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From the editors

It would seem that the dawn of the twenty-first century has elicited varying responses around the world. The word “globalisation” has been accepted into Japanese (*gurōbarizēshon*), but deliberations about its meaning and effect continue unabated in the spheres of business and academia. In the new information age, time and space have contracted in a manner previously unimaginable; while we receive many benefits as a result, we do live (and must live) in a society where the unknown lurks around the corner. As if to challenge this uncertainty head on, the new century was greeted throughout the world with illumination and optimism. For example, on New Year's Eve at the University of Tokyo, the Yasuda Kōdō building was illuminated and a commemorative lecture was held.

The theme of globalisation has been prominent in the symposiums, seminars and forums organised by the ICCLP this past year. Consequently, we have been able to include several short articles, reports and essays touching directly or indirectly on that topic in this issue of the Review.

Last June in a lecture held at the Graduate School of Law and Politics, Emeritus Professor Matsuo Kōya spoke on “Trends in Criminal Legislation—A Review of the Heisei Period and Perspectives for the Future”. Professor Matsuo referred to factors necessitating review of the Criminal Code, such as changes in societal values, shifting attitudes to sentencing and developments in the types of crime. It seems realistic to assume that there will be a substantial change in criminal phenomena over the next ten to twenty years. However, Professor Matsuo stated “internationalisation” and “the information age” are inappropriate and inadequate as keywords to sum up the changes that will occur. He went on to describe how, at an international criminal law conference in Budapest in 1999, the word "proactive" stuck in his mind, but even this is an insufficient tag. He argued that criminal law is an issue that touches our lives individually and that theoreticians must respond accordingly. In concluding, he stressed that "globalisation" will be an extremely important concept and in order for criminal law to respond in a timely fashion it must take into account both the real world and the individuals in it.

The influence of globalisation on economics, politics, law and society is felt not just at a collective level; it has permeated our everyday lives. While eating a banana imported from Ecuador, your mind might wander in various directions: the price of the banana, freight methods, the operator of a South American banana plantation, the people working on the plantation, Japanese trading companies, environmental problems… Or when buying a single rose stem for ¥500 in Tokyo, you might consider: why is it that the same amount will buy a whole bunch in London?; how does the difference in price arise?; is it because roses sold in Tokyo are grown in Japan, while those sold in London are from Africa?; or is it because London is the centre of the rose growing industry? And so on.

For those responding to globalisation by advocating a change in emphasis from “government” to “governance”, the question is how to grasp actual incidents such as the collision with the Japanese fisheries training vessel Ehime Maru caused by the surfacing USS Greeneville off Hawaii: how will the Japanese and US governments, international organisations, the citizens of Japan and the US, and people of other countries variously react? It would seem that it is for the very reason that we live amidst such great uncertainties in a shrinking world overflowing with information that words like “governance” have emerged.

The time has come when international academic exchange too begins to blur at the edges and move towards a multidisciplinary paradigm. As a tentative step in this direction, the ICCLP is preparing,

with the cooperation of the University of Sheffield to conduct a workshop and international symposium in September 2001 where established and emerging academics from the fields of law, politics, economics and sociology can meet and exchange views.

Further, as a new direction in our Forum series, the 110th Comparative Law and Politics Forum allowed an opportunity for younger researchers, with ICCLP Visiting Associate Professor Christopher Hughes as the fulcrum, to openly exchange views in a workshop-style environment.

At the ICCLP, the creation of new networks for the purpose of international academic exchange continues apace. People, place and information are each important (although perhaps the network between individuals forms the foundation): in all three respects, our activities depend on the cooperation and assistance of many.

Our communications are by e-mail; manuscripts come and go as e-mail attachments; every day the number of messages in and out is well into double digits. The sense of trust between sender and recipient sustains a real but intangible communication.

The photograph of the illuminated Akamon gate which graces our opening page this issue was kindly provided by Mr Yamaguchi Kikuji, owner of a sushi shop near the University.

Wada Keiko, ICCLP Coordinator, ICCLP Review Editor
[Translated by Peter Neustupný]

Part I

TAMING DARWIN IN TURN-OF-THE-CENTURY CHINA: COMPETITION AND MORAL VALUES IN DOMESTIC POLITICS AND INTERNATIONAL RELATIONS

DON C. PRICE*

Competition is widely accepted as a positive feature of modern societies. One modern historian of China, recommending policy principles for Taiwan, presumably applicable to the People's Republic as well, advocated a free market in ideas, goods, and political power. His idea was that while consumer choices tended to yield improvement and efficiency in meeting the material needs of a community, likewise, the free exchange and criticism of ideas would promote the intelligence of the community and the citizens' choice between competing programs and candidates would most reliably select progressively better government.[1]

His recommendation, offered a decade ago, was directed specifically against critics of the Guomindang government who seemed to demand a higher level of honesty and public spirit than was generated by the existing markets of media information and political competition. While the principles he advocated are generally dear to the hearts of liberals and democrats, and have to some extent been vindicated by developments in the Republic of China, the criticisms to which he was responding are testimony to the conflict between the moral standards which many of us would apply to social realities and the competitive processes which seem to have generated them.

Among the most extreme critics are those who would prefer the rule of an enlightened elite, usually intellectuals like themselves, if not a philosopher king or modern sage. While the critics could find reason to be bitter about the opportunism and corruption of the political culture, Metzger could argue that open political competition and a free press would, in the long run, provide the safest correction of the evils, whereas the efforts of elites to impose perfection would backfire.

Such are some of the alternatives that revolve around the tensions between competitive processes and moral ideals. Others are perhaps more familiar to us on the international level today. There are those who argue that the unrestricted competitive global movement of goods, services, capital and enterprise will enhance the material welfare of everybody. On the other side are those who argue that such a process, driven by the self-interest of the participants, will exact an unacceptable toll on the environment and poorer populations.

Behind such arguments lies a conflict between two fundamental ideas. One is an appreciation of the possibility that competitive processes, regardless of the often purely self-interested motivations of the participants, may yield greater benefits to the overwhelming majority of those affected than any deliberate plan aimed at moral goals. The other is the view that competitive processes are unstable and uncertain in their effects, and that they must be subordinated to the guidance and requirements of moral standards. Those in the first camp are often identified (perhaps mistakenly) with Adam Smith, whose "invisible hand" was replicated in the Darwinian processes of social and biological evolution which gained wide currency in Western thought in the nineteenth century.[2] Those in the second can point to the tendency of unrestricted economic competition to destroy itself through monopolization, or they can cite the victims of Darwinian struggle—an unavoidable sacrifice in nature perhaps, but unacceptable in human society.

By the end of the twentieth century most moderately sophisticated observers in the developed world

* Professor of History, University of California, Davies. B.A. (Amhurst), A.M., Ph.D. (Harvard).

take both the benefits and evils of competition for granted. The unchecked drive for power within or between states is universally deplored as immoral, and the value of economic intervention, judiciously applied to maintain markets and avoid crises, as well as for humanitarian purposes, is widely accepted, while the protection of privacy and personal reputation as well as of the minds of children usually go unchallenged as grounds for regulating publication through various media. The tension between self-interested competition and moral goals is not thought to require a choice between mutually exclusive principles, and most of us these days don't care why.

This was by no means the case in China at the beginning of the twentieth century. There the raw power of newly confronted Darwinism posed dilemmas that are likely to strike us as naive. They are well illustrated in a brief article of 1904, recording an imaginary debate between an advocate of Darwinian evolution (天 演 家) and an advocate of *datong*, or universal commonwealth (大 同 家). According to the former, "Things compete and Heaven [i.e., Nature] selects; the superior triumph and the inferior lose," while the latter claims "All creatures are equal; universal love has no distinctions." The *datong*-ist says, "Although another may be inferior, how can I bear to destroy him . . . To sacrifice the blood and tears of the majority in exchange for the civilization of a minority, how can one resort to this!" The evolutionist responds, "Does today's civilization in fact surpass that of the past? . . . If so, how was this civilization achieved? I know that there is no answer to this question except for the word 'competition' . . . Suppose I am sorry for another and he is not sorry for me. If I take pity on him, and he does not take pity on me, then what?!" The author of the article, probably Ma Junwu, who had come under the strong influence of both KangYouwei and Yan Fu, summed up the dilemma: "*Datong* is an inalterable standard of right, but Darwinian evolution is an irresistible natural law . . . We cannot for a moment abandon standards of right, but we cannot for a moment escape natural law."[3]

The irresistibility of the natural law had its appeal, since it promised progress as an inevitable result of the natural process of history, without any extraordinary effort. For the heirs of late imperial Confucianism, surveying a past of repeated failures to recover the Golden Age of antiquity, despite the moral efforts of generations and dynasties of public servants and rulers, this alternative had some appeal. But it came at the price of heartlessness, and perhaps despair, since one powerful Darwinian argument was that those who take pity on others will be eliminated by those who do not. The alternative was to continue the struggle for moral goals amidst grave doubts that such efforts would have any substantial positive impact. In the face of such alternatives, it is understandable that considerable energy was invested in the search for some way to reconcile them or otherwise overcome the dilemma. In other words, to be acceptable, and thus useful, to Chinese, Darwinian competition would have to be tamed. The most extensive previous English language studies of Darwinism in Chinese thought of this period have highlighted the inconsistencies in the Chinese use of evolutionary determinism as well as the enlistment of Darwinian ideas in the cause of Chinese nationalism. The present paper, in addition to considering previously neglected textual materials bearing on the subject, and some new applications of competition to the political realm, takes a somewhat different approach, considering the ways in which Chinese sought to reconcile Darwinian competition with moral purposes. Their efforts, I contend, show that more than nationalism was at stake, and their inconsistencies, however opportunistic, were by no means intellectually illegitimate, in light of some of the best Darwinian thought in the West at the time.[4]

The moral dilemma posed by Darwinism was not felt in China alone. The placement of altruism in a natural order including mankind continues to occupy sociobiologists and geneticists in academia today, but it is not a major social or cultural issue. It was so in the nineteenth century West, but in early twentieth century China it was particularly acute, precisely because of the cultural context. Victorian England accepted, honored and rewarded competition, especially in the social and

economic realms. Herbert Spencer used the phrase "survival of the fittest" before Darwin published his evolutionary theories in 1859. The demographic mathematics of Malthus (1798), according to whom growing population would always outstrip the increase in food, influenced all the major Darwinians, while Charles Lyell spoke of the "struggle for survival" and the right of the strongest" in nature as early as 1834.[5] Moreover, in linking survival with the traits which made it possible, Darwinism accorded with utilitarian ethics, while social Darwinism, justifying the stratification of society and the privileges of the prosperous, blamed the poverty of the poor on their lack of the bourgeois virtues of discipline and self-restraint.[6] The losers were thus not just the innocent weak, but those whose sins were properly rewarded with poverty. In England, it was not difficult to invest competition with positive moral significance.

Such was not the case in China. China had a long tradition of arguing from limited resources to a justification of social stratification, a point common to early Confucianism, Legalism and Mohism, but the major tradition did not justify stratification by competition. As Confucius said, "Gentlemen do not compete." Originally, competition was supposed to be eliminated by strict observance of a ritual code tied largely to a hereditary elite. Eventually Confucianism itself survived by largely abandoning the hereditary principle in governance, and recruiting its elite through what was a de facto competitive system, but the system was not conceived of as competitive, the successful recruits were supposed to have demonstrated their wisdom and virtue, rather than success in competition, the unsuccessful were not thought of as having been eliminated in a struggle, and the operation of the system was not intended to produce anything new or better. To be sure, the system was nevertheless keenly competitive, but the possible parallels with Victorian England were, as far as I know, never mentioned by Chinese who sought to understand or adopt competition as a social value.

To the contrary, the novel appeal of competition to Chinese in the late Qing is well illustrated by the case of Yan Fu, who found in the Darwinian world view an exhilarating and compelling contrast to dominant assumptions and values in China. In the process, he shifted the emphasis of Darwinism from competition over limited resources to competition for wealth and power, with no foreseeable limit to the possibilities of increasing wealth. Indeed, he rejected frugality as the ideal of a culture which had resigned itself to stagnation rather than risk competition. Instead, Yan Fu accepted competition as a natural and universal reality which China needed to confront or perish, and embraced it as the means to the kind of progress which had obviously occurred elsewhere, and preeminently in England, the homeland of Darwin and Spencer. Yan's espousal of Darwinism was part of a campaign which boldly rejected traditional Chinese values to embrace the criterion of social utility—and especially that of national survival.

Although emergent Chinese nationalism has attracted historians' attention as perhaps the most powerful of the passions fueling the reform and revolutionary movements in the late Qing era, other considerations as well underlay the appeal of Darwinism. Benjamin Schwartz has noted the sheer intellectual appeal of a system of thought which seemed to explain an entire new world for which the previously comprehensive interpretation of Confucianism was no longer adequate.[7] This element in the appeal of Darwinism is evident in another system which had begun to take shape well before Yan introduced social Darwinism to China, and that was precisely the system, developed by Kang Youwei, which explained the universal progress of the world to the future *datong*. Kang was inspired in his mid-twenties by his first encounters with European civilization to seek a comprehensive understanding of the suddenly much larger world. In the 1880s he developed an early version of the utopian philosophy which was later completed in his *Datong shu*. In its final version this philosophy was reconciled with an interpretation of Confucius as a prophet who had foreseen the progress of the world through three stages, leading from universal strife through partial order to universal equity and harmony.

This striking historical framework has to some extent obscured the dynamics of the process it purported to describe, but it is important to note that Kang did not base his ideas on mere hope or faith in Confucian revelation. On the contrary, his early writings, which did not mention this prophecy at all, did provide a plausible, if somewhat implicit, mechanism of progress. Hardly scientific in any sense, it nevertheless took account of the vastly expanded geographical and cultural world which China now faced, and undertook a rigorous approach to the construction of a universal rational value system. It was based on his analysis of fundamental human capacities and motivations: humanity is sociable and desires happiness, is capable of intelligent choices, and is growing in knowledge and wisdom over time. According to Kang, mankind, in its quest for happiness, and through the growth of its collective intelligence, would come to understand and respect the basic equality of all humans, and their right to personal autonomy, including the right to participate in their government. In what we might characterize as a kind of Darwinian competition of ideas and ideals in the minds of a maturing humanity, Kang expected the superior to drive out the inferior, leading to the emergence of a perfect moral order. Thus, progress resulted from more enlightened choices regarding moral ideals and the kind of social organization necessary to realize them.[8]

Perhaps as early as the 1902 draft of his *Datong shu* Kang specifically addressed the issue of Darwinian competition in the realm of society and the international arena. Natural, amoral struggles had brought about the combination of smaller groups into larger ones, he said, but mankind had discovered better ways to form large combinations, through democracy and federations. To continue amoral international struggles in the present would now amount to a step backward, and an abandonment of mankind's potential to realize its moral nature and to attain universal happiness. Instead, the struggle now must be conscious and voluntary, in the pursuit of moral goals. In fact, he was most explicit about the need to suppress competition (爭, perhaps better translated as "strife" or "competitive spirit") which he viewed as incompatible with social harmony.[9] This does not mean that Kang expected progress to cease, or that he was indifferent to the question of motivating it. Rather, he thought that a system of honoring inventors and other outstanding contributors to human welfare would enhance the impulse to service which would be natural to most in any case.

In broad outline, this vision is rather analogous to that of English Darwinians who saw in human biological and social evolution a departure from pre-human mechanisms of evolution. Huxley, with whom Kang may have been familiar through Yan Fu's translation of *Evolution and Ethics*, held that mankind, having emerged as a species and attained to civilization through a process of amoral struggle, could now reject it, although not entirely. Yan, who focused on morality and social virtues as the product of social evolution, rejected Huxley's dichotomy between the two, and whether Kang could have been inspired by Huxley's original message through the filter of Yan's translation is doubtful. Even less likely is that Kang was influenced by Alfred Russel Wallace, barely second to Darwin as discoverer of biological evolution through natural selection. In fact, Wallace found natural selection inadequate as an explanation for the emergence of the modern human brain, endowed with a potential for both social and technological innovation which set mankind apart from the rest of the animal kingdom. Later theorists would stress the impact of cultural factors on reproductive success and the evolution of the brain in mankind. Whether the liberation of human values from competitive instinct occurred in the course of biological or social evolution, in any case, Wallace, Huxley and others illustrate the tension between commitment to humanitarian moral principles and the recognized power of the struggle for survival in the West as well.[10]

What Yan and Kang shared with those who accepted the operation of Darwinian progress in the West, was two things: 1) a recognition that moral standards must be rationally grounded in some kind of

social utility, although the definition of social utility could differ, and 2) a competitive mechanism which could explain the kinds of progressive developments which, as could now be seen, the world had experienced and could further anticipate. But as the writer cited above noted, the alternatives offered by Kang and Yan involved very different moral commitments. Kangs' explanation relied on the pursuit of goodness, whereas Yan's relied on the pursuit of power, as the title of one of his most influential essays suggested: "Explaining Power."[11] Moreover, Kang's utopian ideal was a universal moral order, whereas Yan's commitment was strictly to the nation. How could a person embrace both theories? How could a person long for universal harmony and happiness, and at the same time accept the idea that he must arm his nation to participate in an international struggle in which armies would be slaughtered and defeated populations enslaved?

The appeal of Kang's alternative can be seen in much of the reform literature that appeared at the end of the nineteenth century. Yan Fu's articles were very influential, but many of the important journals were produced by disciples of Kang Youwei and their allies. Kang himself campaigned for national strengthening under the leadership of the emperor. In contrast, his disciples had been inspired by the utopian and democratic ideas which he had disclosed to them in the early 1890s.[12] As Liang Qichao recalled, Kang concentrated on personal and global ideals, and had not taught them nationalism. At one point in 1896, before he read Yan's articles, he even suggested to Kang that the propagation of their universalist ideas should take precedence over national politics: " . . . Our purpose is the spread of our doctrine, not politics; it is the salvation of the living creatures of the earth and countless worlds, not the salvation of one country." [13]

Within a matter of months, however, Liang had read Yan Fu's reform articles and his translation of Huxley' *Evolution and Ethics*, which explained how human ethics are the product of natural evolution. Liang enthusiastically embraced Yan Fu's work, but continued to link it to the utopian altruism of Kang Youwei. The way in which he did so indicates the crucial importance of "groups" to the question of morality in evolution—that is, "groups" or "societies" (群) rather than individuals, as units of competition in the human realm. It was precisely because man competed and survived best when organized into groups that group struggle tended to displace individual struggle as the primary story of human history, and as Yan, drawing on Spencer and Huxley, explained, groups cooperate and function best when they promote the wisdom and virtue, including inter-group altruism, of their members. Liang expanded on this idea, declaring that nations functioned as groups, and that the whole world could be thought of as a group (天 下 群). Then, after quoting the description of the age of Great Peace/Equity (太 平) and the description of the *datong*, now interpreted by Kang as the prophecy of the future utopia, Liang asked: "Is this not precisely the whole world group!"[14]

Some others were fascinated not only by Yan's discussion of groups as units of competition, but as organizations through which citizens could voluntarily promote their common welfare in a variety of ways. One of the works which must have inspired them was Huang Zunxian's *Gazetteer of Japan*, which described voluntary organizations in that country. From this work and other sources, most likely missionary publications, they formed an impression of flourishing voluntary associations in the more advanced countries, in which the people promoted all kinds of cultural and charitable activities. Among them Tang Caichang also listed societies for promoting international peace.

As regards the question of progress through imperial reform, Kang Youwei's model, Peter the Great of Russia, was not always accepted by his disciples. Xu Qin 徐 勤, for example, denounced Russia's expansionist foreign policy pursued according to the Peter's instructions, but also claimed that the Russian threat was diminishing thanks to the progress of international order, demilitarization, freedom and equality. True strength, he argued, came not with tyranny like Russia's, but with higher

levels of culture and education, and parliaments and other forms of popular organization. Tang Caichang admitted that Peter had been enlightened by autocratic standards, but said that he was crueller than the first emperor of the Qin dynasty. Like Xu, Tang denounced Russia's expansionism, and criticized both Peter and Russia's international rapacity in a long article on world trends entitled "On the Presence or Absence of Standards of Right in the Reforms of the Nations throughout the World."[15]

As the above examples show, many reform writers found the perspective of Darwinian natural selection on the international world repellent. Much of the reform propaganda suggested that standards of conduct in the international arena were improving, and that democracy was on the rise around the world. A number of writers seemed unwilling to pursue progress through autocratic rule, which conflicted with the ideal of democracy, and were critical of the pursuit of national power. Perhaps the most extreme example of commitment to universal moral progress, at the expense of national interests, was Tan Sitong, who called for an end to nations, declared it fortunate that China was weak, and said that England, America, Germany and France would do well to reform China, Turkey and the other "sick men" of Asia by force to cure their illnesses and prevent their infecting the rest of the world.[16] A similar idea was expressed in 1902 by Ma Junwu who declared that it would have been better for Russia under Peter the Great had she been conquered by Sweden, for under Swedish rule they would have enjoyed the liberty for which instead they now must still wage a bloody struggle.[17]

Although the thought that immoral struggle between groups enabled mankind to realized its capacity for social morality may have been intriguing and encouraging, it still left reformers with the problem of what to work for in the present age. As Liang continued to contemplate world affairs and the implications of Yan's writings, he foresaw a bitter struggle. In his 1897 article, "On the Principle of the Displacement of Monarchy by Democracy," he saw with democracy (*minzheng* 民政) the beginnings of the era of Great Peace /Equity (*taiping*) domestically in countries like America and France, and a relatively early transition in China, but then anticipated a protracted period of international conflict, with the universal Great Harmony still "hundreds or a thousand or more years away."[18]

It was still the amoral, deadly competition of groups that selected the best groups for survival. Not until the whole word was united in a single group, would all mankind be joined in a moral community. Liang's article did not explicitly answer the question, when world unity was attained, would it happen because all the inferior groups had been eliminated by the best one, or because good groups decided to unite peacefully? Kang's answer to this question in his *Datong shu*, that it would come about through a federation of democracies, and that the pursuit of disarmament and democratic government would advance the process, had perhaps already been communicated to his disciples. Already in the 1890s Xu Qin and Tang Caichang had suggested that democratization reduced the severity of international strife, and Liang himself pointed to the expanding scale of human societies as a step to the realization of global unity. Thus, the progress of democracy within nations became a focus of attention, as well as the pursuit of an international order in which aggression could be checked. And yet, the question remained how effective the appeal to conscience and sympathy would be in pursuing the long term goals in the present, and to what extent Darwinian processes still determined the course of events.

The tension between national and universal humanitarian commitments remained, and efforts to resolve it centered on two points. One was whether democracy should be pursued as a matter of fundamental human rights, and the other was whether self-interest, as a fundamental motivator of the struggle for survival at all levels, was really compatible with the altruistic and humanitarian pursuit

of these rights. Neither Kang nor Yan had provided satisfactory answers.

As Kang's most influential disciple, Liang Qichao's thinking on these questions was important, and it continued to develop after 1898 when the coup that ended the reform movement forced him and other reformers to flee to Japan. On the ship which bore him into exile, Liang began reading a popular novel by Shiba Shirô, which opens with a scene of cosmopolitan idealism and gender equality reinforced by the attractions of Platonic relationships: a Japanese traveler is admiring the Liberty Bell in Philadelphia in the company of two beautiful and enlightened European women.[19] And on his arrival in Japan he learned that Japanese thinkers experienced the same kind of tension between universal ideals and Darwinian evolution as Kang's disciples had encountered in China. The first year's contents of his new journal, *The China Discussion*, included a variety of Chinese and Japanese writings devoted to the universal ideals. Kang Youwei's early critiques of Confucian hierarchy and affirmation of equality and universal love, were published for the first time, along with portions of Tan Sitong's *Humanitarian Philosophy* (仁 學). Serialization of Shiba Shirô's novel, with its survey of liberation struggles around the globe, began with the first issue. And the link of natural rights with cosmic moral norms continues through the first year's installments in the series "Writings on Liberty," with citations from Japanese authorities like Fukayama Toratarô 深 山 虎 太 郎[20] and the famous Nakamura Masanao. "In producing mankind Heaven desired that all should share peace and happiness, promote morality together, and esteem knowledge and encourage the arts and crafts together," declared the latter. " How could it intend for one to be strong and the other weak, one superior and the other inferior?" And warfare, with all its cruelty and suffering, Nakamura denounced as an "inexcusable sin against the intentions of Heaven and the benevolence of the Creator."[21]

Among other things, Nakamura's ideas also appealed to Liang because he attributed the strength of the West to the virtues of the citizens, and attributed those virtues to moral standards based on the people's right to autonomy. On the one hand, this right to autonomy was also the basis for nations' rights to independence, which was a pressing goal for China. And on the other hand, Liang felt that China's weakness was largely due to her people's failure to understand and value their rights. Thus, Nakamura's ideas linked *datong* ideals with the pursuit of national strength which China would need in the present age.

At the same time, however, Liang was increasingly troubled by the thought that Chinese were unwilling to struggle for their rights and freedoms. This led him for a time to advocate Rousseau's idea of natural rights, thinking that if his countrymen could be persuaded that they deserved them, they would be willing to struggle for them. Of course, to speak of rights as "natural" also invested them with an absolute and immediate moral power. But as the value of struggle became more important, so, too did the Darwinian idea of evolutionary struggle, to which Nakamura had so strongly objected.

