論　説

Principal-Agent Theory and the Law of International Organizations: A Methodological Perspective

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Abstract

Some methodological problems may occur when international legal scholars apply domestic theories to the examination of *legal* issues in an international arena, for instance, in analyzing the relationship between international organizations and member states using principal-agent theory. Furthermore, the issues of state consent—the binary tension between the laws drawn to and detached from consent—are of the inseparable realistic problems in legal functionalism and the law of international organizations. In this context, legal approaches should keep their adaptability between theory and reality, to not raise questions regarding the

significance of taking the approach and the effectiveness of the outcomes obtained from using domestic (public) law theories, *mutatis mutandis*, in analyzing their research targets and constructing theories. This article reveals the theoretical problems of identifying said relationship with a principal-agent relationship and thereby discovers some methodological clues for developing the law of international organizations.

Keywords

Law of international organizations – functionalism – consent – public law – principal-agent theory – legal theory – legal relationship – adaptability between theory and reality

1. Introduction

Generally, the trends in legal studies of international organizations over the past 10 years can be divided into two parts. One is discussions on how the law in the globalized world or the one facing the phenomenon of globalization should be. These discussions can be categorized as constitutionalism,[1)] global administrative law,[2)] international public authority,[3)] rethinking public law/public international

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1） See, e.g., Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009).

2） See, e.g., Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, “The Emergence of

law,[4] and so on. The other is about how the law of international organizations[5]—a legal framework relating to the existence, structure, power/authority, and activities of international organizations—should be. It can be said that the first issue involves academic challenges of rethinking or reconstructing the relationship, *per* se, between law and society in a globalized world by examining the role, activities, and functions of international organizations as a key research area. The second issue involves discussing how the law of international organizations should be, to a limited extent. It seems to me that both challenges more or less share a similar method, namely, using domestic (public) law theories and their vocabularies/concepts, *mutatis mutandis*, in analyzing their research targets and constructing theories.

It is well known, among international legal scholars, that Jan Klabbers, a leading scholar in studying the law of international organizations,[6] has criticized

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Global Administrative Law," *Law and Contemporary Problems*, Vol. 68, No. 3/4 (2005), pp. 15-64; Simon Chesterman, "Globalisation and Public Law: A Global Administrative Law?" in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, 2009), pp. 75-91.

3） See, e.g., Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, "Developing the Public International Law: Towards a Legal Framework for Global Governance Activities" in Armin von Bogdandy *et al*. (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2010), pp. 3-32.

4） See, e.g., Neil Walker, "On the Necessarily Public Character of Law" in Claudio Michelon *et al*., *The Public in Law: Representations of the Political in Legal Discourse* (Routledge, 2016), pp. 9-31; Richard Collins, "Between Contract and Constitution: International Organizations and the Protection of Global Public Interests" in Claudio Michelon *et al*., *The Public in Law: Representations of the Political in Legal Discourse* (Routledge, 2016), pp. 69-86; Ramses A. Wessel, "Revealing the Publicness of International Law" in Cedric Ryngaert *et al*. (eds), *What's Wrong with International Law?* (Brill Nijhoff, 2015), pp. 449-466.

5） From a functional viewpoint, the law of international organizations can be subdivided into the *institutional law of international organizations, operational law of international organizations*, and *remedial law of international organizations*. See Ryosuke Sato, "Functions of Security Council Subsidiary Organs in the UN Financial Sanctions Regimes: From the Perspective of the Law of International Organizations" in Sachiko Yoshimura (ed), *United Nations Financial Sanctions* (Routledge, 2020), pp. 34-36.

