研究論文

For Building e-Confidence: A Proposal for a Trusted Third Party Model

電子取引の信頼性を醸成するために：信頼できる第三者機関モデルの提案

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ABSTRACT

In this paper, we discuss how to build confidence in electronic transactions (e-Confidence), focusing on “trusted third parties (TTPs)” as key agents. Construction of an institutional framework is one important focal point for expanding the market of electronic commerce. In the information society, to promote private dynamism and to activate innovations, it will be necessary to switch from a legal system of ex ante restrictions to a system centered on ex post controls, based on highly transparent standards and the private-initiative principle. So how shall we reconstruct a set of institutions? Establishing a clear position for trusted third parties (TTPs) may be necessary to create a new system for the future. We define TTP as a non-public sector in the intermediate domain between the for-profit, market domain and the public, government domain. By focusing on the functions of TTPs in the fields of personal data protection laws and alternative dispute resolution (ADR), we validate the potential of TTPs. If the for-profit sector, government, academia and private individuals cooperate to assign suitable functions and authorities by organizing TTPs, a system that nourishes e-Confidence will be generated, and the market for electronic commerce will expand.

要旨

本稿では、「信頼できる第三者機関」に焦点を当てて、電子取引における信頼性を確立するための制度的基盤について考察する。情報社会においては、民間のダイナミズムを促進してイノベーションを活性化させるために、法制度を事前的規制から透明性の高いルールに基づく事後的規制を中心としたシステムへと転換し、政府の役割を自主規制や民事規制が有効に機能するような環境整備と消費者の自律支援にシフトすることが求められている。では、どのようにして各主体の役割を見直すべきであろうか。私は、市場原理の機能範囲が拡張し、政府の果たし得る機能範囲が縮小する中で生まれている制度的な空白を埋めるために、信頼できる第三者機関を今後の制度設計と制度運営を担う主体として明確に位置づけることが必要であると考えている。信頼できる第三者機関とは、市場領域と非市場領域の中間領域にあるサービスを担うことによって相対する価値を調整し、政府あるいは市場とは異なる資源配分を行う主体の総称である。本稿では、個人情報保護と裁判外紛争処理に関する制度問題の考察を通じて、信頼できる第三者機関のもつ潜在的可能を検証することができた。産・官・学・民が互いに協力して TTP を組織しながら、それぞれの権能を適切に分散して競争を行うことによって、電子取引の信頼性が醸成され、電子商取引市場が拡大することを期待したい。

[Keywords]
e-Confidence, TTP (trusted third party), ADR(alternative dispute resolution), personal data protection law

[キーワード]
電子取引における信頼性、信頼できる第三者機関、裁判外紛争処理制度、個人データ保護法
1 Toward Construction of an Institutional Framework for e-Commerce

1.1 Private-Initiative Principle and Traditional Institutional Framework in Japan

Preparation of an institutional framework is one important focal point for creating the infrastructure of electronic commerce (e-Commerce). The U.S. Government, which is leading the digital revolution, published its views concerning the rules that should be applied to e-commerce in “A Framework for Global Electronic Commerce” released on July 1, 1997. This report articulates five principles: (i) the private sector should lead, (ii) governments should avoid undue restrictions on electronic commerce, (iii) where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce, (iv) governments should recognize the unique qualities of the Internet; (v) electronic commerce over the Internet should be facilitated on a global basis.

Also in Japan, the Cabinet Advanced Information Communications Society Promotion Headquarters’ Committee on e-Commerce released a report entitled “Japan’s Efforts to Promote e-Commerce” in 1998. On January 6, 2001, the “Basic Law on Advanced Information Communications Network Society Formation” came into effect. These documents present the principle that the private sector should play a leading role in forming the institutions for e-commerce and that the government should prepare an environment so that the vitality of the private sector is unimpeded.

The meaning of this private-initiative principle becomes clear when compared with the traditional institutional framework. Here, we shall take up the product liability system as an example of a system for protecting and promoting consumers’ interests.

