilized to fill this gap in the Japanese case.

CONCLUSION

Andrew Gamble writes in his publication reflecting on the 2007-8 financial crisis that;

> By 2008, in a sense which was true but rather unenlightening, all governments throughout the global economy were neo-liberal governments, because they were obliged to operate within a set of common structures in the global economy which reflected, however imperfectly, neo-liberal principles.
>
> (Gamble 2009: 89)

The food policy reforms in the UK and Japan in the 1990s and 2000s illuminate concrete processes through which the national governments of each country tried to respond to this 'set of common structures in the global economy which reflected, however imperfectly, neo-liberal principles' by revising their domestic institutions into a more market-oriented, flexible and, namely, more neoliberal, direction. Simultaneously, as we discussed above, the moves towards the neoliberalized food governing system in these two countries also display idiosyncratic characteristics, in particular regarding the ways in which each national government tried to influence and calibrate consumers' food preferences and behaviours. While food governance in the UK relies on retailers to play the leading role in changing popular behaviours and ideas about food, in Japan – where the food retail market was more fragmented and less vibrant in the 1990s and 2000s in comparison with that in the UK – a national food education campaign was introduced, to promote a particular set of normative ideas about food and healthy lifestyles in Japan.

Importantly, what the UK and Japanese cases of food policy reform, both of which have been infused with neoliberal doctrines in one way or another, have in common is the focus they place on individuals' food behaviours and practices. By doing this, the reforms in both countries circumvent the structural issues in the food system, for example the adverse effects caused by mass-produced 'cheap' food, environmental damage derived from the technology-driven food industry and the volatility of supply and prices stemming from the speculative trade of foodstuffs, many of which are externalities of a food policy based on the Production Paradigm. In other words, the modus operandi of neoliberal food policy reform, which does not question the idea of treating food as a commodity but rather tries to achieve a more efficient management of food in the market by making amendments to the food system, not only tends to enhance the normative pressures inflicted on individuals, implicitly or explicitly, but also lacks the scope to deal with the fundamental problems existing in today's food systems. This seems to point to an aspect of food policy reform that still needs to be addressed by the national governments of both the UK and Japan.

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[1] In their book, Lang and Heasman propose two more paradigms, the Life Science Integrated Paradigm and the Ecologically Integrated Paradigm, which provide alternative perspectives vis-à-vis the Productioninst Paradigm (Lang and Heasman 2004: 21-8).

[2] A special review committee on the BSE case was organized and issued a report on the government's handling of BSE in 2002. The report clearly condemned the government for a multitude of deficiencies observed in Japan's food regulatory system (Murakami 2004: 160; Miyazaki and Ono 2004: 115). The discussions by the committee were open to the public and broadcast through the mass media for transparency.

[3] The normative tendency to emphasize the importance of the development of a particular type of independent and enabled subject, who always tries to optimize opportunities, is also manifested in the so-called 'Robust' Plan of Structural Policy (*Honebuto no hōshin*). For the link between the *Shokuiku* policy and 'structural reform', see Hatae (2005). I have discussed normative implications of neoliberal political/economic reforms in a separate article (Takeda 2008).

[4] I have discussed the gender implications of the *Shokuiku* policy in other articles (Takeda 2009; 2010).

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A Comment on Margarita Estevez-Abe and Hiroko Takeda

Iwao Sato

In April last year, our Institute started the new joint research project on the theme of governance. Prof. Estevez-Ave, in her paper, provides a clear conception to our joint research by defining “Governance as the nature of interactions between state and social actors, among political actors, and among social actors themselves”. Prof. Takeda, in her paper, shows that the governance possess multilayered structure by referring to the international context of the food governance and also stimulates the discussion of the governance by comparing the recent food policy reforms in the United Kingdom and those in Japan. I appreciate their important contribution to our joint research.

In this brief comment, I’ll make a brief sketch about Japanese context of welfare governance and give some comments concerning papers of Prof. Estevez-Abe and of Prof. Takeda.

Japanese context of welfare governance

An argument that the state’s ability to solve the social problems has been decreasing constitutes the major background of the current discussion about the governance. The financial crisis of government, the emergence of the neo-liberalism and the increase of it’s influence, Globalization, Government failure of response to the various social needs - these factors make it difficult for the state to solve the social problems and this leads us to the idea of governance in which the various actors, not only the government but also citizens, NPOs, private businesses, and other parties, share the authority and powers. This transition is often expressed “From Government to Governance”.

This explanation basically applies to Japan, too. But, simultaneously, I’m afraid the expression “from Government to Governance” may be somewhat misleading in the Japanese context. Even in the traditional welfare system of postwar Japan, not only the government but also the social actors, especially company and the family, played an important role to complement the limited role of the governmental social policy.

For example, in the field of housing in postwar Japan, the scope of the government's role in housing welfare has been kept to the minimum necessary (Sato 2006). The

government concentrated infusion of public funds for housing on the assistance of the home ownership. On the other hand, the volume of supply of the social rental housing at low cost has been very moderate, compared with European countries, such as Netherlands, Sweden and Germany, and moreover Japan has no general scheme of housing allowance. It was the corporate housing benefit that complements this very limited role of the government in the field of housing welfare in postwar Japan. Private corporations had provided their employees with low-cost rental housing (company housing) as well as financial assistance to reduce the cost of housing. In this sense, the private corporations constituted an important subsystem of the housing system in postwar Japan. Naturally, this system has been fraught with a number of problems, such as the disparity between corporations of different sizes and of the disparity between regular and non-regular employees, and, in any event, it has been undergoing a marked transformation since the 1990s. The private corporations are withdrawing from the housing welfare field as the result of the destabilization of so-called "Japanese corporate system." These bring the necessary of re-organization of the housing welfare system at present.

In this Context, the term "from Government to Governance" may have some problems. First, it has a danger to miss the important role of the company and also the family which complemented the limited role of the government in the welfare system of postwar Japan. Second, it has also a danger to underestimate the importance of the government which may undertake the new responsibilities in the new welfare government. In Japan's traditional welfare, the public social expenditure has been concentrated on a pension. Toward the future, the government may have the responsibility for the broad range of social services, including the housing allowance mentioned above for example, naturally under the difficult situation of balancing public income and expenditure.

So, I would like to carefully use the term of "transition from the old welfare governance to the new one" or "Re-organization of the new welfare governance," rather than the term of "from Government to Governance."

Components of New Governance

Then, what is the feature of the new welfare governance? I will point out two important components of the new governance. They are the emergence of new actors and their

net-working and the enhanced transparency and accountability of these activities and their relation.

Concerning the emergence of the new actors, three actors should be especially paid attention to: they are the local government, the “Third Sector” such as NPOs, cooperatives, social enterprises, and the judiciary.

The first two actors will not need the detailed explanation. Since the 1990s, the decentralization reform has been implemented, in order to expand the role of the local government, and current DPJ-government promotes this reform. Concerning the Third Sector, following to the legislations which provided the NPOs with independent legal status since the end of the 1990s, the DPJ-government has been discussed the introduction of the large-scale tax benefits to the NPOs in the frame of the policy towards the development of the "New Public Commons," under which not only the government but also citizens, NPOs, private businesses, and other parties, with the spirit of mutual assistance, play an active role in providing services for our everyday life, such as education, childcare, community development, nursing care and welfare services. This tax benefits to the NPOs were partially introduced in June this year (Act on the Partial Revision of the Act on Promotion of Specified Non-profit Activities [Act No. 74 of 2011] and Order on the Partial Revision of the Order for Enforcement of the Act on Special Measures Concerning Taxation, etc. [Order No.199 of 2011]), to encourage the NPOs’ activities to rescue and to recover the damages in the stricken area by the big disaster which occurred in March this year.

As a socio-legal scholar, I will refer to the other actor, which will play an important role in the new governance, even though it seems to attract few attentions in the present discussion about the governance. That is judiciary. It had been said that the political role of the judiciary in Postwar Japan was relatively smaller than those in other advanced countries, such as the United States and Germany. However, since the end of the 1990s, the broad reform of the justice system has been implemented, in order to strengthen the function of judiciary (Sato 2002). Governance can be understood as a process of the interaction and the cooperation among various actors, such as national government, local government, NPOs, private businesses, and other parties. But simultaneously, this interactive process involves the risk of the serious conflict among those actors. The more actors are involved in the governance and the complicated the authority, the powers and the resources are distributed among those actors, the bigger the risk of

conflict about the distribution of these authority, powers and resources among them. This highlights the important role of the judiciary as an arbitrator of the conflict in the new governance. Moreover, by solving the conflict according to the transparent rules and by fair procedure, the judiciary will contribute the improvement of the transparency and the accountability of the activity of each actors concerned and the relation among them. In these sense, it is worthwhile paying the special attention to the future activity of the Japanese judiciary in the new governance in general and also in the new welfare governance.

Some Prospects

In the paper of Professor Estevez-Abe, she analyses the political possibility of drastic reform of welfare in Japan and took a little bit gloomy view about it. She points out that the rules of the game of the present Japanese political system do not allow the government to reform the welfare state at the required speed. And she also points out that grand coalition can potentially open ways for a drastic welfare reform to create a more universalistic welfare state.

This is the interesting point. Grand coalition will provide the government with stable basis for the political decision for the drastic welfare reform, to be sure. But on the other hand, political compromise between major political parties will be inevitable in the process of forming the grand coalition and this may possibly disturb the drastic reform. As Professor Estevez-Abe emphasized in the discussion, the leadership may be also very important – a grand coalition with strong leadership. Comparative study about the foreign cases also may show which political, economic and social factors will open the way to the grand coalition and which political, economic and social factors will make it possible that the grand coalition open ways for a drastic welfare reform to create a more universalistic welfare regime.

In the Prof. Takeda`s paper, she analyzes the nature of food governance in detail, also with the comparison between United Kingdom and Japan. Private-Interest Approach mentioned in her paper, which encourages enabled consumers to make informed choices of food, seems to be a good a touchstone of estimating the effectiveness of the neo-liberal version of governance. On the other hand, she points up some problems involved in this approach: they are marginalization of the structural problems of the food system, the social-stratified dimensions of this approach, and also its disciplining

effect to the mothers and families. And, as is well known, Japanese food system has various problems to be solved, not only the security of the food safety, but also for example, revitalization of agriculture sector, mass disposal of food in everyday life, especially in the Food Retailing, the problem of the senior people who live in so-called food deserts, which are communities that lack proximity to a supermarket and its fresh food offerings, and so on. Besides the Private-Interest Approach, where the large private supermarkets take the dominant role like UK, it seems to be worthwhile to consider the possibility and effectiveness of an alternative approach, where the so-called "Third Sector" such as COOP will take the important role, to solve the problems of Japanese food system.

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3
Corporate Ownership and Governance*

Wataru Tanaka

In this paper I discuss the development and challenges of corporate governance in Japan, with some comparative analysis with other countries, such as the United States, West European and East Asian countries. In particular, I will argue that the main concerns of corporate governance differ from country to country, and such differences, at least in part, reflects differences in the ownership structures of typical publicly traded companies in those countries. Then I will discuss how the ownership structure characteristic of Japanese firms, especially cross-shareholdings (*kabushiki-mochiai*) – affects the issues of corporate governance.

This paper focuses on publicly traded (or listed) corporations (*kōkai kigyō* or *jōjō gaisha*), that is, companies whose shares are listed on stock exchanges and widely traded among investors. Issues of corporate governance of closely held corporations (*heisa gaisha*) are also interesting, but they are out of scope of this presentation.

What is Corporate Governance?

I would like to start with this question: What is "corporate governance"? In this respect, economists (especially financial economists) tend to focus on the interests of shareholders. Such an attitude is clearly shown in a widely-cited survey article by Andrei Shleifer and Robert Vishny (1997): "Corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment" (p.737). Legal scholars have the same tendency. Corporate governance is mainly discussed by corporate law scholars, and corporate law generally focuses on the protection of shareholders, though it also provides some rules to protect creditors of corporations (Hansmann and Kraakman 2001).

Such a focus on the interests of shareholders is reasonable. Shareholders take on risks and their rights are not specified in contracts.[1] Unlike creditors who have contractual rights, the timing and amount of companies' payouts to shareholders are not agreed upon in advance. Rather, shareholders receive a return only when the company declares payment of dividends. In addition, shareholders' rights are generally

* This article is based on my presentation for the ISS Symposium on Governance in Contemporary Japan. I am grateful for the comments of Professor Yupana Wiwattanakantang and floor participants.

[1] For an economic reason why shareholders, not other stakeholders, should be the main beneficiaries of corporate governance, see Hansmann and Kraakman [2001].

subordinate to those of creditors. Corporate law generally prohibits companies from paying dividends unless they have retained earnings.[2] And once the companies go into bankruptcy, shareholders' equity is typically completely wiped out, while creditors recover some (though typically small) portion of their claims. For example, in the widely reported corporate reorganization case of Nihon Koku (JAL) that is now proceeding in the Tokyo District Court, shareholders will be deprived of all of their interests based on the reorganization plan.[3] Under the plan the airline will reduce its workforce by 16,000, which will certainly be a hardship for many employees.[5] But, after all, laid-off workers can retain their human capital—their skills as pilots or flight attendants, etc.—and utilize those skills in other firms. Shareholders, in contrast, generally have no rights to recover their capital once they have invested in a company.

Since they take on the risks of the company and their rights cannot be specified by contracts, shareholders need some mechanism to protect their investment. In particular, shareholders have voting rights in the shareholders' meetings which have the power of appointing and dismissing directors, among other things. Then the boards of directors have the power of appointing, dismissing, and disciplining corporate executives (presidents or chief executive officers). Without such an oversight mechanism, few people have sufficient incentive to provide risk capital to a company.

I recognize that many people in Japan feel that the focus on the interests of shareholders is too narrow and corporations should be—and actually are—managed for the interests of not only shareholders but also other stakeholders. I will briefly turn to this idea at the end of my presentation. For now, however, I would like to emphasize that there is a reason to regard shareholders as the main, if not the only, beneficiaries of corporate governance.

National Differences in Corporate Ownership and Governance

Now I turn to particular issues of corporate governance. I will make a brief look at the situations in the United States, Western European and East Asian countries, and then discuss Japan. Through my comparative analysis, I will try to make it clear how the main themes of corporate governance differ in those countries according to the difference of ownership structure of typical publicly traded corporations.

The United States, where the idea of corporate governance was born and has been

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[2] See the *Companies Act of Japan,* Arts. 446 & 462.
[3] Nihon Koku et al. [2010], p.2. The plan gained support of majority of creditors and got approval of the court on November 30, 2010.
[5] Nihon Koku et al. [2010], p.5.

debated most actively, is the country where corporate ownership is most highly dispersed (the United Kingdom has a similar ownership structure, and also has a similar concern of corporate governance). Shares of publicly traded corporations are typically held by so many investors in such small quantities that shareholders have little incentive to get involved in the management of the company. Rather, shareholders tend to rubber stamp the decisions of the management, including the appointment of board members. As a result, top executives have de facto control over their companies. This "separation of ownership and control" was discussed in a classic book published as early as 1932 (Berle and Means 1932). Accordingly, how to get managers to act in the best interests of dispersed shareholders has been the main concern of corporate governance in America.

The private sector and the government have both instituted measures to control the behavior of managers. The most drastic response is a hostile takeover, in which an investor or group of investors takes control of a publicly traded company without the consent of its management. In the 1980s, a spate of hostile acquisitions took place for the purpose of busting up inefficiently diversified conglomerates (Bhagat et al., 1990). A less drastic but longer term response is increased activism by institutional shareholders (Gordon 2007). Traditionally, the vast majority of shares of American corporations were held by individuals. Since the 1970s, however, more and more shares have been held by financial institutions such as pension funds, mutual funds and private equity funds. As fiduciaries of individual investors, institutional shareholders have become increasingly concerned about how to exercise their voting rights. Sometimes they vote against the management's proposals, or even make their own proposals on such matters as disclosure of managers' remuneration, abolishing takeover defenses (such as so-called "poison pills"), or appointment of independent outside directors.

Still another response is to appoint "independent" outside directors. The common wisdom on corporate governance in America (and nowadays in many other countries) is that the majority of directors should be non-executive and have no material relationship with the company and its CEOs. Now more than 70% of the directors of American listed corporations are classified as independent (Gordon 2007, p.1474).

Recent corporate scandals such as Enron and WorldCom, and the 2008 financial crisis have strengthened doubts about the effectiveness of American corporate governance. It seems, however, that the main concern of corporate governance has remained unchanged: how to ensure top managers serve the interests of shareholders. Certainly some scholars argue that corporations should be governed not only to protect shareholders, but also other stakeholders, but their arguments do not seem to have

enough power to change the trend, even after the financial crisis.[6] The continued primacy of shareholder concerns is probably due to: (a) high employment turnover in the US making employees less committed to particular firms than in Japan and other countries; and (b) since many individuals hold stocks directly or indirectly through pension or mutual funds, there is a strong perception that national welfare is connected to share values (see Hansmann and Kraakman 2001, p. 452).

European and Asian countries

Although the notion of separation of ownership and management is familiar, recent empirical studies have shown that such separation is not common outside the US and the UK. Table 1 summarizes a comprehensive study on the corporate ownership structure in thirteen West European countries by Faccio and Lang (2002). It shows that only in the UK and Ireland were a majority of publicly traded firms classified as "widely held," which means that they had no shareholders who controlled 20% or more of voting rights, directly or indirectly. In most other countries, a majority of listed companies are controlled—and often directly run by—families.

Table 2 shows results from a similar study of nine East Asian countries by Claessens et al. (2000). Again, "widely held" companies are a minority in all of the countries except for Japan. Firms are typically under the control of families.

Since they have high financial stakes in their companies, controlling shareholders have an incentive to ensure that firms' managers act appropriately in order to enhance the value of their stocks. The efforts controlling shareholders make to maximize their investment returns are also beneficial for minority shareholders. There is a risk, however, that controlling shareholders will use their voting power to expropriate a company's assets. For example, controlling shareholders may force a firm to sell its assets to them at below market prices (called "unfair self-dealing" or "tunneling"; see Johnson et al. 2000). Such risks may be even greater in countries where the top executives are typically controlling shareholders or members of the family that controls the company than in the US or UK where chief executives are typically professional (employed)

[6] For a representative view after the financial crisis that the main concern of corporate governance in the US is the lack of accountability of managers to shareholders, see Zingales (2009), pp. 413-14 ("While in the 1920s the prevailing perception was that investors were defrauded by offerings of securities of dubious quality and by market manipulators, in the new millennium, investors' perception is that they have been defrauded by managers who are not accountable to anyone. … The real issue is the lack of accountability of managers to shareholders, centered in the way corporate boards are elected").

managers who own few shares in their company. In the latter case, if managers get involved in, say, egregiously unfair self-dealings, then the board of directors may well dismiss them. When the managers are also controlling shareholders, however, they can handpick directors who will not intervene.

Therefore, in those countries where concentrated ownership is typical, the main concern of corporate governance is how to protect the interests of minority shareholders against abuse of power by controlling shareholders. Some countries have taken rather drastic regulatory measures. For instance, in Korea, where family business groups called *chaebol* are prevalent, stock exchange rules and commercial law have recently provided mandatory rules to make listed companies appoint "outside directors," non-executive directors who have no relationship with the company or its controlling shareholders. For all Korean listed companies, at least 25% of their directors must be outside directors. For companies whose assets exceed 2 trillion won (roughly US$2 billion), at least 50% of their directors must be outside directors.[7]

Japan

Now let's turn to Japan. As is shown in Table 2, many Japanese listed firms are widely held. Actually, comparative empirical studies suggest that Japan is among the countries where the ownership of publicly traded firms is the most widely dispersed (Holderness 2009). Japan is different from the US and UK, however, in that many shares of publicly traded firms are held by other firms in the same corporate group and by commercial banks that make loans to the corporate group. The companies, in turn, often hold shares of these banks. In other words, they have cross shareholding (*kabushiki mochiai*) relationships. As shown in Figure 1, more than 40% of the shares of Japanese listed companies were held by firms and city or regional (i.e., commercial) banks until the mid-1990s. Also until the mid-1990s, about 25% of the shares of listed companies were cross-held by other listed companies (see Figure 2).

Banks and business firms often become "stable shareholders" (*antei kabunushi*) of the companies they invest in. They do not interfere with a company's management unless the company is in financial distress and has difficulty paying its debts. In order to maintain business relationships with a company, shareholding banks and firms usually vote in favor of its management and do not sell their shares without the consent of the management.

Thanks to these stable shareholders, hostile takeovers were almost unheard of in

[7] Several empirical studies suggest that such regulatory measures have had positive effects on firms' performance. See Black et al.(2006) and Choi et al. (2007).

