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Good Governance in the Public and Private Sectors

TIJ

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TEAM READINGS

Good Governance in the Public and Private Sectors

Faculty

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Description

This team will explore the ways in which governance is performed in contemporary policy work. We will focus on the role of law in governance as a site of choice rather than a ready-made solution to significant policy challenges. The limits of law, the unintended consequences of law and the importance of legal arrangements which may be difficult to perceive – private, informal, foreign – will all be considered. We will focus on the understanding what constitutions can and cannot do against corruption.

Stream Session

Good Governance in the Public and Private Sectors

Fritzen, S. (2005). 'The "Misery" of Implementation: Governance, Institutions, and Anti-Corruption in Vietnam' in: Tarling (ed) *Corruption and Good Governance in Asia* (2005) London ; New York: Routledge. pp. 98-103.   Pages 1-6

Li, T. M. (2014). 'What is Land? Assembling a Resource for Global Investment' 39 *Transactions* pp. 589-592.   Pages 7-10

Meier, H. E. and Garcia, B. (2015). 'Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' 93 Public Administration pp. 889-893.
                                                                                     Pages 11-14

Tarling, & Tarling, Nicholas. (2005). *Corruption and good governance in Asia*; London ; New York: Routledge. pp 2-4.   Pages 15-17

5 The 'misery' of implementation

Governance, institutions, and anti-corruption in Vietnam

Scott Fritzen

Introduction

Economics may have earned the sobriquet of the 'dismal science', but the study of policy implementation is no sunnier. Pressman and Wildavsky captured the mood of early implementation research with inimitable flair in the subtitle to their classic text *Implementation* (1973): 'How great expectations in Washington are dashed in Oakland; Or, Why it's amazing that federal programs work at all.' Due to such seemingly depressing rendering of the great gaps between policy intentions and field-level realities, implementation research came to be characterized as 'misery research, a pathology of the social sciences, if you will'.[1]

The study of implementation as 'misery' has since been criticized as too concerned with the often contradictory priorities and unreadable intentions of elite policy-makers in far-off capitals. Alternative methodologies that begin from the dynamic situation faced by 'street-level bureaucrats' have been added to the range of tools open to the study of implementation. Yet concern over 'implementation gaps' is still a relevant starting point for cases where there is a strong normative appeal and urgency to the policy content under consideration.

Anti-corruption policies and programmes are a good example. Corruption – almost everyone agrees – is a serious problem afflicting nearly all developing countries. If 'governance matters'[2] – to the private sector, to poor and vulnerable populations and to the viability of democratization efforts – then anti-corruption efforts are essential to improved development outcomes.

If various indices of corruption are to be believed,[3] Vietnam should be a country where the outcomes of anti-corruption policies should matter nearly the most. According to Transparency International's well-known index, Vietnam ranks a dismaying 85 out of 102 countries in the world, and has the third-worst score in all of Asia (after Bangladesh and Indonesia).[4] The Vietnamese press itself is no less unforgiving. 'To be poor is a misery', lamented an opinion piece in the influential daily *Lao Dong*, 'but to be poor because of corruption is a national humiliation.'[5]

This chapter examines implementation problems in a high-profile anti-corruption policy initiated by Vietnam's Communist Party leadership in 1997. The 'grassroots democracy' (hereafter GD) decree of that year, coupled with implementation guidelines and a slew of government-sponsored pilot activities, were an attempt to burnish the Party's flagging image in the aftermath of localized demonstrations against local government corruption that had generated a worryingly high level of participation. I draw on recent advances in the policy implementation literature to construct a framework for analysing the implementation of the grassroots democracy decree. This framework should be extendable to other anti-corruption policies, particularly nation-wide efforts that attempt to make entrenched institutions more responsive to local surveillance and control. After presenting a conceptual framework in the first three sections, I describe and assess the decree and its implementation. The final section asks what lessons would-be reformers can draw from the study of implementation as 'misery' in order to improve the performance of similar national anti-corruption programmes.

The chapter concludes that GD as practised in Vietnam has a flawed design that fails to address the incentives of front-line implementers (local People's Committee executives), and that these incentives have deep roots in the country's governance structure. However, there are indirect ways in which GD could contribute towards long-term improvements in local governance.

The problem of implementation in anti-corruption programmes

Corruption, presumably as rampant 25 or 50 years ago as today, has over the past ten years exercised the imaginations of developing country donors, non-governmental organizations (both national and international in scope), and senior leaders in governments (both authoritarian and democratizing) as never before. And there are good reasons for this. Corruption can be seen as central to various agendas that can make strange ideological bedfellows, such as the promotion of the private sector and as the watchdog role of civil society.

What are anti-corruption strategies meant to accomplish? The answer partly depends on the diagnosis of the root problem. Two broad lines of research can be distinguished. In the first, corruption is viewed in terms of individual decision-makers – either senior or field-level – with limited accountability for their actions and monopoly decision-making power in a particular field. Robert Klitgaard[6] famously concluded that corruption results from the confluence of decision-making discretion and monopoly power of an agency minus accountability ('$C = D + M - A$'). To address the determinants of corruption in this view requires tighter controls on administrative procedures, rule-based decision-making and the introduction of competitive markets for public services.

A second category of anti-corruption strategies looks at state capture, when 'corrupt people control the regulatory process and, from the top, make laws, policies and regulations that specifically benefit them'.[7] Governance is more centrally implicated in the corruption problem, and governance reforms that introduce more substantive democracy and citizen control as a counterweight to the power of elites take centre stage.

Support for comprehensive *national-level* policies to combat corruption, as opposed to agency- or sector-specific work, has become a donor growth industry. National-level strategies are intended to weaken in a coordinated way by addressing multiple, interlocking props supporting corrupt behaviour in the public-sector environment. In theory, an overarching anti-corruption strategy would provide a legal framework, introduce new institutions to tackle corruption and provide incentives for civil society to take up a watchdog function.[8] Various Southeast Asian governments have responded both to multilateral advice/pressure and to popular pressure with anti-corruption commissions of various types. Many have passed legislation in the past few years meant to reduce the risks of corruption.[9]

In Vietnam, where the issue of corruption is highly sensitive due to fears it could destabilize the one-party regime in a rapidly democratizing region, donors have not been so prominent. Only in 2002 was it reported that the government had agreed to ask for the assistance of one donor – the Swedish International Development Agency (SIDA), perceived to be a 'safe' partner for historical reasons including their long presence as a donor during the Vietnam War – in conducting a diagnostic study on the extent and causes of corruption. All anti-corruption policy initiatives to date in Vietnam have been internally driven. By 2002 the government claimed to have broad legislative props combating corruption in place, including the 'Anti-corruption Law' passed in 1998 (amended in 2001), 'Law Implementing Government Savings and Fighting Waste' and 'Law on Civil Servants' with various asset disclosure requirements.