Japan’s product liability system was established by an administrative agency and industrial groups under the control of the agency. As an ex ante measure, guidelines about appropriate manufacturing and labeling were prepared by the Ministry of International Trade and Industry (now the Ministry of Economy, Trade and Industry) together with the establishment of the Product Liability Law. Based on that law, each industrial group prepared guidelines imbued with their individual circumstances. Industrial groups and companies also established claim processing institutions and liaisons to prevent accidents as intermediate measures. In addition, the so-called SG mark system was established to evaluate the safety standards of products. On one hand, marks were affixed and inspections conducted as ex ante, intermediate measures. Under the SG mark system, insurance is also provided from donations, and a system for dispute resolution and damage relief are provided as ex post measures. Also as ex post measures, mediation and lawsuit support are available from the complaints processing committees of prefectural and metropolitan governments. The fact that this kind of system has facilitated mutual negotiations may be a contributing factor to the small number of product liability lawsuits in Japan.

However, to promote private dynamism and to activate innovations in the future, it will be necessary to switch from a legal system of ex ante restrictions to a system centered on ex post controls based on highly transparent standards, not based on regulations under the control of administrative agencies. It is necessary to change the role of the government to prepare an environment so that private rules and civil controls function effectively, and to support the self-responsibility of consumers. So how shall we reconsider the assignment of the bodies’ roles?

1.2 Proposal for An Alternative Model: A Trusted Third Party Model

It may perhaps be necessary to design the institutions of the future by establishing a clear position for trusted third parties (TTPs). The concept of TTPs derived partly from a discussion relating to certification authorities (CAs). Since electronic transactions are not face-to-face, a means of identifying individuals is needed. The secure exchange of digital data with electronic signatures over the Internet requires that neutral, trusted third parties certificate the data with signatures and identify the individuals. CAs act as such trusted third parties (TTPs).

A trusted third party model is applicable to other situations. We define TTP as a non-profit sector in the intermediate domain between the for-profit, market domain and the public, government domain.

A clear image is presented by the activities of third-party institutions, such as non-governmental organizations
(NGOs) that are globally active and non-profit organizations (NPOs) that offer services in close contact with the local region. NGOs and NPOs are terms that refer to intermediate sectors whose functional domains overlap. Generally, NGOs are regarded as one division within an NPO that deal with problems on a global scale. Consequently, when the term NPO is used, it means (i) a formal organization where activities based on citizens’ arbitrary ideas are continuously conducted, (ii) a non-profit, private organization, or (iii) an organism that is organized differently to government. Among TTPs, one may include Japan’s industrial organizations and the ombudsmen that developed in northern Europe, as well as multinational coordinating organizations such as the IMF and OECD.

By having TTPs with diverse roots coordinate between governments and commercial enterprises, there is a possibility that loose, super-governmental norms will be formed. Such norms will form a flexible but mutually complementary system, through the process wherein diverse parties who belong to varying networks each plan developments that are advantageous to themselves and freely compete. In that case, we can prepare the institutional infrastructure supporting the private-initiative principle (see Figure 1).

**Figure 1: A Trusted Third Party Model promotes the private-initiative principle**

By focusing on how TTPs function in the fields of personal information and dispute settlement, we shall validate the potential of the TTP model.

2 Global Harmonization through the Use of TTPs

2.1 Institutional Mismatching of the Laws Relating to Personal Data

If one surveys the product liability system in the United States, one finds that alternative dispute resolution (ADR) has developed outside of courts. This development has been motivated by the high incidence of product liability lawsuits that sought massive compensation from companies due to differences in the product liability law and the judicial system. The judicial system is clearly different between the United States and Japan. ADRs can be classified into three types depending on the characteristics of the institutions that implement them. One is the judicial ADR with civil arbitration and domestic arbitration. The second is the administrative ADR operated by coordination committees for public nuisances and suchlike as well as damage relief committees for consumers. The third is the private ADR conducted by ADR companies or non-profit third parties.

Among these, the Better Business Bureau (BBB) in the United States that implements private ADR is a body that is attracting attention. Currently, BBB has instituted BBBOnLine as a subsidiary organization. BBBOnLine is working actively in the area of online dispute resolution and is focusing its energies into its “Privacy Seal Program,” where it certifies the e-commerce privacy policies of companies and monitors the state of their operation.2

In “A Framework for Global Electronic Commerce” mentioned above, moderation in the autonomous making of rules and rule fairness was encouraged on a private basis by studying the strengthening of regulations by supervisory institutions, in the event that suitable voluntary regulations were not made by the end of June 1998.3 As one part of this process, TTPs such as the BBB and TRUSTe and private companies began to become active in developing programs for protecting privacy on the Internet.4

Also in Japan, the attempt to create an institutional framework through private initiatives has begun. For ex-
ample, the Japan Information Processing Development Corporation (JIPDEC) created a system where a privacy ranking is displayed on online sites to indicate that reasonable measures are taken to protect privacy.