The major source of Darwinian influence on Liang at this point was the Japanese thinker Katô Hiroyuki, who argued against natural rights and claimed, as did Spencer and Yan, that all moral and social progress itself was the result of Darwinian struggle. In Yan Fu's writings Liang had found confirmation for Kang's vision of progress, in processes at work even in the midst of an international jungle. But Yan had not dwelt in detail on the process whereby civilized values emerged, and his Darwinism had left Liang with an unresolved tension between *datong* and struggle. And so, shortly after quoting Nakamura's denunciation of war and of the equation of strength with superiority, Liang introduced Katô's idea of "the right of the strongest," equating right with might, beginning in the animal kingdom with the power of lions to devour weaker animals at will, but extending to the human realm as well. Is this what Katô meant for him?

At first glance it might seem that in turning to Katô, Liang had decisively abandoned morality for power, but we find that this is not correct when we look more closely at Liang's treatment of Katô's ideas, presented in *The China Discussion* as a translation of text by Katô with "amplifications."[22]

The first two sections of the article appear to provide a reasonably accurate paraphrase of the Japanese. According to Katô, as human knowledge accumulates and society progresses, the advantage in struggles for survival and power shifts from brute strength to intelligence. In the process, power comes to be wielded in milder ways, because the dominated, as their intelligence advances, find ways to protect their own interests. Katô concedes that the idea of might making right is generally detested as immoral, while the ideas of freedom and popular rights are welcomed. It is explained, however, that the growing equality between the power of the stronger and that of the weaker leads precisely to an equalization of rights and a realization of freedom. "In contrast to what the idealists say, freedom and equality are not given men at birth by Heaven. Humanity is like the plants and animals, and not specially endowed by Heaven with freedom and equality." And yet through the struggles of the stronger and weaker, the human race is unique among life forms in attaining freedom and equal rights.

Here Katô seems to have caught Liang's attention, apparently for the first time, with a point on which Liang had not dwelt in his previous reflections on Darwinian selection. That is, that evolution not only selects for more democratic governments as an important survival trait in competition *between* societies, but generates democracy as a product of struggles *within* society. Thus democratic tendencies win out not as a sort of successful random mutation among various organizational possibilities, but as the product of purposive struggle. And the units of competition are not just states, but people within states. This is an important point when we consider that Rousseau's democratic doctrines appealed to Liang at this time as "the most effective antidote not only to traditional despotism but also to the slavish mentality of the Chinese people."[23]

Thus, what Katô provided was a strategy, grounded in a Darwinian framework, for national strengthening and the moral advance of humanity. He offered a theoretical basis for optimism that elevating the intelligence of the people (as Liang's journalism, for example, undertook to do) would strengthen them in their struggles against oppressive rulers, while simultaneously legitimizing such struggle as the natural way to realize democratic ideals.

At the same time, Liang was certainly intent on applying the principle that freedom is won by those who become strong, to nations as well. To Katô's second section, he added a lesson of his own quite absent from the original. He began with a quote from Kang Youwei: "The way of Heaven has no favorites. It always blesses the strong."[24] Liang continues, "That the strong always dominate the weak is the greatest principle of evolution." The only path to freedom is to seek strength. "If one wants personal liberty, he must first strengthen himself. If one wants liberty for a country, the country must first be strengthened." This "amplification" clearly demonstrates Liang's concern to link the values of freedom to the evolutionary process not only as instruments in the quest for national survival, but as ends for the individual and for the nation.

In the third section of the translation, Liang's selectivity and interpretation are even more evident. He changed Katô's original title, "The Connections between the Right of the Strongest and Laws and Morality" to "The Development of the Rights of the Strongest," and omitted the passages on law and morality altogether. Instead, he concentrated on the process in which power within societies is first oppressively concentrated, and then in later stages, increasingly equalized. In place of the omissions, Liang inserted the idea that the pressures of competition between groups sharpened the concentration

of power within groups, leading to the ultimate achievement of rights by the oppressed in a series of "revolutions" (*geming*). Once again, he identified the stages of this process with Kang Youwei's three ages: Overcoming Disorder, Rising Peace/Equity, and Great Pece/Equity (據 亂, 升 平, 太 平). Even in the West, capitalist exploitation and male domination remained to be overthrown by two more revolutions. At this point Great Peace/Equity will have been achieved *within* the "groups." But only when the strengths of the "groups," or nations, are equalized, will they enjoy equality of rights, in a stage which he described as "Great Peace/Equity among the groups which have achieved Great/Peace/Equity" (*taiping zhi taiping*).[25]

It is significant that amidst his preoccupation with the struggle for rights as a path to national strength, Liang also found in Katô's thought a more persuasive Darwinian basis for Kang's doctrine of progress. In contrast to Kang, who expected natural evolution to be overcome by moral ideals, Yan, who stressed natural selection in competition between groups, Katô showed how the process of self-interested struggle itself, favoring intelligence over brute force, generated moral norms and distributed rights universally, in a way that could satisfy Liang's anticipation of the *datong*. As Liang conveyed in this introduction to Katô's thought, the quest for power, whether on the part of tyrants or people, is a matter of self-interest, but it is from their struggles that freedom and equality are born.

Katô had still more in store for Liang with his naturalistic explanation of the emergence of morality, even altruism, from self-interest. This was the subject of the article, "Three Kinds of Self-interest," which Liang presented to his readers in the fall of 1902.[26] Here, Katô pursued a thoroughgoing reduction of altruism to self-interest in a Darwinian mode. The lower animals, he noted, pursued only the crudest kind of self-interest. The origins of regard for the interests of others can be seen in higher animals which herd together, and it is further developed in primitive man, where a "limited pure self-interest" appears, while in civilization we encounter a "transformed (變 形) self-interest." The latter can be further subdivided into the "material" (唯 物 的) and the "mental," or "emotional" (唯 心 的). In the former case, one serves the interests of others deliberately to promote his own. In the latter case, one directly identifies the interests--the joys and sorrows, weal and woe, of the other with his own, as with friends and family. And yet, precisely because one so emotionally identifies with the other, this does in fact amount to self-interest. Going a step further, religions and moral teachers can so influence us that a failure to serve the interests of others is too painful to bear, but even here, it is our self-interest in avoiding such pain that provides the ultimate motivation.

In his commentary on this analysis, Liang notes that Katô's theories have been bitterly attacked for their extremism, but defends him on the grounds that he is actually appealing to people's self-interest to promote altruism. Nothing in Katô's discourse supports this interpretation of his purposes, but in showing an evolutionary basis for the most sublime moral impulses, Katô has certainly aroused Liang's enthusiasm. In fact, Liang is struck by the evolutionary genesis of altruistic sympathies, and comments that emotional self-interest can be expanded beyond the family to the village, the country, the world, and all living things. Referring to Tan Sitong's *Humanitarian Philosophy*, he says that this depends on the strength of the affective powers of the "ether" (以 太), the fundamental substance of the universe. "Now since the district, the country, all living things under heaven are one's own body, one will suddenly and unaccountably feel a great pain on seeing their pain, and will experience a great joy on seeing their joy . . . For the sake of my own interest, I will be obliged to seek a way to eliminate their suffering and create joy for them."[27] In this way Katô helped Liang reconcile Darwinian principles with his most altruistic utopian visions, bearing in mind that time would be required for their realization.[28] It might be added that this account of the origin of the moral sentiments was reinforced by selections, including vivid anthropological case studies, from Ariga Nagao's *Progress of Society*, which was serialized in Liang's journal at the same time.[29]

In contrast to such benevolent thoughts, Liang did not follow Katô in approving the present international struggles. Liang was highly selective in the writings he chose to translate, and those he passed over included several which reflected Katô's more unpleasant side, including his endorsement of war, even in the present age, as promoting a fierce and unyielding competitive spirit valuable in all areas of endeavor, and his rejection of disarmament as leading to weakness and decadence.[30] Social Darwinism can certainly be ruthless, but this side did not appear in Liang's writings.[31]

Liang's more sophisticated understanding of the relation between self-interested biological and social struggle, on the one hand, and moral struggles, on the other, was carried a step further in a 1903 article by Ma Junwu. Ma's purpose in this article was to reconcile Darwinism with socialism, and in particular, the ideas of Marx. He pointed out that "Darwin's view that in the competition between things, the fittest survive, and the socialists" view that mankind (or groups of people, *renqun* 人群) should live in harmony and share their benefits equally, could hardly be more different." Nevertheless, he pointed out that the struggles of groups emerge in the pursuit of self-interest, and have produced powerful representatives of the workers' interests in Europe. Moreover, the progress resulting from such struggles has led to "the discovery of moral principles to overcome such evil human traits as selfishness, arrogance, cowardice, and brutality . . . Clearly feelings of mutual respect and sympathy regularly advance together with the civilization of the times." Thus, Ma showed how Katô's use of struggle to explain the rise of equality and freedom is reflected in class struggle, altruism and the pursuit of the highest ideals. Finally, Ma uses this explanation to refute the objections of those who invoke the *datong* ideals in the ancient Liyun (禮 運)text of the *Book of Ritual* to oppose the principle of natural evolution.[32]

Liang himself soon found the international threats too severe to allow for the pursuit of liberty and equality in China. This meant, of course, the postponement of a moral struggle which had aroused his enthusiasm, and it was a step that he took with evident disappointment.[33]

A well-known alternative to Liang's pessimistic view of the international scene was that of anarchists influenced by the Russian Peter Kropotkin. While Kropotkin adopted a naturalistic explanation of evolution, including the natural selection of the fittest, unlike Spencer, Huxley or Wallace he emphasized the survival advantage of altruistic and cooperative behavior in the non-human animal kingdom, and thus made the virtues a matter of instinct, rather than the overcoming of instinct by society. Equipped with this theory, anarchists could be more optimistic about the prospects for a universal moral community, and could advocate revolution not to change the governments of nations, but to eliminate them as artificial barriers to man's further progress. In the same vein, they could promote the study of Esperanto, as a means of bringing the world together. Unfortunately for anarchist internationalism, however appealing as a way around the conflict between Darwin and *datong*, it could not answer the needs of most Chinese for an understanding of the efforts required for national survival, and thus remained on the fringes of realistic political discourse.[34]

More politically important was the way in which revolutionaries could justify their pursuit of revolution in the present age. Despite the sophistication reflected in the writings of Liang Qichao and Ma Junwu, by 1903 the terminology of Darwinian competition was widely used and abused in arguments for both reform and revolution. At the beginning of his immensely popular pamphlet *The Revolutionary Army*, Zou Rong proclaimed, "Revolution is a natural law of evolution."[35] Sometimes the rhetoric revealed a profound disregard for fundamental Darwinian principles, as when Song Jiaoren declared: "The victory of the superior and the defeat of the inferior is the principle of evolution. For things to collapse when they reach their peak [manifests] the cycles of physics."[36] Hu Hanmin justified overthrowing the Manchus on the grounds that "they had placed themselves in the

ranks of the losers, and that for our Han race to compete externally it is imperative to cast off these masters—it is all in natural accord with evolution."[37]

In the process, however, revolutionaries had to deal with the objections of Liang Qichao, who after 1905 began to advocate enlightened despotism. In Darwinian terms, he argued that societies must proceed along an evolutionary path through stages, and that institutions which might be advantageous at one stage would actually weaken a group if adopted prematurely. China, in other words, was unprepared to reap the benefits of democracy. To this, Sun Yat-sen's answer was that while institutions evolved by stages, once developed, they could be adopted in their most perfected form. And when revolutionaries stressed the need for the national liberation of Han Chinese from a Manchu yoke of domination, Yan Fu, who had never favored violent revolution, implied that such an attempt to base the nation on the Han race was characteristic of a premodern, "patriarchal" (*zongfa* 宗法) stage, and thus a step backward for China. To this argument, Hu Hanmin countered that the nation state was a characteristically modern political entity.[38]

For Liang Qichao, who experienced a considerable contradiction between his earlier *datong* goals and the Darwinian world in which he thought they would have to be postponed, it had been particularly important to see how moral ideals could emerge from a-moral struggle. Revolutionaries seemed secure in the moral significance of their effort, even when morality meant (as in the case of Zou Rong) vengeance. For most revolutionaries, the problem was the opposite: to show how they could directly pursue their ideal goals and at the same time contribute to China's survival and world peace. Even so, there were those who were sensitive to the question where morality lay in a world in which the evolution of society seemed to be driven by self interest. A case in point is Song Jiaoren, who reacted to Katô's doctrines in a way similar to Liang's.

In 1906 Song Jiaoren came across an article by Katô entitled "Selfless Altruism is None Other than Egoism," presenting much the same argument as that in Liang's translation of "Three Kinds of Self-interest". "As I read his words, they seemed quite logical," Song wrote. Were it not for egoism, he thought, then all morality, religion, law, etc., would have no purpose in their respective realms and be of no use. He found his own ideas in accord with Katô's. "When I finished reading, I found myself quite moved, and decided I should propound them in the future. (I had also previously said that 'egoism' was not like Yang Zhu's 'egoism,' for egoism is simply the criterion of harm and benefit. I think that in calculating benefit and harm, one has to expand the scope as widely as possible, and the time period as long as possible. The implications most be conceived most directly and grandly. But in the last analysis, the self must serve as the standard in order to seek the true goals of the self. If one extends this idea, then one can [arrive at] *datong* for the whole world, not to mention patriotism and preservation of the race.)"[39]

But however well the pursuit of national liberation through domestic democratization might have reconciled a tension between moral action and Darwinian processes, the goal of national strengthening for survival in a competitive world was never far from the minds of the revolutionaries. The understanding of practical realities was more important than Darwinian rhetoric or the philosophy of motivations in considering the implications of revolution for national survival in the present age. Reformers opposed to revolution repeatedly raised the danger that revolution itself would weaken China and expose it to foreign intervention. Thus they were eager to see indications that the threat would not be grave, and their writings repeated a theme present in the earlier writings of the reform era. Revolutionaries often argued that in the present age, the struggles were becoming less brutal, and were being brought under control through the operations of international law. Hu Han-min, for example, claimed that the strengthening of China through revolution would remove a dangerous focus of great-power rivalry in the modern world, and contribute to the support of world

peace. Even now, he claimed, there was an advance of equal rights among nations, paralleling the standard of equal rights among citizens within nations. "Small countries," he wrote, "frequently manage to use [international law] as a weapon to resist large ones . . . Why? Because to place small countries beyond the protection of international law is not only disadvantageous to the interests of the weak but also in many ways damages those of the strong as well. They also fear the opinion of the international community (*guoji shehui* 國際社會) and fear to violate the law with recourse to naked force."[40] A short time later, countering Liang Qichao's warnings of foreign intervention, he wrote, "As the world constantly progresses, the international community's respect for legal principles and precedents increases. The grounds for invoking self-protection are interpreted so strictly that henceforth rapacious countries will certainly no longer be able to use this as a pretext for aggressive measures."[41]

In this article, we see an effort to base a rise in international morality on national self-interest that parallels Katô Hiroyuki's explanation of the emergence of equality on individual self-interest. A more elaborate account of the link of morality in international relations with the advance of democracy appeared in the major revolutionary organ three years later, in a discussion of the lessons of the Persian Revolution. In that article, either Hu or Wang Jingwei 王精衛 argued that Russia, which posed the major danger of intervention, would not dare to act for fear of renewed revolutionary uprisings at home, as had happened during the Russo-Japanese war.[42] Thus, the struggle for rights domestically deterred aggression abroad, and would favor the further spread of democratic revolution.

Aside from advancing the cause of international peace, democratization was, of course, also advocated by revolutionaries as a way of making China stronger. On this point, again, they had to answer Liang Qichao's charge that it would weaken China, and that China lacked the preconditions for an effective parliamentary democracy. By the eve of the 1911 revolution, however, Liang himself had yielded to the nationwide tide of sentiment in favor of a constitutional democracy, and, whatever his misgivings, was prepared to argue for it. At the same time, Liang and other opponents of revolution found the tables of debate turned on them, as revolutionaries criticized the weaknesses of the Qing court's plans for constitutional government. At this point, the implications of democratic institutions were discussed in far more concrete terms than they had been when Yan Fu first argued for participatory government as a way of promoting national unity and encouraging citizen initiative and responsibility.

Now, as specific constitutional arrangements were debated, a consensus emerged among the most influential reformers and revolutionaries alike that a system consisting of a party cabinet responsible to a parliament representing two major parties was the correct choice for China. The arguments in favor of this choice had a strong Darwinian flavor. The most prolific single writer on the subject, Zhang Shizhao, relied on the authority of English writers like Albert Dicey and Walter Bagehot, of whom the latter, in general terms, had argued that a tradition of "contests in assembly" and "government by discussion" proved to be the strongest forms in the selective evolution of political forms.[43] While Zhang did not directly refer to these points in his discussion of the English system, he made it plain that the English system of competitive politics selected the most able leaders and provided them with the best instruments for pursuing the national interest. Song Jiaoren, strongly influenced by Zhang's description of the English system, made a point of criticizing the Qing court's plans for their failure to produce a strong and united leadership, since there was no connection between government administration and a system of competitive selection on the basis of performance. Song himself went on to rally the support of a majority party for a system modeled after England's. Liang Qichao, in his most extensive advocacy of such a system, dwelt on the dangers of the intense international competition which threatened China's survival, and pointed to

the need for a system that would enable her to "compete with the outside world." Echoing Zhang's arguments, he stressed the point that only a leadership chosen in open competition between two parties would command the support of the nation as a whole. A party which lost that support must immediately yield to the other party.[44]

In the political realm the kind of internal competition advocated was obviously somewhat different from the ruthless struggle for survival which prevailed in the evolution of species. Ideally, the competitors would be two parties, and the final elimination of either was not the desired result. On the other hand, the parties would be represented by numerous candidates, and the selection would represent the competing choices of a still much wider electorate. And as Bagehot claims to demonstrate in his essay, such a system further provides for weeding out old ways, values, and ideas, and allows for adaptation in the competition between groups. The Darwinian element remains. And yet as Liang Qichao observed, such a system would have to involve a managed competition, in which the contestants agreed on the rules of the competition and the need to keep it going.

The beneficial operation of competition within the realm of politics could be hoped for because it had been seen to operate elsewhere, and seemed to demonstrate the possibility of a widely shared commitment to the interests of the national "group." As of the early twentieth century it was by no means clear that the same consensus would operate in the realm of economics. Yan Fu, following Adam Smith, had first argued that the enlightened self-interest of participants in a free market economy would benefit the whole nation. For Adam Smith, the beneficial operation of the "invisible hand" showed the harmony of the "enlightened self-interest of individuals and the interests of society as a whole." Yen Fu found it necessary, in a passage reminiscent of Song Jiaoren's discussion of expanded egoism, to explain that enlightened self-interest was closer to true righteousness than an extravagant righteousness which denied self-interest altogether.[45] Nevertheless, in the realm of economics, we are still dealing with a system in which calculations of self-interest, rather than spontaneous identification with and sympathy for others, is generating unintended benefits in the same way that a more ruthless kind of competition has done in biological evolution.

In fact, Yan's confidence in the invisible hand was shaken by the experience of the modern West, where technological advances were strengthening "the monopolizing efforts of robber barons" and leading to a socially explosive growth in the gap between rich and poor.[46] Liang Qichao pursued this theme in his own observations on the growth of large trusts, especially in America. Liang anticipated that in less than fifty years, as a result of Darwinian selection, no more than a few dozen huge companies would survive in the world, and all human institutions would have become accessories in the service of protecting production. Despite the doctrines of Adam Smith and the promotion of free markets in the nineteenth century, the operation of markets had led to periodic crises, a downward pressure on wages, exploitation of female and child labor, and monopolies. The advantages of scale favored the swallowing up of smaller corporations into ever larger monopolies, which benefited from protectionism and generated an irresistible impulse to imperialism and international domination. The era of competition by blood and iron was over, he claimed, and the era of competition in production had arrived. In the long run, Liang predicted, trusts, having eliminated market competition, would destroy themselves in catastrophic crises, having played the historic role as transition to a socialist order. Confronted with this prospect, revolutionaries (most famously Sun Yat-sen) wanted to forestall violent social revolution through state management of the economy and the market, so as to avoid the ascendancy of big capitalism in China without, however, eliminating competitive individual incentives. For his part, Liang hoped that China could escape domination by developing her own trusts.[47]

More important for our purposes than his specific recommendation, however, was Liang's

recognition that in the realm of economics, vast forces were at work which were no longer guided by a benevolent invisible hand, and that these vast economic forces were now bending other institutions, including the political, to their purposes. Only after this process had run its self-destructive course would more benevolent purposes be able to gain the upper hand—a very visible hand in the form of the deliberate human choice of a socialist alternative. Silently reverting to the dynamic that Katô had provided, and in a way eerily reminiscent of Marx, Liang expected that self-interested struggles of an increasingly intelligent majority against the dominant minority would produce freedom, equality and rights.

As noted above, previous studies of Darwinism in China, and of Late Qing thought in general, have highlighted the importance of emerging Chinese nationalism in shaping the reception, creation and use of new ideas. As the imperative of national salvation prompted Chinese to seek an understanding of the vast impersonal forces shaping the change and progress in the world, that same imperative prompted them to intervene in the course of history and to alter China's place in the course of events. Since the forces, especially the Darwinian process of evolution by selection, seemed to be irresistible, efforts to change China's fate verged on logical contradiction. The arbitrariness of Chinese arguments was particularly marked where the inevitable flow of history was used to justify policies designed to change the inevitable flow. Such inconsistencies have been treated at some length by Schwartz and Pusey. On the other hand, they are not, of course, peculiar to China, much less to Chinese nationalism, and the adaptibility of Darwinism to different agendas in the West is a familiar story.[48] In fact, Darwinians themselves recognized the random and creative aspects of the evolutionary process, and Wallace, in particular, stressed the emergence of human intelligence and volition as a major factor in the evolutionary process.[49] If Chinese refused to resign themselves to elimination because China had seemed hitherto stagnant ill-adapted to the modern world, theirs was a position well justified in terms of the most sophisticated Western thought. In fact, as the above reflections on ideas of Kang Youwei, Liang Qichao, Ma Junwu and Song Jiaoren show, there was an intense interest in understanding the range and limits in their choices, and the social and cultural materials on which Chinese, and man in general, could draw in the effort to tame Darwinism and pursue their chosen goals.

Late Qing Chinese were struck by the prospect of engaging a new world at the beginning of a new era. As the world faces the beginning of a new millennium, we can see that much of the current discourse echoes that of a century earlier. One of Liang's counterparts in current American journalism would be Thomas Friedman, columnist for the *New York Times* and author of a best-selling book on globalization. Awe-struck by the technology of the internet, and the instantaneous impact on national governments of the choices of millions of investors world-wide, Friedman, who sees the internet market as "Darwinism on steroids," is optimistic about the way in which the new global trade in goods, services and capital will promote democratization and create a global community of shared interests.[50] Less optimistic is John Gray, professor at the London School of Economics and former adviser to Margaret Thatcher in her efforts to rescue England from its economic doldrums through the discipline of the market. As Gray points out, those (like Friedman) who invoke Joseph Schumpeter (perhaps the twentieth century's counterpart to Adam Smith) to cheer the role of “creative destruction” have misread him. More in tune with the forecasts of Yan Fu and Liang Qichao, Gray notes that Schumpeter stressed the tendency of capitalism to destroy itself.[51] Despite their differences, however, both Friedman and Gray see the need for national governments to take a hand in managing the markets, in the interest of human welfare and the preservation of the planet. In distinction to their Chinese counterparts a century ago, these commentators are no longer concerned about the fate (much less the strengthening) of a nation. The greatest looming threat now is to the global environment and with it civilization in general. And yet, as they wrestle with the vast impersonal forces that now seem to dominate the course of events, and seek ways to manage them,

their efforts may move us to a greater respect for the Chinese who sought to tame Darwin for human ends a hundred years ago.

NOTES

[1]Thomas A. Metzger, remarks at Conference on Political Opposition in Modern China, Lynchburg, Va., 1991. For his published analysis of characteristic aspects of modern Chinese thought inimical to intellectual (and political) give-and-take, see his "Continuities between Modern and Premodern China: Some Neglected Methodological abd Substantive Issues," in Paul Cohen and Merle Goldman, ed., *Ideas Across Cultures: Essays on Chinese Thought in Honor of Benjamin I. Schwartz* (Harvard University Press: Cambridge, Mass., 1990.

[2] Loren Eiseley, *Darwin's Century* (Doubleday: Garden City, N.Y., 1961), pp. 52-53, 178-182.

[3] Junping 君平, "Tianyandatong bian 天演大同辨," *Juemin* 覺民 9+10, in Zhang Nan 張楠 and Wang Renzhi 王忍之, ed., *Xinhai geming qian shi nian jianshilun xuan* 辛亥革命前十年間時論選 (Hong Kong, 1962) pp. 872-874. Ma Junwu 馬君武 used the name Junwu in this journal, and since the fictitious moderator of the debate in this article called himself 平子, it seems likely that Ma adopted the pen name Junping for this occasion. See 辛亥革命時期期刊介 (Beijing, 1982), I:415.

[4] See Benjamin I. Schwartz, *In Search of Wealth and Power: Yen Fu and the West* (Harvard University Press: Cambridge, Mass., 1964), and James Reeve Pusey, *China and Charles Darwin* (Cambridge, Mass. 1983).

[5] Eisely, p. 180.

[6] Jim Horner, "Henry George on Robert Thomas Malthus: Abundance vs. Scarcity," *American Journal of Economics and Sociology* 56: 4. 595-607 (Oct. 1997).

[7] Schwartz, *op. cit*.