Proponents for various anti-corruption strategies acknowledge (in their more sober moments) the potential difficulties of implementation. The key difficulty here is what might be termed a kind of 'orthodox paradox' of anti-corruption work, following Nelson's (1990) term for the difficulties of implementing neo-liberal reforms.[10] The successful implementation of anti-corruption reforms where there is heavy resistance implies autonomy of government action and high levels of political will to overcome resistance; yet these are exactly the conditions that are hampered by systematic corruption. Nevertheless, there are few studies of the implementation of national anti-corruption programmes or strategies, in part because these are new initiatives and in part because the focus in donor circles arguably remains tied to a 'cook-book' approach, reflecting the can-do culture of the 'positive practitioner'.[11]

Modelling implementation in national anti-corruption policies

Top-down and bottom-up explanations of 'misery'

What can the implementation literature teach us about implementing national anti-corruption programmes? Why do outcomes on the ground differ so greatly from policy intentions? In other words, how can we explain the 'misery' of implementation, both from the perspective of policy-makers and implementers?

Two macro-perspectives on implementation have dominated the field since its emergence in the 1950s. Although several attempts at a synthesis have been made,[12] analysts often gravitate towards 'top-down' or 'bottom-up' styles of explanation. The first stylized perspective adopts the metaphor of 'implementation-as-control'. This so-called 'top-down' view is concerned with how the intentions of policy-makers are implemented at the grassroots. It can be described as a 'correspondence' theory of implementation in that it assumes that a clear articulation of the intended policy exists and that the conceptual and practical difficulty lies in how to transmit this intention faithfully down the line of bureaucratic command. Deviations at the field level from the intentions of policy-makers count as an implementation 'gap' or 'deficit'. Theorists adopting this perspective look for deficiencies in the way policies are communicated, and standards of implementation enforced, by policy-makers to field-level implementers.

'Bottom-up' analysts,[13] in contrast, begin with the assumption that 'street-level' bureaucrats often face an impossible task. Policy ambiguity, limited resources, and time pressures make it impossible to implement policies as intended and to fulfil the sense of public service with which most of them began their careers. Their response to this untenable situation is to 'develop conceptions of their work and of their clients that narrow the gap between their personal and work limitations and the service ideal'.[14] To the extent that outcomes are deemed less than satisfactory from a policy-maker's point of view, this perspective would look for the reasons in the lack of resources and in the incentives embedded in the institutional environment faced by street-level bureaucrats.

Towards a synthesis

How can we adapt recent advances in implementation research to the diagnosis of implementation problems in national anti-corruption programmes? The goal of the analysis would be one shared by top-downers – to improve implementation. Yet I assume that local institutional conditions will be particularly binding on implementers of anti-corruption programmes, faced with the 'orthodox paradox' of anti-corruption work defined above.

Figure 5.1 presents a model of implementation drawing on both bottom-up and top-down perspectives. It outlines five categories of variables linking policy formation on the left side to implementation outputs and outcomes on the right. It places great emphasis on the 'disposition of implementers', i.e. the cognitive maps, incentives, and resources available to those ultimately responsible for implementing the most important provisions of the policy. Each of the following categories can be expressed as a set of questions aimed at identifying implementation problems:

1   *Policy design.* Within the policy design category, we can distinguish between policy content and resources available for implementation. Are clear, consistent statements of objectives and criteria for successful implementation provided in the legal framework underpinning the policy? And are resources sufficient for successful implementation made available, or a plan for resource mobilization in place?

2   *Inter-organizational communication and enforcement activities.* This category asks how the policy is communicated to lower levels, and within what framework of accountability? What levels of communication and enforcement effort are present?
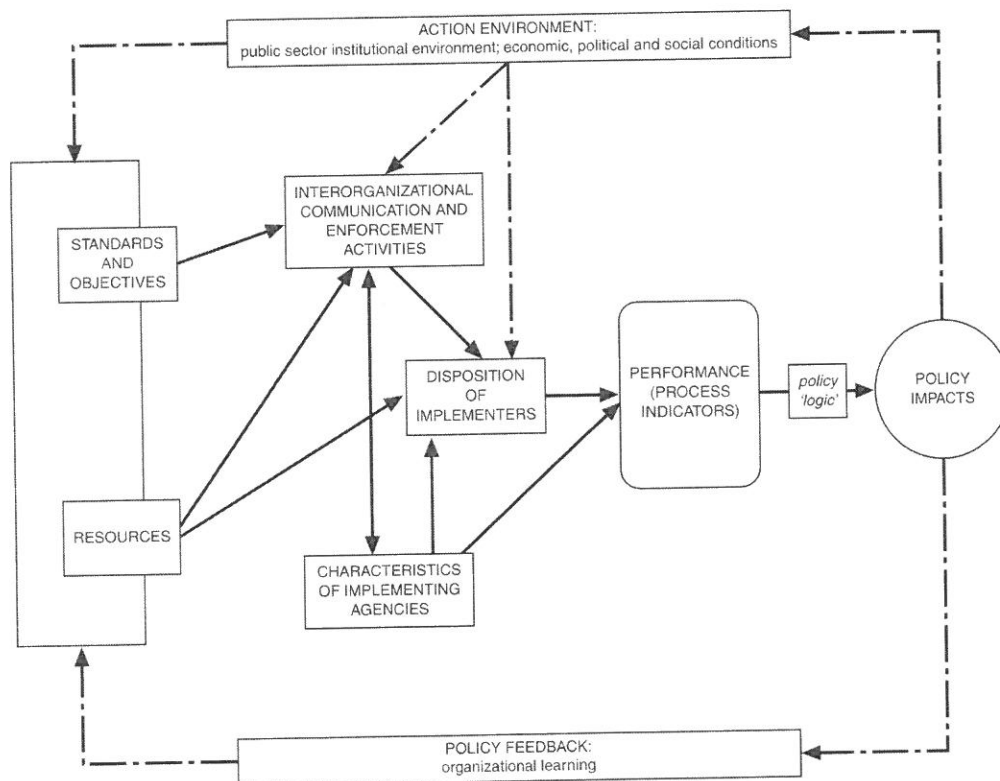

Figure 5.1 Modelling policy implementation (source: Adapted from D. Van Meter and C.E. Van Horn, 'The Policy Implementation Process', *Administration and Society*, 6.4 (1975), p. 463; Hill and Hupe, 2002: 186; and Fritzen, 2000: 14).