However, these private voluntary attempts tend to confront legal hurdles. There are two forms of laws in the world where the main objective is to protect personal data. One is the omnibus form, which establishes a blanket personal data protection law covering all personal data held by both public institutions and private businesses. The other method is the method of segmentation, where separate personal data protection laws exist for public institutions and private businesses, or there is only one law for either public institutions or private businesses. Laws that limit the personal data that is protected or that limit the scope of penalties belong to this latter type of law.

The standard for legislation in all countries is the “OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980 (OECD Privacy Guidelines). When these guidelines were issued, “OECD Privacy – Eight Principles” was agreed upon. They are: (i) the principle of limitations on data collection, (ii) the principle of data accuracy, (iii) the principle of purpose clarification, (iv) the principle of the limitation of usage, (v) the principle of safety protection, (vi) the principle of disclosure, (vii) the principle of individual participation and (viii) the principle of liability. However, since these are recommendations, legislation is implemented by each country individually depending on its domestic conditions. For that reason, different legislation has been passed in each country. For example, the United States and Japan have legislation in the form of the above-mentioned method of segmentation. In Japan, “The Bill to Protect Personal Data,” a bill of the omnibus type was passed by Cabinet and was submitted to the Regular Session of the Diet in 2001. The provisions of obligations are merely the minimum specifications for businesses handling personal data, but the bill is has not yet passed because of strong opposition.

In 1955, on the other hand, the European Union obligated Member countries to pass legislation in the omnibus form, based on “Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.” The deadline for the member states to implement the legislation was October 24, 1998. Both Italy and Greece, which did not have personal data protection laws, have already prepared laws in the omnibus form. Furthermore, “Regulation (CE) No 45/2001 of the European Parliament and of the Council of this Directive of 18 December 2001” came into force on February 2001, because this directive was a framework law and required more detailed regulations, which were directly applicable, to lay down operational rules for the institutions.

What should be particularly noted in the directive is Article 25 (1), which states that data transfers from a member country to a third country can only take place where the third country ensures an “adequate level of protection.” The possibility of using contracts to ensure that personal data transferred from one country to another receives adequate protection under the EU directive is explicitly recognized by Article 26 (2). However, to achieve an adequate level of protection, the minimum requirement is that relief and sanctions against privacy infringement must exist and must be functioning.

So if it is judged that the level of protection in a third country’s handling of personal data is inadequate, it is inevitable that businesses with offices in the country will be disallowed from transferring data relating to orders and settlement if they receive online orders from people living in EU member countries. In addition, the court of jurisdiction and the governing law for the personal data protection laws, consumer protection laws and suchlike is recognized as the place where the harm occurred, that is, as the consumer’s residence. Consequently, there is the risk that the definition of illegal acts and penalty regulations will be determined differently by the laws of different countries. A high level of consistency between the institutions is being strongly demanded to eliminate the risk of such legal uncertainties, but it is very difficult to coordinate the interests of each country and the institutions peculiar to each country at the legislative level and to attain international consistency.

2.2 Solving the Trade-Offs in Personal Information

To avoid potentially harmful trade disruptions with the European Union and to obtain a guarantee that Article 25
of the above directive, the U.S. Department of Commerce and the European Commission have created the “safe harbor” privacy framework. The safe harbor framework was approved in July 2000 and came into effect on November 1, 2000. To conclude such an agreement, it is necessary to guarantee that private, voluntary controls are functioning. The evaluation of an external TTP would probably function as one kind of powerful guarantee and complement private, voluntary controls.