[8] Li San-pao 李三寶, "K'ang Yu-wei's *Shih-li kung-fa ch'üan-shu* (A complete book of substantial truths and universal principles)," *Bulletin of the Institute of Modern History, Academia Sinica* 中央 研究院近代史研究所季刊 7: 687, 689, 692, 699, 706 (1978).

[9] 大同書 (Zhonghua: Shanghai, 1925), pp. 105-7, 428. 争 .

[10] Eisley, pp. 305-6, 321-324. See also Thomas H. Huxley, *Evolution and Ethics and Other Essays* (Macmillan: London, 1911), pp. 34-38, and Mason Gaffney, "Alfred Russel Wallace's Campaign to Nationalize Land: How Darwin's Peer Learned from John Stuart Mill and Became Henry George's Ally," *American Journal of Economics and Sociology* 56: 4. 609-615 (Oct. 1997).

[11] 嚴復 , "Yuan qiang 原強," in Jian Bozan 翦伯贊 et al., ed., *Wuxu bianfa* 戊戌變法 (Renmin chubanshe: Shanghai, 1957) III: 53.

[12] Liang Qichao 梁啓超, *Qingdai xueshu gailun* 清代學術概論 (1921), p. 136; "康有為," in *Wuxu bianfa* IV:14-15.

[13] Ding Wenjiang 丁文江 and Zhao Fengtian 趙豐田, *Liang Qichao nianpu changbian* 梁啓超年譜長編 (Shanghai renmin chubanshe, 1983), p. 58.

[14] "Shuo qun 說群," *Shiwu bao* 時務報 26: 1-2* (1897/5/12).

[15] 唐才常, "Lun dadi geguo biantong zhengjiao zhi you wu gongli 論大地各國變通政教之有無公理," *Xiang xue bao* 湘學報 7:25b-26 (1897/6/19). See also Huang Zunxian 黃遵憲, *Riben guozhi* 日本國志 (Zhejiang shuju, 1898; Taibei facsimile reprint, Wenhai, 1974), 37:33a-34b; 911-914. Huang's report appeared in the 1890 edition of this work, with which Liang was certainly well acquainted. Xue Fucheng 薛福成, writing in England, echoed Huang's ideas with respect in particular to joint stock companies, in an essay which Liang had also probably read. See Noriko Kamachi, *Reform in China: Huang Tsun-hsien and the Japanese Model* (Cambridge, Mass., 1981), p. 165-7; and Don C. Price, *Russia and the Roots of the Chinese Revolution* (Harvard University Press: Cambridge, 1974), ch. 3.

[16] *Tan Liuyang quanji* 譚瀏陽全集 (Taibei reprint, 1968), pp. 281, 302.

[17] *Eluosi da fengchao* 俄羅斯大風潮 (n.p., 1902) 序 pp. 1b-2.

[18] "Lun junzheng minzheng xiang shan zhi li 論君政民政相 之理," *Shiwu bao* 41: 4* (1897/10/6). For other illustrations of pessimistic views of the present age in reform propaganda, see Pusey, pp. 142-144.

[19] Ding and Zhao, p. 158. A partial translation of the novel, Shiba Shirô's 柴四郎 *Kajin no kigu* 佳人之奇遇, appeared in Liang's *Qingyi bao* 清議報. For a discussion of the novel's appeal for Liang, see Philip C. Huang, *Liang Ch'i-ch'ao and Modern Chinese Liberalism* (Seattle, 1972), pp. 48-52.

[20] "Caomao weiyan 草茅危言," in "Ziyou shu 自由書," *Qingyi bao* 27:3b-6/1744-51* (1899/9/15), especially the section "Minquan" (Popular rights).

[21] "Zizhu lun xu 自助論序," *Qingyi bao* 29:5 (1899/10/5). See also 28:5 (1899/9/25).

[22] "Lun qiangquan 論強權," *Qingyi bao* 31: 4-6/1999-2003 (1899/10/19). Unable to locate the original of Katô's text, I have referred here to the republication in *Katô Hiroyuki bunsho* 加藤弘之文書 Part III [Works of Katô Hiroyuki], 加藤弘之講演全集第一 (京都, 1990). See pp. 8-12, "強者の權利の定義," "強者の權利と自由權の關系," "強者の權利と道德法律の關系." These lectures appear to summarize the evolutionary vision which Katô had developed in 1893 in his *Das Recht des Stärkeren*. For a comprehensive analysis of that work, see Winston Davis, *The Moral and Political Naturalism of Baron Katô Hiroyuki* (Berkeley: University of California, Berkeley Institute of East Asian Studies, 1996), ch. 4.

[23] Hao Chang, *Liang Ch'i-ch'ao and Intellectual Transition in Modern China* (Cambridge: Harvard University Press, 1971), p. 192.

[24] Kang's "Preface" 序 for the journal *Qiang xue bao* 強學報, in Ge Gongzhen 戈公振, *Zhongguo bao xue shi* 中國報學史 (Taibei, Xuesheng shuju photographic reprint of original edition, n.d.), p. 124.

[25] "Lun qiangquan 論強權," pp. 6-7*.

[26] "利己心の三種." This essay was ninety-fourth in Katô's collection *Tensoku hyakuwa* 天則百話 (Hyakubunkan:Tokyo, 1899), and appeared in *Xinmin congbao* 新民叢報 21 (30 Nov. 1902), pp. 56-61. This essay seems to summarize ideas on altruism which Katô had developed in 1893 in his *Das Recht des Stärkeren*. For a comprehensive analysis,

see Davis, ch. 4.

[27] Cf. "Tensoku hyakuwa," pp. 281-287.

[28] Liang further develops his ideas on altruism in his discussion of Benjamin Kidd, in which he abandons the reduction of altruism to self-interest, but the evolutionary genesis of it in his account of Kidd's philosophy does not depart significantly from Katô's. See "Jinhualun gemingzhe Jide zhi xueshuo 進化論革命者頡得之學說" *Yinbingshi wenji* 飲冰室文集 (Taibei, 1959), 上, 1:252-259. For Liang's misreading of Kidd see Pusey, pp. 280-292.

[29] 有賀長雄, "Shehui jinhua lun 社會進化論," *Qingyi bao* 47-80 (with interruptions): 1-27* (00/6/7-01/2/19). Cf. the original (Ono shobô: Tokyo, 1890).

[30] "Sekai no shisen oyobi eisei no heiwa 世界の止戰及び永世の平和," *Tensoku hyakuwa* , p. 111-12.

[31] For a focus on Liang's less idealistic approach to the international struggle, see Pusey, pp. 310-316.

[32] "Shehui zhuyi yu jinhualun bijiao 社會主議與進化論比較," in Mo Shixiang 莫世祥 ed., *Ma Junwu ji* 馬君武集 (武昌 , 1991), pp. 83-93.

[33] See his "Da Feisheng 答飛生 ," *Xinmin congbao* 新民叢報 40-41: 156-163 (1904); "Zhengzhixue da jia Bolunzhili zhi xueshuo 政治學大家伯倫之理之學說 ," *Xinmin congbao* 38-39:48-49 (1903 or 1904); and Chang, chap. 8.

[34] Pusey, esp. pp. 427-433.

[35] *Geming jun* 革命軍 in Du Chengxiang 杜呈祥, *Zou Rong* 鄒容 (Nanjing, 1946).

[36] Gongming (pseud.) 共明, "Hanzu qinlûe shi 漢族侵略史," *Ershi shiji zhi Zhongguo* 二十世紀之支那 1:31 (1905).

[37] "述候官嚴氏最近正見," *Min bao* 民報 2: 13 (1906/5/3).

[38] For a detailed discussion of these debates, see Pusey, ch. 7.

[39] Chen Xulu 陳旭籙 ed., *Song Jiaoren ji* 宋教人集 (Zhonghua: Beijing, 1981), 2:637-8.

[40]胡漢民 , "Paiwai yu guojifa 排外與國際法," *Min bao* 7: 22-23 (1906/9/2).

[41] *Ibid*., 9: 63 (1906/11/15).

[42] Minyi 民意 (pseud.), "Bosi geming 波斯革命," *Min bao* 25: 1-12 (Jan. 1, 1910).

[43]*Physics and Politics* [1872], in Forrest Morgan, ed., *Bagehot's Works*, Vol. IV,) Travelers Insurance Co.: Hartford, Conn., 1891), pp. 457-576.

[44] For a fuller discussion of these points see Don C. Price, "Constitutional Alternatives and the Struggle for Democracy in the Revolution of 1911," in Cohen and Goldman, ed., *Ideas across Cultures*, pp. 232-246.

[45] Schwartz, pp. 116, 126.

[46] Pusey, p. 74.

[47] "Ershi shiji zhi juling tolasi 二十世紀之巨靈托辣斯," *Yinbingshi wenji*, 上 , 2: 94-119.

[48] Greta Jones, *Social Darwinism and English Thought: The Interaction between Biological and Social Theory* (Harvester Press: Sussex, 1980), pp. ix, 195.

[49] Eisley, pp. 346-350.

[50] *The Lexus and the Olive Tree* (Anchor: New York, 2000).

[51] *False Dawn* (The New Press: New York, 1998).

SOME NEW TRENDS IN THE PROTECTION OF FOREIGN INVESTMENTS: THE EXAMPLE OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

BRIGITTE STERN*

This article provides some general overview of the mechanism for the settlement of investment disputes represented by ICSID, the International Centre for the Settlement of Investment Disputes.

It will really focus on the more recent trends, which consist of the use of the ICSID to ask for redress of a State's interference with an investment, irrespective of the existence of any contractual relation between the State and the investor. This recent evolution provides a new role for the ICSID, which is a role of general protection of foreign investments against any action of interference with the investment by the State's authorities. This evolution was brought about by a more and more liberal interpretation by the arbitrators of what can be considered as "the consent of the State" required by Article 25 of the Washington Convention creating ICSID (consent given in a national law, consent given in a bilateral treaty on the promotion and protection of investments, consent given in a multilateral treaty on market liberalisation).

The purpose of this article is to provide a general overview of the mechanism for the settlement of investment disputes represented by ICSID, the International Centre for the Settlement of Investment Disputes, created by the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed on 18 March 1965 and entered into force on 14 October 1966.

The first precedents concern mainly the contractual relations between a State and a foreign investor, through what has become to be known as State contracts, for which the agreement was really elaborated. However, today the picture is quite different, and this paper will focus on the new interpretation of the role of ICSID, which consists of the use of ICSID to ask for redress of a State's interference with an investment, irrespective of the existence of any contractual relation between the State and the investor. This recent evolution has created a new role for the ICSID, which is a role of general protection of foreign investment against any action of interference with the investment through the State's authorities, whether the army (such a case has already been decided) or the judiciary (France has brought such a case, but it was settled before a decision was taken) or any other State power. This evolution was brought about by a more and more liberal interpretation by arbitrators of what can be considered as "the consent of the State" required by Article 25 of the Washington Convention creating the ICSID.

This contribution will be presented in two main parts:

A general presentation of the arbitral institution, with its main rules of organisation.
The extensive interpretation of the ICSID jurisdiction and of States' liability towards foreign investment.

* Brigitte Stern is a Professor at University Paris I, Pantheon-Sorbonne, and on the ICSID List of Conciliators and Arbitrators, on proposal of France, since 1992.

A GENERAL PRESENTATION OF THE ARBITRAL INSTITUTION

In fact, today, the Washington Convention can be considered a success-story, as 139 States have signed it, and 126 have deposited their instruments of ratification. For example, Japan ratified the Convention very quickly after its adoption: it signed the Convention on 23 September 1965, and ratified it on 17 August 1967.[1]

While the Washington Convention provides for conciliation as well as arbitration, this article will concentrate on arbitration.

1. Establishment and organisation of ICSID

The International Centre for the Settlement of Investment Disputes (hereiafter referred to as "ICSID" or "the Centre"), in fact is not an arbitral Tribunal but just an institution to "provide facilities" (Article1) for arbitration between States and private investors. What is meant by "provide facilities"? For example, if the parties have agreed to an ICSID arbitration clause, and one of them refuses to nominate its arbitrator, ICSID will make that nomination; or if each party has nominated its arbitrator but they cannot agree on the nomination of the third arbitrator, then again ICSID will make that designation. Another way to facilitate arbitration is to provide the parties with a list of conciliators and arbitrators that have the "benediction" of ICSID. In fact, this list is established on proposals coming from the States parties to the Washington Convention, as well as by designation by the Chairman of the Administrative Council, who is the President of the World Bank. Such lists are called respectively "the Panel of Conciliators" and "the Panel of Arbitrators" (Article 12). Naturally the list is not compulsory, and the States and private investors are free to choose anyone else as an arbitrator (or conciliator) to resolve their case.

The seat of ICSID is at the seat of the World Bank, in Washington, but could be moved by the Administrative Council, composed today of 126 members, that is of one representative of each contracting State. Such a body being too large to be efficient for day-to-day work, a Secretariat has been set up. The Secretary-General plays an important role in the functioning of ICSID: for many years, this position was occupied by Mr. Shihata, who was recently replaced by Mr. Ko Yung Tung from Korea.

2. The constitution of the Tribunal and the award

When a request for arbitration is sent to the Secretary-General of ICSID, the latter sends a copy of the request to the other party and registers the request, unless it is manifestly outside the jurisdiction of the Centre. The Secretary-General can only refuse a request if it is manifestly outside the jurisdiction of ICSID, as it is the Tribunal which has the power to decide on his own jurisdiction ("*la compétence de la compétence",* Article 41).

The Tribunal can consist of one arbitrator or an uneven number of arbitrators, as the parties shall agree, and if they cannot agree, it shall consist of three arbitrators (Article 37). If the arbitral

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[1] Thus, the entry into force of the Convention for Japan was the 16 September 1967, in application of Article 68 of the Convention:

> **Article 68**
>
> (1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.
>
> (2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Tribunal is not constituted within 90 days of the notification of the registration of the request, than the Chairman appoints the missing members. He, contrary to the parties, has to choose the arbitrators from the names of the Panel.

The Tribunal decides the case in applying the law as stated in Article 42 (1):

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

This provision has given rise to an immense legal literature on its interpretation, and it is not possible to consider these controversies here.

The award is not subject to setting aside by a national court, but the Convention provides for an annulment procedure before an ICSID *ad hoc* Committee of three persons appointed by the Chairman from the Panel of arbitrators. Annulment of an award can only be granted on limited grounds provided for in Article 52:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

It is notable that a serious departure from the law applicable to the merits is not a ground of annulment.

If the award is annulled, it can be submitted to a new ICSID Tribunal. This procedure can of course take quite some time.

Once the award is final, this is not, of course, the end of the story, as the goal of any party entering into an arbitration is to receive effective redress, that means to have the award rendered in its favour enforced. Here we encounter one of the most interesting features of an ICSID arbitration, which is that the award rendered by an ICSID Tribunal needs no *exequatur,* no leave of enforcement, to be enforced in all the Contracting States:

> Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award *as if it were a final judgement of a court in that State.* (Art. 54, emphasis added)

This article of course is an immense facilitation to have an ICSID award enforced compared to any other arbitral award.

The Convention, however, does not suppress all enforcement difficulties, especially if the private party wins the case. We must not forget that we are dealing here with an arbitration process involving sovereign States. These States benefit from immunities from enforcement that the Washington Convention can not set aside, as we are reminded in Article 55:

> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any other State from execution.

3. The jurisdiction of ICSID

It is important to state from the outset that the submission - or even the consent to submission - of a case to an ICSID arbitration, bars the State whose nationals are the private investors from according them diplomatic protection. This was one of the provisions considered to be an incentive for the developing countries to ratify the ICSID Convention: if they accept an ICSID arbitration, they no longer have to fear the diplomatic protection of the investors by powerful States from the North, where the investors usually come from.

In order for the jurisdiction of the Centre to exist over a dispute, three procedural conditions must be met, according to Article 25:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

This means that for the jurisdiction of the Centre to exist, three conditions are to be fulfilled at the same time, in a cumulative manner: first, a condition *ratione personae*; second, a condition *ratione materiae*; third, a condition *ratione voluntatis*, related to consent.

Concerning the jurisdiction *ratione personae*, it must be underlined that the Washington Convention had from the outset a very broad approach in the definition of a "national of another State": a national of another State can be a natural person who has the nationality of a Contracting State, or a juridical person.

For a natural person to be concerned by an ICSID arbitration, it is stated that his nationality must be different from the nationality of the State party to the dispute. This means that ICSID is not to be used to settle disputes between a national investor and his own State, nor disputes between a dual national, of whom one nationality is the nationality of the State party to the dispute and that State. This precision is given because of the difficulties which were raised before the Iran-US Claims Tribunal by the dual national cases, Iranians-Americans having been allowed to sue their own State, Iran, before the Tribunal.

For juridical persons to be concerned by ICSID arbitration, Article 25 explains the situation:

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date, and which, *because of foreign control,* the parties have agreed should be treated as a national of another Contracting State for the purpose of this Convention. (Emphasis added)

This means that, when a foreign owned national subsidiary has a dispute over an investment with its national State, it can, for the purpose of settlement of disputes under the Washington Convention exclusively, be treated as a foreign corporation.[2]

Concerning the jurisdiction *ratione materiae*, the comment will be very brief as there is no definition of what constitutes an investment in the Washington Convention. However, the customary meaning of the expression "investment", as well as the jurisprudence of ICSID Tribunals, has made it clear that this notion is quite encompassing.

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[2] This is in clear contradiction with the general rule followed in the ICJ decision in *Barcelona Traction,* 5 February 1970.

Finally, concerning jurisdiction *ratione voluntatis* - the necessary consent in writing -, the Report of the Executive Directors made at the time of the adoption of the Washington Convention, in order to explain and comment it, stated that "*consent of the parties is the corner atone of the jurisdiction of the Centre*".[3] The act in which the parties agree to submit a future dispute to ICSID arbitration was to be in writing, in order to avoid difficulties of proof and unnecessary discussions on the reality of the consent of both parties. What was probably referred to in the Washington Convention was the necessity of an arbitral clause (*"clause compromissoire"*) or arbitration agreement *("compromis d'arbitrage").* However, in the above mentioned Report, it was added that the consent need not be given in a single instrument:

Nor does the Convention require that consent of both parties be expressed in a single instrument. Thus, a host State might in his investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

ICSID Tribunals dealing with jurisdiction used the possibilities left open by this comment. As far as the consent in writing of the State is concerned, ICSID Tribunals have adopted an innovative interpretation, - although already potentially existing in the text of the Convention - that gives a broad realm to ICSID Tribunals' jurisdiction.

THE EXTENSIVE INTERPRETATION OF ICSID JURISDICTION

It must be noted that mere ratification of the Washington Convention is not the consent in writing that is required from a State in order to give jurisdiction to an ICSID Tribunal, as stated in the Preamble of the Convention:

> No Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under an obligation to submit any particular dispute to conciliation or arbitration.

This consent has in general been given by the acceptance by a State of an ICSID arbitration clause included in a contractual relation with a private investor, or through the signature with such private party of an ICSID arbitration agreement.

However, ICSID Tribunals have also found that another type of commitment in writing by a State could be considered as its consent in writing to submit an investment dispute to an ICSID arbitration.

1. Consent can be given by a State unilaterally in a national law: *The Pyramids case*[4]

The *Southern Pacific Properties Ltd. v. Arab Republic of Egypt* (commonly referred to as the *Pyramids case,* sometimes the *Egoth case*) stemmed out of an ambitious tourism project exploiting of the Egyptian Pyramids. The Egyptian government had entered in 1974, through a public

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[3] Emphasis added

[4] ICSID Case N° ARB/84/3, Award of 14 April 1988, *Yearbook Commercial Arb'n.*, 1991. 28. See W. Craig, "The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk", *ICSID Review. Foreign Investment Law Journal*, 1993. 264; G. Delaume, "The Pyramids Stand –The Paraos Can rest in Peace, *ICSID Review. Foreign Investment Law Journal*, 1993. 231;
See also, *Manufactures Hanovre Trust Company v. Arab Republic of Egypt and General Authority for Investment and Free Zones*, ICSID Case N° ARB/89/1, 31 July 1995. (this award was followed by a settlement between the parties) ; *Tradex Hellas S.A. v. Albania*, ICSID Case N° ARB/94/2, 24 December 1996, *ICSID Review. Foreign Investment Law Journal*, 1999. 161 ; ICSID Case N° ARB/93/1, 1997, award of 21 February 1997, *Yearbook Comm. Arb'n*, 1997. 60.

corporation Egoth, into contractual relations with a Hong Kong corporation, Southern Pacific Corporation (hereinafter SPP), which wanted to develop tourism facilities near the Pyramids. Some Antiquities lovers as well as environmentalists started to try to oppose the project. Egyptian and international public criticism followed, and the Egyptian government was finally obliged, in 1978, to cancel the project. SPP considering that it had been expropriated without compensation, tried to obtain damages through arbitration.

After a first ICC arbitration, which was cancelled by the French courts for non-existence of an arbitration agreement accepted by the Egyptian State, the claimant SPP tried to take Egypt before an ICSID Tribunal. Egypt, having signed no arbitration clause or agreement with SPP, denied the jurisdiction of the ICSID Tribunal. SPP then relied on Article 8 of Egyptian Law N° 43, which provides in its relevant parts:

> Investment disputes in respect of the implementation of the provision of this law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered...

As stated by the ICSID Tribunal in a preliminary decision on jurisdiction (27 November 1985), “thus, the determinative question as to the Tribunal’s competence in the present case is the following: Does Law N° 43 constitute a self-executing offer by Egypt to accept the Centre's jurisdiction with respect to the present dispute?”

The answer was given in a decision on the ICSID Tribunal's jurisdiction rendered on 14 April 1988. This answer was in the affirmative.

Egypt did not contest the possibility of giving an advanced consent to an ICSID arbitration in an abstract and general unilateral legislation, but contended that Law N° 43 did not have such effect, because it did not apply to the situation. The Tribunal did not accept such defence, in which Egypt tried to make a distinction between disputes concerning "the non-performance of obligations under Law N° 43" to which Article 8 could apply and disputes concerning "the non-performance of obligations under a contract", to which it could not.

In order to ascertain the meaning of Article 8, the ICSID Tribunal declared that "the starting point in statutory interpretation, as in the interpretation of treaties and unilateral declarations, is the ordinary or grammatical meaning of the terms used."

Applying this method to the case, and relying on other different elements, the Tribunal arrived at the conclusion that this reference to ICSID in the Egyptian law is the required consent in writing:

> A number of considerations make it impossible for the Tribunal to accept that the phrase "within the framework of the Convention" and "where it applies" have the effect of introducing into Article 8 an implicit requirement of a further expression of consent in order to establish the Centre's jurisdiction.

The case was therefore decided on the merits, and in a decision rendered on 1 April 1992, almost US$30,000,000 in damages was granted to SPP. Egypt requested the annulment of the award, but as the case had already lasted for so long, the parties decided to settle. Thus, the case ended in a settlement between the parties (whose terms have remained secret).

It can be underlined, as a closing remark that Egypt was held liable in this case for an interference through a decision of the executive power with a contract between two private entities Egoth and SPP, Egoth a public corporation in the initial scheme having been privatised in 1976. However,

Egypt was quite closely, and partly contractually, linked with the project because the agreement between Egoth and SPP was following a Heads of Agreement signed on the Egyptian side by the Egyptian Ministry of Tourism, which was a kind of "umbrella agreement". We shall see that in the next case, no contractual link whatsoever could be found between the government and the party claiming that its investment had been interfered with by the government.

2. Consent can also be given in a bilateral treaty on the protection of investments: the *AAPL v. Sri Lanka case*[5].

Recently, there has been a tremendous development of bilateral treaties for the promotion and the protection of foreign investments throughout the world. Furthermore, more and more of these treaties make reference to ICSID arbitration. Thus the question is whether such a reference to an ICSID arbitration in a general bilateral treaty on investment be considered to be the consent in writing sufficient to give competence to ICSID?

Quite often, ICSID Tribunals are ready, if the language so permits, to consider the mere reference to ICSID arbitration as the consent in writing of the State. This has been the position adopted in the *Asian Agricultural Products v. Sri Lanka* case. No contractual link existed between the government of Sri Lanka and the foreign investor AAP Ltd, again a Hong Kong corporation, nor had an arbitral agreement been signed. There existed a bilateral treaty between the United Kingdom and Sri Lanka, which had been extended to Hong Kong through an exchange of notes. In this bilateral treaty, Article 8 provided for the submission to ICSID arbitration of "any legal dispute arising between that Contracting Party and a national or a company of the other Contracting Party concerning an investment of the latter in the territory of the former." The ICSID Tribunal considered that it had jurisdiction on the sole basis of Article 8. The bilateral treaty provides for submission to ICSID, if after three months the dispute between the investor and the State has not been solved. The investment of AAPL was damaged by the action of the Sri-Lankanese police and security forces. The company asked the government for damages, but their letter remained unanswered for three months: this has been deemed sufficient by the arbitral Tribunal to prove that the dispute could not be amicably solved within a three month period, and therefore the ICSID Tribunal could assert jurisdiction.

The same interpretation is also possible, when the reference to ICSID arbitration is given, not in a bilateral treaty, but in a multilateral treaty, such as NAFTA or the Energy Charter.