3   *Characteristics of the implementing agencies/disposition of imple-menters.* The institutional characteristics of implementing agencies have a profound effect on how lower levels perceive and act on upper-level directives. The disposition of individual implementers is closely linked to the characteristics of agencies in which they are embedded. It is also affected by other factors, such as their potential for incentives from non-agency sources (including corrupt transactions[15]). This category thus delineates key aspects of agency culture and accountability relationships.

4   *Implementation outputs and outcomes/impacts.* The three categories above jointly determine implementation outputs, which are linked, more or less tenuously, to impacts on the defined problem via their 'policy logic'. In other words, are there logically substantiated links between policy outputs – assuming perfect implementation – and the problems the policy is meant to address?

5   *Policy learning.* In reading Figure 5.1, the feedback loops on the borders are important, as they make the model dynamic. The lower feedback loop concerns *policy learning.* The assumption is that pro-grammes may be redesigned both at key intervals in a formal process (the loop leading to policy redesign) and in a more informal, iterative process as local implementers adjust their expectations and behaviour to the actual implementation situation they face (the arrow leading to implementer disposition).

6   *Action environment.* The upper feedback loop is via the *action environment* to all three of the determinants of implementation noted above. The action environment is here broken into components such as the public-sector institutional environment, political support, and social and economic factors. (All these must be defined within the parameters of the policy at hand.) The influence of this environment lies in two areas. It structures or influences the formation of the policy in the first place. But there is a more dynamic sense as well. As pol-icies work themselves out in a given environment, they may affect the environment in ways that change – for the better or worse, depending on the perspective taken, and in intended or unintended ways – those action environment influences on implementation. For example, a programme may over time empower a previously marginalized group to have a greater stake in a particular policy, changing the stakeholder alignment in ways that create new support or opposition to a policy.

The conceptual framework presented here is a way of structuring inquiry into observed implementation patterns of a particular policy. It incorpor-ates some elements of both classically 'top-down' and 'bottom-up' approaches. The framework can be used to identify specific implemen-tation constraints (as the top-down model stresses), but focuses much attention onto the institutional environment at the local level and the dynamic impacts (often unpredicted) of implementation.

Plenary Lecture

What is land? Assembling a resource for global investment

Tania Murray Li

The so-called global land rush has drawn new attention to land, its uses and value. But land is a strange object. Although it is often treated as a thing and sometimes as a commodity, it is not like a mat: you cannot roll it up and take it away. To turn it to productive use requires regimes of exclusion that distinguish legitimate from illegitimate uses and users, and the inscribing of boundaries through devices such as fences, title deeds, laws, zones, regulations, landmarks and story-lines. Its very 'resourceness' is not an intrinsic or natural quality. It is an assemblage of materialities, relations, technologies and discourses that have to be pulled together and made to align. To render it investible, more work is needed. This *Transactions of the Institute of British Geographers* Plenary Lecture uses an analytic of assemblage to examine the practices that make up land as a resource. It focuses especially on the 'statistical picturing' devices and other graphic forms that make large-scale investments in land thinkable, and the practices through which relevant actors (experts, investors, villagers, governments) are enrolled. It also considers some of the risks that follow when these large-scale investments land in particular places, as land they must.

Key words   land; resource; assemblage; global investment; statistical picturing; risk

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Introduction

Writing about the Indian district of Chotanagpur in 1921, a British colonial official William Archer was investigating the reaction of indigenous communities threatened with eviction because they had fallen into debt. They formed a movement to reclaim or hold onto this land, and distribute it among their followers.

> When asked 'Where are your title deeds?' ... [members of this movement] replied 'The answer is my spade, my axe, my ploughshare are my title deeds ... ploughing is the writing of the golden pen on golden land'. To the argument 'Your lands have been auctioned for arrears of rent and purchased by another', they replied: 'When a man buys a mat he rolls it up and takes it away; similarly unless the purchaser has rolled up my land and taken it away how can he be said to have purchased them? (Damodaran 2002, 93)

Three points are important here. First, what land *is* for a farmer is not the same thing as for a tax collector. Land may be a source of food, a place to work, an alienable commodity or an object of taxation. Its uses and meanings are not stable and can be disputed. Second its materiality, the form of the resource, matters. Land is not like a mat. You cannot roll it up and take it away. It has presence and location. It has an especially rich and diverse array of 'affordances' – uses and values it affords to us, including the capacity to sustain human life. Third, inscription devices – the axe,

the spade, the plough, the title deed, the tax register, maps, graphs, satellite images, ancestral graves, mango trees – do more than simply record the presence of land as a resource: they are integral to assembling it as a resource for different actors. These devices have varied spatial and scalar coordinates, some of them enabling land to be manipulated from a distance, others demanding presence on the ground. These are the points I want to explore in thinking through what is land, and more specifically, how it is rendered available for global investment.

Resources, writes geographer Gavin Bridge, are 'irreducibly social'. They are also material. They are the 'cultural category into which societies place those components of the non-human world that are considered to be useful or valuable in some way' (Bridge 2009, 1218–19). Their 'resourceness' has no essential or intrinsic quality. It has to be assembled or 'made up' (Hacking 1986). It always includes a discursive element that 'acts as a grid for the perception and evaluation of things' (Foucault 1991b, 82). It can wax and wane, or morph as technologies are added, values change and material qualities shift. Thought of this way, what we call a resource or a 'natural resource' is a provisional assemblage of heterogenous elements including material substances, technologies, discourses and practices (Anderson and McFarlane 2011; Bakker and Bridge 2006; Blomley 2013; Callon 1986; Foucault 1980; Li

2007a; Mitchell 2002; Richardson and Weszkalnys 2014; Robertson 2011). Exposing the apparent naturalness of a resource assemblage renders its made-up character available for critical reflection. What are the elements assembled? How is the assemblage stabilised, or made to cohere? Why does it take this form, and not another?