However, the market of electronic commerce is, needless to say, a seamless, cross-border market. It is necessary to create an institutional framework on a global scale, not on a nation-state level. For that reason, TTPs would have to operate in unison with other bodies as well as each other, and would have to create a common framework that is based on mutual evaluation in a competitive environment. As pointed out by Hayek, it is possible that loose norms will evolve through the process of competition. If operable institutions are established where TTPs have appropriate standards of evaluation and a suitable monitoring system, and if such standards and system are linked globally, super-governmental norms might coordinate different institutions.

At present, an attempt is underway to take the first step. On May 18, 2000, JIPDEC agreed to cooperate in a joint venture with BBBOnLine. They plan to draw up blanket online privacy standards acceptable to both Japan and the United States, and based on that, they intend to operate a privacy ranking system premised on mutual certification. In another attempt, TRUSTe has created and operates a trust ranking system for privacy similar to that of BBB, and it has decided to soon conduct evaluation, monitoring and mediation activities for privacy measures of corporations that conduct e-commerce, in cooperation with the Japan Engineers Foundation.

A major incentive for companies entering the Internet business is the ability to immediately add data to the database as it is acquired, to analyze it and to carry out marketing activities based on the preferences of each individual. In particular, to realize customer relationship management (CRM), it is essential to maintain the completeness of the database information. However, according to the surveillance of TRUSTe in July 1997, 41 percent of respondents replied that they leave a website when asked to register personal information, and 27 percent of respondents replied that they first register false information. In addition, three out of five respondents want a guarantee that personal information will be protected on the Internet. Most consumers are worried about how personal data is handled in e-commerce, and this anxiety leads to a loss of completeness of the databases and slows the growth of the market.

The above realities signify that there is a strong possibility that the e-commerce market will expand if personal information is suitably protected. It is also apparent that there is an increasing need to provide a suitable level of protection for personal data from the standpoint of consumer protection. Such an undertaking for global cooperation of institutions through the use of TTPs mentioned above contributes to an increase in e-Confidence by giving consumers peace of mind while removing the risk of uncertainty without waiting on legislation. This undertaking also ensures the development of electronic commerce.

3 The Possibility of ADR

3.1 The Features of Alternative Dispute Resolution (ADR)

This kind of institutionalization is likely to be useful in both privacy problems as well as other issues. Points at issue in the e-commerce institutional framework cover a wide range and include customs tax, tax systems, security, transaction laws and privacy. One issue held in common is how to prepare an institutional framework to engender trust in e-Commerce (e-Confidence) and to resolve the conflicts that will occur. As Internet transactions have the special characteristics of being cross-border and are not conducted face-to-face, it seems likely that ADR as an informal system for settling cross-border disputes will become increasingly necessary.

One of the most important qualities of ADR is that it is possible to offer a “win-win resolution.” In other words, unlike judicature, where judges issue binding decisions based on the law under in a confrontational setting, in ADR a fair and independent third party (TTP) can promote communication between the parties to the dispute and can achieve a flexible and mutually beneficial resolution through the empowerment of both parties. If such a means of settling disputes becomes common at the global
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level and if the resolutions are exposed to mutual evaluation, the qualities of ADR will be fed back into private autonomous controls and into the formal laws and regulations that differ according to the country. It is then conceivable that commonalities that can reasonably process disputes while engendering trust between the adversaries will be formed at the global level.

ADR refers to a broad range of mechanisms and processes designed to assist parties in resolving differences (see Table 1).11

Table 1: What is ADR?11

<table>
<thead>
<tr>
<th>Main ADR Forms and Processes</th>
<th>Corporate Complaint Services</th>
<th>Assisted Negotiation</th>
<th>Mediation</th>
<th>Arbitration</th>
<th>Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>On a sliding scale:</td>
<td>- Facilitation</td>
<td>- Conciliation</td>
<td>- Facilitation</td>
<td>- Conciliation</td>
<td>- Facilitation</td>
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<td></td>
<td>- Automated, or not</td>
<td></td>
<td>- Automated, or not</td>
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<td>- Automated, or not</td>
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<tr>
<td></td>
<td>- More or less active guidance by a neutral party</td>
<td>- Agreement on the parties, to agree before entering ADR, that the outcome will be binding</td>
<td>- Voluntary or mandatory submission</td>
<td>- Automated or not</td>
<td>- Final and binding</td>
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<tr>
<td></td>
<td>- Voluntary or mandatory submission</td>
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<td>- Final and binding</td>
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</tbody>
</table>