Many more pending cases before ICSID Tribunals have in fact been introduced on the basis of bilateral treaties for the protection of foreign investments. The picture today is quite astonishing: of 29 pending cases, only five are based on an arbitration clause, two are based on an arbitration agreement, one on a national law and the rest, that is 21 cases, are based on multilateral (in fact only NAFTA) or bilateral treaties of investment protection.[6]

As underlined by one of my colleagues at the University Paris I, if such a trend continues, and there is no sign that it should stop, on the contrary, given the afore mentioned figures, the role of ICSID arbitration, “could undergo a tremendous change, as it would escape from its traditional contractual framework, in order to become a kind of *tool to control that States respect legality in the economic*

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[5] ICSID Case N° ARB/87/3, 1990, Award of 27 June 1990, *ILM* 1990. 580. ; Exerpts in French in *JDI*, 1992. 215, “Chronique” of E. Gaillard.; D. Asiedu-Akrofi, “ICSID Arbitral Decision AAPL v. Republic of Sri Lanka”, *AJIL*, 1992. 371; Sornarajah, “ICSID Involvment in Asian Foreign Investment Disputes: The AMCO and AAPL Cases”, *BYIL*, 1994. 69.

[6] See for example, *American Manufacturing and Trading Inc. v. République du Zaïre*, ICSID Case N°ARB/93/1, 1997, award of 21 February 1997, *Yearbook Comm. Arb'n.*, 1997. 60, *JDI*, 1998. 253.

field."[7]

These evolutions might bring a new vitality to ICSID arbitration.

[7] Geneviève Burdeau, "Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les Etats", *Revue de l'arbitrage*, 1995, n° 1, p. 21, her emphasis.

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Japan and the Post-Globalisation Security Agenda

CHRISTOPHER W. HUGHES*

Introduction: the post-globalisation security agenda

Globalisation and security are both key, but also strikingly underdeveloped, concepts in the study of International Relations (IR) and International Political Economy (IPE) contemporary era. Even more striking is the lack of proper articulation in much of the extant literature regarding the implications of the intersection of these two concepts. There have been some notable effects to tackle the issue of what can be termed the 'globalisation-security nexus' in relation to globalisation's creation of a new range of security actors and problems, but in many cases these studies have lacked a strong empirical basis.[1] Likewise, those studies that have focussed on particular empirical problems created by globalisation in regions such as the Asia-Pacific have tended to lack a strong conceptual basis in order to explain why it is that globalisation may have a greater impact in this region than in others.

Therefore, it is clear that there is a need to interconnect the study of globalisation and security employing both generic conceptual frameworks and empirical case studies rooted in specific geographical and historical contexts. This has been the attempt of the author in his time spent at the ICCLP in writing a new book on Japan's response to the post-Cold War and post-globalisation security agendas, and the objective of this article is to give a brief overview of the progress of research to date.[2]

This short article begins by investigating the concept and inherent qualities of globalisation and its implications for the existing international security order. It then moves to examine the impact of globalisation in specific terms of the creation or re-release of new levels of security actors, threats and responses. Next, it investigates the reason as to why globalisation may be having a differentially heavy impact on the Asia-Pacific security situation compared to other regions. Finally, in the conclusion, it considers briefly the response, appropriateness and effectiveness of Japan's response to the post-globalisation security agenda in the region.

Globalisation conceptualised

Globalisation has been subject to a wide variety of definitions, ranging from universalisation, internationalisation, Americanisation, and liberalisation. However, the essence of the concept of globalisation, although strongly associated with economic liberalisation, is qualitatively different from these other definitions due to its essential de-territorialisation of social interaction.[3] That is to say, globalisation is a process which reconfigures social space away from notions of delineated territory, and transcends existing physical and human-imposed barriers to social interaction. For instance, in the case of global financial transactions facilitated by information technology (IT), social forces are now able to operate nearly without reference to geographical distance or human barriers.

Globalisation viewed in this light has significant implications for the existing international and security order. In the modern era, the state, with its exclusive jurisdiction over territorial space delineated by physical barriers and human construction--or what is termed as sovereignty--has been the basic unit for the division and governance of global space. States have attempted to exert sovereignty over all forms over social interaction within their territorial domains, including political, economic, and security interaction. Therefore, in the modern era, global space has been to a large

* Senior Research Fellow, Centre for the Study of Globalisation and Regionalisation, University of Warwick, UK.

extent inter-sovereign state (or in more common terminology, international space), and, correspondingly, global security has been centred around the inter-sovereign state system.

Nonetheless, given the conceptualisation of globalisation presented above, it is now clear that globalisation poses a major challenge to this inter-sovereign state security order. This is because globalisation forces operate with declining reference to and the transcendence over sovereign prerogatives, and thus are able to penetrate external state borders and impact directly upon the internal societal groups within these states.

Globalisation's impact upon security

Specifically, the ability of globalisation forces to penetrate the sovereignty of states can be said to have impacted upon security by the vertical extension of the levels of actors involved in security, and a horizontal extension of the dimensions of security issues.

Vertical extension of security

In terms of the levels of actors, it is possible to divide these into three categorisations: referent objects of security (those who are faced with threats and consume the provision of security): imposers of security threats upon others (deniers of security); and defenders from security threats (suppliers of security). In the past, the sovereign state was regarded as the principal referent object of security based on the concept that the security of the state could be equated with that of its individual citizens. Moreover, this was especially so in the case of 'nation-states' where there was a close identification between the fate of the state, as a institution embodying the national will, and the security of the general population. But globalisation is a process which is also capable of defeating this concept and accentuating the potential divisibility between the security of the state and its citizens. Again, this is because globalisation is capable of operating across external state boundaries and impacts directly and differentially on internal societal groupings and individual citizens within the state. This phenomena was seen most clearly during the East Asian financial crisis from 1997 onwards, when states appeared largely powerless to provide economic security to their citizens and protection form the vagaries of global financial flows. In such instances, the state can come to be viewed as a mechanism and institution irrelevant to the provision of security, and attention is focussed away from the state as the principal referent object of security, and towards instead societal groups and individuals--so giving rise to the concept of 'human security' in the contemporary period.

Added to this, globalisation can also increase the range of deniers and suppliers of security, as the ability of sovereign states to mitigate and redistribute the costs of insecurity is perceived to decline. Hence, Transnational Corporations (TNC) have come to both provide and deny security to other actors in the economic and environmental dimensions, and even to provide military security through the increasing 'privatisation' of policing and paramilitary security operations. Globalisation has also triggered the rise of other non-state security actors, such as trans-sovereign organised crime groups as deniers of security; and Non Government Organisations (NGO) as providers of security in the tackling such issues as economic disparity, disease and the ban on landmines.

Horizontal extension of security

Regarding the horizontal expansion of the dimensions of security, it is apparent that globalisation engenders a number of security problems in the economic, environmental, societal, and military dimensions. In the economic dimension, economic liberalisation accompanying globalisation has both integrative and disintegrative effects. The integrative effects of the augmentation of economic interdependency may work to foster a 'democratic peace'. On the other hand, though, globalisation can also produce economic exclusion, disparity, rivalry, and dislocation--all with destabilising effects for intra and inter-sovereign state security. Moreover, the economic integration and disintegration

associated with globalisation also provides the supply and demand conditions for trans-sovereign crime groups which 'piggy back' on globalisation and extend their activities beyond sovereign borders.[4] Furthermore, economic liberalisation and globalisation clearly impact also upon all levels of security actors, but especially individuals, through the acceleration of environmental degradation; as seen in the case of the forest fires in Indonesia in 1997-98 which affected the health and security of literally millions of Indonesian and Malay citizens. Globalisation also impacts upon the societal security by creating the conditions that sponsor migration and threats to identity; and can have an impact in the military dimension by the promotion of rivalry for economic resources and the global arms trade.

Responses to the globalisation-security nexus

Constructing policies which deal with the multiplicity of security problems presented by globalisation is a complex task. Nevertheless, it would seem that the key point is to incorporate into all forms of policy response the conception that those security problems generated by globalisation are essentially trans-sovereign in nature and transcend the borders of one territorial state. Hence, the response to the globalisation-security nexus necessarily has to be multilateral, or multinational, and occasionally even trans-sovereign in nature. The transgression of sovereignty clearly represents a major diversion from many of the ordering principles in the modern era and post-war world, and requires a re-think of existing security practices. Nevertheless, in order to construct a viable post-globalisation security policy, it is important to consider that it may not always be possible to respect territorial sovereignty or integrity.

Globalisation and security in the Asia-Pacific

The differentially heavy impact of the globalisation-security nexus in the Asia-Pacific

The fall out from the East Asian financial crisis in terms of the triggering of internal political unrest in Thailand, Malaysia and especially Indonesia was a clear demonstration of the interconnection between globalisation and security in the Asia-Pacific. Moreover, the continuing integration of the region into the global political economy is likely to only accentuate problems of economic security. For instance, economic exclusion can be said to have underlain many of North Korea's internal and external security problems in the post-Cold War period; economic disparity and uneven growth presents problems for the territorial and political unity of China and the Russian Far East, and the internal ethnic and political stability of a number of Southeast Asian states; economic competition has given rise to concerns about conflict over energy resources in the region; and economic dislocation is a continuing problem for states in both Northeast and Southeast Asia.[5] Meanwhile, trans-sovereign crime is growing in the region, with renewed problems of narcotics cartels and piracy in Southeast Asia; and environmental degradation is also continuing largely unchecked in the region, as demonstrated by the reoccurrence of the 'haze' in Indonesia and Malaysia since 1997.[6] Furthermore, it is clear that the financial crisis was not necessarily a one-off event, and that this region, more than many others, continues to be vulnerable to the security impact of globalisation. Hence, this next section of the paper is devoted to investigating why the Asia-Pacific region may be particularly prone to the problems of the post-globalisation security agenda.

As stated in the introduction to this article, it is important to understand the relationship between globalisation and security through reference to both generic analytical frameworks and specific regional contexts. The first section of this article argued that the essence of globalisation as a security problem is to be found in its transcendence of barriers to interaction across social space, and hence its challenge to the sovereign state as the existing basis for the global security order. The forces of globalisation quickly search out any inconsistencies and flaws in the structure of the sovereign state, and can prise open its external security barriers. Consequently, this suggests that in order to comprehend the reasons for the differential impact of globalisation across regions then it is

necessary to examine the differential nature of sovereign states in each region, and their ability to absorb and withstand the security shocks associated with globalisation processes. Much of what follows is painted in very broad brushstrokes and its generalisations cannot capture the entire complexity of the region. But it is hoped that at the very least it will provide a framework for making intelligible the nature of states and the political economy in the Asia-Pacific.

Vulnerable sovereign states: decolonisation, bipolarisation, and globalisation

If attention is then turned to examining the condition of sovereign states in the Asia-Pacific region, it can be seen that they are particularly vulnerable to the inherent qualities of globalisation due to the dual influence of decolonisation and bipolarisation upon the state-building process in the post-war period. The effect of decolonisation upon the Asia-Pacific region was to create states modelled in theory along the lines of the sovereign and nation states of their former colonial masters, but which in practice have not always conformed to these ideals. In many instances, the idea of the sovereign state came before or diverged from that of the nation state: shown by the fact that the territorial and sovereign space of states in the region was often delineated along former colonial borders which had been drawn in arbitrary fashion and in contradistinction to trans-border ties of ethnicity and religion. These contradictions between sovereign space and societal composition clearly weakened from the start the internal political cohesion of states in the region, and laid the ground for the potential divisibility between the security interests of the state and its societal constituents. Moreover, the common legacy of distorted development from the colonial period also placed these states in a disadvantageous economic position to maintain their internal stability. Therefore, the preoccupation of many states in the Asia-Pacific region since the post-colonial has been to preserve their internal integrity by advancing the process of state-building, and particularly in the economic sphere, as a means to reconcile these structural contradictions.[7]

The problematic position of newly-established sovereign states in the region was further compounded either during or immediately after the decolonisation phase by the impact of the onset of the Cold War. The translation to the Asia-Pacific of the contest between the ideologies and political economies of the US and USSR led to the division of certain states and the bipolarisation of the region to varying degrees. As is well known, the bifurcation of the region in the early Cold War period was to create a legacy of military confrontation which has endured in many cases to this day. Nevertheless, perhaps more important when considering the post-Cold War and post-globalisation security agendas is the affect of the Cold War upon the state building-agenda and related political economies of many of the new states in the region. The Cold War in effect divided the Asia-Pacific region into three zones of political economy.[8] Firstly, a zone of independence centred for the early part of the Cold War upon a socialist bloc under the auspices of the USSR. Secondly, a zone of interdependence centred upon the US, and increasingly Japan as well, throughout most of the Cold War. Thirdly, a zone of dependence, consisting mainly of the newer sovereign states in Southeast Asia, which although seeking economic independence was increasingly drawn into the zone of interdependence, with Japan playing a major role in this process. The zone of independence created an alternative economic system to that of liberal capitalism and ensured the security of many of its members, although it showed increasing signs of breaking down throughout the latter period of the Cold War and as the USSR and China split the zone internally. However, this zone of independence was also eventually to be rendered asunder by the economic pressure from the zone of interdependence at the end of the Cold War, so leaving the already internally weak states of the zone exposed to the forces of liberal capitalism.

Meanwhile, the zone of interdependence can be conceived of in the Cold War period as a form of proto-globalisation and liberal economic system under the leadership of the US. This system was also to affect the state-building efforts of those states within its ambit. On the one hand, the system

provided markets and aid which accelerated the economic growth of certain states on the semi-periphery and later the centre, such as Japan, as well as pulling along the growth of other states on the periphery and located in the zone of dependence in Southeast Asia. In this way, states were able to develop distinctive variations of developmental capitalism and to use economic growth to mitigate problems of internal stability. On the other hand, though, the system, revolving as it did around a form of proto-globalisation which was designed to support the security interests of the US and thus which insulated these states to some degree from full competition, also had particular effects on the evolution of these states' political economies. Hence, in extreme case states in the region were propped up by external aid, but more usually evolved political economies which were developmental in orientation but systemically vulnerable to the fully unleashed global capitalism. Thus, these states may have been able to overcome to some extent the economic shocks of the early 1970s and to move towards a new path of development in the new international division of labour (NIDL). But at the same time, these states were still given special dispensations within the zone of interdependency, consisting of access to technology and the developed markets of the US and West, whilst simultaneously being able to restrict access to their own markets.[9]

Therefore, the twin processes of decolonisation and bipolarisation have had a distinct impact upon the development of the sovereign states of the Asia-Pacific. Firstly, these processes have created states marked by internal contradictions between the delineation of territorial space and societal composition, and a consequent preoccupation with attempts to reconcile the two by the defence of the principle of sovereignty. Nevertheless, despite all these efforts, there still remains a near ineradicable and potential divisibility between the proclaimed security interests of these state and large sections of their citizenry--the very conditions which globalisation is capable of highlighting to the detriment of security. Secondly, they have created states either fundamentally unprepared to cope with global economic forces as in the case of certain former members of the zone of independence such as North Korea, or states driven by the need to exploit the benefits of liberal capitalism to preserve their own internal stability, but which have been insulated in the past from the full effects of capitalism's tendency towards periodic crises. In sum, the Asia-Pacific has been characterised by states vulnerable to those forces which attack territorial sovereignty and generate external economic shocks, so frustrating state-building agendas.[10]

Based on this understanding of the nature of sovereign states in the Asia-Pacific, the reasons for the differentially heavy impact of globalisation in the region become clearer. Quite simply, globalisation, especially when it generates seismic economic shocks on the scale of the East Asian financial crisis, represents the very antithesis of state-building agendas in the region. Globalisation is mercilessly capable of laying bare the internal weaknesses of states. This is not to say that states cannot adapt to and successfully ride the globalisation wave, and then utilise the benefits of economic growth to push forward their state-building efforts. But globalisation is also a double-edged sword, due to its ability to undermine sovereignty and produce economic dislocation. Moreover, with the end of the Cold War and merging of the zones of independence, dependence and interdependence, there is no longer a great incentive for the US to provide special economic dispensations to the states of the Asia-Pacific, so increasing the pressure for them to adopt neo-liberal modes of capitalism. The final outcome is then to deepen and widen the process of globalisation in the Asia-Pacific and to expose its political economies to greater security risks in the process of adjustment to liberal capitalism.

Conclusion: Japan and the post-globalisation security agenda in the Asia-Pacific

Having outlined in the above sections definitions of globalisation, the interrelationship of globalisation and security in generic terms, and then the globalisation-security nexus in the specific regional context of the Asia-Pacific, this concluding section now moves on to examine--in a somewhat speculative manner, based as it is on still incomplete research--Japan's response to the

post-globalisation security agenda.

Japan's correct conceptualisation of the globalisation-security nexus?
At first sight, it would appear that Japan is well-equipped to respond to many of the security problems engendered by globalisation, especially in terms of its relatively clear conceptualisation of this process's impact upon security. Firstly, it is arguable that Japanese government policy-makers in the Ministry of Foreign Affairs (MOFA) and Ministry of Finance (MOF) understand the link between economic dislocation and the horizontal extension of security that this can generate. Indeed, this conceptualisation of the linkage between economics and security is a Japanese trait that can be traced back to the resource diplomacy and evolution of comprehensive security policy from the mid to late-1970s onwards. Secondly, Japan also seems to understand the importance of the vertical extension of security to include not only states as referent objects, but also societal groups and individuals. Hence, the result has been Japan's pushing since 1998 of a 'human security agenda', in both its bilateral relations with states of the region and in international institutions such as the United Nations (UN). Thirdly, Japan also seems to comprehend clearly the relative weakness of the sovereign states in the region, and their related limitations in being able to respond to the problems of globalisation. In particular, Japan's strong traditions of developmentalism and economism, and its own experience of state-building, have led it to appreciate the latent security problems that the states of the region face in terms of diverse ethnic compositions and the lack of internal political legitimacy. Finally, as noted already in the first point of this paragraph, Japan would also appear to understand the need for a comprehensive response to all horizontal and vertical dimensions of security, through its conceptualisation of comprehensive security policy and mobilisation of economic power. This mobilisation of economic power has usually taken the shape of the extension of Official Development Assistance (ODA) to the region; attempts to build economic interdependence and cooperation; and most recently in response to the East Asian financial crisis initiatives such as the Asian Monetary Fund (AMF) and New Miyazawa Initiative.

Japan's defective instrumentalisation of its response to the globalisation-security nexus?
From the above, it would therefore seem that Japan is well-placed to articulate a security policy which is directed at the root causes and security costs of the globalisation-security nexus. However, it is also arguable that, despite crucially important initiatives such as those made during the East Asian financial crisis and Japan's important contribution to the debate on human security, there are also reasons to question the actual degree to which Japan has been able to pursue a post-globalisation security agenda and respond to Asia-Pacific security problems.

The first point to note is that, although the Japanese government has been keen to focus upon a human security agenda in the Asia-Pacific and has utilised ODA in the pursuit of this goal, the channels and ends to which this economic assistance has been directed cast doubts upon the effectiveness of Japanese security policy. Thus, Japan may have concentrated upon human security in the wake of the East Asian financial crisis, but much of its ODA, rather than being focussed directly upon sustaining the welfare of the individual citizens of the states of the region, has instead been used to prop up the regimes and the territorial integrity of the existing sovereign states in the region. Understandably, Japan has no wish to see a breakdown in the inter-state system in the region and the unpredictable security problems this could produce. However, the channelling of Japan's aid towards the governments of sovereign states in the region which may no longer be viable as political, economic and security units is in a sense merely 'papering over the cracks' in the existing international structure, and does not serve as a means to address the root causes of security problems engendered by globalisation--namely, the lack of legitimacy of many of the states in the region as vehicles to provide security for significant sections of their citizenry. This is a near impossible dilemma for Japan to resolve, given its interest in avoiding the disturbance of the regional *status quo*,

but also highlights its limited ability to pursue a human security agenda if directed through the existing sovereign state units of the region.

The second point to note with regard to possible defective elements in Japan's instrumentalisation of a human security agenda in the region is that, even having correctly conceptualised the need for a comprehensive response based in large part on economic power as a means to respond to post-global security problems, the principal direction and energy of Japan's security policy in recent years has been directed towards the incremental increase of its own independent military power and the strengthening of the US-Japan alliance. The debates in Japan about its future military stance are clearly important and may assist it in responding to some post-global security problems such as intra-state ethnic strife through the expansion of its role in peacekeeping operations (PKO). But the main thrust of Japanese security policy has in fact been directed more towards dealing with traditional inter-state security conflicts surrounding the Korean Peninsula and Taiwan through the mechanism of the US-Japan security treaty. Again for some these may be important developments in Japan's security policy, but these policy developments are only a partial response to the problems created by globalisation, and largely miss the expanded security agenda of problems driven by economic instability. Here Japan, with its traditions of comprehensive security, should have the edge in terms of conceptualisation and economic power resources in order to make an important difference in regional security. Nevertheless, its prime security-policy making energy has been poured into the military dimension. This is what dominates the headlines and articles in Japan's newspapers and journals related to security. Viewed in this way, then, Japan is possibly devoting its resources to an older security agenda, and missing important opportunities to address the post-global security agenda.

One evidence of this is the increasing 'ODA fatigue' in Japan and moves to reduce the size of the ODA budget. Budgetary pressures make this move understandable, and it may be that a reduction in the size of the budget could increase the efficiency of ODA usage and direct it to more human security related causes. However, at the same time, the concern and irony has to be that Japan, in spite of its clear conceptualisation of the interconnection between globalisation and security, is really turning away from this vital problem to concentrate on a military security agenda which is declining in relevance in the post-globalisation period and for which Japan is less well-equipped to deal.

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Part II

Visiting Professors at the ICCLP

Bruno Palier (Chargé de recherches, Centre d'Etude de la Vie Politique Française)
(October – November 2000)
Profile:
After entering the Ecole Normale Supérieure Fontenay/St Cloud, Dr Palier studied at the University of Paris X-Nanterre and the University of Paris I. He earned his Ph.D. at the Institute of Political Studies, Paris in 1999. In the same year, he was appointed as a Chargé de recherches at the CEVIPOF (Centre d'Etude de la Vie Politique Française). During his one month stay at the Center, Dr Palier gave two Comparative Law and Politics Seminars entitled "European Welfare State Changes between Globalisation and Path Dependence" and "La transformation du systéme français de protection sociale sous l'effect de la construction européenne et la globalisation: les acteures et le processus des réformes actuelles (les 'politics' des réformes).

Major Publications:
Globalization and European Welfare States: Challenges and Changes (Edited by Rob S. Sykes, Pauline Prior and Bruno Palier, Macmillan, London, forthcoming 2001).
La Protection social en Europe, Le temps des réformes (Edited by Christine Daniel and Bruno Palier, La Documentation Française, Paris, forthcoming 2001).

Brigitte Stern (Professor, University of Paris I)
(November – December 2000)
Profile:
After having studied at the University of Strasbourg, New York University and the University of Paris, she was appointed as a professor at the University of Paris I from 1991. She has also been a director at the CEDIN – Paris I (the International Law Center of the University of Paris I) since its creation in 1982. During her stay at ICCLP, she gave a presentation at an ICCLP seminar on "International Economic Law and National Security" co-organized with the University of Tokyo International Law Seminar. She participated in and gave a presentation at lectures and seminars, not only at the University of Tokyo, but also at other institutions including the Maison Franco-Japonais.

Major Publications:
La succession d'Etats (cours de l'Académie de droit internatinal de La Haye, *RCADI*, volume 262, Kluwer, Hague 2000).
United Nations Peace-keeping Operations: A Guide to French Policies (Editor, UNU Press, Tokyo 1998).

Thomas Meyer (Professor, Dortmund University)
(January – March 2001)
Profile:
Dr Meyer received his Ph.D. from Frankfurt University, following his appointment at Siegen University, he was appointed a Professor and Dean at Dortmund University from 1994. During his stay at the ICCLP, Dr Meyer addressed the ICCLP seminar entitled "the Third Way Problems" and contributed an article to the next edition of the Review. He also gave a lecture at Prof. Susumu Takahashi's class "Europe in the Post Cold War Period".

Major Publications:
Identity Mania. The Politicization of Cultural Difference (Mosaic Books, London/New Delhi 2001).
Mediademocracy. How the Media Colonize Politics (Polity Press, Oxford forthcoming 2001).

The Michigan-Columbia Exchange Project

As part of the Michigan-Columbia Project, the Center hosted 25 professors from the University of Michigan School of Law and 16 professors from Columbia University Law School to participate in the post-graduate lecture series "An Introduction to American Law". Visitors this spring will include Professor Mark Barenberg from Columbia University, and Professors Rebecca S. Eisenberg and Carl E. Schneider from the University of Michigan. Professor Ronald J. Gilson will visit us in the autumn from Columbia University. In addition, in March 2001 University of Tokyo Professor Morita Osamu visited Columbia University Law School and Associate Professor Fujita Tomotaka visited the University of Michigan School of Law. In April, Associate Professor Masui Yoshihiro will visit Columbia University Law School and Professor Nakazato Minoru will visit the University of Michigan School of Law.

Mark Barenberg, Professor of Law, Columbia Law School
Research Area: Labor Law
Major Publications: REGULATORY COMPETITION AND COOPERATION: LABOR LAW (Book Chapter, Oxford University Press forthcoming 2001).
LABOR RELATIONS IN OVERSEAS ASSEMBLY PLANTS: A MEXICAN CASE STUDY (Worker Rights Consortium 2001).

Ronald J. Gilson, Professor of Law and Business, Columbia Law School
Research Area: Corporate Law
Major Publications: THE LAW AND FINANCE OF CORPORATE ACQUISITIONS (with B. Black, Foundation Press 1995).
CASES AND MATERIALS ON CORPORATIONS (with J. Choper and J. Coffee, Aspen Law & Business 2000).