Assembling land as a resource may involve diverse actors, including villagers, scientists, investors, legal experts and government officials. Such actors have distinct views on what land is (its ontology), what it can or should do (its affordances) and how humans should interact with it. Some of them approach land with a governmental rationality of the kind identified by Foucault: that is, a concern to secure 'the right manner of disposing things' to optimise the health and wealth of populations at large (Foucault 1991a, 95). The spectrum of action and reflection concerning land cannot be captured if we define land narrowly, as ownable property. It may be privately owned, but for centuries much effort has been dedicated to *preventing* its privatisation by surrounding it with customary injunctions, suppressing land markets, setting aside protected areas and so on. In this respect land is different from some other resources, such as diamonds, oil or coal, where the range of debate about what a resource is, and what it should be made to do, is more confined. Land's diverse affordances make it especially challenging to assemble as a resource available for global investment, and yet this work is sometimes accomplished and investments proceed.

In this article I first address the question, what is land? I dwell on its materiality, its affordances and the struggles that erupt over the 'right manner of disposing things'. Following this, I examine the inscription devices that have produced land as a resource available for global investment. Exploring this question became urgent in the context of the so-called global land grab or land rush, a spike in transnational farmland acquisitions that began around 2008 and still continues. Adopting an analytic of assemblage enables me to tease apart the elements that make such large-scale investments thinkable, and the practices through which relevant actors (experts, investors, villagers, governments) are enrolled.

What is land?

Indigenous highlanders in the Indonesian island of Sulawesi among whom I have carried out ethnographic research for the past 20 years have no word for land in their language. Their words refer to more specific qualities: soil (*petu*), primary forest (*do'at*), secondary forest (*ulat*), fallowed garden (*abo*), active garden (*jo'ong*), grassy patch (*gio*), barren zone (*doilas*), the head of a watershed (*ompogan*) which is the home of

spirit owners of the earth and water (*togu petu, togu ogo*), and so on. These words convey assemblages of material substances and social relations. Primary forest, for example, means forest in which no one has ever taken axes to trees. Since highlanders consider the investment of labour to create individual property, when they note that a patch of forest is *do'at*, they are not just commenting on the enormous size of the trees. They are noting that no one owns it yet, and hinting towards its potential for use, and future status as individual property when labour is applied. *Ulat* means both secondary forest and the property highlanders inherit from their ancestors, which they hold in an undivided common pool and use in loose rotation. Although I do not have space here to describe highlanders' land system in full (see Li 2014), my brief summary is a reminder that the English word 'land' carries cultural baggage that we need to make strange for the purpose of analysis. Not everyone has such a word, or lumps together the same set of material substances under one label. Nor do they assemble material and social relations into equivalent forms.

Around 1990, when highlanders planted a new crop, cacao, and started to treat land as a commodity and a site of investment, they had to invent a new word for it. They hit on the word *lokasi*, an awkward translation of the English word 'location' via Indonesian. *Lokasi* named a new resource assemblage – a plot of land that was detached from neighbouring plots, and detached from the sweat of the person who first cleared the *do'at* and transformed its status. New modes of inscription emerged as well, but as geographer Nicholas Blomley insists (2013 2014), these modes did not change something concrete into an abstraction. Rather, they reformatted the social relations with which the new resource was entangled, and extended the network of actors and devices connected to it. In the past, wielding an axe in the *do'at* inscribed property relations in a form highlanders recognised, but the meaning of the axe as an inscription device did not travel well. Officials viewing the highlands from the coast, for example, did not acknowledge that wielding an axe produced both property and livelihoods. They called highlanders 'forest-destroyers' and described their rotational cultivation system as 'just moving around'. As land-as-*lokasi* emerged, the network of actors extended to include neighbours and strangers bearing funds who could now purchase it, but it did not include actors operating at a distance. Unlike the farmers of Chotanagpur I cited above, these highlanders were not beset by officials waving land titles or tax registers, nor did government agencies or large-scale investors seek to lay claim to their land. Their new resource assemblage stabilised over time, but it was not set in stone: a shift in one element – law, prices or, in this case, a viral disease that started killing the cacao – could cause the assemblage

to fracture. Next time I return to this research site, *lokasi* might no longer exist and the question 'what is land' will surely be re-posed.

Materiality

Building on this example, there are two core elements to land's material quality I want to emphasise. First, land stays in place. It is excludable and can be partitioned, but it cannot be removed. People can be excluded from it, but its extensive span makes it difficult to accomplish exclusion by means of a choke point (unlike an oil well or a gold mine, which is relatively confined). The mode of exclusion can be physical and forceful (hedges, fences, guns), regulatory (e.g. through customary or formal property law or land-use zones), or it can operate by means of a market mechanism that excludes people who cannot afford the price. It always includes a persuasive element, an attempt to defend exclusion in terms of its legitimacy (Blomley 2007; Hall *et al.* 2011). When people concur on the proper uses and users of land, the costs of enforcement go down. But legitimacy can wax and wane, as people who concede to their exclusion at one point in time might change their position when land becomes scarce, a new generation needs a place to farm, infrastructure or technology make land more valuable, or the transgression of spiritual or environmental ethics passes a threshold of tolerance. Land occupations, arson, mass mobilisations and revolutions may be provoked. With land, it is never over.

Second, land's usefulness to humans depends on exclusion: two people cannot occupy the same spot, and if the highlanders in my study could not exclude other users for long enough to harvest their cacao, there would be no point in planting it. Yet the range of human uses to which land can 'legitimately' be put is huge: land can be source of food, fuel and fodder; a place to build a house; a home for spirits; a place to protect a forest, harvest water or supply 'environmental services'; ground to mine for minerals; or a source of profit through use or speculation. Indeed land supports every aspect of human and non-human life, so complete exclusion from its affordances is not possible. For the highlanders in my study, the landlessness that emerged when some people's cacao took up all the space came as a shock. Access to *lokasi* cost money, and not everyone could afford to buy it. Yet for these highlanders, as for many other people, land's life-giving affordances made it an awkward, resistant or incomplete commodity. Technically, it can be commodified, but there is often push back (Castree 2003; Hall 2013, 90; Prudham 2009). The nearest parallel is water and for the same reasons: its life-giving quality means that full commodification, and with it the possibility of complete exclusion, is unacceptable because its human consequences are too severe (Bakker 2007, 442). It is

not possible to evict all the people all the time. They must have a place to live, and food to eat. In Karl Polanyi's words, to treat land and labour only as commodities, and thus 'to allow the market mechanism to be the sole director of the fate of human beings and their natural environment ... would result in the demolition of society' (1944, 73). Hence regimes of exclusion are subject to continuing debate about what Foucault called 'the right manner of disposing things' (1991a, 95).