ADR is positioned between corporate in-house complaint services where the complainants alone resolve disputes and litigation where a judge intervenes and issues binding decisions. If one considers the functions of ADR in contrast to those of formal systems, ADR covers a wide range of extra-juridical dispute processing systems that include (i) assisted negotiations, (ii) mediation and (iii) arbitration. (i) Assisted negotiations consist of compromises where the adversaries achieve an autonomous resolution facilitated by a third party based on the basic principle of mutual negotiation. Other principles include public and private complaint processing, and ombudsmen who contribute to dispute resolution by processing complaints or facilitating consumer consultations and persuading the adversaries to reach a resolution. (ii) In mediation, the resolution between the parties reached through an impartial third party is nothing more than a recommendation. It can be enforced only through a contract when an agreement exists. (iii) In arbitration, the resolution determined by the arbitrator is generally binding where a trusted, impartial third party intervenes and an arbitration agreement is reached by the parties concerned.

3.2 Online Dispute Resolution

Recently, Online Dispute Resolution (ODR) organizations, which handle ADR online, have become increasingly active. Some of the first organizations were NPOs, such as the Online Ombuds Office (http://www.ombuds.org) and Virtual Magistrate (http://vmag.org). Recently, International Corporation for Assigned Names and Numbers (ICANN), clickeNsettle and the global trustmark system have been attracting attention.

3.2.1 Beyond Nation-State Systems: ICANN

ICANN (http://www.icann.org/) is an NPO that resolves disputes relating to domain names, and is patterned on the policy of “A Framework for Global Electronic Commerce” produced by the United States Government mentioned above. The World Intellectual Property Organization (WIPO) Arbitration and Mediation Center (http://arbiter.wipo.int/) actively contributed to its establishment. In 1999, standardized dispute resolution policies were drawn up, including the Uniform Domain-Name Dispute-Resolution Policy (often referred to as UDRP) and procedures relating to domain names.12 This policy is followed by all registrars, and the rules are followed by all dispute-resolution service providers, with supplementary rules prepared by each provider. In accordance with that, WIPO was certified as an authorized dispute-resolution service provider.

With the progress of globalization, there is a demand for multinational coordination organizations based on nation-state systems, to cooperate with companies, NGOs, and NPOs and to form new complementary relationships. It may be said the activities are a good example of the formation of a global order led by TTP.

3.2.2 Prompt Dispute Resolution by a Private Company: clickeNsettle.com

ClickeNsettle.com (http://www.clicknsettle.com) is a
ClickNsettle.com was selected by a panel of independent judges as Best of Show in the Legal Services category of the Business Insurance 2001 Best of the Web competition. The competition was created in 2001 by Business Insurance in the United States to recognize and promote excellence in Internet-based services for corporate risk and employee benefits executives. The fact that clickNsettle.com provides a win-win resolution is the reason it won the award.

3.2.3 Global Collaboration among TTPs: Trustmark System

A trustmark system is designed to offer consumers a benchmark for evaluating vendors offering products on the Internet and for certifying vendors. The system grants the vendors a trustmark seal of approval when they are confirmed to provide an appropriate level of protection to consumers. The Japan Direct Marketing Association (JADMA) and the Japan Chamber of Commerce & Industry (JCCI) have started a trustmark system, an online accreditation program for fair online shopping, where marketers authorized online by JADMA and JCCI will display “the Online Shopping Trust Mark” to indicate to consumers that they are reputable marketers.14

On September 14, 2001, an agreement was concluded between the Japan Direct Marketing Association (JADMA), the Japan Chamber of Commerce & Industry (JCCI), Better Business Bureau OnLine (BBBOnLine) of the United States, and the Korea Institute for Electronic Commerce (KIEC) on international cooperation regarding online trustmarks. To this end, the organizations established an international “Online Trust Alliance.” Specifically, the alliance is expected to (i) define the minimum standards that online business must comply with, (ii) develop an alternative dispute resolution (ADR) mechanism to deal with cross-border disputes, and (iii) provide business enterprises that meet the first two qualifications an international trustmark along with the trustmark issued by the local trustmark organization participating in the Online International Alliance.15

If networks with TTPs at their core are formed with diverse roots and are linked in a complex manner, it is possible, that loose, super-governmental norms will be established. The norms would generate a flexible but mutually complementary system on a global scale.