Rebecca S. Eisenberg, Professor of Law, University of Michigan School of Law
Research Area: Intellectual Property Law, Biotechnology and Law
Major Publications: *Reexamining the Role of Patents in Appropriating the Value of DNA Sequences*, 49 Emory L. J. 783 (2000).
Analyze this: A Law & Economics Agenda for the Patent System 53 Vanderbilt L. Rev. 2081 (2000).

Carl E. Schneider, Professor of Law, University of Michigan School of Law
Research Area: Family Law, Medical Law
Major Publications: AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 2nd Edition (with Margaret Friedlander Brinig, West, 2001).
THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS (Oxford University Press, 1998).

Essays

The Internalisation of a Foreign Culture: One Belgian Woman's Account of Working in Japan

by Professor Kitamura Ichiro

The adoption of a legal system may be by imposition or by an act of free will. In the same way, the internalisation of a foreign culture can occur due to exigencies, or entirely voluntarily. An example of the former is the case of Jewish intellectuals.[1] A perfect example of the latter is Arthur Waley, the English translator of *The Tale of Genji*, who despite repeated approaches by the Japanese refused their invitation. To be in this position may be unusual, but is certainly conceivable. Is it possible to love a culture but not its people? No-one would know better than Waley that the picture scroll world of the Heian Court which he unraveled within his own mind could not be visited in real life.

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EXORDIUM — In stark contrast to Japanese romanticism and admiration for France, the French consciousness of Japan could be summed up in the question: "Isn't Japan that country next to Turkey?" That was before the War. Later, President de Gaulle was correct in his impression of a Japanese prime minister visiting the Élysée Palace as a transistor salesman and today, when hoardings for Japanese products line the Champs Élysées, the Japanese have become regular players on the stage of French society: "Japan is no longer a curiosity in Europe. Europeans know about Japan".[2]

At least in relation to Japan as a Kantian "thing in itself",[3] the French may know the country better than the Japanese know France. Many French grew up with television programs like *Dragon Ball* and *Sailor Moon*, as well as the ubiquitous Nintendo and Play Station. They queue for movies such as *Princess Mononoke* and *Pokémon* wearing T-shirts displaying (seemingly random) kanji designs. The youths who frequent the manga shelves at bookshops use Japanese stationery, photocopiers and bicycles. Once they get a little older, their off-the-rack clothes and the fasteners used on them, as well as their cameras and video-recorders and home handyman tools, are made in Japan or use brands (e.g. "Tensai" or "Ichiban") to suggest a Japanese origin—but, perhaps because of import restrictions, Japanese cars are not all that common. Intellectuals can keep abreast of Japanese politics and economics, but also phenomena such as cram schools, the *otaku* sub-culture and morning greeting ceremonies within Japanese companies, by reading Phillipe Pons' articles in *Le Monde*, watching television documentaries, or reading the almost ritualistically repeated features in magazines. In relation to literature, there are translations not only of Abe, Mishima and Tanizaki, but also of Tsuji Hitonari (winner of the Prix Fémina), Yoshimoto Banana and Murakami Ryū. And law and policy makers have probably borrowed aspects of Japanese systems as diverse as police boxes (known as *policier îlotier*), alternative dispute resolution (the acronym is *MARC* in French) and even the gloved subway people-pushers.

It is surprisingly important how a certain level of knowledge—it cannot be described as a sophisticated level of knowledge, or even a working knowledge; rather, it is some indescribable level, where the minutiae of life almost don't seem to matter—can trigger empathy for a foreign culture. While Yves Saint Laurent and Louis Vuitton are now worldwide brands, it is "La vache qui rit"

cheese, "DOP" brand shampoo and *gants de toilette* (body-washing towelling mittens) that make up the everyday consciousness of the French. I myself have experienced a link of consciousness at this sort of level: upon hearing a popular American song from the 1960s used as the theme song for a French movie, I felt a great fondness for the France of the time, when I (and, no doubt, the film's director too) was an adolescent. We can probably understand along similar lines the significance in France of director Ozu Yasujirō's realistic perspectives on the family. It may be that a common heritage of such details provides the concrete proof of psychological belonging to a particular society.

Now, assume that a person has grown up immersed in Japan as a "thing in itself" in this way and has gone on to study and master the Japanese language. What would happen to such a person if he or she sought to work in a Japanese company?

This was the situation of Miss Amélie Nothomb, a Belgian woman who described her adventures working for one year in a Japanese company in a novel titled *Stupeur et tremblements*. [4] The title implies bedazzled trembling but, knowing what follows the title page, that trembling might be from fearful awe. Having been published by one of the leading publishing houses in Paris, the book was nominated for all the main literary prizes in 1999 and took the honours in the Grand Prix du Roman de l'Académie Française and the Prix Internet du Livre (voted for by internet users).

The author was born in 1967 as the daughter of a Belgian diplomat stationed in Kobe. She grew up in Japan and China, and can speak Japanese. Straight after graduating from a European university, she looked for work in Japan, as is the subject of the book. She debuted as a novelist at age 25 and completed several novels before *Stupeur et tremblements*. Her simple and tight style, her surprising ingenuity of vocabulary, her decisiveness of expression: all are admirable. It is only natural that she has garnered support from a wide readership through France, from the literati through to young internet users. Further, her next book, called *Métaphysique des tubes* and describing memories of her childhood in a suburb of Kobe, also went on to become a best seller and was a real contender for the 2000 Prix Goncourt. She is a formidable talent.

Having been asked for my thoughts on my trip to Paris in February-March 2000, I have chosen to approach the task by introducing Nothomb's book. Of course, literary criticism has never been my jurisdiction. However, if you go to lecture on Japanese law in France, you are bound to be asked by students whether what Nothomb wrote is true. Nothomb herself says it is true. In that respect, being very much a novel based on her personal experiences, even if there was some literary licence it is undoubtedly appropriate material for comparative cultural study. Moreover, as a person who has remained in an ivory tower for so many years, it would be important before my retirement to undertake that study in order to know the true state of Japanese society!

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NARRATIO — The opening of the novel is memorable, in a quasi-biblical way:

> *Mr Haneda was superior to Mr Ōmochi, who was superior to Mr Saitō, who was superior to Miss Mori, who was superior to me. As for me, I was the superior to no-one.*

Thus the reader is introduced to the 22-year-old Amélie on 8 January 1990, due to work for one year in the export-import division (occupying floors 43–45 of a skyscraper) of the global "Yumimoto" Corporation under division head Mr Haneda, deputy division head Mr Ōmochi, section head Mr Saitō and manager Miss Mori.

At first she was drafting English letters but, following a series of misunderstandings and bungles on her part, she commenced her gradual descent from on high. She was reprimanded for speaking to clients in Japanese when serving them tea and admonished for attracting too much attention to herself when she began at her own initiative to deliver internal mail and synchronise calendars. As a kind of punishment, she was repeatedly ordered to make unnecessary photocopies. When she ably assisted another section in writing a report on the state of dairy products in Belgium, she was scolded for "stealing other people's work" and transferred to the accounts section. There, she became confused when she did not understand the letters "GmbH" (the abbreviation for a German limited company) and struggled for days with her task of checking business trip expenses, which Miss Mori eventually polished off herself in a mere 20 minutes. Once, when Miss Mori had been publicly castigated by Mr Ōmochi and ran crying to the toilet, Amélie followed her, intending to console her, only to be ordered by the enraged Miss Mori to clean the toilets (including the men's toilets) on the 44th floor. As the heroic pinnacle to her ordeal, Amélie spent the remaining seven months of her year's employment doing so.

Discussing the novel over dinner one night, I was struck by the difference of two Japanophile French women's opinions. Mme R, who had lived in Japan for many years herself, seemed to strongly resent Nothomb's portrayal and described her as "twisted with hatred"; Mme F, who has a grandson called Ichirō like me, attempted to justify Nothomb's actions as a form of masochism. I understand that Mme R was trying to defend the honour of the Japanese people. No doubt it was due to the same sort of misgivings that (according to Nothomb in a television interview) the famous author Phillipe Sollers, reviewing the manuscript for the Gallimard publishing house, turned it down. Certainly, in more than one spot the reader is left wondering whether the unrelenting frankness is a legitimation device compensating for her tendency to boast of her wickedness. (In fact, as she appeared on television, she adopted the preciously defensive pose of someone raised in a protected environment, reminding me of Mishima Yukio's mien.) However, at the same time I also had sympathy for Mme F's point of view.

My reason is, for Amélie her entry into Yumimoto Corp was not merely "foreign work experience" or "participant observation"; rather, it was an attempt to rehabilitate herself into a society in which she grew up, although admittedly separated from it by the embassy wall:

> *I had always desired to live in this country in which I had held such faith since the first idyllic memories I retained from my childhood.*
>
> *I felt I could do anything to be reaccepted into this society, which I for so long considered to be my motherland.*

This sounds rather like the children of Japanese businessmen who return to Japan after a overseas posting.

A person's most incomprehensible attitudes are often due to the persistence of a fascination of

youth. The beauty of my childhood Japanese universe so affected me that I was functioning on the reservoir of goodwill. I had before me the scornful horror of a system which repudiated that which I loved, yet nevertheless I remained faithful to those values in which I no longer believed.

Regardless of which view you take of Nothomb, it is undeniable that she faced three levels of tribulation: firstly, the ordeal of a young person seeking her first job; second, the ordeal of doing so in a foreign society; and third, and most specifically, the ordeal of the Japanese company. In order to succeed in her role, the neophyte had to acculturate to the distinctive customs and precepts of an organisation that was an unknown in these three respects.

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PROPOSITIO — However, the company could not cope with this foreigner. Its treatment of her can only be described as mysterious, for several reasons. The first mystery is that an international company engaged in global trade should on the one hand prohibit Amélie from using Japanese, but on the other hand fail to use her special talents as a foreigner. No doubt they merely treated her in the same way as any other recruit. Even those on the fast track to management must first do odd jobs and drudge work; it is said that also a trainee ninja used to begin by scouring the floor! Such treatment is of course part of the initiation process and a test of character, and it cannot be denied that it also includes an element of psychological pressure to forge loyalty and absolute obedience. Notwithstanding this, from a European viewpoint it is difficult to imagine assigning trifling work to a qualified teacher, even if she happens to be a new recruit. Europe is a society that assigns work status and conditions in accordance with qualifications and diploma. Her bedazzlement, namely the collapse of her internalised constructs, found a symbolic expression in her sudden inability to add up: an unconscious rejection of mindless repetitive labour.

The next mystery was the prohibition on the use of Japanese. It seems a natural prerequisite for a foreigner working in Japan that she be able to speak Japanese (I cannot help being vocal in demanding this, against a false image of Japan as an English speaking country), but the company said that their clients did not like being spoken to in Japanese by a foreigner. This response is reported repeatedly from foreign employees, so it appears to be fairly widespread. Do we Japanese feel vulnerable in this situation? Unlike a generation ago when foreigners who could speak fluent Japanese were viewed with curiosity and amusement, as foreigners' understanding of Japanese culture deepens, are we trying to retreat behind a Maginot Line drawn between Japanese speakers and non-speakers? Maybe, just as the Maginot Line was finally ineffective, this response will prove to be ephemeral. Or is it a phenomenon with deeper roots?

And the ultimate mystery is why an objectively completely unnecessary order to clean the toilets (just on the 44th floor) should have been allowed to stand for seven months. If it was only a retaliation measure for Miss Mori's wounded emotions, then after an appropriate cooling-off period it should have been possible for someone further up the hierarchy to take the initiative to repair the wounds. But perhaps the order was an acknowledgement of inappropriate behaviour and an indication to resign? Or perhaps it came to be considered normal for a foreigner to perform work of this kind?

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CONFIRMATIO — However, I think the real "stupor and trembling" for Amélie would have come from two layers of uniqueness of Japanese morals. The first layer involves the selfless service and devotion demanded by Japan's vertical society:

> *According to ancient Japanese imperial protocol, one addressed the person of the emperor with bedazzled trembling* [avec stupeur et tremblements]. *I always loved that formula which corresponds so well to the actors in samurai films, whose voices when addressing their superiors quiver with superhuman respect.*

The condition of an individual retainer who has pledged body and soul may be exquisitely poignant in itself, but the necessity of such a pledge at the societal level in this day and age is another matter entirely. This is, no doubt, the realisation to which Amélie came.

Futhermore, since this vertical society is also male-centred, as a European woman she had to give her fealty and service in two dimensions, and undoubtedly this is the reason for the "Japanese formality" she recounts. On the one hand she admired the grace of Japanese women, but on the other hand felt an inexorable resistance to the image of the "flower of Japanese womanhood", with its numerous detailed mandates about appearance and bearing, the restraints of the ethic of devotion and asceticism in marriage and household affairs, and an existence for which the only reward is maintaining face.

For Amélie, her role model for entry into this society was Miss Mori: her direct superior, an able and attractive office manager, from the Kansai region like Amélie, 29 years old, 180 cm tall, single. Much of the novel is made up of intricate observations of Miss Mori and Amélie's interaction with her. Amélie felt a certain intimacy and adoration for this colleague with whom she shared her birth place, noticing her unconscious (but surely within the bounds of the required fealty and service) courtship rituals towards men, but from the meritocratic Miss Mori's perspective, Amélie was an eccentric (and rather disrespectful) new recruit. It is the friction between these viewpoints that causes the drama to unfold. Miss Mori had suffered many privations to reach her current status, and she was reluctant to see an eventual sudden advancement of this girl, who it seemed could not manage even basic arithmetic, on the basis of her contribution to one report. Nor could she possibly forgive her for humiliating her at the very moment when she was trying to nurse the wounds of her chastisement:

> *"She advanced towards me, with the glint of Hiroshima in one eye and a glimmer of Nagasaki in the other."*
>
> *"Would you follow me even to the toilet? Very well; then stay here."*

The relationship between these two is likened by Amélie herself, to the paradoxical relationship in the movie *Merry Christmas, Mister Lawrence* (Furyo, in France) between the Japanese officer (Sakamoto Ryūichi) and the English POW (David Bowie).

However, thinking that she would herself lose face if she resigned in such ignominy, Amélie decided: "I will conduct myself as a Japanese woman would". So, she resigned herself to sitting

out her appointed term. But she continued her humorous and incisive observations and analysis (e.g. the economics and politics of her male superiors who now avoided the toilets on the 44th floor). Even if she was a bathroom attendant during the day, she had the satisfaction of a respectable intellectual pursuit at night. In this world of ridicule pure and simple, for this "Carmelite of the commodes", at no point in that seven months did I have the sense of being humiliated". Moreover, in her cloistered meditations, she became enlightened about the reality of company culture, learnt through personal experience: "In Japan, existence is the company".

> *My tribulation was not worse than theirs. It was merely more degrading. I did not for that reason envy their position, which was just as miserable as mine.*

They say that Japan has a high suicide rate, but perhaps the puzzle is why it is not higher…

It is not sufficient to pass off this point as all too familiar. The reason is that it raises consciousness of the unique tension in Japanese labour morals. This is the second layer of uniqueness of Japanese morals that I mentioned. As a matter of fact, despite the spread of the two-day weekend, we continue to hear not only about *karōshi* (death from overwork) but also suicide from overwork. Allowing that a work ethic—in the Japanese context, the *shingaku* teachings of Ishida Baigan in a similar sense to the Weberian protestant work ethic—is a worthy philosophy considered in isolation, a mentality where employees do not take their paid leave and forgo public holidays for the sake of improved company productivity not only represses individual lifestyles but is a clear sign of excessive adhesion to the group. It is a short step from such adhesion to a kamikaze focus on ends rather than means where responsibility often lies with a small number of actors. Even if there is no immediate parallel with war in the current circumstances, is it not still the case that "when human beings have to survive in severe and unbearable conditions, it is those with a developed sense of emotionality who die first spiritually"?[5] If it is the fount of Japanese industrial vitality "to suspend all emotions and rely only on a primitive life force"[6] (manifested in stimulant products like "Yunker", "Zena" and "Regain!"), the European canary down the proverbial mineshaft would already be well and truly dead.

There is a commanding view of Tokyo from the female toilets on the 44th floor. Marginalised to the extreme, Amélie places her forehead on the glass and launches her body into the pleasure of imaginary flight. Her defenestration fantasy is at once a kamikaze yearning for unity with the Japanese society below her and also a heartrending symbol of its unachievability.

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PERORATIO — On the appointed day for the end of her year's employment, with fearful awe but without a hint of dissatisfaction or cynicism, Amélie went to each of her superiors to notify them of her resignation and in doing so completes the task of capturing their characters. The über-OL manager, with her "surrealist" convictions of the "inferiority of the occidental brain". The timid and earnest section head, "a footsoldier of a Japanese, at the same time a slave and inept executioner on behalf of a system which he assuredly does not love but against which he will never say a bad word due to his feebleness and want of imagination". The large, overbearing and insensitive deputy division head, who even at the parting moment forces her to eat the melon-flavoured chocolates which only he likes. The division head, who in stark contrast is an elegant gentleman:

"Is it possible that God reigns over hell?"

In the end, this novel should perhaps be considered a graduation thesis. It is a book drawing the final curtain across the aspirations of adolescence. The stage just happened to consist of a Japanese company. For the very reason that her reveries were directed so strongly towards Japan, when disillusionment struck it took a somewhat grotesque form. However, I would not think she was left only with a feeling of hatred. On the contrary, although she was not unbending, she was determined to stick to the principles of Japanese womanhood, to the extent that she could understand it, and by reason of this perseverance she was able to savour the satisfaction (as she describes in the epilogue) of receiving a letter of congratulations from Miss Mori *in Japanese* upon her debut as a novelist.

Accordingly, as a reader, I want to rejoice in the emergence of such alternative views of Japan and the multicultural ethos (like my colleagues researching Japanese law, but also recent authors such as Hideo Levi, Norma Field and David Zoppetti), even if in Amélie's case she had become fed up with that lifestyle. The novel may not go into sufficient detail of Japanese customs to dispel the misunderstandings of all Western readers, but in relation to the clichéd views of Japanese corporate culture and the stifling nature of Japanese community it can but highlight the issues without providing a solution. The problem has been thrown back at the Japanese. These questions are clichés for a reason: the phenomena described provide an all-too-accurate reflection of Japanese reality.

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On a slight tangent from the topic of internalisation of foreign cultures, by way of a coda let me provide updates on two familiar names.

The first emerges from a play which premiered while I was in Paris. In *En route vers le Tokaïdo*, playwright Nicolas Bataille, who also directed the play and starred in it, transplants *Tōkaidōchū hizakurige*[7] into a post-Meiji setting, with Yajirobei and Kitahachi appearing with cropped hair and carrying Western umbrellas. Mr. Bataille is well known in Japan as the NHK's French-language instructor about 30 years ago. He has now aged somewhat and thickened around the middle, but the face, the voice and the smile are unmistakable.[8]

In this production three actors play all the characters, wearing different masks as necessary to differentiate them. The genre is musical comedy, adopting both the *rakugo* and *manzai* comic styles of *yose* (Japanese vaudeville). Particularly entertaining was Thierry Leclerc who played Kitahachi and formed the linchpin of the singing and dancing scenes. The songs were classic, combining familiar Japanese tunes of various styles with French words and stylised humorous gestures. Not all the audience was made up of people who had been to Japan, but this was not a necessary pre-condition for the play to be a big hit. It is amazing how the Japanese pentatonic scale can be transformed into comical chansons! This was the drawcard which tempted me back to see the play a second time.

The other item of good news is that former ICCLP Researcher Béatrice Jaluzot submitted her doctoral thesis on the doctrine of good faith (a comparative study of French, German and Japanese

law)[9] to the University of Lyon and received top marks; Professor Ōmura Atsushi, who was in France at the time, was one of the examiners. She claims that she struggled to the very end in her analysis of Japanese law, but it was a stellar effort on her part to get to the stage of reading Japanese texts and cases after only two and a half years in Japan. She now holds the position of *maître de conférences* (approaching an associate professorship) at the University of Lyon III. We hold great expectations for her future as one of the rare Japanese-speaking comparative law specialists in France.

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NOTES

Professor Kitamura's essay uses rhetorical divisions derived from classical Chinese as section labels. This translation uses similar divisions from the Roman rhetorical tradition: the function of the *exordium* was to introduce the topic and make the audience receptive; the *narratio* served to set out the facts; the *propositio* developed the themes to be argued; the *confirmatio* established the strength of the arguments; and the *peroratio* drew the speech to a close.

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[1] See, for example, Murakami Jun'ichi, "Shisōka Viremu Furussā no tabunkateki haikei" [The multicultural background of philosopher Vilém Frusser], in Kitamura Ichirō (ed.), *Gendai Yōroppa-hō no tenbō* [A Survey of Current European Law] (Festschrift for the 70th Birthday of Professor Yamaguchi Toshio) (Tokyo: University of Tokyo Press, 1998, pp.23-42).

[2] Moriya Ken'ichi, "Ever Only Dissonance: On My Research Stay in Frankfurt" 2(2) *ICCLP Review* 45 at 46.

[3] Ibid.

[4] Amélie Nothomb, *Stupeur et tremblements* (Paris: Aubin Michel, 1999). The novel is introduced in the morning editions of the *Nihon Keizai Shimbun* and *Mainichi Shinbun* for 31 October 1999.

[5] Noda Masaaki, "Sensō to kanjō" [War and emotion] 828 *Gakushikai Kaihō* at 37.

[6] Ibid.

[7] Translator's note: *Tōkaidōchū hizakurige* was a hugely popular series of comic novels written between 1802 and 1822 by Jippensha Ikku. The novels depict the misadventures of Yajirobei and Kitahachi as they travel along the Tōkaidō from Edo to Kyoto and Osaka.

[8] See page 35 of the 1 October 2000 morning edition of the *Asahi Shimbun* for further details.

[9] Béatrice Jaluzot, “La bonne foi dans les contrats: Etude comparative des droits français, allemand et japonais”, thèse Lyon III, 2000 ; Paris, Dalloz, 2001.

[January 2001, translated by Peter Neustupný]

Asians Take Great Interest in How Japanese Go with English

by Ishizuka Masahiko

"Thai people speak English as if they knew 10,000 words even though they know only 1,000, while Japanese people speak as if they know only three words even though they know 10,000," joked Kavi Chongkittavorn, executive editor of The Nation, the leading English-language daily of Bangkok. He was speaking at the Asia-Pacific Journalists Conference on English and Asia's development.

His remark well captured the Japanese psychological outlook toward learning and using English. Another panelist, the Tokyo correspondent of the Washington Post, said that "English classes at Japanese schools are like a ritual." What she wanted to mean was the lack of free-wheeling atmosphere in the Japanese approach to learning English.

The discussion at the symposium, which was attended also by journalists from Japan, Korea, Hong Kong, Indonesia, and Singapore, focused on a "particular mindset" of the Japanese people with regard to English. The journalists agreed that Japanese need to free themselves from such a mindset to improve their English proficiency.

Some Japanese in the audience were apparently unhappy with what they regarded as "foreign tampering". Not only with regard to the Japanese attitude toward English, but with many other things, Japanese are often the target of foreign criticisms and sneering because of this mindset. While some Japanese are self-critical about such mindsets, still others regard them as important from the viewpoint of their identity.

In Japan, there is a rising chorus about the importance of English as an international language. A Japanese journalist at the symposium repeatedly said, however, that despite such a mood no consensus is established yet in the Japanese society as to who needs English of what levels for what purposes. It might take more than 10 years to achieve such a consensus. It is apparent that the absence of a consensus in this regard is a major source of confusion in English-language education in Japan.

This situation in Japan looked surprising to journalists from neighboring Asian countries. "The stage where you discuss whether English is necessary or not is long past," many of them said. "Nobody is saying languages other than English are not important, but it's undeniable that English is the most important foreign language." According to the participant from Hong Kong, in some major cities in China, Shanghai, among others, officials are calling on citizens to learn at least 100 English words in their respective field of work. A young man from Guangdong Province started a unique English language class which attracts a huge crowd of 10,000 or 20,000 people in a stadium where he shouts English words and sentences to be repeated by the mass class. A movie showing the scene of teaching was shown in Tokyo.

What is the cause of this gap between Japan and other Asian countries with regard to studying English? That Japan is not a multilingual society and has no history of having a foreign language imposed can be reasons. Some point out that Japan achieved tremendous economic development in the post-World War period without knowing English -- an allegation which looks dubious.

It is true that you have few problems living in Japan without speaking English. The other day when I happened to help a foreigner, who looked like an Indian, with a map in the Gaien-mae subway station, he was quite surprised that he was spoken to in English. "Oh, you speak English. I'm now

staying at Todai, but they don't speak English there," he said. To Japanese, it is not strange at all that English is not spoken daily on the University of Tokyo campus, but to that man, the situation must look strange for the nation's top university.

I suspect that not a few Japanese don't like it that English is spoken broadly by Japanese people. The stronger the argument of the importance of English grows, the more negative comments we see against English speaking in letters to editors and opinion pages of newspapers. Typical comments go like: "Don't take frivolously speaking English for being an internationally-minded person," "If your head is empty about what to say, it's no use studying English," or "Japanese before English." There seems to be insatiable desire to associate the ability to speak English to some negative qualities of mind, which makes no sense.

At Japanese schools, English teaching is hardly enough, both in terms of quantity and intensity, to be considered as sacrificing Japanese. But there is a persistent concern that teaching English at a young age can undermine the Japanese identity. Such a view rules out the possibility of bilinguality, reducing the argument to a "zero-sum" game.