Japan – at least until 2005--when Livedoor made a widely reported attempt to takeover Nippon Broadcasting. Also, until the late 1990s, when institutional shareholders started to exercise their voting rights actively, there had been almost no attempts by shareholders to challenge the present management at shareholders' meetings, except for political or issue-based efforts by activist shareholders to oppose corporate actions such as the construction of nuclear power plants by electric power companies. As a result, corporate executives have de facto power to choose directors by themselves, and Japanese boards are dominated by inside directors who typically have been employed by the same company for their entire career (Komiya 1988).

Since the late 1990s, commercial banks' shareholdings have sharply decreased. Share ownership in listed firms by city and regional banks fell from 15.4% at the end of fiscal year 1989 to 4.3% at the end of fiscal year 2009 (see Figure 1). This decline was caused by banks selling massive amounts of shares to meet their minimum capital requirements after writing off bad loans resulting from the collapse of the bubble economy. Businesses have also substantially reduced their shareholdings in other firms and banks, resulting in the ratio of cross-holdings falling to less than 10% in the 2000s (see Figure 2). On the other hand, foreign and domestic institutional investors have considerably increased their shareholding since the mid-1990s. Domestic institutional investors such as pension funds and mutual funds typically hold shares in the name of trust banks, and trust banks' shareholding increased from 10.6% in fiscal year 1994 to 18.6% in fiscal year 2009. In the same period, foreign investors' shareholding increased from 8.1% to 26.0% (see Figure 1).

Recent hostile takeover attempts and proxy contests, however, have made it clear that the ties of cross-holdings and stable shareholdings among Japanese companies are still fairly strong. To illustrate this point, I discuss several takeover attempts and proxy contests (for details, see Tanaka 2011).

The first case is the takeover contest between Fuji-TV and Livedoor for the control of Nippon Broadcasting System (NBS) in 2005. In this hotly reported takeover battle, Fuji-TV made a tender offer for all the shares of NBS at ¥5,950 per share, while Livedoor accumulated NBS shares in the stock market. Because of Livedoor's accumulation, the market price of NBS shares was over ¥6,500 throughout the takeover contest. Still, a group of several NBS shareholders, who had 24% of shares in total, tendered their shares to Fuji-TV, presumably because they wanted to preserve their business relationships with the Fuji-Sankei Group. Combined with the shares of NBS that Fuji-TV had already acquired before the tender offer bid, Fuji-TV obtained enough shares (over 33%) to block any fundamental changes in the management of NBS even

when Livedoor acquired a majority of NBS shares.[8] Although Livedoor won the court battle concerning takeover defenses,[9] it finally gave up on acquiring NBS and sold all its NBS shares to Fuji-TV (see Inoue and Kato 2006, chap.1).

Another example was a hostile takeover attempt by Steel Partners Japan (SPJ), a subsidiary of a hedge fund based in the US, of Bull-dog Sauce in 2007. SPJ had accumulated about 15% of Bull-dog shares, and then made a tender offer for all shares of Bull-dog at a price more than 10% higher than the current market price. Still, almost no shareholders of Bull-dog tendered their shares to SPJ. Instead, Bull-dog's shareholders approved a defense measure, which effectively would decrease SPJ's shareholding in Bull-dog by about three-fourths, by an overwhelming majority. Shareholders who owned 83.4% of total shares–nearly all of the shares not held by SPJ–approved the defense measure.

In this case, Peng Xu of Hosei University and I found that Bull-dog had increased its cross-holdings with other business firms and financial institutions since SPJ had begun to accumulate Bull-dog's shares (Xu and Tanaka 2009). At the time of the shareholders' meeting approving the defense measure, at least 35% of Bull-dog shares were subject to cross-holdings.

The third case is the proxy contest between Rakuten and the management of Tokyo Broadcasting System (TBS). In 2005, Rakuten, Japan's largest net-shopping operator, acquired nearly 20% of TBS shares in the market and proposed a business alliance. Rakuten's accumulation of TBS shares without advance notice to TBS caused resentment among TBS's board, however, and negotiations eventually reached a deadlock. Then a proxy contest occurred at TBS's annual shareholders' meeting in June 2007. Rakuten proposed appointing its president and chairman, Mikitani Hiroshi as an outside director of TBS, while TBS's board proposed a takeover defense measure that would effectively stop Rakuten from accumulating more than 20% of TBS shares without the consent of TBS's board. An overwhelming majority of TBS's shareholders (other than Rakuten) voted against Rakuten's proposal and for the defense measure proposed by the board. Despite the defeat, Rakuten still showed an interest in making an

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8 Corporate law in Japan requires two-third majority votes in shareholders' meetings for the approval of mergers, charter amendments and other fundamental changes of the company (see the *Companies Act*, Art. 309 (2)).

9 During the takeover contest, NBS's board decided to issue stock options to Fuji-TV which, if exercised, would have given Fuji-TV a majority of NBS shares. Livedoor filed suit and the Tokyo High Court issued an injunction against NBS, holding that such an issuance had the purpose of preserving the controlling power of NBS's management and thus was "grossly unfair." See "Nippon Broadcasting System Inc. v. Livedoor Co.," 1899 *Hanrei jiho* 56 (Tokyo High Court, March 23, 2005).

alliance with TBS and kept holding TBS shares. Then in 2008, TBS's board announced its reorganization plan, according to which TBS would become a "certified broadcasting holding company" (*nintei hoso mochikabu gaisha*). Under Japan's Broadcasting Act, if a company becomes a certified broadcasting holding company, no single shareholder can have voting rights above a 33% threshold.[10] Thus, the proposed reorganization would have made it highly difficult for Rakuten to take control of TBS. Rakuten naturally opposed this plan, but again, a large majority of TBS's shareholders, who owned 71.86% of outstanding shares, endorsed it.

Like Bull-dog, TBS apparently had increased its cross-holdings with other businesses since Rakuten had begun to accumulate TBS shares. From March 31, 2005, to March 31, 2007 (the date of the shareholders' meeting where Rakuten and TBS's board fought a proxy contest), shareholding in TBS by firms other than Rakuten increased from 29.3% to 41.6% (see Figure 3). In turn, TBS increased its investment in shares of other firms in the same period. The number of firms whose shares TBS held grew from 72 to 104 (see Table 3). Also, according to TBS's consolidated cash-flow reports, TBS and its related companies invested ¥43 billion and ¥31 billion in the shares of other firms in fiscal year 2005 (ending on March 31, 2006) and in fiscal year 2006 (ending on March 31, 2007), respectively. These amounts were about three times higher than TBS's consolidated net income in these two fiscal years (¥13.5 billion and ¥13.2 billion, respectively).[11]

Discussion and Conclusion

There are pros and cons to the practice of cross-holding shares. On one hand, this practice serves as a credible commitment to sustain a long-term business relationship for which detailed contracts may be difficult to write. Also, cross-holdings may be useful to restrain undesirable exercises of power by outside shareholders. For instance, a hostile acquisition may take place not for the purpose of increasing the value of the acquiring company, but for the purpose of expropriating the company's assets by unfair self-dealing. Alternatively, some acquirers may be too optimistic and take over a company in pursuit of an unrealistic business plan. Cross-holdings may be able to block such abusive or undesirable takeovers.

Cross-holding, however, may weaken the disciplining function of the capital market.

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[10] This rule is supposedly for the purpose of keeping the certified broadcasting holding company from being under the control of a particular person or group and thus protecting the "neutrality" of broadcasting.

[11] For more information about TBS's attempt to increase cross-holdings, see Tanaka (2011).

Incompetent management may not be replaced since cross-holdings block hostile takeovers or proxy contests. Also, an important concern is that firms may be locked into long-term relationships strengthened by cross-holdings, making it difficult for new business alliances to develop.

Such concerns are related to a major issue in evaluating Japanese corporate governance, which has often been characterized as an "inner" governance system. Managers, long-time employees and stable shareholders who are also long-time trading partners or creditors cooperate with one another. Such a system may well be beneficial for insiders, but may be detrimental to outsiders such as institutional shareholders, non-regular workers and newly established firms seeking new business alliances. Evaluating Japanese corporate governance is too big a question to deal with in this short paper. For now, I only would like to emphasize that the structure of share ownership is an important factor to consider when assessing the nature and challenges of corporate governance.

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Table1: Ultimate Control of Publicly Traded Firms in Western European countries (Faccio and Lang (2002))

Country	Number of Corporations	Widely Held	Having controlling shareholders (at the 20% threshold)					
			Family	State	Widely held corporation	Widely held Financial	Miscellaneous	Cross-holdings
Austria	99	11.11	52.86	15.32	0.00	8.59	11.11	1.01
Belgium	130	20.00	51.54	2.31	0.77	12.69	12.69	0.00
Finland	129	28.68	48.84	15.76	1.55	0.65	4.52	0.00
France	607	14.00	64.82	5.11	3.79	11.37	0.91	0.00
Germany	704	10.37	64.62	6.30	3.65	9.07	3.37	2.62
Ireland	69	62.32	24.63	1.45	2.17	4.35	5.07	0.00
Italy	208	12.98	59.61	10.34	2.88	12.26	1.20	0.72
Norway	155	36.77	38.55	13.09	0.32	4.46	4.54	2.27
Portugal	87	21.84	60.34	5.75	0.57	4.60	6.90	0.00
Spain	632	26.42	55.79	4.11	1.64	11.51	0.47	0.05
Sweden	245	39.18	46.94	4.90	0.00	2.86	5.71	0.41
Switzerland	214	27.57	48.13	7.32	1.09	9.35	6.31	0.23
United Kingdom	1,953	63.08	23.68	0.08	0.76	8.94	3.46	0.00
Total	5,232	36.93	44.29	4.14	1.68	9.03	3.43	0.51

Notes: Ultimate control of publicly traded firms. Data relating to 5,232 publicly traded corporations as of 1996 – 2000 (different in each country) are used to construct this table. The table presents the percentage of firms controlled by different controlling owners at the 20% threshold. Controlling shareholders are classified into six types. Family: A family (including an individual) or a firm that is unlisted on any stock exchange. Widely held

financial institution: A financial firm (SIC 6000-6999) that is widely held at the control threshold. State: A national government (domestic or foreign),local authority (county, municipality, etc.),or government agency. Widely held corporation: A non financial firm, widely held at the control threshold. Cross-holdings: The firm Y is controlled by another firm, that is controlled by Y, or directly controls at least 20% of its own stocks. Miscellaneous: Charities, voting trusts, employees, cooperatives, or minority foreign investors. Companies that do not have a shareholder controlling at least 20% of votes are classified as widely held.

Source: Faccio and Lang (2002), tbl.3.

Table 2: Ultimate Control of Publicly Traded Firms in East Asia (Claessens et al. (2000))

Country	Number of Corporations	Widely held	Having controlling shareholders (at the 20% threshold)			
			Family	state	widely held corporations	widely held financial
Hong Kong	330	7.0	66.7	1.4	5.2	19.8
Indonesia	178	5.1	71.5	8.2	2.0	13.2
Japan	1,240	**79.8**	9.7	0.8	6.5	3.2
Korea	345	43.2	48.4	1.6	0.7	6.1
Malaysia	238	10.3	67.2	13.4	2.3	6.7
Philippines	120	19.2	44.6	2.1	7.5	26.7
Singapore	221	5.4	55.4	23.5	4.1	11.5
Taiwan	141	26.2	48.2	2.8	5.3	17.4
Thailand	167	6.6	61.6	8.0	8.6	15.3

Notes: Assembled data for 2,980 publicly traded corporations based on Worldscope and supplemented with information from country specific

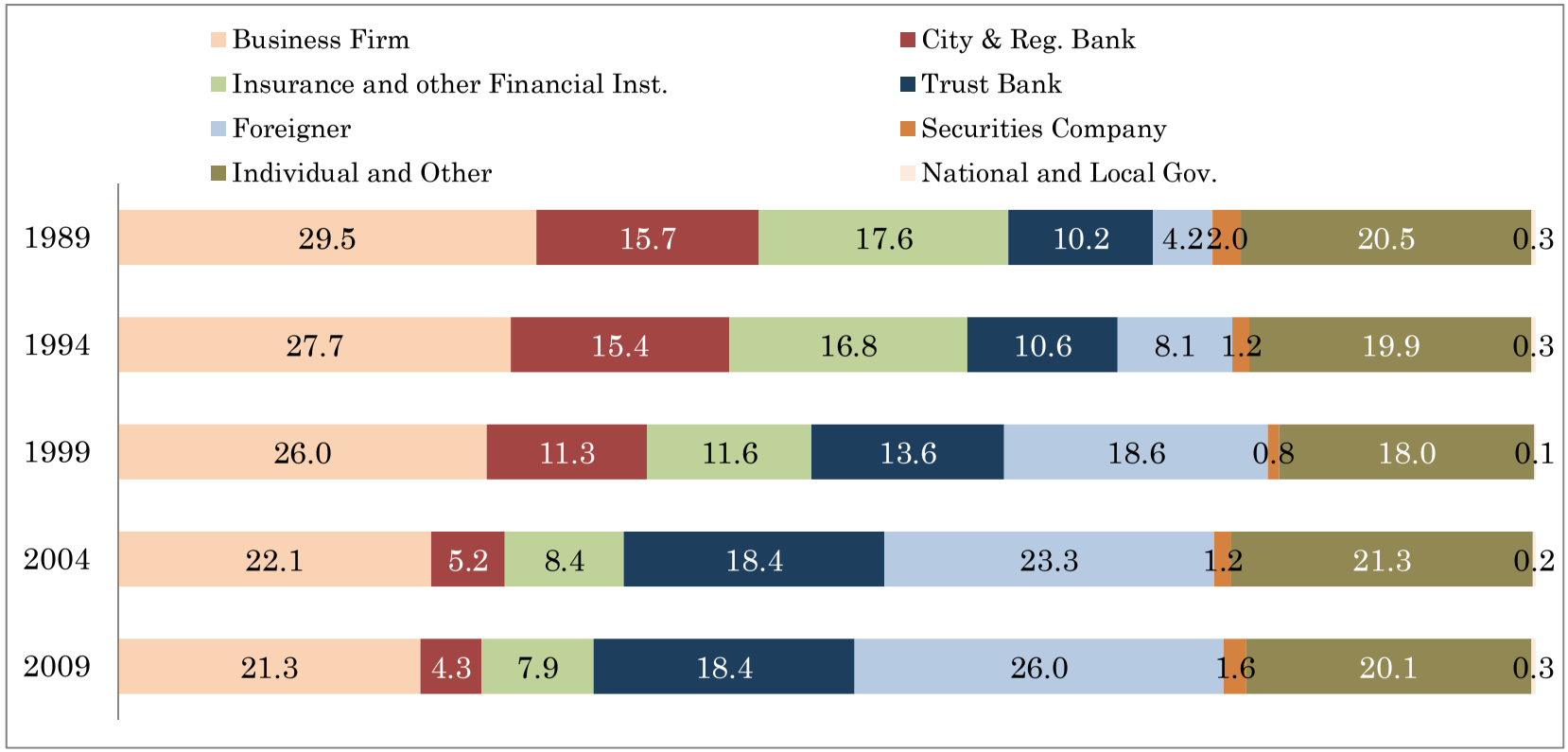
sources. In all cases, they collect the ownership structure as of the end of fiscal year 1996 or the closest possible date. Definition of each category is basically the same as Table 1 (for details, see Claessens et al. [2000], tbl.6). 1,240 sampled Japanese firms consist of 70.9% of all Tokyo Stock Exchange listed firms (1,749) in number, and consists of 93% in market value, as of the end of 1996 (see Claessens et al. [2000], tbl.2).
Source: Claessens et al. [2000], tbl.6.

Table 3: TBS's investment in shares of other firms

Fiscal Year ended	2005.3	2006.3	2007.3	2008.3
Number of firms whose shares TBS holds for the investment purpose	72	93	104	107
Total number of shares TBS holds for the investment purpose	27,112,743	43,112,847	56,938,577	67,635,655
Book value of the above shares (¥ Mil)	115,842	197,713	218,747	169,681
Consolidated Cash-outflow for the investment of financial instruments (¥Mil)	4,111	43,094	31,244	5,818
Consolidate Net Income (¥Mil)	9,890	13,513	13,229	19,022

Source: TBS's annual reports

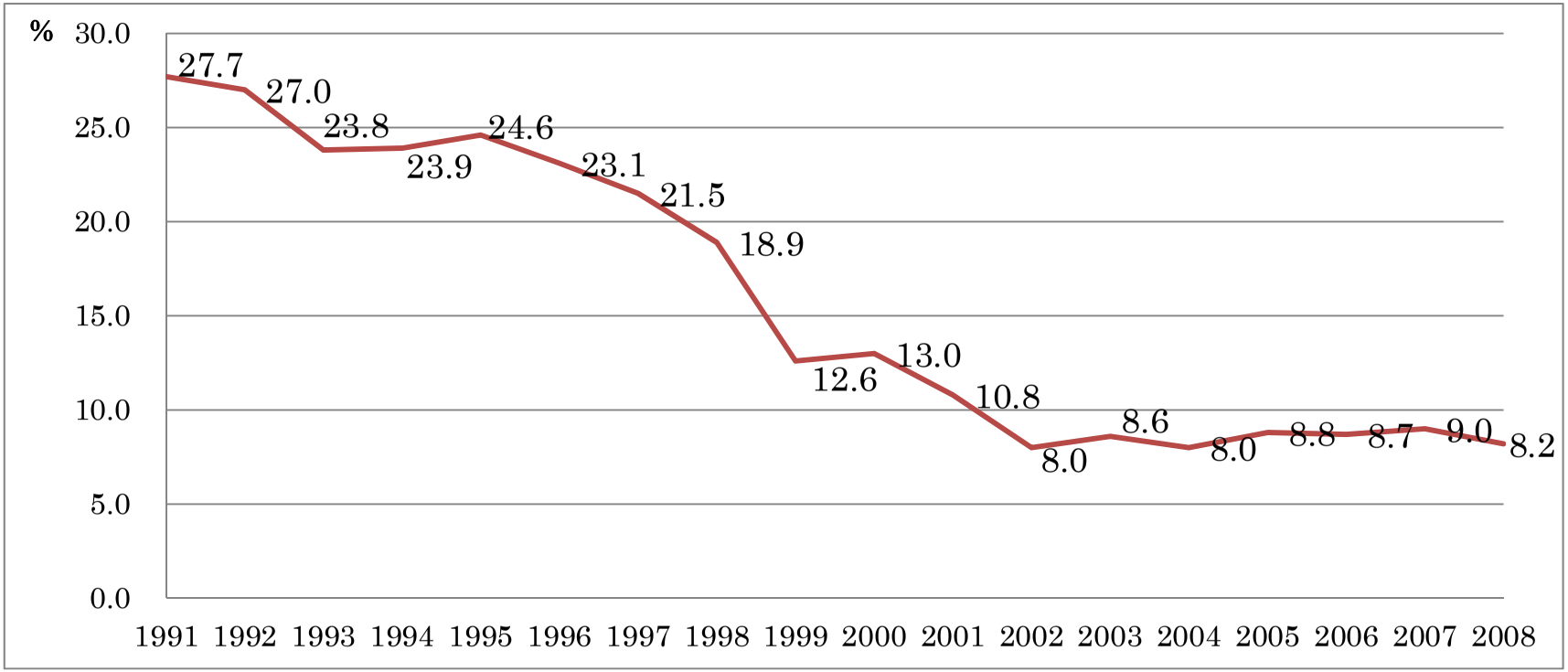
Figure 1: Shareownership by type of shareholder in Japanese listed firms (based on the market value)



Notes: Each figure represents the percentage of the market value of shares held by each category of shareholders to the total market value of shares of all listed companies in Japan at the end of every five fiscal year from 1989 to 2009. Each fiscal year ends on March 31 in the next calendar year. For instance, the graph for "2009" actually represents shareownership as of March 31, 2010.