Debating the 'right manner of disposing things'

Many national constitutions have clauses that refer to the 'social function' of land and the obligation of ruling regimes to manage land in terms of the public good. Every regime of exclusion has therefore to be legitimated, and can be contested. These are not just contests between rich and poor, but contests among philosophers, scientists and governmental authorities who debate what constitutes the public good in terms of many criteria: public health and hygiene, political stability, energy, pollution, species depletion, climate change, peace, development, prosperity, efficiency and more. These matters were the subject of especially heated debate in colonial contexts, where injunctions to make land productive and profitable justified expropriation, while worries over native welfare and political instability suggested a more cautious approach (Drayton 2000; Li 2007b). Such debates continue to animate land policies. In contemporary Southeast Asia, for example, land-titling programmes designed to make land markets more efficient are balanced by laws that identify categories of people (sometimes labelled indigenous) and categories of land (often forested or sloping) for whom 'the right manner of disposing things' does not include extension of the commodity form (Hall *et al.* 2011; Li 2010).

Even when law and custom legitimate the private ownership or management of land, experts, officials and rural people still debate the propriety of making a profit from it. The life-giving affordances of land, and its coincidence with national territory, tend to bring moral arguments to the fore. In 1797, Thomas Paine made an impassioned argument along these lines in his pamphlet on Agrarian Justice, in which he argued that 'the earth, in its natural uncultivated state ... was the common property of the human race' (Paine 1797, np). He thought it was legitimate for people who invested in land improvements to appropriate the additional value they generated, but they could not own the land itself. He devised a formula for collecting ground-rent on the land of England in perpetuity, and distributing it through an annual payment to all citizens upon reaching the age of 21. The distribution was not a charitable donation. It was based on the natural right of citizens to be compensated for their exclusion from

portions of the national territory that had been excised for private use. There are contemporary iterations of this argument today, in programmes for the distribution of the benefit stream from mineral resources to citizens as part of their 'rightful share' of national wealth. Land taxes echo this idea.

Paine's essay was stimulated by his outrage at the inequality produced by the institution of private property in land in the so-called civilised nations. He noted that English paupers were worse off than they would have been in a state of nature, when nature's bounty provided for their support, as it did among native people in the Americas. His argument countered that of John Locke (2005 [1689], 81) for whom improvements on the land made the land itself into fully private property. Locke went on to argue that people who failed to improve land, or used it inefficiently, could legitimately be expropriated. It was Locke's way of thinking that prevailed in colonial contexts, and still underlies land expropriation today. But arguments that justify exclusion on the grounds that land should be put to efficient use can backfire. Absentee landholders and speculators who lay claim to land often make no use of it at all. Paine and Polanyi were right to insist that the absolute right to own land is both strange and outrageous. The question of exclusion from land's affordances – who is being excluded, on what grounds, through what means – always demands critical scrutiny, and raises the question: why does anyone accept this? What makes exclusion stick? Why do your arguments and forms of inscription (lines on a map, or words on paper) prevail against my arguments, my modes of inscription (the axe, the plough, the presence of spirits) and my need to sustain myself?

Clearly, assembling land as a resource available for some purposes to the exclusion of others requires a great deal of complex cultural work. In addition to the hard and ongoing work of legitimation, which I have just discussed, it involves the deployment of technologies to make land productive, metrics to adjudicate between more and less 'efficient' uses, and inscription devices that make land into a resource for different actors. In the next section I explore the assemblage that renders so-called 'frontier,' 'marginal' or 'underutilised' land visible, and available for global investment.

Rendering land investible

Before 2008, around 4 million hectares of farmland were acquired each year by institutional investors, domestic and foreign, for large-scale corporate agriculture. In the period 2008–2009 there was a spike: 56 million hectares in new land deals were announced in the media. About half the deals and two thirds of the total area (40 million hectares) were in Sub-Saharan Africa (Deninger *et al.* 2011, xiv). Although data

sources have been problematic, and not all the announced projects moved forward to acquisition, there was undoubtedly an increase in investor interest and in actual land deals, with areas ranging from 50 000 to 250 000 hectares (Anseeuw *et al.* 2012; Cotula 2012; Hall 2013, 96; Scoones *et al.* 2013).

The immediate causes of the 'land grab' usually highlighted in the literature are the spike in food prices in 2007–8 and moves in a few countries to restrict rice exports to ensure sufficient domestic supply. The threat of export restriction led importing countries like the Gulf states to become nervous about how they could feed their rice-eating migrant workforce, and to consider ways to by-pass global food markets by engaging directly in food production. A second stimulus was the market crash in 2008 that caused hedge funds and other large institutional investors to look for 'safe' places to put their money (Anseeuw *et al.* 2012; Cotula 2012; Fairbairn 2014). But transnational investment in farmland has been sustained long past the market turbulence of 2008, so we need to look more broadly at how land is being identified, inscribed and made available for investment, and what induces investors to put their money into farms far away.