6） See, e.g., Jan Klabbers, *An Introduction to International Organizations Law, 3rd edition* (Cambridge University Press, 2015); Jan Klabbers, *Advanced Introduction to the Law of International Organizations* (Edward Elgar, 2015); Jan Klabbers (ed), *International*

functionalism in (the law of) international organizations.[7] Thus far, his unchanged assertion[8] has had a major impact on how other scholars view functionalism in (the law of) international organizations.[9] If oversimplification is allowed, the summary of how he has recognized and demonstrated functionalism is as follows:

1. Functionalism pervades almost the entire corpus of the law of international organizations or the legal framework of analyzing the organizations.
2. Under the logic of functionalism, international organizations are usually considered to be *agents* acting on behalf of a *principal* (member states) and are typically depicted as "a force for good." Therefore, the organizations have never done wrong. Even if they have done wrong, legal immunity would apply to them.
3. Additionally, in functionalist terms, international organizations can exercise powers and functions delegated by member states broadly and discretionally, and thereby, member states cannot be inclined to control such exercises.
4. Therefore, such problematic functionalism should be transformed fundamentally for the sake of developing the law of international organizations. If the necessary transformation is difficult in said functionalism, the law of international organizations should replace functionalism with another doctrine/approach. It is imperative for the law of international organizations to be revitalized and developed further.

Organization (Ashgate/Dartmouth, 2005).

7） Ian Johnstone stated, "Jan Klabbers' two decades of 'obsession' with functionalism as a theory of international organizations." See Ian Johnstone, "Are Functionalism's Flaws Fatal?," EJIL:Talk!, https://www.ejiltalk.org/reply-to-klabberss-article/ (August 20, 2015).

8） His unshakable belief has been found lately in Jan Klabbers, "International Organizations and the Problem of Privity: Towards a Supra-Functionalist Approach" in George P. Politakis, Tomi Kohiyama, and Thomas Lieby (eds), *ILO 100*: Law for Social Justice (International Labour Office, 2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/publication/wcms_732217.pdf (August 10, 2021), pp. 629-646.

9） As a theoretical influence on a newly published monograph, see, e.g., Lorenzo Gasbarri, *The Concept of an International Organization in International Law* (Oxford University Press, 2021), p. 17.

It should be remarkable, from a methodological viewpoint, that Klabbers defines functionalism as "essentially a principal-agent theory, with a collective principal (the member states) assigning one or more specific tasks—functions—to their agent."[10] Certainly, there are concerns about situations wherein an international organization acts independently or unrestrictedly and goes beyond the remit that member states have granted or conferred, for instance, the Frankenstein Problem, even though the organization is a functional entity derived from the states.[11] Furthermore, Klabbers indicates some problems of functionalism intertwined with principal-agent theory. He criticizes that the said situation regarding international organizations, especially their organs with a great degree of discretion and autonomy, "can only be squeezed into a functionalist framework with great difficulty,"[12] rather than corrected under the framework.[13] Considering that principal-agent theory has been mainly developed so far in domestic legal/political/economic theories, it is natural that Klabbers analyzed functionalism by making use of domestic theories and their vocabularies/concepts *mutatis mutandis*. However, a methodological viewpoint also raises other questions concerning the application of principal-agent theory to functionalism or the law of international organizations: To what principal-agent theory does Klabbers owe much for his critical analysis? Is it possible to identify the relationship between international organizations and member states using a principal-agent relationship from factual and theoretical viewpoints? Might it be said that there is little room for identifying them at least as a legal relationship? Even if principal-

10） Jan Klabbers, "The EJIL Foreword: The Transformation of International Organizations Law," *European Journal of International Law*, Vol. 26, No. 1 (2015), p. 10.

11） Andrew Guzman, "International Organizations and the Frankenstein Problem," *European Journal of International Law*, Vol. 24, No. 4 (2013), pp. 999-1025.

12） Klabbers, *supra* note 10, p. 26.

13） "[F]unctionalism is ill-equipped to address issues that do not emerge from the relationship between principal and agent or, or more colloquial terms, between organization and members." Jan Klabbers, "The Transformation of International Organizations Law," EJIL:Talk!, https://www.ejiltalk.org/the-transformation-of-international-organizations-law/ (August 18, 2015).

agent theories in politics and international relations can be applied to the legal analysis of international organizations, what kind of outcomes can scholars obtain theoretically and legally by recourse to them? If principal-agent theories have mainly permeated on the premise of application in a domestic arena, does this mean that international legal/political scholars should correct and adapt said theories, where appropriate, into reality in an international arena? In other words, is the validity or persuasiveness of argumentation supported by recourse to said theories dependent on the methodological appropriateness of its application of domestic theories?