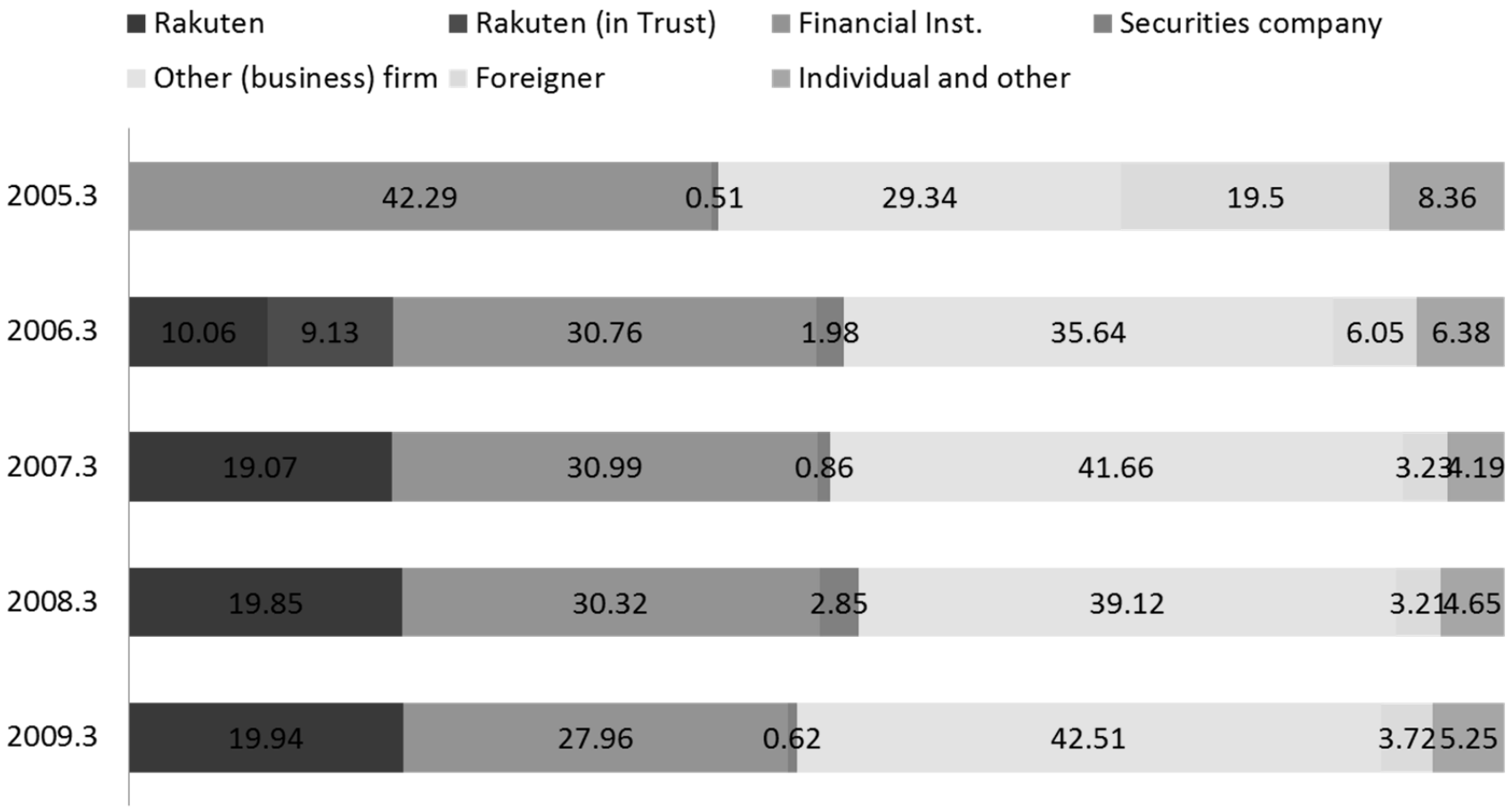
Source: Tokyo Stock Exchange (2010), sec.2-5.

Figure 2: Ratio of cross-shareholdings in Japanese listed firms (based on the market value)



Notes: Ratio of cross-shareholdings each fiscal year. "Ratio of cross-shareholdings" is the ratio of the market value of the shares of listed firms (whose shares are listed on the market of Tokyo, Osaka, or Nagoya Stock Exchange or JASDAQ) held by other listed firms to the total market value of shares of those firms. Figures are estimated by Daiwa Institute of Research based on disclosure information (for details, see Ito [2009]).
Source: Ito [2009].

Figure 3: Shareownership in TBS by type of shareholder



Notes: Shareownership (%) in TBS by type of shareholder as of the end (March 31) of each business year.

Source: TBS's annual reports (*Yuka shoken hokoku sho*).

A Comment on Wataru Tanaka

Yupana Wiwattanakantang

Summary of the paper

This study reviews important issues in corporate governance structure by focusing on ownership structure across countries around the world. The major findings are:

- US/UK: the firms have dispersed share ownership. Shareholders have little incentive to get involved in the business of the company. So, top managers have de facto control over the firm but their shareholdings are typically small.
- Continental Europe and Asia (except Japan): The firms have concentrated ownership in the hands of families. The controlling family-managers, therefore, have incentives to maximize the firm's value. However, they may also expropriate minority shareholders.
- Japan: The ownership is dispersedly held. Typically, banks and corporations have large shareholdings who have been "stable and quiet" shareholders. In addition, cross-holdings were common. However, the governance role of banks, corporations, and cross-shareholdings has been declining over time.

Comments

I have three major comments.

First, in Japan, the role of banks as large shareholders are over stated. Even though banks have been major shareholders of corporation, they may not play the monitor role for the following reasons.

1. In the aggregate level, banks altogether own quite large stake, but a closer look at each bank reviews that each actually owns relatively little shares. Given a relatively small shareholding, each bank should have less incentive to monitor (Shleifer and Vishny, 1997).
2. Banks have CG problems as they have no real owners and hence have their own governance problems (花崎・ウィワッタナカンタン・相馬　2005).

Second, many publicly traded corporations have not been controlled by corporations or banks. For example, Mehrotra, Morck, Shim, and Wiwattanakantang (2010) carefully investigate the ultimate and control structure of the firms that went public

from 1949-1970. They find that the founding family has played a crucial role in management and governance in around 40% of the listed firms. In these “family firms” the founding family is either listed among the top ten owners or serving as the President or Chairman. They find that about 80% of the family firms have remained family firms until 2000. These firms are namely Toyota Motors, Canon, Suzuki Motors, Bridestone. Therefore, the ownership and control of Japanese firms are not unique. Japan has similar governance in the same manner as other countries in the world. That is, family firms are an important form or corporate control structure of publicly traded firms.

Third, similar to the Japanese firms, recent studies also show that publicly traded firms in the United States are not as widely held or managerial control as often thought. The founding family appears to play an important management and governance role. For example, Villalonga and Amit (2010) study Compustat firms in 2000 and find that around 50% of the firms are family firms and these firms control around 43% of the market share.

In conclusion, recent studies in the economic literature have shown that family firms are very important form of governance structure of large firms around the world including Japan and the U.S., The major difference of family firms in Japan and the U.S. from other countries in Asia and Europe is that the families that own listed firms in Asia and Europe often own business groups that comprise of an extensive number of firms.

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4
The Governance of Immigrant Integration in Europe*

Roland Czada

Among the variety of governance institutions involved with immigrant integration in Europe, one finds an increasing number of consultative committees set up by governments. These committees serve as institutions of functional interest representation for immigrant associations and corporatist intermediation between government agencies and immigrants. As institutional interfaces of state and society, the consultation bodies not only enable immigrant associations to voice their opinions on issues which concern them as representatives of foreign residents or naturalized citizens, they also provide governments with an opportunity to address minority groups in matters of policy making and implementation, particularly legislation and political conflict management.

An analysis of immigration consultation bodies in different countries reveals a high degree of complexity and cross-national variety of procedures and institutional choices. To explain these choices, nations' specific immigration profiles as well as the historical origins of such bodies of interactive governance must be considered. Major variables affecting their scope, structure and functioning are examined from a cross-national perspective in this chapter. I will first present some general empirical evidence on immigration and integration policies in Europe and then follow with a discussion of corporatist immigrant consultation bodies that have been set up to integrate immigrant groups into national societies, cultures and systems of social and religious governance.

Corporatism refers to a political power structure and practice of consensus formation based on the incorporation of groups into public policy making. Political status is attached not only to individuals based on their civic rights and citizenship but also to their belonging to social groups maked by class, ethnicity, faith or language. The fact that many immigrants are non-citizens and immigrant groups are foreign to existing national systems of interest intermediation, may cause disadvantages and irritation, even unrest, when it comes to the representation, articulation, and consideration of their special interests and political concerns in a receiving society. Against this background a twofold mechanism of societal and political

* Thanks for stimulating discussions and helpful comments on earlier versions of this paper go to Elisabeth Musch and David Seaman. Of course, all errors are my own responsibility.

integration can be identified: integration through citizenship or acquisition of citizenship on the one hand and integration through group based participation on the other hand.

Immigrant integration policies

Immigrant integration policies gained priority in many European countries following the September 11, 2001 attacks on the World Trade Center, the White House and the Pentagon in 2001 by islamist al Qaeda terrorists (Musch 2011a). Integration efforts have been further intensified in the aftermath of immigrant unrest in the United Kingdom, France, Belgium, Portugal, Italy, and Denmark. In 2005, Muslim mobilization and claim making intensified throughout Europe following the publication of disrespectful caricatures of the prophet Muhammad in a Danish newspaper. In the same year, massive riots in France by youths of North African descent were blamed on a failed immigrant integration policy. Anti-immigration parties have gained momentum since the 1980s in some European countries, and have been unexpectedly successful in national elections, particularly in Belgium, the Netherlands, Austria, Switzerland and Sweden.

Apart from varying anti-immigration sentiments, the factual challenges of immigrant integration differ considerably across OECD countries. This is due to different scales of immigration, the number of alien long-term residents in relation to naturalized citizens, and the share of repatriates among immigrants. Moreover, integration problems as well as policy responses are highly dependent on the national and cultural origins of immigrant populations. In the same way, the behaviour and cultural traits of the host country play an important part. Most Europeans and their governments feel particularly challenged by the threat of segregation or even ghettoization. Above all this holds if most immigrants to a nation are from a single ethnic or religious group such as North African Muslim immigrants in France or people of Turkish origin in Germany.

The proportion of foreign-born, naturalized citizens to non-citizens can be seen as a rough indicator of the extent to which immigration may cause policy problems in a given country. The higher this ratio, the more immigrants have acquired citizenship, whereas lower ratios mean that more immigrants are staying in their receiving society as alien permanent residents. One should keep in mind, however, that the foreign-born category includes repatriates--citizens or citizens' children born abroad who have returned to their home countries. The latter group has been particularly relevant for Poland, the Czech Republic, the

Slovak Republic, Turkey, and Hungary (OECD Factbook 2007, 253). Apart from these special cases, the ratio of foreign-born to non-citizens is strongly correlated with data on naturalization rates (Table 1). Lower numbers of non-citizens in relation to the foreign-born population indicate liberal naturalization regimes. In these cases, relatively short residency requirements facilitate immigrants' access to full citizenship as in traditional immigration countries such as Australia, Canada, the USA, or New Zealand.

The highest portions of alien residents (non-citizens or non-nationals) as a share of the total population are found in Luxemburg and Switzerland; both have had low rates of naturalization thus far. Among the EU member countries, immigration has been high in Sweden, Germany, Austria, France, Belgium and the Netherlands (see table 1). In contrast, immigration remains comparatively low in Eastern Europe and Finland. Outside of Europe, low naturalization rates can be found in South Korea, Mexico, and Japan, the last having the lowest rates compared to all other OECD countries (Chung 2010: 666).

Table 1. Immigration and Naturalization in OECD Countries

	Percent foreign-born		Percent non-citizens		Ratio Foreign born / Non-citizens (2001)	Naturalization rate[1]
Country	2001	2009	2001	2009		
Australia	23.0	25.5	7.4	n.a.	3.11	75
Austria	12.5	15.4	8.8	n.a.	1.42	52
Belgium	10.7	n.a.	8.2	n.a.	1.30	59
Canada	19.3	20.2	5.3	n.a.	3.64	84
Czech Republic	4.5	3.7	1.2	3.9	3.75	n.a.
Denmark	6.8	8.8	5.0	5.8	1.36	57
Finland	2.5	4.1	1.7	n.a.	1.47	n.a.
France	10.0	11.0	5.6	5.8	1.79	47
Germany	12.5	11.6	n.a	8.8	1.42	37
Ireland	10.4	14.1	5.9	11.3	1.76	n.a.
Japan	1.3	1.7	1.0	n.a.	1.30	n.a.
Luxembourg	32.6	32.2	36.9	43.5	0.88	12
Netherlands	10.1	10.9	4.2	3.9	2.40	78
New Zealand	19.5	22.3	n.a.	n.a.	n.a.	n.a.
Norway	7.3	10.3	4.3	6.3	1.70	70
Poland	2.1	2.7	1.0	1.0	2.70	n.a.
Portugal	6.3	7.4	2.2	4.2	2.86	n.a.
Slovak Republic	2.5	6.1	0.5	1.0	5.00	n.a.
Spain	5.3	13.8	3.8	12.3	1.39	44
Sweden	12.0	13.8	5.3	5.9	2.26	82
Switzerland	22.4		20.5	21.7	1.09	35
United Kingdom	8.3	11.4	4.5	6.6	1.72	67
United States	12.3	13.8	6.6	10	1.86	50

1) Percentage of naturalized immigrants aged 15 to 64 (2007)

Sources: OECD: International Migration Outlook: SOPEMI – 2006, 2007, 2010 Editions, OECD, Paris; Dumont / Lemaître (2005).

There are two principal approaches to shaping immigration and integration policies. One tends toward the granting of rights and supportive measures for individuals and liberal naturalization policies. Sweden, Norway, Portugal, the Netherlands and Belgium have relatively inclusive citizenship regimes. The Netherlands and Belgium combine inclusive liberal citizenship policies aimed at naturalization with the second approach--namely corporatist consultation bodies that reflect traditions of interest intermediation in industrial relations and labour politics. Nowadays it seems more convenient for governments to deal with and address individual citizens or organized groups of citizens rather than groups of alien residents; especially in situations of conflict and social unrest.

This group-centered approach can be frequently observed in countries with more restrictive citizenship regimes that possibly products of, among other things, ethno-nationalist principles of statehood, high unemployment, xenophobia or traditions of the *jus sanguinis* principle of inherited nationality. The national governments of many of these mainly continental European countries – Germany, Denmark, Switzerland and Austria in particular - were decidedly unaware of immigration problems for a long time. The reason for this was the

so-called “guest-worker syndrome”: the belief that labour migrants would only stay for a certain period of time.

Later on when it became obvious that erstwhile migrants had settled in their host-countries, governments remained reluctant to act in part because they feared that immigration policies would become major campaign issues in national elections and eventually strengthen right wing populist parties. The increased conflict over immigration issues and the concomitant rise of strong anti-immigration parties in Denmark, Austria, the Netherlands, and Switzerland have confirmed such fears (van der Brug and Fennema 2009). During the 2000s, however, all European governments and the European Commission were forced to address a growing number of immigration and integration issues.

Policy making in areas such as immigrants’ legal rights, discrimination, public safety and security, social rights, labour market access, education, schooling, family reunification, and particularly religious expression have proven difficult. Governments have met obstacles in addressing and negotiating with non-citizens who often lack civic rights, remain politically less organized and dissociated from public life. Fears that ghettos and deviant “parallel societies” may emerge from social isolation in terms of language, culture, social status and political orientation have prompted most European governments to set up far-reaching immigrant integration programmes. After 2005, the main concern of policy programs has been extended from social welfare integration policies to civic integration courses (and tests) – particularly language courses - and to religious multiculturalism. For example, German sub-national *Länder* governments established university chairs for Islamic theology and several university programs for imams. This should be seen as a first step to incorporate the Muslim faith into the German model of religious governance (cf. Czada 2010).

Learning host-country languages has been declared a priority for immigrants in all European countries. Headscarf debates have led to the total ban of religious symbols in French schools. A teacher headscarf ban came into effect in several German states following a ruling of the Constitutional Court in 2003. Some *Länder* explicitly forbid teachers to wear headscarves, while allowing students to do so and, as Green (2005: 202) points out, “simultaneously permitting the display of Christian and Jewish religious symbols, such as crucifixes, in the classroom”.

In 2000, after long political debates, Germany liberalized its naturalization laws, whereas Ireland and other countries have turned towards a more restrictive practice of naturalization. In general, European countries have increasingly turned away from earlier visions of a multicultural society. To be sure, governments and major civil society associations continue to strive for a climate of tolerance and cultural diversity, but one that is compatible with goals of social cohesion, inclusive civic discourse and mutual understanding.

Challenges to established state-society relations

Large-scale immigration has posed specific problems for established state-society relations in some cases. Immigrants constitute latent or manifest social groups based on their

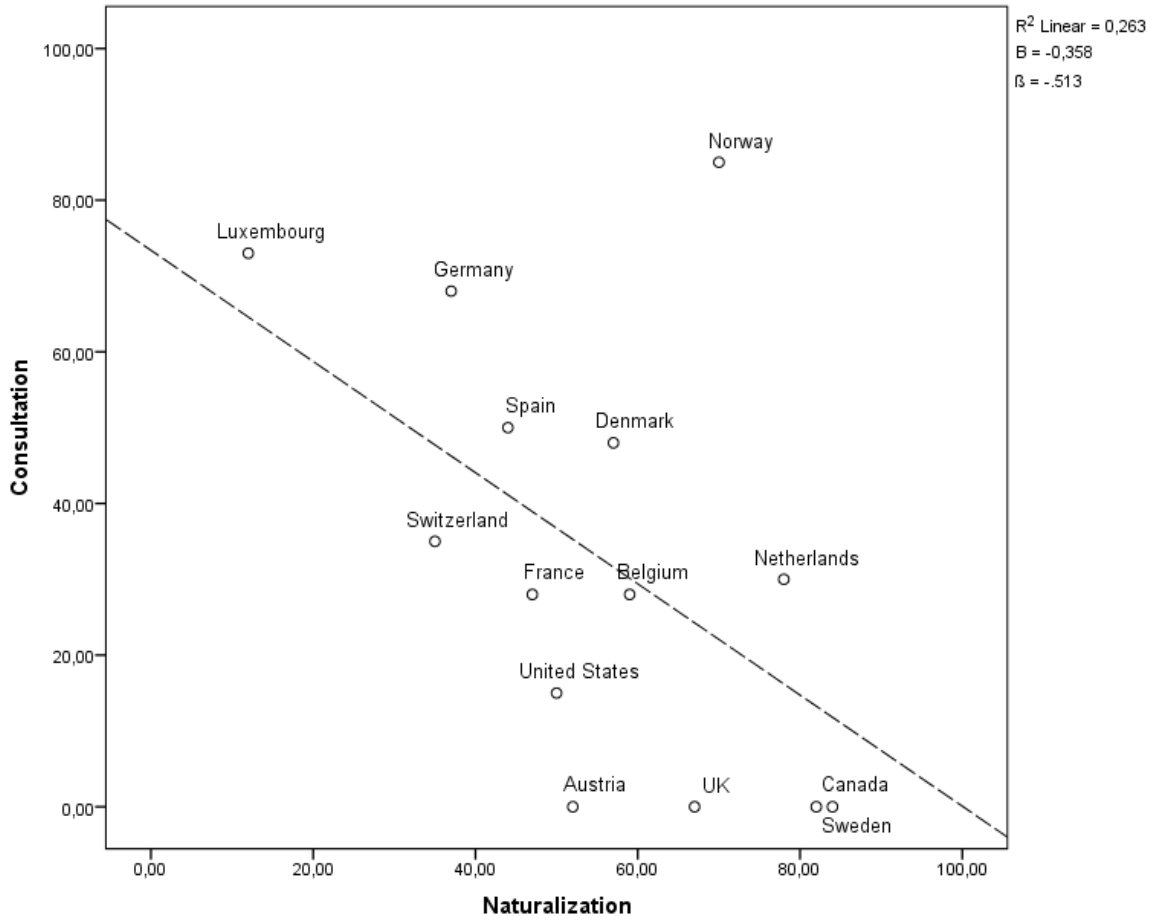
countries of origin, ethnicity, religion, or native language. Such groups are somewhat out of place in established national associational systems at first. This is especially true if relatively closed or even exclusive corporatist systems of interest intermediation prevail in their host countries, as for instance in Germany, the Netherlands, Austria, Norway or Japan.

A number of European governments have established consultation committees to address immigrant groups. Some of the consultation processes remain informal while others come close to highly institutionalized corporatist bodies based on national laws and regular meetings between representatives of governments and ethnic or religious immigrant minorities (Table 2). National immigrant consultation bodies of major relevance can be found mostly in countries which have experienced long traditions of corporatist interest intermediation: Norway, Denmark, Germany, the Netherlands, and Switzerland. Austria and Sweden rely on the participation of immigrants in corporatist bodies and consultation procedures that have not been tailored especially for immigrants but are regularly used in different policy contexts and on different levels in society.