Statistical picturing

The land identified as a resource available for global investment is classified as 'underutilised' or frontier land, or sometimes as marginal, idle or waste land. Frontiers, as many scholars have noted, are artefacts of technology and imagination. Specifically, as Gavin Bridge argues, frontiers are imagined (and constructed) as sites of 'bountiful emptiness'. They are 'fecund' spaces, 'empty but full' (Bridge 2001, 2154). That is, they are empty of people, histories and claims, but full of potential for new and improved use. To classify land as underutilised requires discounting current uses. It also requires a new regime of distinction, in which a diverse array of land types in a great many places is homogenised and aggregated under a new label: their underutilisation. This process, which David Demeritt calls 'statistical picturing', is one in which scientists and other experts play a prominent role. Demeritt traced the role of statistical picturing in producing the US nation's forests 'as a whole', together with the 'normal forest', 'annual allowable cut' and 'maximum sustainable yield', categories of thought and action that induced people to see, measure and calculate in new ways (2001, 439). In a similar vein, Nicholas Blomley discusses the role of the map, the survey and the grid in making up land for investment in colonial situations. He notes that surveying techniques were first developed by the English for use in Ireland, where 2.5 million acres were to be seized in retaliation for the 1641 uprising. Surveying enabled this vast expanse to be seized in the mind well before it was seized on the

PROTECTING PRIVATE TRANSNATIONAL AUTHORITY AGAINST PUBLIC INTERVENTION: FIFA'S POWER OVER NATIONAL GOVERNMENTS

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Scholars have engaged in discussions over whether the rise of transnational private authority is beneficial or undermines public legitimate authority. While the recent focus on civil regulation has emphasized the key role of public authorities and civil societies in such arrangements, the case of the International Federation of Association Football (FIFA) provides strong evidence that global policies can be formulated and administered by completely private institutions relying on strong enforcement mechanisms and able to confront public authorities. FIFA's power results from its control of market access to global football, which represents a vital 'club good' for national football industries. Therefore, FIFA is able to force European Union member states to deviate from national paths of sport regulation. Without orchestrating their efforts, public authorities are unlikely to succeed in challenging FIFA's power. Although the recent corruption scandals might force FIFA to implement some reforms, FIFA has a vital interest in protecting its regulatory powers.

INTRODUCTION

Football is not only a social phenomenon, but an expanding industry that is heavily controlled by the sport's governing body, the *Fédération International de Football Association* (FIFA). FIFA, a private not-for-profit association with headquarters in Switzerland, attributes to itself the powers to govern and regulate world football in collaboration with continental confederations and national football associations (FAs), from the rules of the game to the social and economic dimensions (FIFA 2015a, Articles 1–13).

At the moment, FIFA is engulfed in major scandals. An investigation led by the US and Swiss police authorities resulted in senior members of the governing body being detained to be extradited to the United States, where they face accusations of alleged large-scale corruption, tax evasion and money laundering, among others (Gibson and Gayle 2015). Misconduct and corruption within FIFA have long been denounced (Jennings 2006; Calvert and Blake 2014) and there have been numerous calls to increase FIFA's accountability towards stakeholders and public authorities (Lyons *et al.* 2014). After many years resisting calls for reform, FIFA president, Joseph Blatter, decided to relinguish his position just days after being re-elected by the 2015 FIFA Congress. However, Blatter announced that he would implement structural changes before an extraordinary congress elects his successor, to ensure that an improved FIFA remains strong and independent (FIFA 2015b). Thus, even in the middle of its most important crisis in decades, FIFA has signalled its will to keep control of the reform agenda.

While the corruption cases are outside the scope of this article, the way FIFA muddles through them is perplexing and leads to more general questions that form the core of this article: Why has FIFA successfully occupied a regulatory space that could have belonged to public authorities given the importance of football as a socioeconomic activity? Furthermore, how is it possible that a private not-for-profit organization with headquarters

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in Switzerland is able to claim *and* maintain its autonomy from the so-called shadow of hierarchy of public authorities (Chappelet 2010)?

Indeed, FIFA aims to *'control* every type of association football' (FIFA 2012, Article 2, emphasis added). Here, we explore the different ways in which FIFA defends its autonomy to govern football privately in the global and transnational market, without the intervention of public authorities. It is necessary to clarify from the outset that we do not argue that FIFA has infinite powers in every situation; what the article does is to focus on the balance of forces of FIFA, as a private organization, vis-à-vis public authorities in the transnational regulation of football. Thus, on a theoretical level, FIFA is not just a case study for football enthusiasts as it reminds scholars to abandon 'methodological nationalism' and to realize that global policies can be formulated and administered by completely private institutions (Stone and Ladi 2015). Moreover, while scholars have focused on civil regulation employing soft law, FIFA illustrates that transnational private regulators can confront public authorities by relying on strong enforcement mechanisms.

The article proceeds in four steps. First, we review the academic debates on transnational private regulation. Second, the article examines why FIFA rose as a transnational private authority. It is argued that FIFA can impose its preferences on national governments because it controls access to global football as a club good vital for national football industries. Third, as its main empirical contribution, the article presents evidence of how FIFA exerted its power as transnational football regulator in three case studies against the national governments of Greece, Spain and Poland. In the conclusion, we discuss the extent to which FIFA's multiple roles as regulator of the game, transnational corporation and grassroots movement can be contested by national governments on their own. We argue that due to football's character as grassroots movement, policy-makers at the national level do not trust the electorate to reward them for confronting FIFA. Accordingly, the present crisis might result in some organizational reforms, but FIFA is unlikely to waive its regulatory powers easily.

TRANSNATIONAL PRIVATE REGULATION

From the time of Rosenau and Czempiel's (1992) publication, governance by non-state actors has increasingly occupied the attention of scholars (Mattli and Büthe 2005; Büthe 2010; Shamir 2011). Private actors can participate in policy implementation (Pattberg 2005), transnational corporations (TNCs) provide public goods for failing states (Börzel and Risse 2010) or impose their demands on developing countries (Koenig-Archibugi 2004). Moreover, private actors are also engaged in transnational private regulation (TPR). Building on Pattberg (2005, p. 593) as well as Graz and Nölke (2007, p. 3), TPR can be defined as the ability of non-state actors to cooperate across borders in order to establish rules and standards of behaviour in a distinct issue area accepted as legitimate by agents not involved in the rule definition. Thus, FIFA's regime can be conceptualized as a TPR since it establishes rules accepted by national FAs and governments. This raises the question of how private regulators claim power and how they exert it.

Scholars emphasizing the important role for TNCs in TPR claim that neoliberal ideology and the pursuit of corporate hegemony account for the rise of transnational private authority (Cutler *et al.* 1999; Johns 2007; Schäferhoff *et al.* 2009; Shamir 2011). More functionalist approaches argue that globalization has created a mismatch between markets and politics in terms of governance. Accordingly, demand for rules has given rise to a variety of sources of supply (Haufler 2000). Thus, private actors have assumed regulatory powers

in order to deal with the necessities of global trade in the absence of international regulations by public authorities or effective intergovernmental regulatory action (Bartley 2007). In other words, they fill a regulatory vacuum of 'old international governance' (Abbott and Snidal 2009, p. 577; Schäferhoff *et al.* 2009; Bomhoff and Meuweuse 2011). The rise of private authority has also been framed as resulting from explicit or implicit delegation of certain functions by the state (Cutler *et al.* 1999).