In an article on the opinion page of a leading newspaper, one commentator described Japanese emphasis on English as liable to arrogantly take pride in "imperfect English" looking down on other Asian languages. This statement is hard to understand on two points. Why does the knowledge of English, imperfect as it is, inevitably lead to looking down on Asian languages? Also, it is now Japanese that are being looked down by fellow Asians because of imperfect English. It is an undeniable reality that English is the common language of Asia as is evidenced by the fact that several hundred meetings of the Association of Southeast Asian Nations (ASEAN) that take place each year are entirely conducted in English. The journalists from Asian countries invariably said that they are proud that their leaders--Zhan Zemin, Kim Daejung or Lee Kwan Yue--speak English on the international stage.

These journalists, it seemed, take English proficiency both of top leaders and average people as part of national resources. The journalist from Thailand noted that the English-speaking capability of Chinese delegates at international conferences is rapidly improving, which is enhancing China's international presence. If the Chinese voice strengthens in the future, he speculated, Japanese may feel compelled to improve their English under competitive pressure. The Thai journalist appears to be linking Japanese English proficiency to leadership capability in Asia, but this may be exactly the way of thinking Japanese reject.

It is likely that the Japanese skepticism about the necessity of English for them will persist, making it difficult to create a consensus about English education. This may well be an issue of self-image of the Japanese, but it can also be attributed to their tendency to take English too seriously and lack a relaxed outlook like Thais who speak English as if knowing 10000 words even though they know only 1000 words.

One thing certain, however, is that Asian people are taking great interest in how Japanese will go with English.

(February, 2001)

2001: A Trade Odyssey? - Challenges for APEC in Times of Change

by Gregory C. Ellis

Just as Odysseus had to face many perils from the Cyclops to lotus eaters and sirens, not to speak of upstarts in his own home base, so the coming year for APEC promises to be a long and treacherous path toward further liberalization in trade and investment in the Asia-Pacific region. The danger of the trek is compounded by the fact that APEC will be navigating this journey in a weakened state. As much of the hype surrounding the APEC Leaders meeting in Brunei last November pointed out, the forum has lost much of the momentum built up over more than a decade since its formation in 1989.

Part of the recent pessimism surrounding APEC stems from the forum's apparent inability to make an effective contribution to the fallout from the Asian financial crisis of 1997-98. This was compounded by APEC's failure to deliver as a major regional coalition at the WTO Ministerial Meeting in Seattle in December 1999, despite overt assurances of camaraderie just prior at the Auckland Summit. The result was a stark picture of APEC's inertia. At a more fundamental level, doubts are now being raised by some regarding the feasibility of achieving the Bogor Goals – which call for all APEC members to implement free trade and investment by 2010 for industrialized economies and 2020 for the rest – given the slowdown in regional growth following the economic and financial turmoil of recent years. This is not to mention the wide-spread backlash against globalization, the impact of which has yet to hit much of the region but is bound to do so in due course, as evidenced by the demonstrations at the World Economic Forum's meeting in Melbourne last year. Considering all this, APEC does not commence its 2001 journey in ideal condition, a fact that will put added pressure not just on the skills of APEC's incoming chair for this year, China, but also on that nation's commitments to push ahead with the APEC program of trade and investment liberalization and facilitation.

WTO – prodding the Cyclops!

The continued stalemate preventing the launch of a new round of global trade talks in the WTO is arguably the greatest factor that has dampened APEC's dynamism and will continue to pose problems for APEC this year. In the absence of an agreed agenda at the WTO Ministerial Meeting in Qatar in November this year, APEC will find it hard to move ahead with its own plans for liberalization in the region, particularly as this relates to its two largest economies, Japan and the United States.

A variety of factors have been given for the failure of the WTO's Ministerial Meeting in Seattle. These range from the street protests to the inability of the US leadership to forge a consensus among the diversity of WTO members. More decisive, however, was the unwillingness of all parties to concede on key issues, from agriculture to labour, from the environment to antidumping, which led to such a spectacular breakdown. This year the basic issues remain the same and a key to reaching a broad-based, equitable consensus will be allaying the concerns of the developing countries.

Service negotiations based on the General Agreement on Trade in Services, or GATS, which forms part of the so-called "built-in agenda" from the Uruguay Round, is one of the areas that has the potential to be delayed in the absence of a new WTO round. Until recent years, trade in *goods* had been the main focus of global trade talks, but with trade in *services* increasingly comprising a greater proportion of commercial relations between nations, liberalization in such areas as telecommunications, finance, construction, distribution and education, is gaining in importance. Much like trade in goods, the issue of appropriate safeguards to minimize the impact of rapid

liberalization on domestic service suppliers is a controversial one and could delay negotiations this year. To build broader support for progress in the liberalization of trade in services, negotiations will need to address capacity building measures for economies with comparatively weak service sectors to ensure that liberalization is not to the benefit of only the strongest service exporting countries.

In this light, the capacity building initiative announced last June by Japan at the APEC Trade Ministers' Meeting is worthy of attention. The plan is a targeted approach that calls for the matching of the legitimate capacity building needs of developing economies with well-designed ecotech (economic and technical cooperation) projects in developed countries. The effect should be a softening of developing economies' skepticism toward further opening their markets and thus should contribute to ameliorating the division between the developed and developing nations in efforts to launch a new WTO round.

FTAs – Lotus seeds in disguise?

APEC's journey this year is also likely to be complicated by the trend toward sub-regionalism in the form of a proliferation of Free Trade Areas, or FTAs, in the region. Several APEC member economies including Australia, Canada, Chile, Japan, South Korea, Mexico, Singapore, New Zealand, and now the US, are in the process of either studying or negotiating bilateral free trade agreements. Furthermore, the ASEAN countries announced last November that they were commissioning a one-year feasibility study to link their economies with those of China, Japan and South Korea, and there has been talk of a trans-Pacific P5 arrangement that groups together the US, Australia, New Zealand, Singapore and Chile.

Although the view adopted by these countries is that FTAs are a complimentary way to further stimulate growth in global trade, the above trend raises certain important concerns that will need to be addressed. These include the relationship between proposed FTAs and the broader multilateral trading system, in particular, the need to ensure WTO-consistency as defined by Article 24 of the the General Agreement on Tariffs and Trade, or GATT; the problem of ensuring that the movement toward FTAs is supportive of APEC member economies' long-term commitments as laid out by the Bogor goals and the Osaka Action Agenda; and the issue of how to treat the more than 120 FTAs that already exist.

What can be said at this stage is that none of the countries studying or negotiating FTAs have rejected the broader multilateral trading system embodied in the WTO or APEC. Sub-regional arrangements are conceived by participants as a way of supporting and prodding the global trade agenda and not as an alternative to it. In addition, it should be remembered that in many cases, FTAs have a large domestic significance. For example in Japan, FTAs are seen by many as a vehicle to promote domestic reform in a variety of sectors. Although the Japan-Singapore "New Age Economic Partnership" excludes agriculture, this is unlikely to be possible in other proposed FTAs, where agricultural products comprise a significant component of bilateral trade, without violating the principle of WTO-consistency. As such, FTAs can in the long run contribute to, not run against, the realization of APEC's long-term goals of free trade for the region.

Japan and the US – Looking for Hermes and a bag of wind!

APEC's travels over the coming months will also obviously be influenced by its two largest members, the Japan and the US, but the prospect of APEC being revitalized by either of these two countries appears remote.

Firstly, the recovery in the Japanese economic recovery appears increasingly fragile, with the problem of non-performing loans re-emerging to trouble the banking industry. In addition, the health of the country's ailing retail and construction sectors continues to look precarious, all of which has led to a sharp decline in confidence in the immediate prospects for the economy as reflected in the declining stock market. Moreover, the influx of cheap imports such as PC parts, textiles, fresh vegetables (and even eel and seaweed!) has led to calls from domestic producers for the government to impose emergency import safeguards. Furthermore, there are the structural problems that face Japan such as mounting public debt – which now stands at close to 130% of GDP – and the aging of the country's population. On the plus side, significant corporate restructuring in recent years has managed to decrease excess capacity and labour, and important gains have been made in the deregulation of financial markets and administrate reform of the central government bureaucracy. Still, these important changes that have taken place are unlikely to bear fruit for some time.

With regard to the U.S., it is unclear that the new Bush Administration will give the Asia-Pacific the same high priority as President Clinton during his years in office. Against the background of a slowdown in the economy, the Bush administration's early signals on trade policy have been inconclusive and it is uncertain what the priorities of the White House will be. Newly appointed United States Trade Representative, Ambassador Robert Zoellick, has commented that achieving a free trade area of the Americas, or FTAA, and promoting new global farm trade negotiations are of utmost importance. This has sent a signal to the rest of the world that more broad-based, comprehensive, multilateral trade talks may not be on the top of the administration's agenda.

Regional uncertainty – Poseidon's storm on the horizon?

In addition to the above problems, APEC will be traversing the year at a time when many of its other member economies are simultaneously experiencing mounting political and economic uncertainties. Indonesia, Malaysia, Taiwan, the Philippines, and Peru have all recently experienced either a change of government or some form of significant political unrest. More importantly, many of the region's economies in 2000 experienced weakening currencies and sharp stock market declines, a situation that is likely to be exacerbated by the decline in U.S. demand for Asian imports in 2001.

While the increase in financial uncertainty in the region is not expected to lead to a repeat of the dramatic crash of 1997, the situation has been a catalyst for further debate on the kind of financial architecture that is appropriate for the East Asian region. In May last year, Finance Ministers from the so-called "ASEAN plus three (APT)" – which comprises the Association of Southeast Asian Nations plus Japan, China and South Korea – announced their intention to launch a regional currency swap arrangement. The framework will allow member economies to transfer hard currencies to each other to prevent serious external imbalances that might be caused by a currency crisis, such as the one that swept the region in 1997.

In addition, the issue of the most effective currency regimes for regional economies is again being widely debated with some commentators advocating the adoption of currency baskets comprising the dollar, yen and euro to minimize the effect of currency fluctuations on the domestic economy. Moreover, the idea of some kind of Asian Monetary Fund is again being voiced in the region, this time with grudging acceptance from Western countries such as the U.S. unlike three years back.

APEC will need to explore ways of contributing constructively to this ongoing debate on reform of the region's financial architecture. After all, it was the collapse in regional currency arrangements – namely dollar pegs – that triggered the economic crisis of 1997 and dampened APEC's own plans for regional economic development. It is worth noting that this year the APEC Finance Ministers'

process will in effect for the first time be synchronized with the broader APEC process, with the APEC Finance Ministers' meeting to be held just prior to the Leaders' Summit. This is a clear sign that the Finance Ministers' process is coming into line with the broader APEC agenda. One would hope that this will allow greater coordination and interaction between the hitherto largely independent arms of APEC, and provide more opportunity for exploration of the connection between financial issues facing the region and the Asia-Pacific's broader trade agenda.

Conclusion

For the above reasons, APEC's journey in 2001 will be an interesting one. Still, the news is not all bad. APEC's principles of open regionalism, flexibility and voluntarism allow it to encompass such a diversity of member economies, and its activities extend across a broad range of areas such as trade and investment, energy, fisheries, transport, telecommunications, human resource development and e-commerce. Furthermore, the forum's decentralized network of working groups has contributed positively to forming a community spirit in the region, particularly in Pacific Asia. As such, APEC arguably remains the most appropriate vehicle to promote the common agenda of economic development and modernization in the region. At the end of the day, however, whether or not APEC will be able to manifest its strengths and realize its own long-term goals for free trade and investment in the region will ultimately depend on the political leadership in member economies pushing forward the policy agenda for domestic reform, which at the current stage is by no means assured.

(March, 2001)

The 7th Comparative Law and Politics Symposium

International Governance and Policy Learning: The Future of the International Economic Institutions in an Era of Globalisation

Date:	15 December 2000
Speakers:	Professor Richard Higgott, University of Warwick, UK
	Dr Diane Stone, University of Warwick, UK
Commentators:	Professor Glenn Hook, University of Sheffield, UK
	Dr Christopher Hughes, University of Warwick, UK, and Visiting Associate Professor, ICCLP
Moderator:	Professor Kashiwagi Noboru, ICCLP

Professor Richard Higgott and Dr Diane Stone visited the ICCLP immediately after having taken part in the World Bank's (WB) Global Development Network (GDN) conference held in Tokyo the same week, and were thus able to combine in their respective papers the latest findings of the conference and their own longer term perspectives on the issues of globalisation and governance.

Professor Higgott spoke specifically on the theme of 'Contested Globalisation: the Changing Context and Normative Challenges'. In a dynamic presentation, he put forward the argument that globalisation has generated a substantial degree of economic inequality, and that this has obliged both individual sovereign state governments and the international economic institutions (IEI) of the International Monetary Fund (IMF) and WB to reconsider the utility of the existing structures of economic governance. Professor Higgott stressed in particular that the economic shocks of the East Asian and other financial crises that occurred from 1997 onwards have led the IEIs to begin to rethink the so-called 'Washington Consensus' on the management of the global economy. Events such as the East Asian financial crisis and 'battle in Seattle' concerning the World Trade Organisation (WTO) Millennium Round in 2000 have given rise to the 'politics of contested globalisation', and forced the IEIs to search for new frameworks to compensate for and redistribute the inequalities and injustices of economic liberalisation. Hence, since 1997 there has gradually emerged a 'Post-Washington Consensus' (PWC) which aims to build a greater consensus on globalisation and the potential benefits of economic liberalisation by focussing on the need to include 'civil society' within the policy-making networks of the IEIS, and to enhance these institutions own transparency. Consequently, in place of the original buzzwords of the Washington Consensus of liberalisation, deregulation and privatisation, the PWC now stresses terms such as civil society, social capital, capacity-building, transparency, the new economic architecture, institution-building and safety nets.

However, Professor Higgott also proceeded to then strongly critique the PWC due to its attempt to approach governance from an essentially technocratic and economic efficiency standpoint, rather than any consideration based upon a fundamental questioning of any of the principles of economic liberalisation or its necessary impact upon political systems of governance. He posited that in this sense the PWC was still a managerialist approach to governance, or 'governance without politics'. He noted that the ideology of economic efficiency was still substituted for an ideology of politics, and that the attempt to reach out to civil society was based more on a utilitarian need to mobilise and co-opt social capital, rather than a fundamental recognition of the need for the IEIs to open up to greater accountability and popular representation. Given these deficiencies in the global governance programmes of the IEIs, Professor Higgott then argued that it was important to go beyond the PWC and attempt to inject into the debates on governance more normative, political and ethical approaches. This alternative and 'reformist' approach would forgo the parsimony of economic theory, and deal with substantive issues of justice and redistribution which demand a political perspective.

In this light, it would be instructive to consider the importance of building into the global governance debate questions about 'societal values', inequality, justice, and democracy.

Dr Stone then followed on from Professor Higgott's paper by going deeper still into the analysis of the policy-making process within the IEIs. Dr Stone's paper was entitled 'Learning Lessons, Transferring Policy and Exporting Ideas' and much of the content was drawn from her experience from working at the WB as part of the GDN project, and her subsequent responsibility for editing the proceeding of the first GDN conference. This book was published the same week as the GDN conference and symposium and is entitled, *Banking on Knowledge: The Genesis of the Global Development Network*. Dr Stone's paper contained three sections. The first outlined systematically the diverse theoretical literature on policy learning, transfer and export. The second section then addressed the ideational and primarily non-governmental domain of policy transfer. She discussed in particular the 'soft' forms of transfer and policy entrepreneurship as undertaken by think tanks, consultancy firms, foundations and the university sector. In third section of her paper, Dr Stone then proceeded to also strongly critique, in line with Professor Higgott's paper and based on her own inside knowledge of the WB, the weaknesses of the approach of the IEIs to global governance. Dr Stone concentrated mainly on the problems of attempting through the GDN to involve NGOs and 'civil society' in capacity-building projects. She pointed out how the WB was still focussed upon the mobilisation of civil society as a means to assert its own globalisation project rather than to fully take on board the criticisms of those actors resistant to globalisation. Therefore, once again, the conclusion was reached that the approach of the IEIs to governance was overly technocratic, and deficient in understanding the necessity for a theory of politics to undergird the legitimacy of the IEI management of economic liberalisation and globalisation.

Professor Higgott's and Dr Stone's presentations occupied the first hour of the symposium and were then followed by comments and questions from Professor Hook and Dr Hughes. Professor Hook's comments and questions focussed on the theoretical aspects of policy learning, and how it is possible for states or policy actors to not only learn, but also to learn incorrectly. Hence, he point out the potential pitfalls of the 'mal -adaptation' of policy learning, and Dr Stone agreed that this was certainly one genuine risk of policy learning. Meanwhile, Dr Hughes commented on both presentations by agreeing on the deficiencies of the governance programmes of the IEIs, but also stating his uncertainties about exactly what 'theory of politics' would be appropriate to form the basis for governance, and the danger of substituting parsimonious economics for parsimonious theories of politics. Firstly, he argued that, although concepts such as justice, transparency, representation and accountability were all admirable in themselves, these could also be applied to any political community--authoritarian, democratic or otherwise. Hence, the question arises whether we should be more open and call for democracy as the standard of global governance, rather than trying to form a managerial theory of politics? Secondly, he asked whether the standards of governance of civil society evolved mainly in the developed world were applicable to the case of the Asia-Pacific, where the norms of non-intervention and elite led societies mean these may not function well, despite the best intentions. Hence the question arises as to whether it is more important to take a step back, and work at the state-to-state level of governance which has only just begun in the wake of the end of the Cold War, before trying to work at the level of civil society which is immature compared to the West and may not function correctly. In answer to these questions, Professor Higgott and Dr Stone stressed that there were new theories of cosmopolitan government which could provide a functional political basis for governance with out having to openly push for democracy, and that they were also in favour of state-to-state interaction in the Asia-Pacific as a crucial starting point of governance in the region. In addition, to these questions from the commentators, there were also a series of exchanges with the audience concerning the role of perception politics in governance.

Overall, then, the symposium produced the opinion that the current mechanisms, standards and norms of the governance of economic globalisation are in need of a fundamental rethink. Nevertheless, the symposium also indicated the possible future direction of governance programme with regard to the need to emphasise political considerations and to include a wider number of actors within the policy-making networks of the IEIs.

[Christopher Hughes]

Comparative Law and Politics Seminars & Forums

Held the University of Tokyo, Graduate School of Law and Politics, October 2000-March 2001.

[Seminars]

The 95th Comparative Law and Politics Seminar－10 October 2000
Speaker: Professor Don C. Price, University of California Davis; ICCLP Visiting Professor
Topic: Taming Darwinism in Late Qing China: Ideas of Social and Political Progress
Language: English with summary in Japanese
Moderator: Professor Paul Ch'en

The 96th Comparative Law and Politics Seminar－25 October 2000
Speaker: The Honorable William J. Hibbler, Federal District Court Judge for the Northern District of Illinois
Ms Catherine M. Ryan, Assistant State's Attorney of Illinois
Topic: The Erosion and Transformation of the Juvenile Court
Language: English with summary in Japanese
Moderator: Professor Saeki Hitoshi

The 97th Comparative Law and Politics Seminar－25 October 2000
Speaker: Professor Bruno Palier, Research Fellow at the CEVIPOF(Center for the Study of French Political Life) － FNSP(France), ICCLP Visiting Associate Professor
Topic: European Welfare State Changes between Globalisation and Path Dependence
Language: English with summary in Japanese
Moderator: Professor Takahashi Susumu

The 98th Comparative Law and Politics Seminar－2 November 2000
Speaker: Professor Bruno Palier, Research Fellow at the CEVIPOF (Center for the Study of French Political Life) － FNSP(France), ICCLP Visiting Associate Professor
Topic: Europeanisation, Globalisation and the French Welfare State Reforms: the Politics of the Reforms(Actors and Processes)
Language: French (with Japanese interpretation by Associate Professor Nakayama Yohei)
Moderator: Professor Kitamura Ichiro

The 99th Comparative Law and Politics Seminar－8 December 2000
Speaker: Professor Brigitte Stern, University of Paris Ⅰ; ICCLP Visiting Professor
Topic: International Economic Law and National Security
Language: English(with summary in Japanese)
Moderator: Professor Nakatani Kazuhiro
＊Co-organized with the University of Tokyo International Law Seminar

The 100th Comparative Law and Politics Seminar－13 December 2000
Speaker: Professor Ehud Harari, Hebrew University
Topic: War, Peace, and Regional Cooperation: What can Israel Learn from Japan's Relations with East Asia
Language: English
Moderator: Professor Fujiwara Kiichi

The 101st Comparative Law and Politics Seminar－14 December 2000
Speaker: Professor Kenneth Port, Marquette University Law School
Topic: Wal-mart Stores, Inc.v. Samara Bros., Inc.: the United States' New and Confused Standard for Inherently Distinctive Trade Dress
Language: English
Moderator: Professor Higuchi Norio

The 102nd Comparative Law and Politics Seminar－14 December 2000
Speaker: Professor Haward Shelanski, University of California, Berkeley
Topic: Telecommunications and Competition Policy in the United States
Language: English
Moderator: Professor Kashiwagi Noboru

The 103rd Comparative Law and Politics Seminar－20 February 2001
Speaker: Professor John Langbein, Yale Law School
Professor Tamar Frankel, Boston University Law School
Professor Kanda Hideki
Associate Professor Fujita Tomotaka
Professor Higuchi Norio
Topic: The Relation of Traditional Law of Trusts with the Commercial Trusts
Language: English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting

The 104th Comparative Law and Politics Seminar－3 March 2001
Speaker: Professor Thomas Meyer, Dortmund University
Topic: Third Way Issues
Language: English
Moderator: Professor Takahashi Susumu

[Forums]

The 108th Comparative Law and Politics Forum－ 17 October 2000
Speaker: Professor Ronald Mann, University of Michigan School of Law
Topic: Legal Problems with Debit Cards
Language: English (with summary in Japanese)
Moderator: Professor Kashiwagi Noboru

The 109th Comparative Law and Politics Forum－ 9 November 2000
Speaker: Professor Robert Kneller, Department of Intellectual Property Research Center for Advanced Science and Technology, University of Tokyo
Topic: Genetic Information: Japanese and U.S. Approaches
Language: English
Moderator: Professor Higuchi Norio

The 110th Comparative Law and Politics Forum－ 19 December 2000

Speaker: Dr Christopher Hughes, Senior Research Fellow, University of Warwick, ICCLP Visiting Associate Professor
Dr Hugo Dobson, Lecturer, University of Sheffield
Topic: Japan's Response to Globalisation
Language: English and Japanese
Moderator: Lecturer Iokibe Kaoru

The 111th Comparative Law and Politics Forum－ 18 January 2001

Speaker: Bruce Aronson, Lawyer, Visiting Research Scholar of the Graduate School of Law and Politics, The University of Tokyo
Topic: Private Practice on Wall Street: A Personal View
Language: English
Moderator: Professor Higuchi Norio

The 112th Comparative Law and Politics Forum－ 25 January 2001

Speaker: Professor Lawrence Ward Beer, Professor of Civil Rights, Emeritus, Lafayette College, Visiting Research Scholar of the Graduate School of Law and Politics, The University of Tokyo
Topic: Studying Constitution of Japan and Others
Language: English
Moderator: Professor Hasebe Yasuo
*Co-organized with Anglo-American Common Law Study Meeting

Reports on Selected Seminars and Forums

[Seminars]

The 92nd Comparative Law and Politics Seminar—28 June 2000
Professor Don Herzog
Is Freedom of Speech an Absolute? : The Case of Hate Speech Regulation

In 1989, a United States District Court correctly struck down a hate speech code adopted by the University of Michigan, which was drafted without consulting any of the law professors there, because it was open-end, vague, and over-broad. Many Western countries have hate speech regulations, but it is commonly held that such legislation is unconstitutional under the first amendment in the United States. Some commentators have tried to legitimate hate speech regulations from several viewpoints, but Professor Herzog discussed the possibility of legitimizing some of those regulations based on the traditional liberal free speech case law.

One might think speech as such is absolutely protected, but the law is honeycombed with entirely uncontroversial regulation of speech. Consider hearsay, contempt citations, price-fixing, criminal conspiracy, criminal solicitation, libel and slander, and so on. At the very least, the "speech" protected by the amendment is a term of art.

First amendment law is also systematically attentive to social setting. The most robust protections attach to what is called the speech of democratic citizens in public spaces. What, however, about settings in which we do not appear as citizens? Consider soldiers in the military: *Parker* v. *Levy* (417 U.S. 733 (1974)), upholding court-martial conviction for speech critical of the Vietnam War, core political speech. Consider prisoners in jail: *Jones* v. *North Carolina Prisoners' Union* (433 U.S. 119 (1977)), hyperdeferential to prison warden's restriction of organization and mailing privileges. Consider students and teachers in school: *Hazelwood School District* v. *Kuhlmeier* (484 U.S. 260 (1988)), where a principal pulled two pages from a high school newspaper before publication. This, one might think, is a first amendment nightmare: administrative discretion and prior restraint. In fact, the Court said that the only thing they need say is that the principal did not act unreasonably.

Both these points suggest possible room for hate speech regulation on college campuses. One odd case, nominally still good law, is *Beauharnais* v. *Illinois* (343 U.S. 250 (1952)). Beauharnais was fined $200 under a statute banning any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." The opinion of the Court managed not to mention the first amendment, but upheld the statute as banning group libel.