The European Migrant Integration Policy Index (Niessen J. et. al., 2007, Huddleston et.al. 2011) provides data on existing consultation bodies for foreign residents on national, regional and local levels. The data comprise processes of leadership selection, degrees of institutionalisation and representativeness, e.g., whether candidates have to be endorsed or directly selected by the state. The participation of immigrant associations in policy implementation is indicated by public funding of immigrant organisations on national, regional and local levels. In some countries such as Sweden, consultation bodies are not formally recognized or regulated but participate in different contexts that are not necessarily immigrant-specific. Other nations switched from inviting informal participation of immigrants in pre-existing corporatist bodies of self-government to establishing more formal immigrant-specific national consultative bodies. In Germany for instance, guest workers have been represented in welfare state institutions such as boards of social security schemes and welfare associations as well as in obligatory labour councils (Thränhardt 1984). It was not until the mid-2000s that the German national government established a special consultation structure for immigrants called the “Integration Summit” (Table 2).

Data in the MIPEX-index (Huddleston et.al. 2011) reveal a negative correlation between formal immigrant consultation bodies established by governments and naturalization rates (Figure 1). This inverse relationship points out to the underlying paradigms of group incorporation versus individual citizenship. Immigrants’ individual legal and civic rights acquired through naturalization seem to soften problems associated with mass immigration, and simultaneously tend to make special consultation structures for ethnic or religious groups of immigrants less important. One has to be cautious, however, when drawing functionalist conclusions of this sort. In historical perspective the establishment of consultation structures regularly followed from immigrant protests and conflicts over immigration issues. Therefore social unrest among immigrants and intensified conflicts over immigration could serve as an underlying variable explaining both low naturalization rates and the establishment of consultation structures.

Figure 1: Specific immigrant consultation bodies and naturalization rates



Sources: International Migration Outlook: SOPEMI 2010 – OECD (see table 1), (Huddleston et.al. 2011; http://www.mipex.eu/sites/default/files/downloads/mipexrawdata.xlsx)

As noted above, in some nations parties opposing immigration have grown strong during the last decades. Fennema (1997) in his study on the ideologies of the new Western European protest parties proposed calling them 'anti-immigration parties'. However, the term 'anti-immigration' does not fully capture right-wing protest parties from Central or Eastern Europe since immigration into these countries has been very limited thus far (cf. van der Brug and Fennema 2009). Taking strong europhobic , xenophobic, and anti-Roma sentiments into account, however, nationalist right-wing parties and movements in Eastern Europe bear a close resemblance to their Western European counterparts.

Closer look at various consultation bodies reveals that on the one hand, governments instituted dialogue structures with immigrants' representatives on general integration issues and, on the other hand, special Muslim integration bodies to fight radical Islamism and deal with challenges in incorporating growing Muslim communities into national systems of religious governance. The organizational solutions vary across countries. One finds corporatist dialogue committees with multi-partite membership consisting of state officials

and representatives of societal groups (in Germany, the Netherlands, and Denmark) as well as peak associations of immigrant groups that have been established by governments to serve as their officially recognized contact partners (Belgium and France). Moreover, these bodies differ in terms of size, degree of institutionalization and membership selection (Musch 2011a).

Among the first bodies was the Dutch National Minorities Consultation Structure established by law in 1985 (Landelijk Overleg Minderheden; LOM, see table 2). The consultation began in reaction to escalating conflicts over migration and integration issues. Violent activities of young Moluccans served as a catalyst for the Dutch government to become active in immigrant integration issues. In 1976 the *Inspraakorgaan Welzijn Molukkers* (IWM) was set up by ministerial decree. The decree stated that it should be representative and act as a dialogue partner to the government. The parliamentary debate on policy measures for Moluccan migrants broadened to a debate on developing an integration policy for all immigrant minority groups. When developing its ethnic minority policy the Dutch government fell back on the action repertoire of "consociationalist" accommodation (Lijphardt 1968) as a proven model for social and political integration of different segments or pillars of society (Musch 2011a).

The Dutch consultation processes have targeted separate ethnic groups such as Mollucans, Turks, Chinese, Surinamese, vagrant migrants and Roma and are chaired by the government's Integration Minister. Furthermore, a delegation of civil servants from the Department of Civic Integration (*Directie Inburgering en Integratie*) also participates. If policies under the jurisdiction of a particular ministry are being discussed, the minister or state secretary of the department in question is invited to participate. The criteria of 'representativeness' that the various participating societal groups and organisations must fulfil are regulated by law (Musch 2011a).

Apart from general immigrant integration bodies, national governments have established separate dialogue platforms with representatives of Muslim communities (see Table 2). "Official recognition of Islam in Belgium was characterized by a hasty response to the international political climate and by the fact that Islam was becoming problematic in terms of the state minority policy on the other hand" (Kanmaz 2002: 99). Politicians capitalized on anti-immigrant sentiment. The extreme right-wing political party Vlaams Blok, which was founded in 1979, has won a growing share of votes in city, regional and national elections. In 1989 the Royal Commissariat on Immigrant Policy (KCM) was established to create a coherent 'integration' policy to deal with minorities, a first for Belgium.

The first contact structures arose from the Belgian government's efforts to install a Muslim "Head of Cult" and later from the Executive Committee of Muslims in Belgium (EMB), established in 1996. Implicit in the negotiations and debates regarding EMB was the expectation that it should be representative and democratically elected (Kanmaz 2002). The EMB was intended to serve as a mediator between the state and Muslim communities with

tasks ranging from providing religious education at schools and training for imams to the appointment of Muslim chaplains in hospitals and prisons. The EMB received state subsidies beginning in 2001 and in 2002 the government began paying salaries to imams assigned to officially recognized mosques in Belgium. In 2008 the EMB was dissolved by governmental decree due to financial irregularities and complaints that it did not adequately represent the diversity of the Muslim population in Belgium.

Table 2: National Immigrant Consultation Bodies in Europe

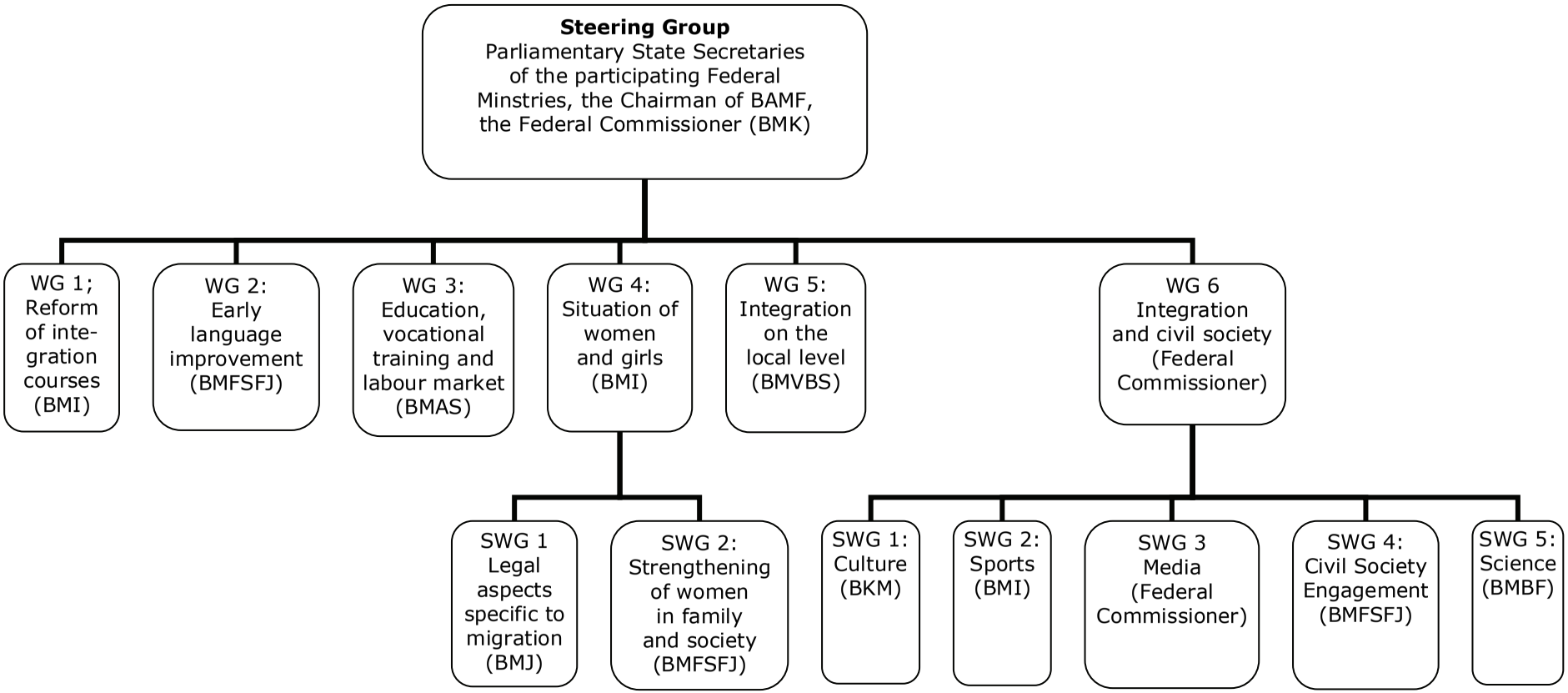
Focus / Country	Immigrant ethnic minorities (Governmental contact and dialog committees)	Immigrant religious minorities (Governmental and non-governmental contact bodies and dialog committees)
Belgium	Minority Forum (Flanders) *(Minderhedenforum; MF, est. 2000)*	Executive Committee of Muslims in Belgium *(Exécutif des Musulmans de Belgique; EMB, est. 1996, abolished in 2008*)
Denmark	Danish Council for Ethnic Minorities (*Rådet for Etniske Minoriteter, est. 1999)*	Danish Muslim Joint Committee (*Muslimernes Fællesråd, est. 2003*)
Germany	Integration Summit (*Integrationsgipfel, est. 2004)*	German Islam Conference (*Deutsche Islam Konferenz;* DIK, est. 2005)
Netherlands	National Minorities Consultation Structure (*Landelijk Overleg Minderheden; LOM, est. 1985)*	Inter-islamic Platform for Governmental Affairs *(Inter-islamitisch Platform Overheidszaken; IPO, est. 2006*)
Norway	Contact Committee for Immigrants and the Authorities (*Kontaktutvalget mellom innvandrer-befolkningen* og myndighetene; KIM, est. 1984)	Islamic Council of Norway (Islamsk Råd Norge, est. 1993)

Germany was a latecomer in matters of national immigration dialogue. The establishment of the German Integration Summit and German Islam Conference in 2006 (see Table 2) followed fierce public debates about youth violence in schools, especially among pupils at the Rütli high school in Berlin-Neukölln, a school with a large proportion of immigrant youth. Furthermore, the 2005 riots in France also played a role (Musch 2011a). In advance of the Integration Summit, the federal government's Commissioner for Integration had been shifted from the Ministry of Social Affairs to the Chancellery. The establishment of two dialogue structures – the Integration Summit and the German Islam Conference can be seen as part of a new policy approach. Already having begun under the red-green government led by Gerhard Schröder (1998-2005) with the enactment of an immigration law in 2005 (Thränhardt 2009: 271), the establishment of the Islam Conference was primarily security related. In terms of the duration of the dialogue platforms it remains to be seen if they will be further institutionalized. Both consultation structures have been continued to date, albeit in a slightly different shape, under the second cabinet of Angela Merkel (Musch 2011b).

Official dialogue structures with minority groups deal with a multitude of problems but as state-society networks they also pose severe administrative challenges for group-representation and inter-ministerial coordination. ## The government was represented by seven ministries at the German Integration Summit. The summit was organised around six

working groups and five sub- groups, each tasked with special responsibilities (Figure 2). The summit has been burdened not only with conflicts among immigrant representatives but also jurisdictional disputes between governmental departments and between the federal and state levels of government. The latter have been particularly burdened by overlapping competences due to the predominant role of *länder* in matters of cultural, educational and religious governance (Czada 2010). As the consultation procedures involve a host of inter-governmental tasks, they pose particular problems for multi-level governance, all the more so since the European Commission is also weighing in as it tries to develop a coordinated EU-wide approach. However, European institutions – despite their capacities in controlling the external frontier of the EU - have not been major players in immigrant integration policies. This is due to the fact that these policies aim at integration into national societies. Moreover the major topics – legal status, citizenship, culture, language and religion – are still close to the core of national sovereignty or, in regards to culture and education –subject to sub-national regulation in many countries.

Figure 2: Working Groups of the German Summit Conference on Immigrant Integration Issues



Source: Musch 2011a; Blätte 2007

Abbreviations

WG=Working groups, SWG=Sub-working group
BAMF=Federal Office for Migration and Refugees,
BMI=Federal Ministry of the Interior,
BMFSFJ=Fed. Ministry of Family Affairs, Senior Citizens, Women and Youth
BMJ=Federal Ministry of Justice,
BMVBS=Fed. Ministry of Building, Transport and Urban Development,
BKM=Federal Commissioner for Culture and Media,
BMBF=Federal Ministry of Education and Research

Summary and conclusion

From the 1990s onwards, growing conflicts over issues of immigration and Islam have led to the establishment of consultative bodies or councils dealing with immigration and Muslim religious matters in many Western European Countries. These councils have been expected to function as official interlocutors with governments and administrations as well as with other religious and civil society groups in some cases. The official institutions established by governments during the last decades have served to address immigrant ethnic and religious minorities, negotiate policy issues with their representatives, and more or less incorporate immigrant associations into national systems of interest intermediation and religious governance. From a political science point of view it seems remarkable that immigrant and Muslim consultations have been initiated in a top-down fashion by national governments, but not by the groups concerned.

Governmental initiatives, in most cases, can be traced to challenges such as cultural identity conflicts, xenophobic incidents, conflicts over modes of religious governance, and terrorist threats. As state actors create institutional opportunities for immigrant groups to organize and negotiate minority integration policies with public authorities, the establishment of national consultation structures must be seen as an example of state-led "administrative interest intermediation" (Lehmbruch 1991). This procedure resembles governance forms known from studies of the Japanese political system, namely administrative guidance of societal sectors by government agencies.

When dealing with immigrant associations, current studies often refer to the theory of political opportunity structures (POS). The central argument here is that the development of social movements and their mobilization depend upon pre-existing opportunities and constraints set by the structural characteristics of the political system. In contrast to this approach, governments themselves have set up new governance institutions in order to cope with new problems of minority integration and religious governance. It can be shown that the establishment of these "new" institutions has followed traditional, national patterns of interest intermediation, including consociationalist, corporate pluralist, or corporatist legacies.

It was the administrative state, not as a structure but as an actor, that set up and shaped institutions of interest intermediation and interactive governance in the field of immigrant integration policies. By involving migrant ethnic and religious groups into policy making processes, governments followed a rational exchange paradigm; they recognized the interests of immigrant groups and attributed official status to them. At the same time government actors set the guidelines and rules according to which consultations take place. In exchange for the attribution of political status to migrant associations and their involvement in policy making processes, governments sought to gain information and support for their policy proposals. The interactions between government actors and immigrants and their associations can thus be seen as an exchange of resources in the face of mutual dependency. Despite this overall functional explanation, cross-national variations of institutions and procedures of immigrant consultation seem to be deeply rooted in the

traditional "action repertoires" of administrative actors and bound to specific historical patterns of state-society relations found in these respective countries.

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A Comment on Roland Czada

Kenji Hirashima

Along with external frontier controls, which have been increasingly coordinated within the remit of EU immigration policy, the integration of immigrants into national societies has undoubtedly become one of the most salient issues for contemporary Europe. How have governments of European countries addressed this heightened policy challenge?

Czada classifies two broad national options for immigrant integration. The liberal nationalization approach grants individual immigrants relatively easy access to full citizenship, and the corporatist approach provides group-specific consultation procedures. While the former approach was taken by the traditional immigration countries outside of Europe, such as Australia, Canada, and the USA, the latter has been adopted by Western European countries. According to Czada it is exactly the countries with corporatist experiences that attempt to solve the immigrant integration problems through setting up consultative institutions.

Corporatism, defined as the 'political power structure and practice of consensus formation based on the incorporation of groups into public policy-making' was once widely observed among such countries as Austria, Norway, the Netherlands, or Germany. Falling back on the administrative 'action repertoires' deeply rooted in history, the governments of these countries established consultative bodies or councils vis-à-vis ethnic and religious minorities in order to integrate them into society. Thus the system of interest intermediation applied to macroeconomic policies has been extended to the new policy area of immigrant integration.

In so far as it was initiated not by the minority groups themselves, but by the state actors of host countries, the new governance architecture is a typical manifestation of 'administrative interest intermediation' (Lehmbruch 1991). It is interesting to note that the multi-faceted nature of immigrant integration necessitates far more complicated institutional structures. For example, the German Integration Summit and German Islam Conference established in 2006 embraced broad cross-sectoral jurisdictions and thereby included coordination problems peculiar to inter-sectoral and multi-level governance.

My question is concerned with the location of the Dutch case in the above dichotomy, and the overall assessment of immigrant integration governance in European countries.

Together with Belgium, the Netherlands is presented as an exceptional case, which combines inclusive liberal citizenship policies with the corporatist approach. Yet, by introducing language courses and labor market preparation for newcomers, the once pioneering country of multiculturalism had turned towards civic integration by the end of the 1990s. In the wake of the killing of a populist politician in 2002, the coercive dimension of civic integration was further dramatically emphasized through the 2006 revision of the relevant law, which effectively transformed immigrant integration policy into a de facto 'no-immigration policy' (Joppke 2007).

Is this transformation to be interpreted as a remarkable failure of the relevant policy *in spite of* the corporatist governance attempt in the Netherlands? And, in relation to this point, are we witnessing a convergence among the West European countries towards immigrant integration policy with a flavor of 'repressive liberalism' (Joppke 2007)? In fact, not a few specialists commonly point out a general tendency towards greater restrictiveness in the case of EU immigration policy of the last decade. We should be more aware of the increasingly harsh realities facing governments and civil society associations that 'strive for a climate of tolerance and cultural diversity' which are 'compatible with goals of social cohesion, inclusive civic discourse and mutual understanding'. (Czada this volume: 77)

Governance in Thailand

Kasian Tejapira

Abstract

On August 9, 1997, in the second month of the severest financial crisis in Thai modern history, the IMF-derived term "good governance" was hastily reincarnated in the Thai language as "*thammarat*." Though obviously prompted by the impending diktat of the global financial regime, which was quickly acceded to by the Thai government, the political scientist who coined the term, Chaiwat Satha-anand of Thammasat University, and its chief public advocate, Thirayuth Boonmi, a lecturer at the Faculty of Sociology and Anthropology also of Thammasat University, clearly intended the term *thammarat* to create a space for defining good governance in Thai cultural politics in a way that was relatively autonomous from the IMF-derived meanings and associated policy imperatives of the word.

Apropos of the translation-as-transformation of good governance into Thai, I discuss the varying responses to and interpretations of *thammarat* by different groups in the Thai polity—the authoritarian military establishment, the liberal corporate elite, and the communitarian public intellectuals and activists. The upshot is that the ensuing pluralistic and conflicting discourse of *thammarat* or good governance-Thai style went far beyond Camdessus' wildest dreams. The recent use of good governance discourse by royalist intellectuals and activists in their struggle against supporters of ousted prime minister Thaksin Shinawatra is also discussed.

Introduction

This paper tracks the launch and trajectory of the concept of "governance" in Thailand from the perspective of cultural politics, focusing on the politics of its translation and transformation into the Thai language and culture as well as its actual activation.[1] The underlying idea is that the cross-language, cross-cultural movement of discourse is a complex process, wrought with politics. So too is its activation and manipulation in local culture and politics. The point of the whole exercise is to try and relate the soft power of cultural political practice in the Thai context with the hard political economic reality of the dominant neoliberal global policy regime, demonstrating how the Thais managed to mess up "good governance" in the process.

The Neoliberal Shock Doctrine

The introduction of "governance" to Thailand is directly related to what Naomi Klein, a leading North American public intellectual of the global justice movement, called the "Shock

[1] This paper is partly based on my contribution to Carol Gluck and Anna Lowen haupt Tsing, eds., Words in Motion: Toward A Global Lexicon (Durham and London: Duke University Press, 2009), "*Thammarat*/Good governance in Glocalizing Thailand," Pp. 306 - 26. The importance of translation to the study of cultural politics in the case of Japan is extensively discussed by Alan Tansman in "Japanese Studies: The Intangible Act of Translation," eScholarship University of California, published 12 February 2003, http://escholarship.org/uc/item/28r119ks.