Thus, there are diverging approaches to explaining and researching TPR. Vogel (2007, 2010) has distinguished two forms of TPR: (1) transnational industry self-regulation; and (2) 'civil regulation'. Traditional industry self-regulation has been depicted as serving to overcome collective action problems and to reduce transaction costs by specifying technical rules and guidelines for various materials, products and processes (Bartley 2007; Vogel 2007). In contrast, civil regulation specifies the responsibilities of global firms for addressing labour practices, environmental performance, and human rights policies (Vogel 2010, p. 68). According to Vogel (2010), civil regulation, intended to define standards for responsible business practices, is more likely to be politicized, transparent and to involve external stakeholders. In contrast, traditional industry self-regulation is depicted as intending to remove business regulation from public scrutiny. Given the diversity of industry self-regulation, which often anticipates public concerns (Gunningham and Rees 1997; Sinclair 1997; Black 2001), and an ongoing debate about the rise of the regulatory state, which is supposed to rely on different forms of self-regulation (Levi-Faur 2014), Vogel's dichotomy appears reductionist. Thus, a central point made here is that, although global self-regulation is still under-researched (Porter and Ronit 2006), scholars seem to have recently almost exclusively focused on civil regulation. While this interest in civil regulation has certainly generated new insights on TPR, it has also neglected some important phenomena.

First, research has emphasized the role of global civil society for the creation of civil regulations on global supply chains (Bartley 2007; Vogel 2010). Second, scholars have provided new (albeit diverging) answers on the relationship between private governance and public authority. On the one hand, scholars have stressed that powerful non-state actors might challenge the authority of sovereign states (Sending and Neumann 2006). In particular, TNCs seem able to impose their rules on developing countries (Abbott and Snidal 2009, p. 538). Further, it is also argued that TPRs can depoliticize policy issues (Nölke and Perry 2007), which is likely to favour private actors over public authorities (Underhill and Zhang 2008). On the other hand, Börzel and Risse (2010, p. 116) claim that private governance is still subject to the 'shadow of hierarchy', that is, a credible threat of state intervention. Accordingly, the shadow of hierarchy catalyzes 'voluntary agreement[s] closer to the common good rather than to particularistic self-interests'.

Again, this dichotomous approach to TPR power seems slightly reductionist, given the complexities of contemporary societies and economies. Pattberg and Stripple (2008; Falkner 2003) argue that the study of transnational civil regulations needs to go beyond the public–private divide since civil regulations represent business–civil society collaborations involving NGOs and multi-stakeholder organizations (Vogel 2007; Cafaggi 2011). Accordingly, Abbot and Snidal (2009) have suggested that civil regulation of transnational socioeconomic activities is actually located in a governance triangle between public authorities, private firms and NGOs in which civil society or NGOs serve as 'rule demanders' and supervisors (Overdevest 2010). Thus, the case of football (or sport) is of academic interest because FIFA acts as both a TNC marketing global football *and* a civil society not-for-profit NGO.

Here, the crucial point is that the recent debate on civil regulation has depicted an image of TPR as practice that operates besides or around the state. The fact that there exist TPRs that can effectively establish rules modifying domestic policies against governments' will is neglected. Moreover, the focus on civil regulation has resulted in a narrow perspective on TPR enforcement. It is commonly assumed that firms participate in private regulation because the benefits of participation received exceed their costs (Lenox 2006). Potoski and Prakash (2005) argue that private regulation works because it provides specific club goods, that is, non-rival but potentially excludable benefits. However, recent research on civil regulation has mainly dealt with 'soft law' mechanisms. Thus, the club good provided by civil regulations is mainly brand reputation, which is essential for TNCs (Vogel 2007).

Thus, two shortcomings of recent scholarship on TPRs are stressed. First, attention is called to the persistence of powerful transnational self-regulators able and willing to confront national governments. Transnational sport governance represents a long-established TPR, which originally filled a regulatory vacuum, able to self-regulate vis-à-vis public authorities and other third actors. Moreover, the case of FIFA provides evidence that powerful transnational industry self-regulation does not exclusively rely on 'naming and shaming'. In contrast, FIFA controls market access, which is a vital club good for national football industries. The strong dependence of national industries on global market access allows transnational private regulators to impose their will on national governments. FIFA's claim to regulatory autonomy is exceptional in comparison with attempts to regulate global supply chains. However, FIFA's means of enforcement call for increased scholarly attention on the issue of TPR compliance.

GOVERNANCE AND REGULATION IN TRANSNATIONAL FOOTBALL

The governance of international football represents a mixture of a pyramid and a network of stakeholders, private commercial actors and public authorities (García 2007). FIFA performs a threefold role in the transnational governance of football: regulation and rule making; fund-raiser (through exploitation of the World Cup) and subsidizer (of national FAs that receive solidarity funds); and a market gatekeeper because FIFA membership is a precondition for participation in international football competitions (FIFA 2015a). These governance capacities are exceptional even for international sport governing bodies (Forster and Pope 2004; Forster 2006). Thus, the International Olympic Committee (IOC) certainly possesses 'global event power' (Rojek 2013) comparable to FIFA's, but its governance covers only the Olympics (Chappelet and Kübler-Mabbott 2008). Other sport bodies lack FIFA's strong commercial powers, posing the question why has FIFA risen to this level of regulatory capabilities without real noticeable opposition?

Research on FIFA's history suggests that FIFA's rise to power resulted from an institutional first-mover advantage and a complex interaction with the 'politicization of sport' (Tomlinson and Young 2006). Typically established as 'gentlemen's clubs' (Tomlinson 2000), international sport governing bodies filled a regulatory vacuum when they created and regulated international competitions, because national states did not address these matters at that time. Thus, the very creation of transnational sport governance contradicts 'methodological nationalism' (Stone and Ladi 2015). The acceptance of these sport bodies' claim to regulatory autonomy and the increasing participation of countries in their tournaments and competitions indicate some kind of 'implicit delegation' of a TPR regime. The very recent recognition by the United Nations (IOC 2014) and the European Union (article 165 of the Treaty on the Functioning of the European Union, in force since 2009)

regions and the countries have in common, dealing with which may form the groundwork for general and particular strategies. This Introduction outlines some of the discussion at the conference, and thus provides an additional context for the volume.