Commentators have sometimes pointed to the classic fighting words cases. In *Chaplinsky* v. *New Hampshire* (315 U.S. 568 (1942)) the Supreme Court held that:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

The last part tends toward clear and present danger jurisprudence, but what are words "which by their very utterance inflict injury"? This could be something like subjective distress, the pain suffered by the target of racist speech, say. As a ground for restricting speech, this is worrisome. People get distressed over all kinds of things. Even reasonable distress, however we might gloss that, would seem to trench on all kinds of things even those interested in regulating hate speech want to protect: take a scholarly lecture exploring the thesis that some races by nature are less intelligent than others. So suppose we gloss words "which by their very utterance inflict injury" as words inflicting a dignitary harm, lowering someone's social status, identifying them as less fully human, to be treated with contempt. The injury, in this view, is public, social, objective -- and so more legally tractable than the psychological vagaries.

One context for thinking about dignitary harms is supplied by a long trajectory in the history of political theory and social history. Personhood as a dimensional concept transformed to binary concepts; subjects transformed into citizens. Contempt is the key battleground, and again injury is not subjective distress. This gives a way of reconstructing and defending the central insight of Beauharnais, without just sweeping the first amendment under the rug.

Is hate speech regulation automatically a threat to free speech? Consider prerequisites of flourishing social practice: diverse community, everyone gets to talk, everyone to listen. Contempt may tend to silence some speakers and may tend to make the audience not pay any heed to their words. Ruling out of bounds certain gross expletives, say, opens up possibilities otherwise unavailable.

Professor Herzog concluded that if one wants to argue for the constitutionality of hate speech regulation, this is the way to go. A lot of work needs to be done still hammering out a properly narrow statute. Whilst the question of whether or not, as a matter of policy, there ought to be such regulation was not discussed, Professor Herzog felt that it is just crude and peremptory to announce that hate speech regulation flies in the face of the first amendment.

[Asaka Kitchimoto]

The 95th Comparative Law and Politics Seminar —10 October 2000

Professor Don C. Price

Taming Darwinism in Late Qing China: Ideas of Social and Political Progress

By the end of the twentieth century the world takes for granted the benefits of self-interested competition as a means of progress, and with progress as the replacement of the inferior by the superior. The process is recognized as having produced biological evolution, including the emergence of the human species, in the natural realm, and to be available, and to some extent, inevitable, in the realm of human affairs. At the same time, it is widely recognized that the social and human value of competition, and indeed, the survival of competition itself, require management. While the specifics of management are the subject of intense political struggle, the twentieth century has more or less come to terms with Darwinian competition.

In the nineteenth century, when Darwinian evolution was new, the philosophical struggles were as intense as the political struggles. Even in England, where Darwin's discoveries benefited from an environment of social and economic competition (cf. Herbert Spencer's even earlier "social Darwinism"), defenders of Darwin struggled with its implications for humanity. When Darwin and social Darwinism came to China at the end of that century, the shock was even greater. Earlier analyses of this subject have stressed 1) the tendency of Chinese thinkers to bend Darwinian ideas to the purposes of emerging Chinese nationalism, and 2) the logical contradictions entailed in this effort.

The present paper takes a somewhat different approach, considering the ways in which Chinese sought to reconcile Darwinian competition with moral purposes.

Yan Fu presented the new ideas as a way of understanding the competitive would that threatened China, and China's need to accept competition to survive.
Yan's persuasive presentation appealed to a generation of Chinese in need of an orientation to a bewildering new world. The fact that Darwinian competition explained progress down to the present, and promised more in the future, also gave it a certain optimistic appeal. But the selfish motivations on which it rested, and the innocent victims it claimed, outraged the moral sensibilites of many Chinese. Many of those who supported reform were deeply influenced by the alternative vision of Kang Youwei. Although less scientific, Kang also provided a coherent and more optimistic account of the world's history and future based on mankind's intellectual and moral progress, leading to a utopia of worldwide harmony and prosperity.

Many Chinese were disturbed by the clash between these two alternatives, and searched for a way of reconciling them. Liang Qichao, a disciple of Kang and perhaps the most influential writer at the beginning of this century, was particularly impressed by the thought of Katô Hiroyuki. In Katô's works Liang found a clear explanation of the emergence of altruistic morality from self-interested competition, and a strategy for pursuing both moral goals (in the form of liberty and equality), and China's national interests at the same time.

Although Liang himself soon found the international threats too severe to allow for the pursuit of liberty and equality in China, revolutionaries did not. Echoing the ideas of earlier reform writers, they claimed that international competition was yielding to the progressive moral influence of international law. Later, both Liang and the most important revolutionary strategist in 1911, Song Jiaoren, were to argue that open and fair political competition would select the best government in China, and enable it best to survive in a dangerously competitive world.

In the realm of economics, Yan Fu following Adam Smith, had argued that the enlightened self-interest of participants in a free market economy would benefit the whole nation, but contradicted himself in observing that the growth of wealth in the West had been accompanied by a growing gap between rich and poor, threatening rebellion. These themes were taken up by both Liang Qichao and revolutionaries, who saw in the concentration of wealth and enterprise in the West challenges and opportunities for China: The emergence of great monopolies would overshadow political and military power as a threat to China's independence and at the same time, generating social and political crises in the West, they would lay a basis for transition to a more moral socialist order, by violent revolution in the West, or peacefully in China.

In their different analyses of these political and economic possibilities, Chinese used and rejected Darwinian ideas. Their disagreements and inconsistencies arose most fundamentally not from a preoccupation with national interests, but from a wide range of biases which influenced their different assessments of the possibility and desirability of managing and moderating Darwinian competition. In this respect, their debates in many ways foreshadow debates at the end of this century (for example, in the works of Thomas Friedman and John Gray) over the impact of new technologies on globalization, including the expansion of free markets, the role of huge multinational corporations, and the proper role of government intervention.

[Don C. Price]

The 96th Comparative Law and Politics Seminar—25 October 2000
The Honorable William J. Hibbler, Ms Catherine M. Ryan
The Erosion and Transformation of the Juvenile Court

Introduction
Judge Hibbler is a Federal District Court Judge for the Northern District of Illinois. He previously served as Presiding Judge of the Juvenile Justice Division of the Circuit Court of Cook County. Ms Ryan is an Assistant State's Attorney, Chief of the Juvenile Justice Bureau, Office of the State's Attorney of Cook County, Illinois. The following is a summary of the presentations.

Judge Hibbler, The Erosion of the Juvenile Court
As our society has become more impacted by the proliferation of drugs, guns and gangs have proliferated there is no question but that violent offenses have become more prevalent. The general response of law enforcement and political leaders nationally to this increased violence has been to call for tougher law and stricter enforcement.

Very early in the history of the juvenile court it was decided that there were some juveniles who were beyond the reach of the juvenile court. In response to this realization, a process was needed to remove these individuals from the juvenile system. Some call this process waiver, and others call it transfer. Generally three mechanisms are utilized by the various states to accomplish transfer. The mechanisms are judicial waiver, statutory exclusion and concurrent jurisdiction; the decisions makers are the juvenile court judges, the legislature and the prosecutors.

The first transfer provision in Illinois provided that in order for a juvenile to be transferred to the adult court, a hearing must be held before a juvenile court judge. Only the designated offenses of murder and rape were transferable offenses. In order to prevail on the transfer motion, the prosecutor had to convince the judge that the minor was not amenable to being serviced in the juvenile court.

In the late 1970s after several expansions in the number of crimes which made juvenile eligible for transfer, a new process was unveiled. The legislature enacted its first automatic transfer provision. Certain minors 15 years of age and older were automatically excluded from juvenile court if they committed certain enumerated offenses, including murder and rape.

Literally, every year since the first automatic transfer provisions were enacted, there has been some expansion in either the number of crimes subject to such transfer or addition of some criteria which would result in transfer. Today we have automatic transfer, mandatory transfer, presumptive transfer, and discretionary transfer. Any child thirteen or older can be the object of a transfer motion. With each new report of some atrocious crime by even younger offenders, the pressure grows to lower the age for transfer. In some states the age has been lowered to ten years of age.

In a twist of fate, some of the recent highly publicized cases may have helped to stem the tide of erosion. It has traditionally been poor, inner-city, minority children involved in most of the violent crimes which receive widespread publicity. This fact made it easy for some to take a very aggressive stance towards treating offenders as adult because they did not believe their own children would ever become targets of these new tougher laws. The recent spate of horrendous acts by affluent, suburban, white children from good homes with respected parents has shocked many people. They are now more willing to search for ways to identify potentially violent children earlier and to expand services to keep children out of the adult court.

Cook County, again playing a leading role has initiated efforts in concert with this new approach.

The probation department expanded the resources available to the court. Specifically the availability of residential treatment for violent youths, sex offenders and emotionally or mentally disordered juveniles through probation has been of tremendous benefit. Efforts such as these will not only stop the erosion of the juvenile court, but they will strengthen that court and make it an even more effective institution. The battle for that court is not yet won, but hopefully we are on the right path.

Ms Ryan, The Balanced and Restorative Justice Approach: A New Day in the Juvenile Justice System in the United States.

This is a new day in juvenile justice in the state of Illinois and in many parts of the United States. Typical of the first hundred years of the juvenile court in the United States, these arguments focused on the individual juvenile (to provide treatment or punishment) with little attention paid to either the victim or the community. In response to the re-examination of the mission of the juvenile justice system, some states adopted a balanced and restorative justice approach. The survey of the Balanced and Restorative Justice Project in 1999 revealed that states had incorporated a balanced and restorative justice approach in different ways. It was found that 19 states had adopted laws to provide for this approach, and 21 states had written this approach into their juvenile justice policies. Furthermore, 32 states had adopted the approach in mission statements, and 36 states had written the approach in program plans.

The balanced and restorative justice approach fuses two important concepts: "restorative justice" and "balanced justice". Restorative justice recognizes that, when a juvenile violates a law, he/she causes harm to a particular person whom we call a "victim". That youth also causes harm to the community from which the victim and youth come. Therefore, the juvenile justice system should work to help and to insist that the juvenile take steps to heal the harm he/she caused to the victim and to the community. The juvenile should attempt to restore the victim and the community to the state of well being they had before the commission of the crime.

Balanced justice recognizes that - to be a fair system - the juvenile justice system should be premised upon three equally important principles: (1) accountability, (2) competency development, and (3) protection of the community.

The goal of the principle of accountability is to have a juvenile offender take full responsibility for causing harm to another person. There are numerous ways to accomplish this goal, such as (1) victim-offender conferences, (2) apologies, (3) financial restitution, (4) community service, (5) victim impact panel, and (6) victim empathy classes.

The goal of competency development is to acquire skills that other healthy members of the society value and to use those skills. Many strategies can work toward this goal. (1) Work experience, service crews and community beautification projects, (2) leadership development and service projects, (3) dispute resolution and mediation, (4) personal and family living skills development, (5) adult mentors, and (6) youth as teacher are such strategies.

The goal of community safety involves both the immediate need for safety and the long-term need for safety. The society may use exterior means, such as (1) community guardians, (2) day and evening reporting centers, (3) home confinement and electronic monitoring, and (4) secure or locked facilities, to protect the community in the short term. In the long run, the most successful intervention is to help the juvenile mature and develop internal controls thorough the accountability and competency building measures.

It has always been the mission of the prosecutor to work for justice in a way that addresses the needs of the three stakeholders: the victim, the juvenile offender, and the community form which they come. What is different? All the professionals who work in the juvenile justice system must move from trying to manage the juvenile's behavior directly to facilitating the community processes that direct the juvenile's behavior. The assistant state's attorney did not visit the communities unless they were viewing a crime scene or interviewing witnesses. How have we changed? We have worked with members of local communities to develop community-based programs. We are still learning how to accomplish this collaboration. Nonetheless, in the first years of this work, we reduced the number of delinquency cases we filed by approximately 7000 cases.

[Saeki Hitoshi]

The 97th Comparative Law and Politics Seminar - 25 October 2000

Professor Bruno Palier

European Welfare State Changes between Globalisation and Path Dependence

Since the mid-1970s, the western welfare states have found themselves in new circumstances. During the 1990s more and more European studies have focused on the actual welfare state changes that have occurred (or not) during the last 25 years. In order to understand these changes, scholars often refer to globalisation as the main independent variable. This presentation has examined the possible relationships between globalisation and the welfare state changes through a rapid review of the most common perspectives on globalisation and welfare. Firstly, some argue that the significant impact of the process of globalisation upon the welfare state has necessitated change. However, the welfare state analysis shows that the welfare institution is still there and did not change that much. Secondly, others argue that globalisation has not had any significant effect upon the welfare state. The real forces playing upon the welfare state are *domestic* forces, in particular the changed economies of advanced societies, the consequences of the 'maturation' of welfare states, and demographic change. Globalisation as an *exogenous* set of forces is, at best, of secondary significance. However, globalisation may also be used to legitimate welfare reforms, even where globalisation has little or nothing to do with the problems. Reference to globalisation *qua* competition and associated economic change is used by national governments as a justification for welfare reform. Similarly, international agencies have sponsored and sustained a discourse around globalisation's assumed impact in order to legitimate welfare reforms, which have been retained by governments as arguments. Therefore, globalisation as a political factor shaping reform should not be neglected.

Between these two extremes are those who argue that these processes may be influential, but only via the mediation of national political and institutional factors. In responding to the dilemmas created by globalisation, *different* national systems can and do respond in *different* ways. This presentation has developed this third perspective in underlining the importance of welfare state institution in framing the different paths taken by the different welfare reforms. Welfare state institutions (*Mode of access*, *benefit structure*, *financing mechanisms*, *management arrangements*) combine differently in the different European welfare systems, which can be gathered into four different families of social protection. These institutional differences lead to different problems, different resources and interests for the actors and different outcomes.

All in all, the new policies adopted in the U.K. have reinforced the liberal and residual dimension of the British social protection system, but also the repressive and social control aspects of providing for the poor. Despite some retrenchment, the Nordic regime has remained relatively stable. Its main strength is the high level of public support it enjoys with the electorate. Continental welfare states

are probably the most challenged, and are still undergoing reform. A specific case should be made for Southern Europe, for which European integration was the opportunity to expand its welfare state and not to retrench it.

[Bruno Palier]

The 98th Seminar Comparative Law and Politics Seminar - 2 November 2000

Professor Bruno Palier

Europeanisation, Globalisation and the French Welfare State Reforms: the Politics of the Reforms (Actors and Processes)

Among the 'frozen' continental European welfare states, the French social welfare system is often seen as one of the most 'immovable objects'. This presentation has analysed most of the welfare system changes that occurred in France during the last 25 years. It argued that during this period, French governments have implemented three different kinds of policies to cope with their welfare state problems.

During the late 1970's and the 1980's, they have faced the Social Security deficits by mainly raising the level of social contribution. These policies only changed the level of the available instrument without reducing the overall level of social expenditure. In the early 1990's, due to new European constraints and changes in the economic environment, new policies occurred, with the sectorial reforms - new medical agreements in health care, a new benefit in unemployment insurance and new modes of calculation for retirement benefits. They introduced new instruments but remained within the traditional (historical and institutional) logic of the French welfare system. Since these two kinds of changes appeared insufficient and since the French welfare system itself appeared to create economic and social problems (unemployment, social exclusion), governments have also decided to act indirectly in reforming the institutional causes of these problems. The French welfare state was felt to be so resistant to changes that governments decided to introduce structural reforms so that it would become less frozen. These structural reforms - new means-tested re-insertion policies (RMI), new financing mechanisms (CSG) and a new role for the State - imply both new instruments and a new logic of welfare.

The conclusion that the eurosclerosis or the path dependent continuity theses are neglecting are certain reforms which may imply profound welfare state changes. The presentation analysed how these structural changes occurred. First, two important changes in the context seem essential: the end of Keynesianism in the late 1970's-early 1980's and the new European constraints. Through Jacques Chirac's failure in 1974-1976 and Pierre Mauroy's one in 1981-1982, the Keynesian use of social benefits have been definitely delegitimised for both left and right governments. The second contextual element, European constraints and commitments, are also important to understand the change in perception of social protection in France: lowering 'social charges' appeared necessary in order to render French companies competitive within the single market, retrenching social expenditure had to be included in the strategy of reducing public expenditure and public deficits in order to meet the Maastricht criteria.

Second, an important political change has been the new position of one of the trade union during the late 1980's. The CFDT was out of the management of social insurance funds since 1967; it made a change in its economic and social position. This trade union has been one of the most active proponents of re-insertion policies, and above all of CSG (and nowadays 35 working hour week). On the contrary, FO or CGT appeared to remain on a very defensive position, opposing any kind of reform proposal. After 1995, the head of each social insurance Fund has changed; FO has lost all its

important position (especially at the head of the National Health Care Insurance Fund) to the benefit of CFDT, who made an alliance with the employers representative.

Finally, these changes have been introduced very progressively, as if they were very marginal, before they happen to play a major role within the core of the social protection system. It is probably because they are seen as marginal that few analyses focus on these changes and that the common analyses on welfare state changes (and especially on continental welfare systems) are emphasising path dependency and continuity. These latter analyses focus on the processes of adaptation of the welfare states. They are closed to an evolutionary perspective, emphasising the inertia of internal dynamic of institutions. They do not credit public policies with having much structural impact. Yet, the recent developments of the social protection systems are not only due to their own evolutionary dynamic, but also to the implementation of public policies. Therefore, the analysis should also focus on the impact of public policies, which is sometimes structural.

[Bruno Palier]

The 100th Comparative Law and Politics Seminar—13 December 2000

Professor Ehud Harari

War, Peace and Regional Cooperation: What can Israel Learn from Japan's Relations with East Asia

What can Israel learn from Japan's relations with her East Asian neighbors? Not much, it may seem. Leaders, instead of learning from events abroad, tend to cast their previously shared image and prejudice. The two regions, East Asia and the Middle East, are so different that may doom any attempt for comparative analysis. Few studies have compared Israel and Japan to begin with, and the few exceptions are very poor in quality.

There is, however, much to be learned by comparing Japan and Israel. Japan, an aggressor in the previous war, is now accepted and tightly integrated into the network for regional cooperation in the East and Southeast Asian region; Israel, after decades of wars and violent confrontations with her neighbors, is now about to cooperate with her formal adversaries for peace-making. Few think this will be easy, but then few had thought it would be possible for Japan to work it out with the East Asian states.

Let's start from the differences. Japan lost a war, but Israel did not. In fact, peace making in the region is more difficult in the Middle East because both sides refuse to give in, taking compromise as a sign of defeat. Both Japan and Israel suffer from legitimacy deficits, Japan with its imperialism underneath the rhetoric of Anti-Western Imperialism, and Israel suffering from allegations that takes her as tokens of Western imperialism in the region. Japan suffers less from territorial or religious disputes, while both are critical in the mid-Eastern conflicts. Religion plays a critical role in the Middle East, while modern powers in East Asia are all secular in nature. The list goes on.

Aside from such regional differences, there are differences in domestic politics. Japan, after losing the war, has not suffered from military vulnerability, although there still is a sense of economic vulnerability; Israel, although winning a series of wars, still suffers from a sense of both military and economic vulnerability. This lead to a larger political role played by the military in Israel, while Japan became something of a merchant state after World War II.

When we turn our attention to the political party system, the remarkable stability of her dominant-party system stands out. Israel also had a dominant-party system, but that system has now crumbled

down into a Balkanized party system. Moreover, the relationship between the bureaucrats and politics is just the reverse in the two countries. In Japan, bureaucrats command the political picture, while politics always had the say in Israel, ever since her independence.

In spite of such remarkable differences, there are salient similarities as well. Both Israel and Japan suffer from legitimacy deficits toward their neighboring countries. Both nations enjoy relative economic preponderance in their regions. Both are potential nuclear powers, Japan a could-have and Israel a might-have. Both are placed under special relationship with the United States, which has related to pro-and anti-US public opinion in both nations. And both Israel and Japan have been greeted by the duality of their neighbor's perception, where Israel and Japan were at once hated and copied at the same time.

One critical area is the similarities and differences in regional order. The challenges for the Japanese to work out her relationship with Asian nations must have been more difficult than the challenges that confront Israel. Japan, however, seems to have been more successful in managing her relationship with Southeast Asian nations. This may be one area to draw lessons from.

The tools of Japanese foreign policy were Official Development Assistance and private investment. Such did not work to make the Japanese liked in the region, but at least the Japanese were accepted, a significant achievement considering the status of Israel in the Middle East.

However, this was not done by money alone. The Japanese carefully constructed regional norms of cooperation. Without enforcing norms or a code of behavior, the Japanese government exerted leadership from behind. This attempt of policy coordination provided a bridge between economic preponderance and the legitimacy deficits, turning the perception to Japan from a threat to an ally and a model.

The differences between Japan and Israel, or East Asia and the Middle East for that matter, are still so large that it does not allow for parsimonious conclusions. And yet it should be clear that the Japanese case may offer some hints for coordinating Israel's relationship with her neighbors, a critical issue at this very moment.

[Fujiwara Kiichi]

The 101st Comparative Law and Politics Seminar—14 December 2000

Professor Kenneth L. Port

Wal-Mart Stores, Inc. v. Samara Bros., Inc.: The United States' New and Confused Standard for Inherently Distinctive Trade Dress

Introduction

It is now rather idiomatic that trademark rights in the United States are derived from use, not from registration. Trade dress, like all trademarks in the US, is protectable if it is either is inherently distinctive or possesses secondary meaning. Trade dress has been defined as the total image or overall appearance of a product, and includes, but is not limited to, such features as size, shape, color or color combinations, texture, graphics, or even a particular sales technique.[1] Secondary meaning exists when an appreciable portion of the consuming public believes the indicia claimed identifies the source of the good and not just the good itself.[2] Inherently distinctive trademarks are marks

[1] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 765 n.1 (1992).

[2] *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 10-11 (2d Cir. 1976).

which are new or coined terms such as Kodak or Sony, or suggestive marks which do not describe the goods but only suggest them such as Coppertone. Under the U.S. common law, all indicia of source have been protected as trademarks or trade dress provided they either have secondary meaning or are inherently distinctive.[3]

Although the definition of inherently distinctive trademarks has been well settled for quite some time, the US courts have never adequately defined inherently distinctive trade dress. This is so despite the fact that the United States Supreme Court in *Two Pesos v. Tacao Cabana*[4] in 1992 allowed the overall business impression (both interior and exterior) of a Mexican restaurant to be protected as inherently distinctive trade dress even though there had been a jury finding that the dress in question lacked secondary meaning. However, the Court did not define inherently distinctive trade dress. *Wal-mart v. Samara*[5] was expected to answer that question.

I. Facts[6]

Respondent Samara Brothers, Inc., designs and manufactures children's clothing. Its primary product is a line of spring/summer one-piece seersucker outfits decorated with appliques of hearts, flowers, fruits, etc. US retailers, such as JCPenney, sell this line of clothing under contract with Samara.

Petitioner Wal-Mart Stores, Inc., is one of the nation's best known retailers, selling among other things children's clothing. In 1995, Wal-Mart contracted with one of its suppliers, Judy-Philippine, Inc., to manufacture a line of children's outfits for sale in the 1996 spring/summer season. Wal-Mart sent Judy-Philippine photographs of a number of garments from Samara's line, on which Judy-Philippine's garments were to be based; Judy-Philippine duly copied, with only minor modifications, 16 of Samara's garments, many of which contained copyrighted elements. In 1996, Wal-Mart briskly sold the so-called knockoffs, generating more than $ 1.15 million in gross profits.

In June 1996, a buyer for JCPenney called a representative at Samara to complain that she had seen Samara garments on sale at Wal-Mart for a lower price than JCPenney was allowed to charge under its contract with Samara. The Samara representative told the buyer that Samara did not supply its clothing to Wal-Mart. Their suspicions aroused, however, Samara officials launched an investigation, which disclosed that Wal-Mart and several other major retailers -- Kmart, Caldor, Hills, and Goody's -- were selling the knockoffs of Samara's outfits produced by Judy-Philippine.

After sending cease-and-desist letters, Samara brought this action in the United States District Court for the Southern District of New York against Wal-Mart, Judy-Philippine, Kmart, Caldor, Hills, and Goody's for copyright infringement under federal law, consumer fraud and unfair competition under New York law, and -- most relevant for our purposes -- infringement of unregistered trade dress under 43(a) of the Lanham Act.[7] All of the defendants except Wal-Mart settled before trial.

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[3]The Lanham Act, a federal codification of state common law of trademarks, defines trademarks as it defines in 45 to include "any word, name, symbol, or device, or any combination thereof [used or intended to be used] to identify and distinguish [a producer's] goods . . . from those manufactured or sold by others and to indicate the source of the goods . . . ." 15 U.S.C. 1127.

[4]505 U.S. 763 (1992)

[5]___U.S.___, 120 St. Ct. 1339 (2000).

[6]This section consists of a lightly edited version of the Supreme Court s description of the case.

[7]15 U.S.C. 1125(a).

After a week-long trial, the jury found in favor of Samara on all of its claims. Wal-Mart then renewed a motion for judgment as a matter of law, claiming, *inter alia*, that there was insufficient evidence to support a conclusion that Samara's clothing designs could be legally protected as distinctive trade dress for purposes of 43(a). The District Court denied the motion[8] and awarded Samara damages, interest, costs, and fees totaling almost $ 1.6 million, together with injunctive relief. The Second Circuit affirmed the denial of the motion for judgment as a matter of law,[9] and the Supreme Court granted *certiorari*.[10]

II. Holding

The Supreme Court reversed and very narrowly held that a product configuration trade dress is only protectable when the owner can show secondary meaning. The court created a new distinction between product configuration trade dress (the shape of the good) and product packaging trade dress (the wrapping or container of a product). The court held that the trade dress in Taco Cabana was of the latter category and did not require secondary meaning and that Wal-mart was in the former category and therefore required secondary meaning.