Doctrine“ in her acclaimed book of the same title.[2] According to Klein, a general collective shock, be it induced by an economic crisis, a military coup and subsequent brutal repression, or a natural disaster, is crucially instrumental in stunning the populace and stifling their resistance to the imposition of unpopular, neoliberal economic policies that typically involve a massive transfer of resources from the public sector to the corporate sector of the economy, and from the bottom to the top of the economic hierarchy.[3] This astute practical observation encapsulates the drastic redirection of economic policy under the Pinochet regime (1973 - 1990) in Chile among others. The “shock doctrine” was developed into a conscious strategy by the most influential advocate of neoliberal economic doctrine, Milton Friedman, University of Chicago economist and Nobel laureate.[4] As he stated in the preface to the 1982 reissue of *Capitalism and Freedom*:

> Only a crisis— actual or perceived—produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable.[5]

Two years later, he further expanded upon the shock doctrine by specifying the limited time frame available for policy imposition:

> A new administration has some six to nine months in which to achieve major changes; if it does not seize the opportunity to act decisively during that period, it will not have another such opportunity.[6]

As far as Thailand was concerned, such a shock-inducing crisis came in 1997 in the form of currency free-fall, financial collapse, severe economic contraction and recession, widespread bankruptcies and unemployment, rising poverty, and fire sales of assets to foreign financial investors. The crisis was indelibly symbolized in the general public’s minds by a photo of then IMF Managing Director Michel Camdessus towering over the stooping Indonesian President Suharto’s signing of the bailout package deal on 15 January 1998.[7] Thai GDP contracted by a massive 10.8% in 1998.[8] A quarter of all firms were delisted from the Stock Exchange of Thailand (one hundred in total, half of which had declared bankruptcy or ceased to exist). About a quarter of the

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[2] Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism (London: Penguin Books, 2007).
[3] Klein, The Shock Doctrine, pp. 7-9, 15-17.
[4] Klein, The Shock Doctrine, pp. 80-83. For more on and the so-called Chicago school of economics, see Ross B. Emmett, ed., The Elgar Companion to the Chicago School of Economics (Northampton, MA: Edward Elgar, 2010).
[5] Milton Friedman, Capitalism and Freedom (Chicago: The University of Chicago Press, 1982), p. ix.
[6] Milton Friedman and Rose Friedman, The Tyranny of the Status Quo (San Diego: Houghton Mifflin Harcourt, 1984), p. 3.
[7] See for instance, Emmanuel, *“Flashback: Camdessus-Suharto Pic,”*,International Political Economy Zone, created 4 September 2007, http://ipezone.blogspot.com/2007/09/flashback-camdessus-suharto-pic.html.
Unless indicated otherwise, the general account in this part is derived from Kasian Tejapira, *“Post-Crisis Economic Impasse and Political Recovery in Thailand: The Resurgence of Economic Nationalism,”* Critical Asian Studies, 34:3 (September 2002), pp. 323-56.
[8] Bank of Thailand, Key Economic Indicators (Bangkok: Bank of Thailand, 28 February 2002), p. 5.

top 200 business groups either vanished altogether or drastically shrank.[9] Nearly two-thirds of big Thai capitalists went bankrupt, thousands of companies folded, and two-thirds of private commercial banks went under and changed hands. One million Thai workers lost their jobs and three million more fell below the poverty line.

It was precisely amid such an economic crisis and resultant psycho-cultural shock in the region that an alternative to the pre-crisis East Asian *dirigiste* and developmentalist, if crony-capitalist, policies was imposed in the form of the Wall Street-pushed and Washington consensus-based IMF loan conditionality.[10] The new policy package essentially comprised further economic liberalization, business deregulation, privatization of state enterprises and higher education, cuts to social spending and government subsidies, and last but not least, governance reform.[11]

The Thai Cultural Political Buffer/Shock Absorber

The way in which Thai political society and Thai public intellectuals in particular coped with the overwhelming policy diktat owed much to what Prince Wan Waithayakon Worawan (also known as Kromamun Naradhip Bongsprabandh, 1891 – 1976), an eminent scholar and top Thai diplomat, called *"Phutthiphrom haeng phasa"* or "the creative intelligence of the Thai language."[12] As he stated in a public lecture on the Siamese language in 1932, the year of the constitutionalist revolution against the absolute monarchy by the People's Party:

> It is the Thai language that will guarantee the security of the Thai nation. This is because if we favor the use of Thai transliterations of Western words about ideas, we may walk too fast. That is we may imitate other people's ideas directly instead of pre-modifying them in accord with our ideas. But if we use Thai words and hence must coin new ones, we will have to walk deliberately.[13]

In effect, Prince Wan's coinage guideline amounts to a cautious reception of Western modernity, based on a considered political manipulation of language and translation. By controlling the spelling and pronunciation of words, one controls their meanings; by controlling their meanings,

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[9] According to the findings of Professor Akira Suehiro cited in Chang noi, "*10 years after the 1997 crisis*," The Nation, published 12 June 2007, www.nationmultimedia.com/option/print.php?newsid=30036611.

[10] An analytical account of the pre-crisis *dirigiste* and developmental states in East Asia and their neoliberalization in the aftermath of the crisis appears in Meredith Woo-Cumings, ed., The Developmental State (Ithaca and London: Cornell University Press, 1999) and Meredith Jung-En Woo, ed., Neoliberalism and Institutional Reform in East Asia: A Comparative Study (New York: Palgrave Macmillan and UNRISD, 2007).

[11] See in this connection, Jolle Demmers, Alex E. Fernandez Jilberto, and Barbara Hogenboom, eds., Good Governance in the Era of Global Neoliberalism: Conflict and depolitisation in Latin America, Eastern Europe, Asia and Africa (London and New York: Routledge, 2004); and Barbara Orlandini, *"Consuming 'Good Governance' in Thailand: Re-contextualising Development Paradigms*," (unpublished Ph.D. dissertation, University of Florence, 2001). For an updated version of good governance, see "The IMF and Good Governance," International Monetary Fund, accessed 23 February 2011, www.imf.org/external/np/exr/facts/pdf/gov.pdf.

[12] Major General His Royal Highness Kromamun Naradhip Bongsprabandh, *Witthayawannakam* [Scholarly Writings] (Bangkok: Phraephitthaya, 1971), pp. 243 – 322, especially pp. 270 and 315. As to Prince Wan's profile, see *"Prince Wan Waithayakon (Thailand) Elected President of the Eleventh session of the General Assembly,"* General Assembly of the United Nations, accessed 14 February 2011, www.un.org/en/ga/president/bios/bio11.shtml.

[13] Prince Naradhip Bongsprabandh, *"Pathakatha reuang siamphak"* [A lecture on the Siamese language], in *Chumnum praniphon khong sassatrajan pholtri phrajaoworawongthoe kromamun naradhip bongsprabandh* [Selected writings of Professor Major General Prince Naradhip Bongsprabandh], ed. Songwit Kaeosri (Bangkok: Bangkok Bank, 1979), p. 416.

one controls people's thinking. Although registering the opposite political intent, Prince Wan's dictum finds unexpected resonance in Prasenjit Duara's concept of "*body cultural*," which was first propounded in his well-known book *Rescuing History from the Nation: Questioning Narratives of Modern China* (1995).[14]

Situated at the margins of a national language, translation guards the linguistic border and integrity of a nation-state's "body cultural." Where language is standardized and coinages need to be sanctioned by central authorities as in modern Thailand, the translation of foreign political and ideological words can be a highly politicized and contested process in which the language "border patrol" screen newly translated lexical immigrants. They discriminate against radical ones by declaring them *verba non grata*, or, failing that, proceed to re-translate (in some cases even pre-translate) words in such a way as to quarantine them or turn them into domesticated and de-radicalized tools of regime support. Take for example, the translation/transformation of the word "democracy" into Thai. The standard Thai equivalent of democracy is "*Prachathipatai*" The current system of government is normally referred to as "a democratic government with the King as Head of the State."[15] But in fact *Prachathipatai,* which was coined by King Rama VI as early as 1912, originally meant "republic," a government with no king.[16] The shift in *Prachathipatai's* meaning from "republic" to "democracy" followed a compromise between the People's Party and the monarchy in the anti-absolutist revolution of 1932 when a constitutional monarchy was chosen in place of a republic.[17] The characterization of the present Thai political system as *"Rabob prachathipatai an mi phramahakasat song pen pramuk"* or "a republic with the King as Head of the State," is an oxymoron made possible by the successful taming or metathesis of a foreign-derived radical signifier.

In the case of the imposition of "good governance" on Thailand, its latter-day buffer or shock absorber *à la* Prince Wan was coined by Chaiwat Satha-anand of Thammasat University. A Thai Muslim of Indian descent and the foremost peace studies and non-violent conflict resolution scholar in the country, as well as a colleague of mine, he strategically coined the first Thai equivalent of good governance: *thammarat*, literally meaning a righteous state or a state guided by *thamma* (i.e., moral righteousness, truth, law, etc.). His intent was to make it possible to interpret *thammarat* or Thai-style good governance as the use of *thamma* as the norms to control, regulate and discipline the Thai state, thus providing a legitimate ground for civil disobedience against it.[18]

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[14] Prasenjit Duara, Rescuing History from the Nation: Questioning Narratives of Modern China (Chicago: The University of Chicago Press, 1995).

[15] See Section 2 of the official English version of the current Constitution by the Constitution Drafting Commission, the Constituent Assembly in Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Assistant Professor Dr. Pinai Nanakorn, trans. (Bangkok: Bureau of Printing Services, The Secretariat of the House of Representatives, 2007), p. 4.

[16] King Vajiruvudh, *Jodmaihet raiwan khong phrabatsomdej phramongkutklao jaoyoohua R.S. 131* [Diary of King Vajiravudh, 1912 A.D.] (Bangkok: Duang Kamol Press, 1981), p. 7.

[17] A standard history of the 1932 Revolution can be found in Thawat Mokarapong, History of the Thai Revolution: A Study in Political Behaviour (Bangkok: Distributed by Chalermnit, 1972).

[18] See the statement which Chaiwat drafted on behalf of the Faculty of Political Science, Thammasat University entitled *"Khosanoe waduai thammarat fa wikrit setthakij-kanmeuang"* [A proposal on good governance in the face of political economic crisis], Matichon Daily, 10 August 1997, p. 2.

Chaiwat's cultural political initiative was then picked up and developed into a public campaign by Thirayuth Boonmi, a lecturer at Thammasat University. A former student leader and guerrilla fighter, Thirayuth redefined *thammarat* in a broad, consensus-seeking manner as a tripartite self-reform of the state, business and civil society for efficient and just public administration. He then deployed his public intellectual clout and personal political and business connections to build *thammarat* up into a widely publicized national agenda and high-profile reform campaign, enlisting the help of many intellectual, political and business luminaries.[19]

From then on, the term *thammarat* was appropriated and differently reinterpreted by various groups in Thai political society, based on their respective political proclivities and socio-economic interests, as summarily illustrated by the following tables: [20]

Diagram I: The Five Different Versions of *Thammarat*

IMF

⇩

"GOOD GOVERNANCE"

⇩

ธรรมรัฐ

(THAMMARAT → Thamma + Rat

i.e. Moral Righteousness, Truth, Justice, Law & Rules + State)

Chaitwat Satha-anand & the Faculty of Political Science, TU
Created a new space for re-interpretation in the Thai language

STATE-CIVILIZING *THAMMARAT*	**NATIONAL-CONSENSUS *THAMMARAT***	**AUTHORITARIAN *THAMMARAT***	**LIBERAL *THAMMARAT***	**COMMUNITARIAN *THAMMARAT***
the use of *Thamma* to control, regulate and discipline the state, thus providing a legitimate ground for civil disobedience	A tripartite self-reform of state-business-society, not just the state, for efficient and just public administration	The state imposes *Thamma* on the people in a top-down manner	Orientation to management, efficiency & results + depoliticization	Weaving social fabric together → generating social energy → pushing for National *Thammarat* → building an ideal *Santi Prachatham* society
by Chaiwat Satha-anand & Co. (academic community)	by Thirayuth Boonmi (pluralist political activist & strategist)	by General Bunsak Kamhaengritthiron g (military, National Security Council)	by Anand Panyarachun (business leader, former Prime Minister)	by Dr Prawase Wasi (royalist medical doctor, civic leader & NGO sage)

[19] See Thirayuth Boonmi, *Thammarat haeng chat: Yutthasat koo haiyana prathet thai* [National good governance: Strategy for salvaging Thailand] (Bangkok: Sai Than Publishing House, 1998).

[20] These diagrams are adapted from Kasian, "*Thammarat*/Good Governance in Glocalizing Thailand", pp. 320 – 21.

Diagram 2: The Three Different Meanings of *Thammarat*

Issues	Authoritarian Version	Liberal Version	Communitarian Version
Power	State-centralized power over a monolithic, harmonious nation	Limitation, checks & balances of power; allowing for conflict	Decentralization of power
Market	Compliance to market forces	Taking as its premise the triumph of free-market capitalism	Taking as its premise the failure and injustice of capitalism; seeking space for a "sufficiency economy"
Democracy	Thai-style	Considering *thammarat* and democracy as two separate issues; the former being about administrative process, the latter having to do with power relations; a country can have *thammarat* without democracy, e.g., Singapore	*Thammarat* & democracy can't be separated; hence all forms of dictatorship, whether monarchical, military or communist, are emphatically not *thammarat*

Thammarat's After Effects

Given their translated Thai cultural political buffer/shock absorber and all, have the Thais been able to resist the shock-induced and IMF-imposed neoliberal alternative? Fourteen years on, the record is mixed. The populist and royal-nationalist force of organized labor and farmers, old business elite, middle-class entrepreneurs, NGO activists and intellectuals mounted a determined resistance to prescribed neoliberal policy reform. But their success has been partial, uneven and sectorial.

Due to an IMF loan-conditioned series of legislation, the Thai economy has become structurally more open. The penetration of foreign capital is deeper and more widespread. The inflow of foreign investment in the post-crisis decade (1997 – 2006) was three times higher than in the pre-crisis decade (1987 – 1996) in dollar terms, and five times higher in baht terms. At the height of the boom, 112 of the world's top 500 multinational corporations had an operation in Thailand; the figure is now double that--over 250.[21] Certain key lucrative state enterprises were privatized such as petroleum and natural gas,[22] telecommunications,[23] and electronic media.[24]

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[21] Chang noi, "*10 years after the 1997 crisis*."

[22] The Petroleum Authority of Thailand (PTT – established in 1978) was privatized under Corporatization Act B.E. 2542 (A.D. 1999) and became the PTT Public Company Limited in 2001. See *"Background",* PTT, accessed 19 February 2011, www.pttplc.com/en/about-ptt-background.aspx?.

[23] The Communications Authority of Thailand (CAT – established in 1977 on the basis of the pre-existing Post and Telegraph Department) was privatized under Corporatization Act B.E. 2542 (A.D. 1999) and became the CAT Telecom Public Company Limited in 2003. See *"Corporate Info",* CAT, accessed 19 February 2011, www.cattelecom.com/site/en/company_detail.php?cat=375.

[24] The Mass Communication Organization of Thailand (MCOT – established in 1977 on the basis of the Thai Television Company Limited, which had been founded in 1955) was privatized under Corporatization Act B.E. 2542

But privatization met stiff resistance from vested interests in other state enterprises and was repeatedly delayed, partly compromised (at leading national universities),[25] or even reversed by the courts in one important case (electricity generation).[26] Especially in the aftermath of the overthrow of the elected Thaksin Shinawatra government (2001 – 2006), which pursued a crony capitalist-oriented globalizing/neoliberalizing policy,[27] in a palace-blessed military coup led by the so-called Administrative Reform Council (ARC) of top commanders of the armed forces, a substantial number of consumer group and labor union activists as well as royalist-nationalist public intellectuals were appointed by the ARC to the National Legislative Assembly.[28] They submitted a bill to abrogate the Corporatization Act so as to put an end to the "nation-selling" privatization of state enterprises.[29] The ARC-installed government of prime minister Surayud Chulanont –formerly commander-in-chief of the army, supreme commander of the armed forces, and privy councilor – submitted another bill to replace the Corporatization Act in an effort to rectify and regulate the existing flawed and corruptible privatization process.[30] These separate and uncoordinated moves eventually doomed the anti-neoliberal legislative attempt to repeal or reform the Corporatization Act. Reformers became divided and weakened whereas the proponents of privatization were alarmed and jolted into inflexible opposition. The first bill was rejected by the National

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(A.D. 1999) and became the MCOT Public Company Limited in 2004. *See "Thurakij khong borisat"* [Company's business], MCOT, accessed 19 February 2011, mcot-th.listedcompany.com/business.html.

25 *"Korani rang phraratchabanyat mahawitthayalai nai kamkab khong rat"* [The Case of the Autonomous University Bills] *Siam jodmaihet: Bantheuk khaosan lae hetkan, pi thi 31 pho.so. 2549* [CD] [Siam Archives: Record of News and Events, Vol. 31 B.E. 2549] (Bangkok: Siamban Company Limited, 2006), pp. 1660-61; *"Rang phraratchabanyat mahawitthayalai nai kamkab khong rat"* [Autonomous University Bill] *Siam jodmaihet: Bantheuk khaosan lae hetkan, pi thi 32 pho.so. 2550* [CD] [Siam Archives: Record of News and Events, Vol. 32 B.E. 2550] (Bangkok: Siamban Company Limited, 2007), p. 1046; *"Rang phraratchabanyat chulalongkornmahawitthayalai"* [Chulalongkorn University Bill], *Siam jodmaihet 2550* [CD], pp. 1663, 1666, 1669; *"Kanprachum saphanitibanyat haeng chat"* [National Legislative Assembly's Session], *Siam jodmaihet 2550* [CD], p. 1722.

After nine years of persistent opposition by students as well as faculty and staff who wanted to hold on to their job security and life-time benefits, the government presented each employee with a choice between the status of permanent government official and that of contracted state employee (albeit with better pay) upon their respective universities change of status from public to autonomous. However, new university hires are all employed on a contractual basis. See, for example, the case of Thammasat University which has yet to change its status in *"Thangdoen khong mahawitthayalai Thammasat soo kanpen mahawitthayalai nai kamkab khong rat (nab tae pho.so. 2541 theung pajjuban)"* [The Path of Thammasat University towards an Autonomous Status (since B.E. 2541 to the Present)], Thammasat University, accessed 20 February 2011, legal.tu.ac.th/tu_51/tu_control/pdf/ ทางเดินของมหาวิทยาลัยธรรมศาสตร์.pdf; *"Rang phraratchabanyat mahawitthayalai thammasat pho.so….."* [Thammasat University Bill], Thammasat University, accessed 20 February 2011, legal.tu.ac.th/tu_51/tu_control/pdf/ ร่างพรบ.มธ%20ฉบับปรับปรุง%20_มี.ค.51_.pdf.

26 The Electricity Generating Authority of Thailand (EGAT) was privatized in 2005, amid fierce and continuing protests by its trade union and consumer groups. However, in a lawsuit filed by the Foundation for Consumers and its allies, the Administrative Court ruled in 2006 that EGAT's privatization was not done in accordance with the law and hence null and void. Consequently, EGAT has since reverted to being a state enterprise. See *"40 pi kofopho"* [40 years of EGAT], EGAT, accessed 19 February 2011, www.egat.co.th/thai/images/stories/pdf/route-40-year.pdf.

27 See Kasian Tejapira, *"Toppling Thaksin,"* New Left Review, second series, 39 (May/June 2006), pp. 5-37.

28 Kasian Tejapira, *"Ratthaprahan 19 kanyayon pho.so. 2549 kab kanmeuang thai"* [The 19 September 2006 Coup and Thai Politics], Ratthasatsan, 29: 3 (September – December 2008), especially pp. 58 – 60.

29 *"Ekkasan prakob kanphijarana rang phraratchabanyat yokleok phraratchabanyat thun ratthawisahakij pho.so 2542 pho.so……"* [Supplements to the Abrogation of the Corporatization Act B.E. 2542 Bill B.E…...], Wutthisapha, created 19 April 2007, www.senate.go.th/ doc_law/2550/index/ap48_50.pdf.

30 *"Poed rang pho.ro.bo. praeroop ratthawisahakij"* [Unveiling the State Enterprise Corporatization Bill], The Investor Club Association, accessed 19 February 2011, investment.ic.or.th/InvestmentWindow/slidnews/viewall.php?newsid= 224.