Additionally, this sort of methodological problem may occur when domestic *non-legal* theories and their vocabularies/concepts are applied to examine *legal* issues. As illustrated above, some public theories are used directly or indirectly for theoretical considerations—even in the legal theory of international organizations—about how the law should be suitable for the reality of the globalized world. What is methodologically appropriate or valid for applying any theoretical framework or conceptual tool developed in a domestic arena to the analysis of law and society in an international arena? It seems to me that the matter of dealing with principal-agent theory in the law of international organizations is very instructive to answer this question. Grounded on the points mentioned thus far, this article reveals the theoretical problems of identifying the relationship between international organizations and member states with a principal-agent relationship and thereby discovers some methodological clues for developing the law of international organizations theoretically.

The article proceeds as follows. The first part outlines the principal-agent theories in each discipline. The second part discusses several issues of the theoretical application of principal-agent theory to functionalism. The third part evaluates some theoretical and methodological significance resulting from such an attempt to apply said theory to the law of international organizations. The final part suggests some points to be considered toward the theoretical development of the law of international organizations.[14)]

2. A Sketch of Principal-Agent Theories

First, how have scholars recognized and dealt with principal-agent theories in each discipline? I survey this matter from two perspectives, namely, non-legal and legal disciplines.

2.1 Principal-Agent Theories in Non-Legal Disciplines

Originally, principal-agent theory was developed in politics and economics.[15] For example, principal-agent theory has been discussed in economics—incentive theory, contract theory, game theory, and so on.[16] In politics, the relationship between the congress (politicians, legislators) and the bureaucracy (government officials, executives) has been studied in a principal-agent framework.[17] Moreover, within the

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14） In this regard, the incorporation of domestic theories in an international arena can be described as "analogy"—one of the well-known legal techniques—interchangeably. According to Bordin, as far as international law is concerned, the term "analogy" has been used so far in cases covering judicial proceedings in a narrow sense to the codification and progressive development of international law in a broad sense. Certainly, it seems that the latter overlaps, to no small extent, the cases of examining the activities of international organizations by public law approach, which will be addressed in this article. However, the research target of applying domestic theories to international ones is not limited to the term "analogy," which has often been relied on in legal reasoning. This is because the application of domestic theories to international ones does not necessarily mean dealing with uncertainty and ambiguity of the law of international organizations or filling the lacunae in the law relating to international organizations. See Fernando Lusa Bordin, "Analogy" in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019), pp. 25-38.

15） See, e.g., Stephen A. Ross, "The Economic Theory of Agency: The Principal's Problem," *American Economic Review*, Vol. 63, No. 2 (1973), pp. 134-139; Barry M. Mitnick, "The Theory of Agency: The Policing "Paradox" and Regulatory Behavior," *Public Choice*, Vol. 24 (1975), pp. 27-42.

16） See, e.g., Jean-Jacques Laffont, "Introduction" in Jean-Jacques Laffont (ed), *The Principal Agent Model: The Economic Theory of Incentives* (Edward Elgar Publishing, 2003), pp. xi-xxi.

17） See, e.g., Barry R. Weingast, "The Congressional-Bureaucratic System: A Principal Agent

context of domestic politics, legislators are the principals but "simultaneously agents of party officials, campaign contributors, and voters," while the officials are not only the agents of the legislators but also "agents of courts, the media, [and] interest group."[18] Hence, there are variations and complexities in this relationship.