Ignoring Taco Cabana, the Court relied instead on *Qualitex v. Jacobson*.[11] In that case, the issue was whether or not simply the color of press pads could be protected as a trademark. The Supreme Court there held that color, like any other non-word mark, could be subject of trademark protection provided it act to identify the source or origin of the good or service that is, provided it had secondary meaning.

In *Wal-mart*, the Court not only held that Samara could not protect it s trade dress because it lacked secondary meaning, it also signaled a large departure from prior Supreme Court precedent indicating an effort to equate trademarks and trade dress for all purposes. This Court has draw a bright distinction between trademarks and product configuration trade dress: trademarks may be inherently distinctive, but product configuration marks never can be.

III. Significance

In this case, the Supreme Court held that product configuration trade dress could never be inherently distinctive but must always possess secondary meaning prior to receiving trademark protection. However, at the same time, the Court did not overrule *Two Pesos v. Taco Cabana* in which the Court held that the festive atmosphere and the design of a Mexican restaurant was inherently distinctive trade dress and receive trademark protection even though the jury had expressly found that the dress involved lacked secondary meaning. In *Wal-mart*, in fact, the Court entirely dismissed the *Taco Cabana* case referring to it as some tertium quid that is akin to product packaging and has no bearing on the present case. [12]

This judicial abdication is especially troublesome given the fact that the Court's own question

[8]969 F. Supp. 895 (SDNY 1997).

[9]165 F.3d 120 (1998).

[10] 528 U.S. ___ (1999).

[11]514 U.S. 159 (1995).

[12] *Wal-mart*, 120 S. Ct. at 1345

presented asked What must be shown to establish that a product's design is inherently distinctive. . .[13] That is, the Court's question presumed Taco Cabana would be at the center of the matter, not irrelevant.

At least as troubling is the new judicial two-step the Court has created: the Court divined a distinction between product configuration trade dress on one hand (which cannot be inherently distinctive) and product packaging trade dress (which can be inherently distinctive) on the other. This case seems to have unnecessarily complicated the notion of protecting unregistered trade dress. What is clear is that most owners of unregistered trade dress will now claim their dress is packaging akin to *Taco Cabana* and not configuration akin to *Wal-mart*. After all, in some ways, the famous shape of the Coke Cola bottle is not configuration but the packaging of the beverage. This silly semantical argument seems to be the likely future course of trade dress litigation in light of *Wal-mart*.

Rather than analogizing to the obvious and expected case of *Taco Cabana*, a trade dress case, the Court relied on *Qualitex*, a case which asked whether color alone could ever become a trademark. *Qualitex* is not a trade dress case.

In the United States, when no clear statute exists, courts are supposed to look for the most analogous case and hold in accordance with that case unless they have the authority to overrule that case. The most analogous case here is not Qualitex, but Taco Cabana. Color is less analogous to product configuration than the trade dress addressed in Taco Cabana. If the Supreme Court was going to come to a conclusion inconsistent with Taco Cabana, they should have overruled it rather than using pejorative terms to describe it.

There is another, more distressing significance to *Wal-mart*. It is now well documented that the Rehnquist Court has largely rejected the individual rights jurisprudence that had affected many of the Supreme Court s cases since World War II.[14] One of the bastion indicators of individual rights in America has been the unpredictable jury system. It appears that *Wal-mart* may be another blow to the jury system in the United States.

In *Markman v. Westview*[15] the Supreme Court held that patent claim interpretation was a question of law, not a question of fact. This holding removed patent claim interpretation from the jury and left it exclusively to the judge. This is the source of what is now referred to as a Markman hearing where some judges require parties to essentially litigate in a bench trial the scope or definition of a patent claim before the infringement issue is presented to a jury.

Similarly, by holding that product configuration trade dress can never be protected absent secondary meaning, the Court has effectively removed yet another question from the jury. In *Markman* there may be some reason for removing claim interpretation from a jury. After all, it is a very specific, technical question that may not be best left up to the average lay juror. Inherent distinctiveness of a trade dress, that is, upon first glance is it capable of identifying source, seems to be exactly the kind of question that should be left up to the jury.

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[13]Stuart M Riback, Product Trade Dress: Where Do We Go From Here?, 90 TMR 563 (2000).

[14]*See, e.g.*, Stephen E. Gottlieb, MORALITY IMPOSED (2000).

[15]Markman v. Westview Instruments, 517 U.S. 370 (1996).

IV. Conclusion

Why the Court unanimously held that not only should this unnatural distinction be made between product configuration trade dress and product packaging trade dress but also effectively remove yet another question from the jury should give us all pause. Regardless, this case will likely be the source of interesting debate and analysis for sometime in the future.

[Kenneth L. Port]

The 102nd Comparative Law and Politics Seminar-14 December 2000

Professor Howard A. Shelanski

Telecommunications and Competition Policy in the United States

Regulation and antitrust enforcement in technologically dynamic markets are challenging tasks. Enforcement that impedes technological change may have substantial social costs over time. But enforcement that is overly diffident might yield concentrated markets, higher prices, and no offsetting, long-term benefits. How policy officials should approach conflicting claims about competition and innovation is one of the central questions in US microeconomic policy today. The issue has become particularly salient in the telecommunications sector.

Indeed, participants in regulatory and antitrust proceedings affecting telecommunications have, with increasing frequency, asserted that policy decisions designed to promote or preserve competition will have unintended, negative consequences for technological change. The goal of my speech was to determine the initial presumption with which regulators and enforcement agencies should approach such contentions. To that end, my speech examined how the introduction of new technology in U.S. telecommunications networks has historically related to market structure. It analyzes deployment data from a sample of technologies and finds that innovations have been more rapidly deployed in telecommunications networks the more competitive have been the markets in which those networks operated. This positive correlation between competition and adoption of new technology suggests that policies designed to preserve competition may will be consistent with encouraging firms to deploy innovations and bring new services to consumers.

There will certainly be instances when good evidence supports the likelihood of a tradeoff between competition today and new technology tomorrow. For example, financial and technical analysis might demonstrate that deployment of an innovative facility or service is truly contingent on achieving larger scale or unifying complementary assets. Or, data might show that consumers are beginning to consider new services as substitutes for established ones and that markets should be defined more flexibly and dynamically. When there is good reason to believe that tradeoffs between competition and innovation both exist and will produce net economic benefits, regulators should not be so focused on short-term market structure and performance that they miss greater dynamic benefits. Any presumption in favor of preserving existing competition must therefore be subject to rebuttal.

My speech, however, concluded from its examination of historical case studies of technological deployment that telecommunications regulators and policymakers in the United States should approach claims that new products and services will flow from market consolidation warily. They must certainly recognize that technological innovation and conventional competitive ideals might at times conflict in as dynamic an industry as telecommunications. But their presumption should be in favor of preserving competition.

[Howard A. Shelanski]

The 104th Comparative Law and Politics Seminar—3 March 2001
Professor Thomas Meyer
Third Way Issues

The new "Third Way"-dialogue between proponents of the European Social Democracies during the last few years has created a considerable amount of consensus both in their basic political philosophy and regarding the guidelines for new policies appropriate to implement them. This does by no means come as a surprise taken into account that all the respective countries are facing the same new challenges of globalization and rapid internal change. The ground on which they stand is very much the same, and so are the basic values in accordance with which they are aiming to cope with the new challenges. Relevant differences remain, however: national differences in the actual social and economic situation itself; differences in the weight of ideologies and traditions in each of the Social Democratic parties; differences in the political cultures of each country, in their political systems and in the composition of the respective political arenas in which they have to compete with other parties.

Notwithstanding all remaining differences the similar problem constellations and dominant similarities in the interpretation of basic values such as justice make for a substantial convergence in the approach of modern Social Democracy. The new issues under discussion are the same everywhere, an so are the basic ways of responding to them. The new approach is focussing on six related dimensions:

1. New Economy. Here the question is : what is really different, and what will be the political responsibility of governments in a globalized knowledge economy for growth and employment - largely without the Keynesian recipes of the golden age of Social Democracy.

2. New Welfare. How can the welfare state contribute to growth, development and activity of the individuals and self-responsibility instead of cultivating passivity. But also how can it guarantee minimum standards for a decent life for everybody that are sustainable in the long run.

3. New Governance. What is the proper role of government in a highly complex, decentralized and utterly dynamic modern society? What is the appropriate division of responsibility between state, society and the individual, between individual rights and duties in todays society?

4. New Politics. How can Social Democratic parties prompt very different social milieus- such as traditional blue collar workers, modern wired workers, new middle classes in the service sectors, and new IT- entrepreneurs - to support their political projects and form an electoral majority. What are the relevant strategies to reach all of them? Which policies must be offered, what ways of communication are necessary?

5. Modern Social Justice. Required is a realistic and appealing concept of **social justice** that matches with the complex modern challenges. Which inequalities are productive and desirable for the whole of society? Which are to be tackled by new policies? In which ways has such a complex concept of justice to be communicated in the individualized and highly diverse society of today.

6. Transnational Regulation. Last not least the most controversial issue: what are the prospects for transnational regulation of the finance markets, for the control of transnational concentration of economic power, for social and ecological responsibility and framework-setting.

The constraints with regard to which the new challenges have to be met are the same in all countries:

- The devaluation of the Keynesian macro – economic coordination that erstwhile had been the favourite tool of social democratic economic policies, due to economic globalization

- The increasing stress on all the welfare system budgets due to high rates of long term unemployment and new social developments;
- The growing diversification of the different parts of the old and new working classes;
- The emergence of new rivals on the left in the electoral arena (Green Parties)

Within the limits of an overall consensus five different approaches amongst European Social Democratic Parties are discernible: The market oriented approach of British Labour, the statist approach of the French Socialist, the Dutch consensus model, the reformed welfare state model in Skandinavia and the social liberal model in Denmark. A Process of benchmarking between these models is underway in present day Europe.

[Thomas Meyer]

[Forums]

The 109th Comparative Law and Politics Forum—9 November 2000
Professor Robert Kneller
Genetic Information: Japanese and U.S. Approaches

Background

Most of the human genome containing about 100,000 genes has been sequenced. New genes are their functions are being identified almost every day.

Many diseases and many traits that are considered good and bad have a genetic basis. Within about 10 years, many of these genetic bases will be known. If we know a person's genetic blueprint, we will be able to make good estimates of the risks for developing various diseases as well as predispositions to depression, hyperactivity, high or low intelligence, etc. Because these predispositions are unchangeable, determine to a large extent the our individual identities, and shape how we are perceived by other persons, access to this information by ourselves and others is a sensitive issue. Already there are tests for between 500 and 1000 genes that affect health, and this number is increasing rapidly.

In the U.S., people are concerned that access to personal genetic data might threaten employment or promotion chances, as well as access to health, disability and life insurance. This talk will discuss legislation to deal with these concerns. However, such information may also affect marriage opportunities and relationships among family members and close friends. Ultimately, such information may have a profound effect on the way we regard ourselves and others—specifically on our notions of individual freedom and responsibility and our expectations of ourselves and others.

Employment and insurance discrimination.

<u>the problem</u>

There have been examples of Americans who have lost or been denied insurance, or who have lost or been denied employment or promotions because of genetic test results indicating increased risk for particular diseases. Although these examples may be isolated, some have been widely reported and there appears to be widespread concern that employment and insurance may be jeopardized.

On the other hand, employers often argue that some genetic susceptibilities to disease are highly relevant to certain types of potentially hazardous occupational exposures and it makes sense to keep vulnerable persons out such of such work.

Insurers argue that access to genetic information will allow them to assess individual risk more accurately than they do in traditional underwriting. Persons with low genetic risk profiles will have to subsidize persons at high risk to a lesser extent than they do now. Prevention programs could be targeted to persons who need them most. Insurers maintain that if they have access to individual genetic profiles, the number of persons refused insurance and the average premiums would probably be no higher than they are today. They also note that denying insurers access to genetic profile data held by their insureds would enable the insureds to unfairly manipulate the system. I.e., the persons most likely to demand insurance would be those who knew they had a predisposition to illness or early death.

Few, if any insurance companies require genetic tests as a condition for enrollment. However, if available, most will use such information to make decisions concerning eligibility and premiums, unless they are legally prohibited from doing so.

Therefore, the question arises: under what circumstances can insurers and employers have access to genetic data and when can they collect, use and distribute such data.

legislative solutions

As of 1996, Austria, Belgium, the Netherlands and Norway had laws restricting the use of genetic information by insurance companies. For example, the Dutch law prohibits life insurers from requesting or using genetic information for policies valued at less than 200,000 guilders ($50.000). At least 28 U.S. states have passed laws to limit access or use by insurers or employers, however these restrictions vary considerably.

In 1997, a U.S. law intended primarily to make sure that persons changing jobs do not lose health insurance coverage prohibited group health insurance plans (i.e., employment-related health insurance plans) from refusing to enroll persons on the basis of genetic information. However, employment-related group health plans, by their very nature, usually are open to all employees, so the likelihood of genetic discrimination is low. Moreover, this prohibition applies only to persons without symptoms of the disease associated with a genetic predisposition. Furthermore, there is no prohibition against the employer or the insurer requesting, collecting or disclosing genetic information. Could an employer dismiss or refuse to hire a person because of genetic test results? The Americans with Disabilities Act, which was enacted to limit employment discrimination against disabled persons, may prevent this, buts this is not certain.

Since 1998, a bill has been under consideration in the U.S. Congress [H.R. 2457] that would prohibit individual as well as group health insurance plans from (1) requesting or collecting genetic information (unless voluntarily authorized in writing) and (2) denying coverage or adjusting premiums on the basis of genetic information—including information about family members and information about a request for genetic testing or services. Similarly, it would prohibit employers from requesting or collecting genetic information (except for carefully regulated programs to detect genetic damage as a result of occupational exposures) and (2) basing hiring, discharge or promotion decisions upon such information. This bill provides a high level of protection against both health insurance and employment discrimination—at least of persons without symptoms of genetic disease.

One aspect that is particularly troubling to both insurers and employers is the broad definition of "predictive genetic information" which includes information about the health history of family members. Such information is clearly information from which inferences can be drawn about genetic predispositions to disease. At the same time, such information is part of a routine medical history and is found throughout medical records and even in many job application forms. In other words, the distinction between what information should be private and which need not be private is unclear.

Another troubling provision for employers is the absence of any provisions allowing (1) collection of genetic information that has scientifically proven relevance to potentially hazardous occupational exposures and (2) employment decisions based upon such information. While employers believe such exceptions are appropriate, defenders of the current bill believe such exceptions would provide a large loophole allowing employment discrimination, and would also decrease incentives for employers to reduce hazardous workplace exposures.

An alternative anti-discrimination bill [H.R. 2555], which contains just such a generous loophole "if consistent with business necessity," has also been under debate in the U.S. Congress for over two years.

These details about U.S. draft legislation show the complexity of the genetic privacy debate and the difficulty of finding a fair compromise that meets the needs of all parties.

Adopting some form of guaranteed universal health insurance in the U.S. would go a long way towards solving problems associated with the increased availability of genetic data. The presence of universal health insurance in Japan and most European countries has probably muted the genetic discrimination and privacy debate in these countries. However, if employers are responsible for paying the majority of their employees' health care costs (as is usually the case in Japan), employers will still have an incentive not to hire persons whom they know are genetically predisposed to disease.

Social and philosophical dimensions

However, other problems will remain. Interviews with clinical and research geneticists suggest that Japanese families are deeply concerned about the social implications of genetic testing. In particularly they are concerned that the entire family will be stigmatized if a family member is found to have a gene for a serious disease and that prospects for marriage and having children for all members will decrease.

At present, the only regulations relating to genetic privacy, cover participants in Japanese government sponsored genetic research projects. In this case, the protections with respect to voluntary participation, informed consent and confidentiality of data are quite strong. However, these regulations cover only a small subset of genetic testing.

One possible solution for the U.S., Japan and other countries is to establish a system for anonymous genetic testing and counseling. However, to guarantee confidentiality, such a system would probably have to be outside normal health insurance systems and therefore patients would have to pay for these services themselves. Also, if disease genes are detected, patients will have to re-enter the normal health insurance system for preventive care. At least in the U.S., insurance companies still have the right to ask for information on genetic test results in most states and if the patient has answered untruthfully, their coverage may be terminated.

The greatest challenge posed by the increasing ability of genetic tests to predict one's future goes beyond the issues discussed above. The possibility exists that this will fundamentally change how we view ourselves and other persons, and our sense of individual freedom, responsibility and ability to control one's destiny. Our ability to do something about the genetic predispositions that we discover may have an important bearing on this issue. If palatable, affordable means are available to prevent or cure the diseases to which we find ourselves susceptible, such testing will likely enhance both our health and our sense of control over our destinies. The more distant challenge then will be how to deal with genes that bear upon factors such as intelligence, personality, etc. Will ignorance or knowledge be better? Will being able to change these factors (for ourselves and/or our offspring) or not being able to change these factors, or avoiding change even if it possible, be better? We may have partial answers. In any case, once we know our genetic blueprints, our

perceptions of ourselves and of our neighbors will change forever.

[Robert Kneller]

The 110th Comparative Law and Politics Forum – 19 December 2000
Dr Christopher Hughes, Dr Hugo Dobson
Japan's Response to Globalisation

This forum was designed to promote the exchange of opinions between young researchers, and to build-up a future transnational network of scholars. With this objective in mind, a workshop style was adopted for the first time. Stimulating lectures by both speakers, Dr Hugo Dobson and Dr Christopher Hughes, initiated and contributed to a spirited debate amongst the participants with each of their presentations. Both talks were based principally on the chapters of the book, co-authored by Drs Dobson and Hughes, and Professor Glenn Hook (University of Sheffield) and Dr Julie Gilson (University of Birmingham). The volume is entitled *Japan's International Relations; Politics, Economics and Security* and will be published in June 2001.

Dr Dobson began by describing Japan's diplomacy as 'quiet diplomacy', commenting on his research into its behaviour in international arenas, and in particular the United Nations (UN). He explained that Japan's diplomacy has been relatively successful in the achievement of national interests by making the most of the three spheres of activity: bilateralism, regionalism and multilateralism. In particular, he pointed out that Japan has a remarkable facility to switch its diplomacy between these levels. Thus, a significant development in Japan's diplomacy recently has been for it to raise tariff issues in the multilateral context of the World Trade Organisation (WTO), rather than try to deal with these issues on a bilateral basis. Moreover, such multilateral institutions have also increased the opportunities for Japan to act as the representative of East Asia. Given these characteristics of Japan's diplomacy as quiet and moving between different levels, the impact of globalisation can be regarded as not necessarily a potential encumbrance for Japan's pursuit of its national interests, but rather as means to facilitate and further exploit multiple channels of diplomatic activity. The rebirth of G7 as the G8 with the addition of Russia has given what was formerly described as a 'club' a more political and institutionalised setting, and this has created new diplomatic space in which Japan can operate. However, at the same time, an important test for Japan's diplomatic ability will be how it can be applied and adapt to the new global environment. This includes the challenges of the enhanced influence of non-state actors, such as Non-Governmental Organisations (NGO); moves to reform and resist economic globalisation; and changing conceptions of security.

Dr Hughes then proceeded to discuss the problem of globalisation and its potential impact on Japan's international relations, highlighting what he termed as the 'globalisation-security nexus'. He argued that although globalisation was a highly influential concept in the field of security studies, it is as yet a subject which has not received sufficient attention or detailed examination. Dr Hughes explored the issue of the globalisation-security nexus in both generic conceptual terms and with regard to the specific impact of globalisation in the Asia-Pacific region. He posited that globalisation inherently defies conventional concepts of security due to its breaking down of the natural interlinks and cohesiveness between territorial sovereign states and their citizens. Therefore, in the light of the impact of globalisation, the study of the issue of security needs to be more comprehensive in order to cover all levels of domestic and international issues. The horizontal expansion of the security agenda under conditions of globalisation requires the transcendence of the traditional focus on the military dimension, and a move towards the inclusion of economic, environmental and societal security issues, so as to formulate a 'human security' agenda. The vertical extension of the concept of security, on the other hand, should be targeted at the inclusion of non-state security actors. In order to demonstrate more clearly these aforementioned concepts in relation to the changing nature of security, Dr Hughes argued that in the Asia-Pacific region the twin processes of decolonisation and bipolarisation have undermined the ability of states to mitigate the gap between the security of states

as institutions and the security of their individual citizens. Hence, in facing the tide of globalisation, the region has become more vulnerable to a range of security contingencies and threats. Dr Hughes, in line with Dr Dobson, agreed that Japan is perhaps in a favourable position to respond to globalisation's security challenge in terms of its disposal of political and economic power. However, he also questioned Japan's actual and effective pursuit of an 'human security' agenda in the region due to its declining reliance upon the use of Official Development Assistance (ODA), even though many of the security problems of globalisation demand a response based on economic power; and also Japan's over-reliance on the bilateral military security relationship with the US.

Following the presentation of the two lectures, the participants (including the speakers and moderator) were divided into two groups and free discussion followed. The main theme was concerned with to what extent Japan's diplomacy can be termed as bilateralism or regionalism-oriented. The two groups both shared the viewpoint that, in an era of globalisation, no country could afford dispense with any of the three spheres of bilateral, regional and multilateral diplomacy. Nonetheless, Japan appeared to incline towards bilateralism. The first group argued that although Japan's bilateral-oriented diplomacy might be somewhat out of step with global trends and necessities, the concept of 'regionalism' contained too many ambiguities at the present to be a basis for Japan's international relations. Additionally, in order to overcome the difficulty of creating a shared sense of regional community in East Asia, it was necessary to look to overcome the problems of history. In asserting this point, the first group implied that Japan must graduate from the practice of 'quiet diplomacy' to take a more open and leading role in the region. The second group proposed that we should judge which diplomacy form of diplomacy is superior on a case-by-case basis, and also that the concept of 'human security' is still vague and underdeveloped. Moreover, even though it is undeniable that globalisation compels international actors to tackle in a multilateral fashion a variety of issues such as the environment and the stability of financial markets, it is also important to remember schemes such as the Asian Monetary Fund (AMF) failed due to still conflicting national interests and perceptions in the East Asia region.

In response to these critiques and questions, Dr Hughes and Dr Dobson noted that the interests of the all actors in the East Asian are indeed diverse and complex. Nevertheless, irrespective of this complexity, both claimed that by the introduction of a more comprehensive concept of security and by seeking to implement policies based on new thinking, there is still a strong possibility that grounds for a common regional perception could be fostered. For it is important to acknowledge that whilst Japan continues to depend upon the US in terms of security, she is also increasingly adopting a policy of supplementalism centred on ASEAN in order to deal with global financial and environmental problems.

Although this forum set out with the originally limited intention of creating a venue for interaction between Anglo-Japanese researchers, it turned out to be a real 'forum' which stimulated open debate and a frank exchange of opinions. The key to the forum's success lay not only in the way in which the theme was selected and discussed in a detailed manner in the presentations, but also in the ways in which the workshop style arrangement and skills of the moderator enhanced the friendly atmosphere amongst all participants. Therefore, this type of forum will be highly desirable in the future and will provide a vital means to build up a 'global' network of younger scholars.

[Kodate Naonori]

Visiting Research Scholars of the Graduate School of Law and Politics
October 2000—March 2001

Lawrence W. Beer, Emeritus Professor, Lafayette College
Term: November 2000－January 2001
Research Area: Human Rights Law and Politics
Host: Professor Hasebe Yasuo

Kim Ji Hwan, Lecturer, Sungkyunkwan University
Term: November 2000－November 2001
Research Area: A Study on the Holding Company
Host: Professor Egashira Kenjiro

Jöel Thoraval, Professor, Ecole des Hautes Etudes en Sciences Socials (Paris)
Term: December 2000－December 2001
Research Area: Anthropology of Ethnicity, Contemporary Confucian Thought
Host: Professor Watanabe Hiroshi

Lee Chul Song, Professor**,** Hanyang University
Term: December 2000－February 2001
Research Area: Several Issues about the Current Laws of Japan and Korea Regarding the Economic Relations of Both Countries
Host: Professor Iwahara Shinsaku

Lee Dongwon, Judge**,** Seoul High Court
Term: December 2000－March 2001
Research Area: Issue Assortment Procedure, Bidding During a Certain Period
Host: Professor Takahashi Hiroshi

Robert B. Leflar, Professor, University of Arkansas
Term: January 2001－August 2001
Research Area: Comparative Health Care Quality Control Strategies
Host: Professor Higuchi Norio

Yoo Jin Sik, Lecturer, Kyounghee University
Term: January 2001－February 2001
Research Area: Division, Control and Responsibility in Government Organization Law
Host: Professor Kobayakawa Mitsuo

Patricio Valdivieso Fernandez, Professor, Pontificia Universidad Catolica
Term: July 2000－August 2000
Research Area: Political Education and International Relations
Host: Professor Ogushi Kazuo

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Director of the Center: Professor Watanabe Hiroshi
Chairman of the Committee: Professor Kanda Hideki

7-3-1 Hongo, Bunkyo-ku, Tokyo 113-0033 JAPAN
tel: +81 3 5841 3170/3178
fax: +81 3 5841 3174
e-mail: lhikaku@j.u-tokyo.ac.jp
homepage: http://www.j.u-tokyo.ac.jp/~icclp

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