Legislative Assembly; the second bill passed its second reading but was left to expire. The Corporatization Act is still in force though politically unusable in face of widespread public suspicion and opposition.[31] Apparently, privatization is stalled for the time being.[32]

Cuts in social spending have been largely offset by major populist programs such as subsidized health care and housing, village funds, and small business credits introduced by the deposed Thaksin government in what may be called "compensatory" neoliberalism.[33]

As to the accompanying discourse of good governance itself, it has been "normalized" by being re-translated as "*thammaphibal*" (meaning the fostering and maintenance of *thamma*) and "*kanborihan kijjakan banmeuang thi di*" (good administration of public affairs).[34] The concept has also been safely and securely lodged in officialdom by the Office of the Public Sector Development Commission and the affiliated Institute for Good Governance Promotion, and by virtue of the Cabinet-issued "Royal Decree On Criteria and Procedures for Good Governance, B.E. 2546 (2003)" (see a tentative official translation at www.opdc.go.th/english/ main/content_view.php?cat_id=3&content_id=20.[35]

More significantly, good governance has also been hegemonized by populist and royalist-nationalist forces, then used as a rallying cry in their anti-corruption campaigns in general, and in the anti-Thaksin movement in particular. Good governance figures prominently in the military junta-promoted current Constitution of 2007 (Sections 74 and 84), whose aim is "to prevent future Thaksins gaining power," according to former Royal Thai Air Force squadron leader Prasong Soonsiri, a veteran state intelligence official, self-proclaimed key conspirator of the 2006 coup, and

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[31] This information and observation was kindly provided by Dr. Pokpong Junvith, a lecturer at the Faculty of Economics, Thammasat University, who was directly involved in drafting the bill with Dr. Chalongphob Sussangkarn, minister of finance under the Surayud Chulanont government. (Pokpong Junvith, personal e-mail correspondence, 19 February 2011).

[32] This recent *rapproachement* between the former left and the former right in Thai politics under a nationalist banner against the globalizing other is taken to task by Thongchai Winichakul in *"6 tula nai khwamsongjam khong faikhwa 2519 – 2549: Jak chaichana soo khwamngiab (tae yang chana yoo di)"* [The October 6th Incident in the Memory of the Right B.E. 2519 – 2549: From Victory to Silence, albeit Still Victorious] , Khwamrunraeng son/ha sangkhomthai [Hidden/Seeking Violence in Thai Society], Chaiwat Satha-anand, ed., (Bangkok: Matichon Press, 2010), pp. 482 – 86. For an earlier theoretical discussion, albeit with the opposite political import, of this predictable anti-globalization political shift, see Pierre Bourdieu, Richard Nice, trans., *"Neo-liberalism, the Utopia (Becoming a Reality) of Unlimited Exploitation,"* Acts of Resistance: Against the Tyranny of the Market (New York: The New Press, 1998), pp. 104 – 05.

[33] See Kasian, *"Toppling Thaksin",* pp. 27 – 28; Pasuk Phongpaichit and Chris Baker, *"Thaksin's Populism",* Journal of Contemporary Asia, 38: 1 (February 2008), 62 – 83. The two versions of neo-liberalism are derived from Perry Anderson*, "Editorial: Jottings on the Conjuncture",* New Left Review, second series, 48 (November/December 2007), 24.

[34] The two new translated Thai equivalents of good governance appear interchangeably in the text of the current constitution which was drafted by the military junta-appointed Constituent Assembly and approved in a nationwide referendum in 2007, see *"Ratthathammanoon haeng ratcha-anajakthai"* [The Constitution of the Kingdom of Thailand], Royal Thai Government Gazette, Volume 124: Section 47 ko. (24 August 2007), Section 74 and 84, p. 20, 25.

[35] There exists, for instance, a much-promoted research and training institute called Soon Borikan Wichakan Thammaphibal (Center for Good Governance Academic Services), affiliated with the Chandrakasem Rajabhat University in Bangkok. See its official website at www.thaigoodgovernance.org/ webpage/home.php. As for a typical scholarly publication on the topic of Thai good governance, see Amporn Thamronglak, ed., *Kanborihanpokkhrong satharana (Public Governance) kanborihan ratthakij nai satawas thi 21* [Public Governance: Public Administration in the 21st Century] (Bangkok: Textbook and Publication Program, Faculty of Political Science, Thammasat University, 2010).

chairperson of the Constitution Drafting Commission.[36] The trajectory of governance has thus followed the dynamics and vagaries of intense political conflict in Thailand in recent years. In short, good governance has become part of the resurgent anti-democratic discourse in Thailand as demonstrated by a series of public statements made by key members of the monarchical network and their populist NGO allies in recent years. Firstly, we have Sumet Tantivejkul, a close aide to King Bhumibol Adulyadej, secretary-general of the Chaipattana Foundation since its establishment in 1988,[37] and president of Thammasat University Council since 2005.[38] In a public lecture entitled "The State and Private Sectors' Common Front Against Corruption" on March 16, 2004, Sumet claimed that Thai-style good governance or "*Thammaphibal or Thammarat*" actually predated Western good governance for decades, as evidenced by King Bhumibol's accession speech in 1950: "I shall reign by Dhamma, for the benefit and happiness of all the Thai people."[39] Thus it fell upon all loyal Thais to help rid the country of corruption and uphold *Thamma* as called upon by the king. To carry out this royally ordained mission, he also founded and chaired an anti-corruption NGO called *Moonnidhi prathetthai sai sa-ad* or the Foundation for a Clean and Transparent Thailand – FaCT.[40]

Next came Borwornsak Uwanno, a leading royalist scholar of public law, secretary of the cabinet under prime minister Thaksin, and secretary-general of King Prajadhipok's Institute – a think tank affiliated with the Thai parliament (see its official website at www.kpi.ac.th/kpien/).[41] After his timely and politically expedient resignation from the waning Thaksin government three

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[36] Cited in Nattaya Chetchotiros, "*CHARTER DEFENDED: Prasong says aim was to prevent future Thaksins gaining power,*" Bangkok Post, 18 August 2007, p. 3. As to Prasong's alleged role in the 2006 coup, see his interview in Rodney Tasker, "Grumbles, revelations of a Thai coup maker," Asia Times Online, created 22 December 2006, www.atimes.com/atimes/Southeast_Asia/HL22Ae01.html.

[37] The Chaipattana (literally meaning "winning development") Foundation is a royal NGO that finances royally-initiated development projects nationwide from private donations to avoid restrictive government rules and regulations. See "*Background,*" The Chaipattana Foundation, accessed 26 February 2011, www.chaipat.or.th/chaipat_old/noframe/eng/index.html.

[38] See a path-breaking M.A. thesis on this subject that was later revised into a book by Chanida Chitbundid, *Khrongkan an neuang ma jak praratchadamri: Kansathapana praratcha-amnajnam nai phrabatsomdej phrajao yoo hua* [The Royally-Initiated Projects: The Making of Royal Hegemony] (Bangkok: The Foundation for the Promotion of Social Science and Humanities Textbooks Project, 2007), pp. 329 – 56, 404 – 20.

[39] Cited from Borwornsak Uwanno, *"Ten principles of a righteous King,"* Bangkok Post, 12 June 2006, p. 8. The spellings of *"Thamma"* and *"Dhamma"* are interchangeable here. A slightly different translation is given in Nicholas Grossman, editor-in-chief, Chronicle of Thailand: Headline News since 1946 (Bangkok and Singapore: Bangkok Post and Editions Didier Millet, 2009), p. 48, as "We shall rule with righteousness for the benefit and happiness of the people of Siam."

[40] *"Kong baeb buranakan, dr. sumet yam rabsang nailuang song thon maidai chaeng khontujjarit"* [Integrated Cheating, Dr. Sumet Stresses the King Couldn't Help Cursing Corrupted People], Thaipost, 17 March 2004. FaCT maintains a website with VDO clips and publications about its objectives and activities at www.fact.or.th/fact/.

[41] See Borwornsak's profile and interviews on his personal background and work in the Thaksin Government in *"Borwornsak Uwanno,"* Thailand Political Base, accessed 27 February 2011, politicalbase.in.th/index.php/บวรศักดิ์_อุวรรณโณ; *"Botsamphas sastrajan do.ro. borwornsak uwanno lekhathikan khanaratthamontri meua wansuk thi 23 phreussaphakhom 2546"* [Interview of Professor Dr. Borwornsak Uwanno, Secretary of the Cabinet on Friday May 23rd, B.E. 2546] by Associate Professor Dr. Nantawat Boramanand, Public Law Net, accessed 27 February 2011, www.pub-law.net/publaw/view.aspx?id=172; *"Botsamphas sastrajan kittikhun do.ro. borwornsak uwanno wanangkhan thi 24 tulakhom 2549"* [Interview of Professor Emeritus Dr. Borwornsak Uwanno on Tuesday October 24th, B.E. 2549] by Associate Professor Dr. Nantawat Boramanand, Public Law Net, accessed 27 February 2011, www.pub-law.net/publaw/view.aspx?id=999;

months before the military coup and his subsequent ordination as a Buddhist monk, Borwornsak published a series of articles in both Thai and English in the local press on the subject of the Thai monarchy and politics. [42] He argued that King Bhumibol's diligent and consistent practice of *Dasarajadhamma* (Buddhism's ten righteous principles for monarchs) accorded with good governance, making the king a *Dhammaraja* (a righteous king) and adding a warm, compassionate, and uniquely Thai paternalistic quality to royal governance under his reign.[43]

After the ARC's coup in September 2006 and the subsequent installment of General Surayud Chulanont as prime minister, the Surayud government (October 2006 – January 2008) was attacked by deposed prime minister Thaksin for lacking credibility, especially among foreign investors. Surayud then retorted that had the Thaksin government practiced *Thammaphibal* or good governance, there wouldn't have been any problem.[44]

Among the populist NGO allies of the monarchical network, Rosana Tositrakul, a long-time consumer rights and public health activist-turned-high-profile anti-corruption and anti-Thaksin crusader, was elected to the Thai senate by Bangkok residents in 2006 and 2008. She commands a formidable reputation for helping to put a corrupt cabinet minister behind bars for the first time and reversing the privatization of EGAT.[45] As chairwoman of the Senate Committee on Studying and Inspecting Corruption and Strengthening Good Governance, she has censured the current military-backed government of prime minister Abhisit Vejjajiva for failing to adhere to *Thammaphibal* in several major instances.[46]

And last but not least, we have the yellow-shirted mass movement, ironically called the People's Alliance for Democracy or PAD, which shortly after its formation helped the ARC to

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42 *"Lekhathikan khana ratthamontri la ok jak tamnaeng"* [Secretary of the Cabinet Resigns], *Siam jodmaihet: Bantheuk khaosan lae hetkan, pi thi 31 pho.so. 2549* [CD] [Siam Archives: Record of News and Events, Vol. 31 B.E. 2549] (Bangkok: Siamban Company Limited, 2006), p. 778.

43 Borwornsak Uwanno, 1) *"Ten principles of a righteous King"*, Bangkok Post, 12 June 2006, p. 8; 2) *"Thailand's Dhammaraja",* Bangkok Post, 13 June 2006, p. 10; 3) *"King and the Constitution",* Bangkok Post, 14 June 2006, pp. 4, 12-13; 4) *"A Proof beyond any shadow of doubt",* Bangkok Post, 15 June 2006, p. 12; 5*) "The King's paternalistic governance",* Bangkok Post, 16 June 2006, p. 10. In addition, see Borwornsak Uwanno, *"Dynamics of Thai Politics"* (paper presented in the seminar on "The United States – Thailand Relationship and Southeast Asia" organized by the Royal Thai Embassy in Arlington Virginia, on 9 – 10 May 2007).

44 *"Rai thammaphibal jeung don lai, surayud suan maew"* [Surayud Retorts That Thaksin Was Driven from Power for Lack of Good governance], Matichon Daily, 25 January 2007, p. 1. See, in addition, his address to the Japan National Press Club during his visit to Tokyo on 3 April 2007 in Prime Minister General Surayud Chulanont, *"Japan and Thailand: Celebrating a New Era of Intensified and Sustainable Partnership,"* Government House Media Center, accessed 27 February 2011, media.thaigov.go.th/pageconfig/viewcontent/viewcontent1e.asp?pageid=472&directory=1942&contents=8498.

45 *"Rosana tositrakul,"* Wikipedia, accessed 27 February 2011, th.wikipedia.org/wiki/รสนา_โตสิตระกูล; and *"Rakkiat sukthana,"* Wikipedia, accessed 27 February 2011, th.wikipedia.org/wiki/รักเกียรติ_สุขธนะ.

46 *"Rosana fak 3 khamtham thuang thammaphibal nayok"* [Rosana Calls on the Prime Minister to Respond to 3 Questions about Good governance], Khao Thairath Online, created 23 September 2010, www.thairath.co.th/content/pol/113470; *"Chamlae rak wikrit sangkhomthai, 'ao leuad hua ma lang tin' tong mai koed kheun"* [Dissecting the Roots of Thai Society's Crisis, 'Off with Their Heads" Must Not Happen], www.prachachat.net Online, created 30 March 2010, www.prachachat.net/news_detail.php?newsid=1269951068.

For a contrarian view of Senator Rosana's forceful role, see *"Ruangkrai yuen po.po.cho.-ko.ko.to. thod ko.mo.tho. sob thujjarit chai amnaj maichob"* [(Senator) Ruangkrai Petitions the National Anti-Corruption Commission and the Election Commission to Dismiss the Senate Committee on Inspecting Corruption for Abuse of Power], Khao Thairath Online, created 27 September 2010, www.thairath.co.th/ content/pol/114438.

drive out Thaksin, then occupied the Government House and Bangkok's international airports to oust the successive, selected pro-Thaksin governments of Samak Sundaravej and Somchai Wongsawat in 2008. PAD has consistently and self-righteously campaigned on the royal-nationalist platform of New Politics: defense of the monarchy, moralistic and clean politics, economic prosperity, and good governance, which old electoral politics could not deliver, or so it claims.[47]

All in all, good governance, as the IMF and World Bank's global discursive enforcer of neoliberal political economic order, has paradoxically been turned on its head (or "glocalized") by some Thai royalist-nationalist intellectuals into *Thammarat or Thammaphibal,* a national discursive saboteur that is bent on wreaking havoc and creating chaos in a vain attempt to impose a conservative, even reactionary, undemocratic and unconstitutional Thai moral order on their compatriots.[48]

[47] Kasian, *"Toppling Thaksin",* pp. 5 – 10; and Kasian Tejapira, Songkhram rawang si: kon theung jud thi mai aj huanklab [Warring Colors: Before the Point of No Return] (Bangkok: openbooks, 2010).

[48] See in this connection, Kasian, *"Rabob prachathipatai an mi phramahakasat pen pramuk khong sondhi limthongkul"* [The Democratic Regime of Government with the King as Head of the State *à la* Sondhi Limthongkul], Songkhram rawang si, pp. 120 – 35.

A Comment on Kasian Tejapira

Akira Suehiro

We are asked to be careful when using particular terms relating to political and economic systems such as “democracy” and “civil society” in so far as these terms are essentially connected with Western values. When the term “democracy” was introduced into Asian countries, political leaders in these countries tended to interpret it in ways that favored their authoritarian rule. For instance, Muhammad Mahathir preferred the term “guided democracy,” while political leaders in Thailand championed a Thai style of monarchical democracy (“a democratic government with the King as Head of the State”) from a Western-style democracy.

Similarly, the term “civil society” became popular in Thailand in conjunction with the rise of democratization movements after the early 1990s. However, there were big debates over how to translate the term “civil society” into the Thai language among scholars and NGO leaders. So far as I could find in Thai textbooks and newspapers, there were around ten tentative translations. Finally, scholars agreed to employ the term *prachakhom* to indicate the term “civil society,” and they introduced this term to the public through the mass media. Thais have traditionally identified themselves as servants of the king rather than independent members of a civil society, an identification that is especially dominant among rural people. It is not surprising that the term *prachakhom* did not become popular among rural people in Thailand

Immediately after the currency and financial crises battered Thailand’s economy in 1997, the IMF and the World Bank introduced the terms “governance” and “corporate governance” to promote institutional reforms in financing and other corporate activities in accordance with Anglo-American practices. In the process of adjusting to IMF reforms, local authorities and NGOs immediately faced the new translation problem of how to best translate the unfamiliar term “governance” into Thai.

They opted to employ *thammarat* as the official equivalent of “governance” in the West. *Thammarat* is a neologism that combines the traditional concept of *thamma* or *dharma* (Buddha’s rule or Buddha’s law) with *rat* (state). This unique interpretation using a traditional social value contributed to wide acceptance among the Thai people, but

produced serious confusion in understanding the English word "governance," and further brought about multiple re-interpretations, some being quite different from the original meaning in the West. Especially, political leaders and NGO leaders have arbitrarily employed *thammarat* in depicting their own conceptions of what Thai society should be. As a result, the term "governance" was localized, and became a keyword not to move Thai society closer to the Anglo-American ideal but to adapt it to more acceptable rule on the basis of Thailand's traditional values.

Kasian's paper is an insightful piece which uses a political culture approach to clarify the deep gap between the term "governance" in the West and local understandings of this imported concept. And he illustrates how political leaders and scholars have arbitrarily employed this term in the process of democratization movements in recent years. Kasian's paper also provides us with a lot of insightful ideas concerning the question of how to understand the essence of the Thai political system in the wake of the conflict between the "red shirts group" (pro-Thaksin) and the "yellow shirts group" (anti-Thaksin) after the military coup in September 2006.

More importantly, his paper raises the fundamental question of how to evaluate the scope of the Western rules of "democracy" in the political arena, "civil society" at the societal level, and "corporate governance" in business circles. The Thai use of *thammarat* does not represent an adaptation of Asian countries to IMF norms, but rather is a key concept demonstrating the local response to IMF conditionality and the increasing pressures of globalization.

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WTO Governance: A Legal Cultural Critique

Colin B. Picker*

I. Introduction

As comparatists the world over understand, it is often through consideration of other legal systems that we can grow to understand our own better. In a symposium largely devoted to issues of governance in Japan, a consideration of governance within the World Trade Organization (the "WTO"), the world's premier international institution, may provide comparative insights that may be applicable to governance issues within Japan. Thus, readers of these Proceedings will hopefully have ideas about their own systems and governance issues sparked by this paper and its methodology.

The comparative analysis in this paper will employ a legal cultural methodology and will this focus on the *role of legal culture* in WTO governance. That methodology may be applicable when considering Japanese governance issues as well, for there is no question that legal culture is also an important component in any understanding of governance in Japan.

As I have recently defined legal culture in an earlier volume of proceedings from the Institute for Social Science:

> The term "legal culture" is not a term commonly employed or understood within the law. While other fields, such as social science, may have considered cultural issues in great depth, in law it is relatively rare. In part this may because it is viewed as too "soft". So, in order to give it greater strength I define legal culture to consist of those characteristics present in a legal system, reflecting the common history, traditions, outlook and approach of that system. Those characteristics may be reflected in the actions or behaviours of the actors, organizations, and even of the substance of the system. Legal culture exists not because of regulation of substantive law, but as a result of the collective response and actions of those participants in the legal system. As a result, legal culture can vary dramatically from country to country, even when the countries share a common legal tradition. Critically, legal culture is also to

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be found within international organizations and fields—for they too are legal systems. Those different legal cultures are critical for understanding the legal systems, for different legal cultures tell different stories, see the world differently, and project different visions.[1] It should be emphasized that legal culture is not anthropology or sociology. For sure, culture is part of and studied by those two and other fields—often in ways of importance to the law. But, here, rather, everything that is a part of "legal culture" should be a cultural issue of legal consequence. Too often one can drift into non-law. . . . By way of example, to highlight the "legal" component of legal culture, the American or Anglo-American legal culture may be easily contrasted with that of the French or Japanese or Iranian. Thus, the differences in legal culture are clearly apparent when considering the expected role/behaviour/activities of Anglo-American judges versus those in civil law systems (passive versus active judicial behaviour); the role/behaviour/activities of American attorneys in business negotiations versus those in Japan (the significantly greater use of lawyers in the former versus the latter); and the role/character of legal sources in Anglo-American systems versus those in religious law systems (pluralistic and dynamic versus monolithic and difficult to change). Those specific legal cultural characteristics, simplified for sure in these examples, exist largely independently of statute, regulation or other positive law. They exist as part of the legal culture.[2]

In addition, in a work such as this, it is worth noting the differences between legal cultures, legal systems and legal traditions:

> Legal systems are "the composite of the legal organizations, rules, laws, regulations, and legal actors of specific political units--usually states or sub-state entities[- - and] have largely the same characteristics[,] the same rules and organizations."[3] Legal traditions, in contrast, are:
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> > families of legal systems, sometimes . . . legal models or patterns . . [but] a legal tradition is not a synonym for the history or development of law in a given country[, r]ather, it is the aggregate of development

[1] *See* Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (Harvard 1987) at 8.

[2] *See* Colin B. Picker, *China, Global Governance & Legal Culture:* in CHINA AND GLOBAL ECONOMIC GOVERNANCE: IDEAS AND CONCEPTS (ISS Research Series No.45, Tokyo: Institute of Social Science, University of Tokyo.) (Junji Nakagaw, ed.) (2011) at 69-88.