3.3 To Ensure Neutrality, Fairness and Effectiveness in the Resolution of Consumer Disputes

In business-to-business (B2B) transactions, there is likely to be a large amount of leeway that is entrusted to agreement between the parties conducting the transactions, since this is how the arbitration system for commercial matters has developed and has been used up to now. On the other hand, for Internet transactions involving multiple, unspecified parties including consumers as well as small and medium enterprises, there are many cases where it is necessary to consider the one-sided nature of the volume of information and negotiating power, and the many cases where the monetary amount at stake is small. For that reason, it becomes necessary to settle the disputes in a speedy manner and at low cost. However, in the event that the private sector becomes the main supporter and contributor of funds for informal dispute resolution, there is the risk that the anticipated effects will not be achieved because the use of ADR cannot be recommended due to concerns over neutrality and fairness.

To ensure impartiality and effectiveness, the European Commission adopted the “Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court settlement of Consumer Disputes” (98/257/CE) in 1998.16 It was followed in April 2001 by the “Commission Recommendation of 4 April 2001 on the Principle for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes.”17 In addition to these general recommendations, the European Council adopted in February 2000 the Common Position (EC) No 22/2000, “the Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society
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Services, in Particular Electronic Commerce, in the Internal Market.\textsuperscript{18}

This directive has the objective of creating a clear and general framework to cover certain legal aspects of electronic commerce in the internal market in order to provide a high level of legal integration for information services and the people of Europe. To attain the objective, Article 17 of this directive obligates to each member state to implement measures so that out-of-court dispute settlement is available in an appropriate manner, including appropriate electronic means. It also obligates member states to encourage bodies responsible for out-of-court settlement, particularly of consumer disputes, to operate adequate procedural guarantees.

In this approach, too, stronger participation by the public sector may be considered to ensure neutrality, fairness and effectiveness in the resolution of consumer disputes. However, it is probably more important to first encourage multilayered institutionalization through a variety of parties and methods, to encourage competition among them, and to coordinate them as necessary. Expanding the room for user participation in the management of ADR organizations is likely to contribute to the fairness of the rules while encouraging collaboration among the private sector, the public sector and the range of intermediary organizations currently in existence.

Most countries’ industry ombudsman systems that are affiliated with the judicial system do not have a legal basis. However, their constituents include both businesses and users, and many people of experience or academic standing are assigned to represent the expert viewpoint.\textsuperscript{19} One example is in the financial industry in the United Kingdom. The British Bankers Association (BBA), the Building Societies Association (BSA) and the Association for Payment Clearing Services (APCS) established “Good Banking” in 1991, now called “The Banking Code.” This code is a set of private behavioral rules for the member financial institutions with regard to consumers.\textsuperscript{20} These three bodies organized an impartial, third-party institution called the Banking Code Standards Board (BCSB), to monitor compliance with the code.\textsuperscript{21} The board is organized by private industries, but the staff consists of both businesspeople and consumers. Ombudsmen in northern Europe, on the other hand, are positioned in the public sector.

However, even there, cooperation with experts and citizen groups is regarded as important. The expansion of room for user participation is likely also to encourage the principles of autonomy and self-responsibility while bestowing impartiality, credibility and effectiveness.

In institutionalizing ADR, there will be questions as to how to secure personnel and financing as well as questions on the merits of using ADR for companies and consumers. We will also face problems that include how to balance expert capabilities with neutrality. With regard to efficacy, in Japan, the records of civil mediation and domestic mediation in courts of law have the same force as a final judgment, and arbitration decisions may be compulsorily enforced. However, the mediation records of civil ADR are limited in that they only have the force of a contract. Establishment of private ADR institutions is also restricted by Article 72 of the Lawyers’ Law.

However, another method available is that of encouraging moderation while ensuring efficacy through extra-legally informal sanctions. This is a method where businesses are obliged to be impartial. In cases where no improvement is apparent, then as a general rule, ratings will be reduced and certifications stripped away. Then the mechanism of reputation may come into play to make inappropriate activities an untenable approach. In the United Kingdom, “The Financial Services and Markets Act 2000” came into effect in 2001 through legal revisions in recent years. Above this act, the Financial Ombudsman Service that traverses the financial industries was established under the control of the Financial Services Authority (FSA). This service settles disputes between financial institutions and consumers. This settlement system assigns partially binding power over businesses and leaves the path open for judicial remedies.