Like rust, as Robin Dare, the New Zealand Comptroller of Customs, put it, corruption never sleeps. The topic, too, is a broad one. However, when remedies or restraints are considered, it is desirable to choose a particular target. In an era marked first by 'development' and then by 'globalisation', it is not surprising that the recent and contemporary focus has been on the relation of 'public' and 'private', in particular on the usage that defines corruption as the abuse of trust, or more particularly the misuse of public power for private gain.

In some societies, if not all, such relationships have been customary, and seen, at least if contained within limits, as acceptable. They may also be instrumental or functional, ways of making new systems work. The two concepts are not necessarily distinct. What became customary was once new. What is new may adopt or adapt, build in or distort what has become customary.

Periods of systematic change may indeed offer particular opportunity. Will the restraints that accompanied custom survive? Are new systems being introduced without the promotion or acceptance of new conventions? Is 'corruption' required to make them work? Does it emerge in the process of transition? Does it become entrenched and stand in the way of further transition?

These are considerations that relate to transitions, to changes over time. Is corruption intrinsically related to any form of government more than another? The introduction of democratic systems seems to have enhanced corruption, but that may be a matter both of focus and of perception. Authoritarian and bureaucratic systems may locate corruption elsewhere, and it may be less obvious, even if widely thought to exist.

Even if democracy provides no less fertile soil for corruption, it may be better at checking its growth. That is an argument for democracy, aside from its essential merits, but the validity of the argument will depend on the extent to which democracy itself has taken root and the form it has assumed. The argument is somewhat circular. Success in dealing with corruption will help to establish democracy. It will have to be demonstrable and it will have to be worked for.

Democratic systems emerged, we should recall, because governments needed to draw on the wealth and support of their peoples: they needed assent for taxation and conscription; and they had to show how the money – and the lives – were spent. Governments in newer states, in Southeast Asia, for example, have often been able to avoid that course: not threatened by their neighbours, and able to secure aid and FDI on an unprecedented scale. Democracy, within the context of a civil society, has to be argued from different premises, so that it becomes more than merely a

ritual through which a ruling regime goes through in order to secure the legitimacy that it, perhaps only if, can provide.

The means of checking corruption may be available to governments whatever form they take, and they may even be part of or represented by a narrow, 'non-political', or managerial concept of 'governance'. But a survey of them may suggest their particular affinity with a working democracy. One means – necessary, though insufficient in itself – is 'transparency'. Only that can provide the basis for accountability on the one hand and confidence on the other. It is necessary not only for international investors and aid organisations. It is even more necessary at home, providing the material for discussion, for appraisal, and for criticism. Without it, it is impossible to determine priorities or to use resources in the most efficient and effectual manner. That is always important, in good times as well as bad, though it is likely to be more contentious in bad.

Many governments – often in kneejerk reactions to popular or media concern – resort readily to making laws and regulations, and New Zealand, which has, at least in the past, had a reputation as the fastest lawmaker in the West – is among them. Laws do not, however, suffice on their own. For them to work against corruption, as against other social evils, they need the support of institutions, non-governmental as well as governmental, and of the media. Even if some of those may themselves be corrupt or become corrupt, it is better for them to exist in that form than not at all. They need, too, the support of opinion. People have not only to believe that it is a bad thing, but also to act on that belief.

Education must thus play a role, too. It must, however, not only be education delivered as part of a school curriculum. It needs also to be education by example. That must be given by governments themselves, and by politicians and officials. Particularly when privatisation is leaving more to business and to public/private arrangements, the obligation extends to the business world, too. If the focus is on the relationship between the public and private, it is not only the public sphere that must avoid corruption. Business itself needs a code of morality which it upholds and is seen to uphold, and it should extend not only to its relationship with government.

Nor, of course, is business in a globalising world merely a domestic matter. It is necessary for international business to work against corruption rather than accept it, only to protest and call on government when things go wrong or circumstances change. More broadly, it has to demonstrate that the sort of probity it wants to find in its customers, contractors and debtors also demonstrably marks its own practices. Other kinds of international intervention may otherwise be undermined. These include the work of a range of agencies and NGOs dedicated to improving 'governance' and 'fighting' corruption. There is indeed always a risk in a world of independent nations that international intervention will be resented as being too like the influence of the colonialists or imperialists of the past and their work thus is rendered ineffective or counter-productive. They

have to find ways of working with elements in each nation without arousing a 'nationalist' opposition or enabling a government to arouse it.

Accepting such a world, accepting, too, perhaps, that these are the possible constraints on corruption, and that they may work best if combined with a working democracy, we may still consider whether there are other conditions which discourage corruption and whether they can be established. Size seems to be a factor. It emerges, for example, when considering the relationship of public and private, on which we are focusing. If government becomes 'small' – less interventionist than in the post-Depression and post-war period or in the early years of independent states – that may provide less opportunity for corruption, at least in public/private transactions, though the process of deregulation and privatisation may provide a bonanza. It will still be necessary to avoid complacency, to guard the guardians. How good is the rust-proofing?

The size of states themselves – as distinct from governments – may also be a factor. Both history and contemporary experience suggest that a small state may be able to do a more thorough job than a large one. But it may also be unduly dominant. The conference was offered a striking paper on Singapore, inviting a reappraisal of accepted views.

The world of nation–states is a world of equal sovereignties, but very unequal sizes. Breaking up the large state is not a practical prospect. But the advantages of smallness might be achieved by a greater measure of decentralisation, and with that it is possible to couple greater participation and more democracy. So far, however, the record of decentralisation has not been persuasive. It is not sufficient in itself, even if loyally carried out.

Corruption has to be checked, and if possible eliminated, not only for the convenience of foreign investors or at the behest of foreigners, but in order to avoid waste and misdirection of resources, to the disadvantage of the mass of the people.

The essentials appear to include: (1) political will, whether sustained by democracy or not; (2) appropriate structures and legislation; (3) provision for their application at all levels; and (4) transparency. These must be combined with what one of our contributors terms in Howard Dick's phrase a 'search strategy' that will ensure their relevance to the circumstances of the particular country concerned.