[3] Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VANDERBILT J. TRANS. L. 1093, 1094 (2008).

> of legal organizations (in the broadest sense of the term) in a number of countries sharing some fundamental similarities in the law.[4]

> Thus, one can see that while similar, and often confused and at times interchangeable in some comparative analyses, the critical issue that differentiates a legal cultural analysis is that legal culture is more informal, subconscious, and typically tied to just one system's legal actors. In contrast legal systems are more formal and their characteristics are consciously created and applied, while legal traditions normally typically describe broad groupings and more typically reflect formal sources of law. Consequently, a comparative legal systems analysis of [international organization ("IOs") would focus on the formal rules within and across the organizations. Whereas a comparative analysis of the legal traditions of IOs, while its methodology in many respects would employ similar devices as those suggested in this paper, would focus more closely on groups of organizations and on the formal sources of their rules and regulations. In contrast, a legal cultural analysis of an IO would usually analyse just one organization and would focus quite heavily on, among other factors, the human actors involved in the organization. All three of these methods of comparative analyses to some extent, often a large extent, overlap.[5]

Identification of legal cultural issues allows us to properly evaluate governance issues in comparative terms. Such an evaluation allows us to place the characteristic into a legal cultural framework. Identification is the first step in being able to employ comparative law tools. That identification also allows the issue to be noted, as opposed to the characteristic being subsumed within other governance issues. Once identified and noted specifically in its own right, one can then figure out if comparable characteristics exist in other systems and whether those other systems experience the same governance consequences. If so, one can then look to see if they employ mechanisms to counteract any negative consequences for the system, and to then consider whether those same "safeguards" can then be borrowed,[6] though it should be noted that successful transplantation is a complex and difficult undertaking. Identification of legal cultural governance characteristics in a legal system can also

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[4] Ugo Mattei, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053 (2001) (text at fn 68) (citations omitted).

[5] *See* Colin B. Picker, *An Introduction to Comparative Analyses of International Organizations* in COMPARATIVE LAW AND INTERNATIONAL ORGANIZATIONS: COOPERATION, COMPETITION AND CONNECTIONS (Publ. of Swiss Instit. Comp. L) (2011) (Lukas Heckendorn & Colin Picker eds.) (some citations omited).

[6] In comparative law we call them "safeguards'- but that term has a different meaning in the WTO context.

allows us to understand the system's interaction with other legal cultures, domestic and international, helping explain points of conflict between the systems. While legal culture may only sometimes be a cause for governance failings in corporations, states and in international organizations, understanding the role of legal culture permits one new understandings and insights into those governance problems

The comparative analysis here will not focus on the technicalities of governance within the WTO, such as the qualified majority voting rules.[7] It will instead consider those aspects of the WTO's legal culture that are relevant to the overall effectiveness or success of the WTO's governance. This non-technical approach is supported by the fact that discussion of WTO governance does not typically centre on the technical aspects of governance. Of course, those issues are important and worthy of research, but at the legal culture level, they are, for the most part, unnecessary for this initial consideration of the WTO's governance.

Indeed, the dictionary definition[8] of governance is similarly non-technical, and provides, in relevant part, that

> Governance is "the action or manner of governing; the fact that (a person, etc.) governs [or] [c]ontrolling, directing, or regulating influence; control, sway, mastery".[9]

This definition may include the technical details of governance, but it also suggests that there is a broader meaning to "governance"—especially the idea of "control" and "mastery". Indeed, when governance is mentioned in other settings, it usually does not mean the technical details of the management operation. The failure or failing control or management is more likely the intended issue. Thus, for example, in the corporate context it means the creation of mechanisms to stop abuse and ensure transparency and good results.[10] Indeed, following the corporate scandals of Enron and WorldCom, "governance" was pointed to as one of the critical factors in the cause of those scandals (where bad governance prevailed) and in the safeguards that would

[7] AGREEMENT ESTABLISHING THE WTO, Article IX.

[8] The WTO DSB often employs dictionaries to help determine the meanings of words and phrases in the WTO texts. "Thanks to the wisdom of the Appellate Body of the [WTO] the Oxford English Dictionary has been cited in almost every appellate report since 1995 and is emerging as one of the leading sources for the interpretation of WTO law." Ernst-Ulrich Petersmann, *Tribute: On the Constitution of John H. Jackson*, 20 MICH. J. INT'L L. 149, 149 (1999).

[9] From the OED online, see http://www.oed.com/view/Entry/80307?redirectedFrom=governance#.

[10] *See generally* Claire Moore Dickerson, *Ozymandias As Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035 (2003).

be set up to reduce the likelihood of further such scandals.[11] The governance issues of the WTO is, however, less like that of the corporations, in substance and spirit, than like that associated with states when their governmental systems are seen to be incapable of carrying out the necessary governmental task. In the government context, discussions of governance are usually part of a conversation on failure of government. Failure of the government to do what it needs to do. In other words, talking about governance presupposes that something is broken!

One of the best examples of broken state governance may be taken from that of governance within the United States—specifically, the failure of the U.S. government to stop using the lowly one cent penny. That coin actually costs close to two cents to manufacture, while it has been estimated that the time wasted in handling pennies in the United States is over a billion dollars a year.[12] Despite wide knowledge of this inefficiency, the American government seems unable to eliminate the penny. Of course, the case of the American penny is just an example of America's governance issues—of its "gridlock".

But, while numerous, the technical causes of America's "gridlock", such as overly short terms for the House of Representative, campaign finance rules, and so on, are really just reflections of aspects of the foundational legal and political culture of the United States.[13] It may be that the American governance system is working exactly as it was intended! Consequently, the current concerns within the United States about its governance may just reflect an alternative legal and political culture battling with the foundational culture. Thus, it is possible to see American governance differently even after a very brief examination of it within its legal cultural context. This paper's examination of the WTO's governance in a legal cultural context will also provide different perspectives and insights into that governance.

II. WTO Governance

Today's expectations for good governance by a government or organization can be said to include the expectation that it:

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[11] *Id.*

[12] See http://en.wikipedia.org/wiki/Penny_debate_in_the_United_States . Perhaps, the elimination of inefficient coins should be included as one of the measurements of good state governance in the next section!

[13] One can see this reflected in in Federalist Paper No. 51's description of the interaction of the different parts of the proposed United States federal governance scheme. Available at

http://avalon.law.yale.edu/18th_century/fed51.asp.

1. Be an efficient controller, director or regulator.

2. Be rational, predictable and consistent

3. Balance the short and long term needs of its constituencies

4. Operate according to design

5. Where appropriate, act as a true representative body[14]

In every system, there will be a legal cultural components associated with the above criteria that may be helpful in understanding the presence and quality of each of these expectations in any particular governance context—including that of the WTO. But, before delving into the legal cultural components, one must first assess the WTO's governance against these criteria, albeit with a focus on those issues relevant to legal culture.

1. Be an efficient controller, director or regulator.

Few would ever describe the WTO as efficient, despite the WTO's focus on market principles and economic theory, with their corresponding concern with economic "efficiency". Indeed, the foundation of modern trade, comparative advantage, is premised on the benefit of utilizing differing levels of efficiencies among trade partners. While there has been some concern with efficiency, for example in the timeframes for disputes to be resolved at the WTO's Dispute Settlement Body (the "DSB"), overall efficiency is not one of the qualities which comes to mind when thinking about the WTO. Of course, efficiency, especially organizational governance efficiency, is relative and it may be that in fact the WTO is relatively more efficient than many other international organizations. Nonetheless, there are some specific governance efficiency, or inefficiency, issues within the WTO.

A major example of governance inefficiency within the WTO can be seen by consideration of the governance role played by the WTO's Dispute Settlement Body (the 'DSB") and the cases brought before it. That situation has arisen as a result of the

[14] These five are a distilation from Daniel Esty's comprehensive consideration of "good governance" in Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 10 J. INT'L ECON. L. 509 (2007). "Good governance thus depends on an appropriate blending and balancing of these elements in practice . . . 1. representativeness; 2. accountability; . . . 3. Rationality; 4. Efficacy; 5. Efficiency; 6. Neutrality; . . . 7. clarity; 8. stability; . . . 9. power sharing; 10. legality; 11. fairness; . . . 12. deliberation; 13. transparency; 14. participation and due process" *Id*. at 512-13.

confluence of two related governance issues—the WTO's "voting" system and the corresponding role that has then been assumed by the DSB. The members of the WTO rarely vote, instead there is an extreme reliance on consensus, while an admirable democratic and harmonious principle has proven itself to be an ineffective mechanism for decision making.[15] There has been virtually no decisions made at the member level since the WTO was created in 1995.[16] That inability to agree on necessary interpretations and amendments to the WTO rules and practices has left that critical governance role to the DSB. This means that policy is only made or explained in the context of those cases brought before the DSB, a role which it has vigorously adopted. So, even though there may be need for change throughout the WTO Agreements, that change appears to only be able to take place within the narrow context of such disputes as are brought before the DSB. Furthermore, the decision about which cases should be brought to the DSB is one left to the members themselves, usually operating along or in loose coalitions of similarly situated states. The decision to bring an action, of course, will depend on numerous WTO-independent factors unique to the states at issue.[17] Such a system, in which enforcement of WTO obligations takes place only as a result of other members' actions at the DSB is not an efficient method for the development of WTO law or the enforcement of WTO obligations. That method will likely lead to over and under enforcement with respect to specific issues or states. Clearly, this is a very inefficient governance mechanism and is hardly a model for efficient regulation or control of the world's international trade institution.

Compounding the above inefficiencies is the fact the actual implementation of the WTO's policies is carried out within the member states, through their domestic law, against a backdrop of enduring notions of state sovereignty. Furthermore, the WTO institutionally has rather weak powers and cannot efficiently direct or regulate its members. Its most effective method is through the trade policy review mechanisms,[18] which have the effect of shaming non-compliant members and alerting other members

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[15] *See generally* Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?* 8 J. INT'L ECON. L. 51 (2005).

[16] The one noteable exception relates to compulsory licensing of pharmaceutical products under the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") agreement of the WTO. See World Trade Organization, Decision of the General Council, Amendment of the TRIPS Agreement, WTO Doc No WT/L/641 (Dec 6, 2005).

[17] *See*, *e.g.*, Gregory C. Shaffer, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) at 33-36.

[18] *See* WTO website Trade Policy Review Gateway at http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

to potential issues that may be brought before the DSB.[19] Compounding these weak powers is the fact in the face of member violations, the WTO cannot itself bring a dispute against a recalcitrant country to the DSB. Instead it must rely upon the state members to bring enforcement actions, complete with the inefficiencies that go with that discussed earlier.

The above, and other issues not discussed due to the length limitation of this paper, suggest that WTO governance suffers from some structural inefficiencies that likely undermine the WTO's development and effectiveness.

2. Be rational, predictable and consistent

As an initial matter, and like most organizations, levels of rationality, predictability and consistency within the WTO will be strongly impacted by the political atmosphere present within and surrounding the organization. This is especially the case when it comes to policy negotiations and implementation or enforcement of obligations. At those times one would expect political concerns to be especially influential. The rationality at those times will often reflect WTO members' perception that they are involved in a zero-sum game.[20] Those perceptions are not such a problem so long as the system is set up to manage such perceptions. But, it is not clear that is the case in the WTO, though it may be more so than for perhaps any other international organization.[21] Without the safeguard mechanisms to ensure that overall the different self-interest rationalities work to the common interest, one is left with a somewhat anarchic version of rationality, one not so suited to what is normally considered to be supportive of good governance.

Given the slow pace of change at the WTO there may be less concern about lack of predictability than would have been the case were the WTO to be a dynamically developing organization. As noted before, there has been almost no formal changes to the substantive WTO agreements since the end of the GATT's Uruguay Round negotiations in 1994.[22] To the extent there has been any development of the

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[19] *See generally* Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153 (2007).

[20] Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. 1, 125 (2009).

[21] *See*, *e.g.*, WTO News: Speeches — DG Pascal Lamy: *Comparative advantage is dead? Not at all, Lamy tells Paris economists* (12 April 2010), available at http://www.wto.org/english/news_e/sppl_e/sppl152_e.htm.

[22] *See also* Matthew Kennedy, *When Will the Protocol Amending the Trips Agreement Enter into Force?* 13 J. INT'L ECON. L. 459, 459 (2010).

organization and law, it has been developed by the DSB. Admittedly, the DSB does provide a level of predictability and consistency across its decision, reinforced by the DSB's inclusion of an appeals system – the Appellate Body of the DSB. But, while the specific disputes may be resolved somewhat predictably, the overall development of the WTO will be remain unpredictable as the cases on which it scan develop the law will be brought to the DSB without any coherent or predictable pattern. Instead, as noted earlier, they are submitted to the DSB based solely on the self-interest of the members, which is itself based on their own internal politics and pressures. Clearly, such a mechanism for selection of disputes will lead to gross inconsistencies, for some violations will lead to dispute settlement and some will not. Thus, some states more than others will be party to disputes, and some substantive fields more than others will be subject to DSB development. Paradoxically, that inconsistency sits on top and despite the very consistency provided by a dispute settlement system representing the new law bound trade system.

Another potential source of inconsistency is the disparate implementation of WTO agreements within member states. Of course, it is often difficult to know whether states have appropriately implemented WTO obligations. Fortunately, the WTO's trade policy review mechanism provides information on implementation, and many of the WTO members conduct their own broad reviews as well, such as that provided in the US National Trade Estimates Report.[23] A brief examination of the reports generated in those mechanisms, shows a broad range of inconsistent implementation across the WTO membership. The failures in implementation can be blamed on many factors, including ineffective governance structure, such as the failure within the Dispute Settlement Understanding to provide for the payment of compensation or for retroactive application of any findings of violations by the DSB.[24]

A significant new and major source of inconsistency is the growth of "WTO-plus" for new members.[25] Since China's WTO accession process, there is now a move to have new members join the WTO with greater levels of commitments (the so-called "WTO-plus") than was the case with the original or early members. Indeed, these new members often have to join with liberalization commitments greater than those

[23] *See*, *e.g.*, Office of the U.S. Trade Representative National Trade Estimates Report 2010 at http://www.ustr.gov/about-us/press-office/reports-and-publications/2010.

[24] *See* Simon Lester, Bryan Mercurio, Arwel Davies & Kara Leitner, WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY (Oxford: Hart Publ.) (2008) at 165.

[25] *See generally* Julia Ya Qin, *The Challenge of Interpreting "WTO-Plus" Provisions*, 44 J. WORLD TRADE 127 (2010).

applicable to many of the original WTO members.[26] For example, the newer members often are pressured into committing to additional liberalizations beyond the mandatory WTO commitments, such as agreeing to sign onto the WTO's plurilateral Government Procurement Agreement.[27]

The failure to reign in the recent proliferation of regional trade agreements ("RTAs") has permitted the formation of hundreds of different RTAs, with little predictability or consistency among them or with the WTO.[28] Each of the RTAs is unique, covering different sectors and disciplines in diverse way and at different levels of liberalization. Furthermore, it is far from clear that these RTAs comport with the strict requirements of the WTO's rules that permit states to enter into RTAs, found in such provisions as the GATT's Article XXIV.[29] The failure of the WTO to enforce the rules concerning RTAs has lead to a trading regime that is, as is frequently noted, a "spaghetti" or "noodle" bowl of differing rules and demands.[30]

Finally, Rules of Origin can serve as a pernicious barrier to trade and yet each country and each RTA is essentially free to adopt its own rules for determining the origin of an imported product, and hence whether it is subject to specific rules applicable to the originating country and that product.[31] The WTO in 1995 began the process of harmonizing the many different rules of origin, but to date has yet to complete that task.[32] The failure to bring Rules of Origin under control, both for WTO members generally and within the RTA environment, has accentuated the inconsistency and lack of predictability caused by the 150-plus members and the ever increasing hundreds of RTAs. That failure has permitted the creation and maintenance of a veritable pasta bar of inconsistency throughout the world trade environment.

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[26] *See generally* Steve Charnotvotz, *MAPPING THE LAW OF WTO ACCESSION* in THE WTO: GOVERNANCE, DISPUTE STETTLEMENT AND DEVELOPING COUNTRIES (Jannow, Donaldson & Yanovitch, eds) ch 46 (2008) available at http://ssrn.com/abstract=957651.

[27] *Id*. at 22.

[28] *See generally* Colin B. Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INTL ECON. L. 267 (2005) (hereinafter "Picker (RTA)"). "The surge in RTAs has continued unabated since the early 1990s. As of 31 July 2010, some 474 RTAs, counting goods and services notifications separately, have been notified to the GATT/WTO." WTO Website: RTA Gateway, available at http://www.wto.org/english/tratop_e/region_e/region_e.htm.

[29] *Id*.

[30] Jagdish Bhagwati, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY 290-91 (1998).

[31] *See generally* Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT'L ECON. L. 111, 114-24 (2010).

[32] *See*, *e.g, Rules of Origin: Outgoing chair says 55% of rules of origin agreed*, WTO: 2010 NEWS ITEMS (25 March 2010), available at http://www.wto.org/english/news_e/news10_e/roi_25mar10_e.htm.

Accordingly, while a sophisticated and relatively successful institution, the WTO's governance failings have led to an institution riddled with inconsistencies, irrationalities and a lack of predictability.

3. Balance the short and long term needs of its constituencies

The art of governance can be a balancing act. Among the many different things that must be balanced are the short and long term needs of the different and numerous constituencies. The primary constituents of the WTO may be thought to be the State members, but more concretely those domestic participants within the state responsible for the state's interaction with the WTO—politicians and civil servants. The WTO must then balance the short and long term demands of those often competing groups. Needless to say, that balancing act is difficult, made all the more so by the difficulty of identifying the many different constituents' goals—be they short or long term goals.

At a general level, considering the long term, those civil servants and politicians involved in international trade governance will typically be committed to the idea of the multilateral regulation of international economic interactions and to an associated and eventual economic development and progress in their own and in other states. But, those goals are only slowly achieved. Nonetheless, a slow but consistent progress at the WTO would satisfy that long term goal. But, the present lack of progress in the on-going and interminable post-Uruguay Round negotiations, including the interminable Doha Round, risks satisfying their long term goal.[33] Indeed, the slow abandonment of that long term goal can be seen in the increasingly common abandonment of the multilateral trade system in favour of the development of bilateral and regional trade relationships.[34]

Those same civil servants and politicians also have short term goals. Their short term goals can be classified into market or industry protective or enhancement goals. Perhaps the most critical being the protective goals. This goal involves the management of the short term dislocations for markets and industries caused by new international economic relations. Those are the sort of new relations that constantly arise when a state is involved in the international trade system. There are many such dislocations, but this paper will merely discuss a few examples including, among so many others, the dislocations caused by: new members joining the WTO; the ever lower tariff and non-tariff barriers that come into effect when phase-ins expire; the

[33] See Doha Development Round gateway at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

[34] *See* Picker (RTA), *supra* note 28.

new and imaginative protections enacted by different states under guise of WTO exceptions; the trade diversions of new RTAs; the rulings of the DSB; and so on. They must be managed in the short term for the civil servants and politicians to continue to work successfully with and in the WTO. The question is then whether the WTO balances and meets these short term goals. The WTO does appear to provide governance mechanisms that allow these short term demands to be managed. One of the primary mechanisms is the provision for unilateral imposition of safeguards, which allow politicians and civil servants to temporarily enact protections to off set dislocating events.[35] The potential to employ safeguards when needed also permits politicians and civil servants to make the initial deals necessary for the long term relationship of their state with the international trading system.[36] But, what if the international political fall-out from the use of safeguards undermines their employment by civil servants and politicians that have to balance domestic and international politics? Perhaps a noticeable decline in the use of safeguards may reflect such a balancing, but in favour of international harmony.[37] But, overall, these defensive short term needs may be met in the WTO's governance system.

It is a different story, however, for the short term enhancement goals of politician and civil servants. The goal in this case is to help the international economic condition of their domestic industries or markets, through the reduction in foreign barriers to their trade. These enhancements, as proof to voters of the benefits of the multilateral trade system, can also help secure the long term goals of the civil servant or politician by providing them with the ability to engage in negotiations for long term development of the trading system. The question is then whether the WTO has met these short term enhancement goals. Given the lack of substantial progress in adding to the benefits of the system that were established in 1995, it may be that the WTO is generally failing to satisfy this short term goal. While there may be some gains from victories at the DSB, for the most part the WTO has not provided new benefits to industry and markets beyond that of the Uruguay Agreements. Proof may be found in the desire by industry and politicians and civil servants to seek international economic enhancements in the bilateral and regional trade environment.

[35] *See generally* the WTO Safeguards Agreement.

[36] *See* Lester, *supra* note 24 at 522.