Once the for-profit sector, government, academia, and the public cooperate to assign suitable functions and authorities by organizing TTPs, it is likely to heighten the possibility that we will achieve e-Confidence in the global, borderless electronic commercial market. We expect that diverse bodies with cooperate with each other.

4 Closing Remarks

We have discussed above e-Confidence in the fields of privacy and ADR, focusing on trusted third parties (TTPs) as key agents. TTP model has the potentiality to create a
new order suitable for the information society. Finally, we briefly described the possibility from the socio-economic point of view.22

4.1 Conflict of Centralization and Decentralization

As is well known, the theory of building confidence has traditionally discussed in a research area of international law. It is because mismatch of law and lack of law become a problem in international transactions as well as in electronic transactions. Generally speaking, the parties concerned with transactions agree on jurisdiction and an applicable law by a contract. However, especially in consumer disputes, it would be possible that the territorial principle is prior to the agreement. Global harmonization of laws is required.

In order to uniform international law order, international bodies such as WTO, OECD and UNCITRAL have worked for establishing the rules between nation-states for contract formation and governance of international contract performance.

Here is one problem of institutionalization. Institutionalization which such international bodies lead has often been promoted by initiatives on the part of multinational corporations and governments of the great political and economic powers.23 Concentration of structural power is not desirable for our freedom.

On the other hand, there is another problem peculiar to the networked society. The decentralized network structure and the evolutionary speed of technologies weaken the acceptability of unified and government-enforced institutions. It is needed flexible and diverse institutions. But institutional convergence is causa sine qua non for borderless transactions.

If we summarize a problem situation, there is a conflict of institutional convergence and institutional divergence. In other words, there is a conflict of centralization and decentralization.

If such conflict is coordinated in a spontaneous order, it is not a big problem in fact. When one recognizes that we are constantly facing the limits of our knowledge, then the meaning of competition lies in connecting to the idiosyncratic knowledge of a person instantaneously through learning how to acquire knowledge by activating the spontaneous interaction of the assorted individuals. When the process of mutual learning is repeated many times, as a result of unforeseeable behaviors and practices, spontaneous order is formed from endogenous institutions (informal constraints).25

The order is supported by the relatively stable shared beliefs of the groups which depend on the order, and it has a self-sustaining characteristic wherein the order that supports the dominant shared beliefs reinforces expectations. It can be described as an interactive process where customary behaviors and specific individual characteristics co-evolve.26

Formal rules will not create a stable order if it is not supported by informal constraints which are generated endogenously through mutual leaning processes (see Figure 2).27 That is why international bodies are opening the doors to NGOs wishing to attend their decision-making processes.

Figure 2: Order Formation Loop

Information ➔ Individuals ➔ Action ➔ Information

Formal rules: To get the institutions right
Informal constraints: Often with no purpose

Competition is achieved for the first time when the knowledge can be exchanged among the parties inside the framework of the given order. In other words, market competition will not function without institutions to support the order. If competition based on free, spontaneous interchange is performed inside the framework of the given order, it does not destroy the order.

However, it is important for sustainable development to break out of a steady state condition and promote the formation of a new order suitable for new realities. But, in dynamic evolutionary process, competition would become over-emphasized to maintain the stable order. As pointed out by Murakami,28 if each party acts to pursue their own interests under conditions where the dynamic increasing-returns mechanism is strengthening, there is basically no capability for self-coordination in the competition for expanded market share. And there are also no restrictions on
price competition.

That is why governments have conventionally been entrusted with the role of coordination, wherein they eliminate the harm due to the shortsightedness and other failings of the markets’ power of coordination and encourage a more appropriate distribution of resources. Yet, if the coordinating role of a government becomes bloated, it is possible that effectiveness will be diminished when resource distribution becomes fixed. For example, artificial barriers, such as entry barriers and price restrictions that the government establishes to restrict competition, produce rent that cannot be sustained over an extended period in a competitive market and may cause solidification.