[37] *See* WTO: 2010 News Items,*Committee on Safeguards: Safeguard actions reported to WTO show significant decline*, 25 October 2010 avaliable at http://www.wto.org/english/news_e/news10_e/safe_25oct10_e.htm.

To the extent the management of the short and long term expectations and needs of the WTO's constituents are not been fully met by and within the WTO, this may reflect a serious governance issue that will have its own short and long term governance consequences.

4. Operate according to design

While governance can exist without a design, it is likely that such a form of governance would not comport with modern notions of good governance. Even dictatorships will have a design or a modus operandi that is understood by all within the system within which they operate. Without a design there would be anarchic government, with the "failure" of that state or system not far behind. In some sense then, the existence of a design is the hallmark of governance, but that same governance can be measured against its practice of operating within and according to its accepted design.

Today the design of a government is typically, although not always, found in the constitution or founding documents—be they of a state or international institution, or even a corporation.[38] Of course, the original design will change over time, be a "living constitution" subject to later understandings or interpretations, though it must continue to follow the spirit of the underlying and original design or else it will be considered to be a new design or constitution. The WTO has an original "constitution"—its founding agreements. The question, however, is whether the WTO has in its short fifteen years already departed substantially from that design – formally or in spirit.

Of course, in some respects it is entirely too soon to make any determination whether the WTO has significantly departed from its original design. For design is something hard to see from within, it must be viewed from above and over time.[39] Furthermore, before assessing whether a design has been implemented and followed, one must first identify the design. With respect to the WTO, while the WTO Agreements are quite

[38] There are a few notable exception where that design is not considered to exist within some few specific identified documents, normally called constitions. The main example is that of the United Kingdom which does not have a constitution located in one or two documents identified as such, instead its constitution is spread across multiple documents spanning hundreds of years, from the Magna Carta to the Human Rights Act of 1998. See Colin B. Picker, *"A Light Unto the Nations" —The New British Federalism, the Scottish Parliament, & Constitutional Lessons for Multi-Ethnic States*, 77 TUL. L. REV. 1, 7 (2002).

[39] Supposedly, after being asked his opinion of the impact of the French Revolution two centuries earlier, Zhou Enlai noted that it "is too early to say". See BBC News website at

http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/key_people_events/html/zhou_enlai.stm

clearly the WTO's constitutional documents, the WTO nonetheless exists within a larger framework that casts a significant gloss over the institution. That framework includes the international legal order and the post-war Bretton Woods international economic architecture, including the GATT. The WTO is thus informed by those earlier frameworks, just as the U.S. Constitution is informed by the British Bill of Rights of 1689.[40] This background is especially important for it has the benefit of time, in contrast to the mere decade and a half of the WTO. Indeed, given the fact that as a technical matter the design of the WTO has not been breached in any significant manner, we must rely more on whether the design reflected in the spirit (or the "vibe" [41]) of the WTO and its historical constitutional context has been breached.

There are a number of issues that quickly come to mind when considering whether the soul or spirit of the design has been breached, though due to space limitations only a few will be discussed briefly here. Despite the purposeful move away from the diplomatic method of resolution of disputes and towards a more institutional mechanism, it can hardly have been intended that the sole vehicle for WTO substantive development would be through the DSB. If so, we can imagine numerous safeguards that would have been provided to control such an all-powerful DSB. Another departure from design would be the failure of the WTO negotiating rounds, from the Seattle Ministerial onwards. Few politicians or civil servants present at the end of the Uruguay Round would have imagined that the unresolved issues during that negotiating round would remain unresolved almost two decades later. For example, the failure to move the Agreement on Agriculture forward is a significant violation of the spirit of the foundation of the WTO, and a perceived betrayal by the developed world of the understandings made to the developing world at that time.[42] Finally, and perhaps the most egregious design failure is the inability of the WTO to reign in the incredible growth of RTAs. The massive move away from multilateral trade policy development by almost every member of the WTO is perhaps the most significant departure form the spirit of the multilateral WTO.

Thus, in less than twenty years the WTO appears to have departed in some significant respects from its original design. Of course, with all "living" designs, one can expect new directions and innovations. Deviations from design, however, can be critical, as they may be here, when they threaten the very life of the institution itself. As a

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[40] *See*, *e.g.*, Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 663 (1996).

[41] The "spirit and the feel" of a constitution may be akin to its "vibe", *see* The Castle (Miramax Home Entm't 1997). scene available at http://www.youtube.com/watch?v=ITUSZ6LRHrk (concerning a property takings alledgedly made in violation of the Australian Constitution).

[42] *See* WTO Agreement on Agriculture, Art. 20.

governance issue, these alterations to the WTO's plan may be its most significant governance problem.

5. Act as a true representative body

In most modern governmental systems there is an element of representativeness. Sometimes it is a major component of governance, sometimes it is less present (such as in monarchical or despotic systems, especially ones where inheritance is the de jure or de facto mechanism for leadership succession). In some respects, representativeness reflects the demand for a legitimacy that is necessary for effective governance.

Within the WTO, there are strong elements of representative governance. As a formal matter every state member of the WTO is considered equal and has the ability to vote and take part in all areas of governance, with almost all matters being decided by consensus.[43] But, the formal structure masks some fundamental failures in representation—inequities that reflect economic and political power disparities among the members.[44] Some failure of representativeness is to be expected, and exists within all systems. After all, the inability of politically and financially weaker parties to take part in governance to the same extent as more powerful members of a system is found in most, if not all, systems. To the extent the WTO's representativeness mirrors these typical failings then WTO's governance should receive no greater approbation or demand for change than would be the case for other systems.

If that failure, however, is self-perpetuating and inflexible then it may reflect a long term and serious governance problem. Governance may endure inequities in the short term. Even as short term inequities are problematic, we nonetheless expect such inequities to arise in the short term. But inequities that endure suggest the system is no longer representative in a long term sense, and will, among other things, lack legitimacy. Insufficient mobility, both in the increase and in the diminishment of power within the governance structure, suggests a long term failure in representation. While the WTO is only fifteen years old, many observers believe that it has inherited the political power legacy of the GATT—with its so-called "Green Room" system that reflected the traditional global power structures.[45] It should be noted, however, that there has been some mobility among those states that historically did not have

[43] *See* Lester, *supra* note 24 at 86.

[44] Ehlermann & Ehring, *supra* note 15 at 67.

[45] *See* Lester, *supra* note 24 at 90.

power in the WTO, especially when they have banded together to operate as a block. So, the issue is far from negative. Indeed, since 1995, we now have new participants playing significant roles at the WTO, such as Brazil.[46]

At a more technical level, there may be a failure of representation and hence legitimacy as a result of the very policy of equal treatment for all members. One-member-one-vote may itself undermine its true representativeness, for per capita representation is then skewed. Consider for example the relative power of one person in China versus one person in New Zealand. Furthermore, that governance failure is accentuated by the fact that the only effective part of the WTO, and the only part developing the Agreements is the DSB—a body largely independent of the WTO members, even as its agenda is driven by those relatively large number of disputes brought by or against the traditional state powers.

The WTO as a formal matter has good representativeness, though there remain some enduring issues related to the continuing power of the traditional economic global powers and to the counter-majoritarian power of the DSB. As a governance issue, there are clearly some problems, though overall this concern is a relatively less critical governance issue.

III. Legal Culture & WTO Governance

The question then is how the WTO's governance issues may be viewed through a legal cultural prism. In other words, whether one can discern legal cultural attributes that may then enhance our understanding of the WTO's governance. A few examples can highlight the method's utility.

1. The DSB and Legal Culture

The DSB is a goldmine of legal cultural characteristics. In the discussion of WTO governance above, the role of the DSB looms large as a result of the fact that the DSB has taken on the primary role in developing the rights and obligations of the WTO members—as a de facto, if not a de jure matter. In so doing, it is supplanting those very same members' role in WTO governance and the original design of the WTO. Furthermore, the development of that new "law" is controlled by whichever disputes

[46] *See*, *e.g.*, Gregory Shaffer & Michelle Ratton Sanchez, *The Trials Of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008).

happen to be pursued by members before the DSB, which is neither systematic, efficient nor predictable.

As a legal cultural matter, the role of a dispute settlement body in making law is traditionally found in the common law systems, though increasingly we see the same in many civil law systems though not usually at this high level of participation.[47] Similarly, the lack of systematic approach towards the development of the law is also a hallmark of the common law systems.[48] The question is then whether the DSB's role is a reflection of an emerging common law legal cultural approach.[49] If so, then instead of viewing it negatively, it may then appear to be a part, perhaps even a successful part, of the WTO's emerging governance system. After all, common law systems very often have good governance—despite the powerful role of their judiciaries in the governance architecture.

Similarly, the idea that the law is made in what appears to be an anarchic, chaotic, and ad hoc fashion should also not be viewed as necessarily alien or negative, but merely a similar reflection of an emerging legal culture—whatever that may end up being.[50] It may even have some positive attributes, such as increased flexibility and the ability to respond quickly and providing new law as the need arises. In other words, the governance may not be failing, though may not be perfect. Rather, is just different than what had perhaps been expected of this international institution and its associated field.

The consideration of governance above, with an eye towards a legal cultural and comparative analysis allowed us to see some unusual characteristics. For example, the fact that the WTO governance structure is driven by its members' cases at the DSB, where they enforce WTO obligations like "private attorneys general" in the United States. Such a mechanism is not one commonly found in legal systems, where public law is normally enforced by the government.[51] Public law suits brought by ordinary individuals is a particularly American invention, reflecting the American legal culture of small government and empowerment of the people through their lawyers and the

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[47] Colin B. Picker, *A Framework for Comparative Analyses of International Law and its Institutions: Using the Example of the World Trade Organization* in COMPARATIVE LAW AND HYBRID LEGAL SYSTEMS (Eleanor Cashin Ritaine , Seán Patrick Donlan & Martin Sychold , eds.)) (PUBL. OF SWISS INSTIT. COMP. L) (2010) at 123.

[48] *Id*. at 121.

[49] *Id*. at 135.

[50] *Id*. at 122.

[51] Gregory F. Hauser, *Representing Clients from Civil Law Legal Systems in U.S. Litigation: Understanding How Clients From Civil Law Nations View Civil Litigation and Helping them Understand U.S. Lawsuits*, 17-AUT INT'L L. PRACTICUM 129, 131 (2004).

courts.[52] But, this method as applied in the WTO differs in some fundamental respects from that found in domestic systems, even that of the United States. Significantly, the WTO itself cannot bring a violating state to the DSB. It must rely upon states to bring enforcement actions. Even in the United States there are usually mechanisms for the State to sue or intervene in such cases.[53] But there is not such a mechanism within the WTO. Nor is the WTO's approach the norm for international organizations that provide dispute settlement for their members. For example, at the United Nations, the General Assembly and other specific parts of the UN system can bring a case against a UN state member to the International Court of Justice, albeit via the Advisory Opinion process.[54] The second difference is that in all common law systems, the common law making process is not the sole law making process. There is always an executive, and usually a legislature, that is able to provide any governance not provided by the common law courts through their law creating in their settlement of disputes. That is not the case with the WTO, where there is no comparable executive, and the members serve as the "legislature", albeit a non or dysfunctional legislature. These two differences suggest that the WTO governance architecture may have a significant flaw in its failure to either have a functioning legislature/executive or to permit the WTO itself to bring cases against recalcitrant members as a counterweight or safeguard against the DSB's law making.

2. The Weak Power of the WTO as an Institution

Another major governance characteristic that lends itself to a legal cultural analysis is the fact that the WTO is a relatively weak institution vis a vis its members.[55] The WTO is merely an institution, one that serves its members and which has little to no control over them. It is a member-run organization of sovereign states. Indeed, governance in the WTO may be hard to identify given the decentralized and disparate implementation of the WTO Agreements by the 150-plus members. Additionally, the growth of the RTAs has come at a significant cost to the multilateral WTO, weakening it yet further. This weak structure suggests that the WTO's governance is one of "limited powers". For those legal systems with strong governance systems this may present a legal cultural disconnect. Similarly, the issues raised when considering

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[52] Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1073-76 (1997).

[53] *See generally* Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853 (1989).

[54] *See* Statute of the I.C.J., art. 65 (stating that ICJ may issue advisory opinion on any legal question asked of it by authorized body of United Nations).

[55] Theodore R. Posner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 FORDHAM INT'L L.J. 481, 501 (2000).

implementation of the agreements by the WTO members suggests federalism or subsidiarity may be relevant issues to consider.

For those countries that are unitary and not federal or that do not belong to unions or confederations with similar issues, or for those states with strong centralized powers, this may be another governance issue where there may be a cultural disconnect between those members and the WTO. But, identification of the issue as one related to subsidiarity or federalism and of limited government, should make the issue less alien. It may even allow a better understanding of what is going on in the WTO, and permit the WTO to address those issues better, perhaps even by borrowing from legal systems that face similar issues. For example, as noted before, the WTO cannot even bring suits to the DSB—in contrast to the European Union and the European Court of Justice.[56] Another example that may be examined anew under this perspective is the proliferation of RTAs. Perhaps consideration of how other legal systems with weak central governments have countered a centrifugal pull from their constituent parts could be relevant to the WTO handling the increasing use of RTAs by WTO members.

3. The Lack of Change to the WTO Agreements

The failure of the WTO to amend its agreements is also amenable to a legal cultural analysis. Since it was established in 1995 the WTO has had essentially little development that was not related to the DSB's decisions. That development by the DSB, however, has and will necessarily fall short of what a rational and orderly system requires. By failing to develop, both the short and long term expectations of the members are frustrated. There is little question that the WTO members are growing increasingly impatient with the lack of development. The fact that they are turning ever more often to regional arrangements and abandoning the multilateral WTO is proof of that impatience. As a matter of legal culture this presents a disconnect with the progress that will have been experienced in the legal systems of most of the members of the WTO during that same period. During those fifteen-plus years, new domestic statutes, codes, regulations and other forms of positive law will have been created and implemented by those states' legislatures and executives. Such development is not only normal, it is expected in those legal cultures. While some legal cultures do not expect development, particularly in some non-Western or

[56] Treaty on the Functioning of the European Union Articles 258 and 260 (old arts. 226 and 228 of the EC Treaty).

religious legal cultures, for the most part, the legal cultures that belong to the western legal tradition expect development and change.[57]

Of course, international law in general is also slow to change, but that slow pace is not typically considered problematic. Indeed, we do not talk about international law being like a bicycle, as we do with international trade law—that it has to keep moving or it will fall over.[58] Perhaps the difference is due to the impression that the WTO is more of a "real" system, tied to the internal activities and needs of its members in a way that is less obvious with the vast bulk of international law. Furthermore, the normal acceptance of the slow pace of change in international law is undermined in the WTO context by the speed with which commerce, the heart of the WTO's mission, wishes to respond to new issues. Yet, the WTO is a part of international law, and subject to the same forces that slow down the development of international law—primarily that sovereign states simply cannot act as quickly as can domestic legislators. The WTO is thus caught in a tug of war between the demand for and the impediments to change that apply to all international institutions and fields. While examining the issue through legal culture may not provide any quick fixes to this issue, it can lead to greater understandings of the impatience of the state members and perhaps lead them to understand the different reality present in the WTO.

The above few insights that were gleaned from just a brief legal cultural consideration of the WTO's governance issues show the strength of the methodology, both for an international institution such as the WTO, but also for a complex modern state and its diverse domestic institutions, public and private.

IV. Conclusion

Comparative analyses cast light on the system and field under examination, but are perhaps most helpful in serving as a mirror in which to observe and consider our own systems. In this case, the discussion of the WTO's governance issues and the related legal cultural considerations may permit us to consider the governance issues within our own legal systems. The ISS conference brought people together under the issue of governance in Japan. The question is then whether the issues noted above may in any way be helpful when considering Japan's governance issues. Just by raising the

[57] Harold J. Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 7-10 (1983).

[58] *See*, *e.g.*, Robert B. Zoellick, *The WTO and New Global Trade Negotiations: What's at Stake* (October 30, 2001), COUNCIL ON FOREIGN RELATIONS, available at http://www.cfr.org/world/wto-new-global-trade-negotiations-s-stake/p4149.

questions and issues discussed here, there may be benefits for those considering Japan's governance concerns. For example, the issue of the WTO departing from its original governance design may be relevant when thinking of the current state of governance in Japan. It does this by forcing one to think back to original goals and principles and then to identify the factors that may have led to a departure from the original governance conceptions. Another insight that may prove helpful is to consider what appear to be new developments under a comparative lens. For example, when we consider the new and powerful role of the DSB within the WTO's governance under a comparative lens we discern common law characteristics. If we keep them in mind when examining the DSB it may then permit us to better understand the DSB and its roles and behaviours. A similar approach to novel, and perhaps disquieting and troubling domestic governance characteristics may also permit better understandings and insights.

A Comment on Colin Picker

Junji Nakagawa

Professor Picker's paper has two goals, direct and indirect. The direct goal is to shed new light on the governance issues of the WTO from the perspective of comparative legal culture. The indirect goal is lend some insights from the legal cultural analysis of the WTO to the analysis of governance issues in contemporary Japan. Though these two objectives are presented in a rather limited manner, Professor Picker successfully achieved both of these goals in his paper.

As a scholar of international economic law, I was much interested in his analysis of WTO governance. First of all, he succeeded in presenting the governance structure of the WTO, as well as its major functions, in a broader context of comparative legal culture. One notable example is his analysis of the WTO dispute settlement mechanism (DSM), a widely acclaimed model of international dispute resolution. Despite its vaunted reputation, as Professor Picker persuasively explains, the DSM is not an effective tool of WTO governance, due to its member-driven, casuistic system of dispute settlement and rule-making. The lack of standing on the part of the WTO itself, which makes it unable to bring cases to either the UN (International Court of Justice advisory opinion) or the EU (European Court of Justice), is another important but rarely mentioned shortcoming of the WTO DSM in terms of governance.

Another point he raised in his paper is the proliferation of regional trade agreements (RTAs) under the WTO. In contrast to the prevailing international economic law literature that regards RTAs as a serious violation of Article XXIV of the GATT 1994, Professor Picker views RTAs as proof of the dissatisfaction of WTO members, both developed and developing, with the limited achievements of the WTO since its inauguration, notably in the areas of rule-making and trade negotiation. When viewed from a comparative legal cultural perspective, these examples enable us to understand the WTO's structure and functions within the broader context of international institutions and domestic legal systems as well.

Secondly, his characterization of the WTO DSM as having common law elements is an eye-opening explanation of the subject matter. The academic literature on the WTO DSM has mainly focused on the analysis of its "case law," without paying much attention to its common law characteristics. Professor Picker successfully sheds a

new light on the WTO DSM, and makes a well-balanced assessment of its dispute settling and rule-making functions and the limits thereof. The author, however, would like to add one more explanation to Professor Picker's insightful comment on the WTO DSM, as to why it has come to include elements of a common law system: the prevalence of U.S. law firms in WTO litigation. American trade lawyers and European trade lawyers trained in the U.S. are involved in most WTO litigation cases, regardless of the nationality of parties, and they tacitly introduce elements of common law to the WTO DSM. One example is the common law principles and rules on the burden of proof, which neither the Dispute Settlement Understanding (DSU) nor the Dispute Settlement Rules of Procedure provides specific rules. As Professor Picker concludes, such common law elements of the WTO DSM may be positively accepted, but we should not disregard the fact that the failure of formal WTO rule-making has led to the overburdening of the WTO DSM, and this should be seen as among the most serious governance issues of the WTO.

With respect to the second, indirect goal of his paper, Professor Picker is humble in briefly showing the utility of his analysis in understanding the governance issues in Japan. For instance, he asserts the issue of the WTO departing from its original governance design may be relevant when thinking of the current state of governance in Japan. We see many such examples in state, local, and corporate governance. Secondly, as we saw in the previous paragraph, when we consider the new role of the WTO DSM within the WTO's governance through a comparative lens, we discern common law characteristics, and this enables us to better understand the roles and actions of the WTO's Dispute Settlement Body. A similar approach to novel and troubling governance issues in Japan may also permit better understandings and insights. Finally, in light of this last remark of Professor Picker, let me suggest analyzing the successes and failures of the recent judicial reforms in Japan (civil jury system, increasing enrollment in law schools, etc.). These reforms were inspired by the U.S. judicial system, but the heart of Japan's continental-based legal system remains unchanged. One may credit the success of the civil jury system to its similarities with the North American jury system, especially in the levels of cooperation between civil juries and judges. On the other hand, the failure of the Japanese law school expansion may be explained by the abrupt increase in enrollment without a proven rise in the demand for lawyers.

Professor Picker's paper is a unique contribution to the study of international economic law, notably the laws and institutions of the WTO. It should be fully expanded, so that readers can gain much more from his insights on the structure and function of the WTO and international economic law as a whole.