Furthermore, as we have mentioned above, institutionalization which is promoted by initiatives of the government or international bodies cannot resolve a conflict of centralization and decentralization.

4.2 A New Order Suitable for New Realities

Now we must transcend the dualism. The dual system of the market domain and the government domain is facing limitation. We should simultaneously seek to build collaborative relationships between parties. If networks with TTPs as their nodes are formed with diverse roots and linked in a complex manner on a global scale, there might be endogenously formed loosely super-governmental norms (“meta-norm”).

The norm coordinates opposing values between the two domains. In this case, the information society will evolve while maintaining a balance between competition and coordination. Supposing the balance of competition and cooperation is dynamically maintained under a meta-norm, the conflict of centralization and decentralization will be resolved through evolutionary emergent processes.

In order to maintain the balance, we must remember that the spontaneous order is rationalized for the first time by social selection of rules.

TTP is a network node. Although TTPs include international bodies or NGOs, they do not restrict to such bodies. The interest which it coordinate is not restricted the interest between nation-states. Selection by the governmental authority does not necessarily function well.

Therefore, it is required for two or more TTPs which work with different purposes in the overlapping area to exist, and to perform competition. Then, unsuitable institutions will be screened, and loose mutual evaluation rules will be generated.

The networked world is, needless to say, a seamless, cross-border sphere. It is necessary to create an institutional framework on a global scale, not on a nation-state level. If we design an operable institutional framework of the future clearly positioning TTPs, a new order suitable for the information society would be generated.

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Notes and References


[2] BBBOnLine Seal Program holders have met BBB’s significant privacy program requirements, and have made a commitment to dispute resolution through BBBOnLine. Generally speaking, the privacy seal is displayed in conjunction with the company's online privacy policy. (See http://www.bbbonline.org/about/board/Vol2_No8.asp, last accessed on September 19, 2002.)

States, which is the institution that supervises privacy, has received high praise for its stance on business restrictions that are not restrictions to competition in relation to the Anti-Trust Law, while being particularly active in the promotion of studies on and analyses of the protection of the personal data of minors and medical data. The FTC has also been praised for preparing a system that takes a firm stance against the strengthening of regulations through legislative measures in the event that appropriate protection is not achieved. (See the homepage of The Fair Trade Commission available at http://www.ftc.gov/privacy.)


[9] CRM is an attempt to build long-term customer relations with mass customization through one-to-one marketing, using the lifetime sales to each customer as a standard of evaluation.

[10] While it depends on the institutions of each country, formal and informal systems actually exist on a continuum without natural division. Even in cases where there exists an advance agreement to settle disputes through ADR, it is possible to leave open the path of judicial resolution in conformity with the formal system. Furthermore, in Japan, attempts to compromise are recommended, and by recording a compromise in the form of an arbitration decision, compulsory enforcement is often made possible.


[19] Matsumoto, Tsuneo, “Supervisory System for Actu-


[27] In traditional economics, institutions have been treated as exogenous variables. And non-profit third-parties and firms have been treated as black boxes. Now, the new institutional economics theory is progressing. The theory focuses on institutions and third parties. One of the good surveys is Williamson, Oliver E., ”The New Institutional Economics: Taking Stock, Looking Ahead”, *Journal of Economic Literature*, Vol. 38, September, 2000, pp.595-613.


[29] Arthur explains that one of two opposing technologies becomes the predominant technology and forms the dominant technological paradigm through the positive feedback mechanism that is brought about by the increasing-returns mechanism. He points out that the increasing-returns mechanism is realized easily in advanced scientific and technological industries. This is because hi-tech products such as computers, aircraft, automobiles and communications networks require a huge initial investment for R&D, but the cost of imitating and producing the same hi-tech product is very small in relative terms (Arthur, Brian W., “Increasing Returns and Path Dependence in the Economy,” Michigan, the University of Michigan Press, 1994).

The lock-out of alternatives and path-dependency through the increasing-returns mechanism in Arthur’s study captures one side of the selection mechanism of technologies, but the structural changes of technological paradigms are also important for long-term development of our socio-economic system. The dynamic increasing-returns mechanism in this paper refers to a trend of long-term increasing-returns in a region through the interaction and accumulation of knowledge and through the interplay between institutional changes and technological changes.