In international relations, there have been fertile studies on controlling international organizations, which tend to act—although created by states—apart from their control and cause some trouble. It can be described that principal-agent theory is referred to as a discussion framework.[19] It has been indicated that principal-agent theory in international relations is substantially similar to that in domestic politics,[20] and its theoretical focus is placed not only on the analysis of problems occurring in the relationship between international organizations (agent) and their member states (principal)—agency slack—but also on the examination of control mechanisms as a solution.[21] Some scholars argue that the role of third parties such as non-governmental organizations should be incorporated into said mechanisms.[22] On this point of third parties concerned, the discussions have been extended to issues such as third parties' influence on the principal and their direct effects on the agent resulting from bypassing the principal.[23]

Turning to the topic of designing international organizations, there have been

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Perspective (with Applications to the SEC)," *Public Choice*, Vol. 44, No. 1 (1984), pp. 147-191; David A. Weisbach, "Tax Expenditures, Principal-Agent Problems, and Redundancy," *Washington University Law Review*, Vol. 84, No. 7 (2006), pp. 1823-1860.

18） Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney, "Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory" in Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney (eds), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006), p. 9.

19） *Ibid*., p. 4.

20） *Ibid*., pp. 4-5.

21） *Ibid*., pp. 24-31.

22） David A. Lake and Mathew D. McCubbins, "The Logic of Delegation to International Organizations" in Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney (eds), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006), pp. 341-368.

23） Hawkins *et al*., *supra* note 18, p. 9.

various methods adopted for this research, including rational choice theory, delegation theory, constructivist approaches, and regionalism approaches. For instance, delegation scholarship focuses on principal-agent theory[24] and demonstrates "preference heterogeneity among principals and the need for reliable information produce fewer *ex ante* controls and thus greater IO autonomy"; therefore, "preference heterogeneity within the collective principal can make *post hoc* control mechanisms—such as IO reform or reconstructing—quite difficult."[25]

2.2 Principal-Agent Theories in Legal Disciplines

2.2.1 Domestic Law

There are studies on principal-agent theory in legal disciplines. Namely, domestic private law situates said theory as part of the "law of agency" or agency relationship. In this case, the legal relationship to a third person can be a theoretical issue when, for instance, a person representing and acting on behalf of another deals with the purchase/sale of real estate vis-à-vis a third person.

As a useful reference to grasp the substantial nature of this relationship, hereinafter, I follow G.H.L. Fridman's explanation. First, Fridman gives us a tentative definition: "[a]gency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property."[26] Second, he argues, "the two factors merit consideration, in the

24） Jon Pevehouse and Inken von Borzyskowski, "International Organizations in World Politcs" in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016), pp. 4-15.

25） *Ibid*., pp 10-11. [IO is an abbreviation for international organization.]

26） G.H.L. Fridman, *The Law of Agency*, 3rd edition (Butterworths, 1971), p. 8.

light of their necessity for the understanding of the legal nature and function of the agency relationship. They are: the consent of the parties and the authority of the agent."[27] However, the point here is that while some scholars regard the agency as "a consensual relationship,"[28] others criticize this view. According to Fridman, it is certain that although consent is necessary expressly or implicitly to be the basis of establishing the relationship, it is "for the law [relating to agency] to determine what is or is not agency."[29] Notably, it is still incumbent on the agent to implement their obligations imposed by the law, even if any contract or agreement related to the relationship is lacking.[30]

Third, it is illustrated that the notion of authority is very important to understand agency relationship, but there are criticisms that the explanatory power of the notion is insufficient. Moreover, this notion "describes the purposes of the agency relationship, in that it is a relationship by which one person 'permits' (or, in law is regarded as 'permitting') another person to act for him; but it does not say why this permission (or authorization) is so vitally important"[31] to the relationship. In other words, this "missing explanation" is considered to be filled with "the analysis of the relationship in terms of the agent's power to affect his principal's legal position."[32] On this point, Fridman mentions Seavey's exposition of agency relationship as "a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other."[33] Based on the above, Fridman finally redefines agency relationship as "a power-liability relationship."[34] According to him, the relationship, *inter* se, is

27） *Ibid*., p. 9.
28） *Ibid*., p. 10; Warren A. Seavey, "The Rationale of Agency," *Yale Law Journal*, Vol. 29, No. 8 (1920), p. 868.
29） Fridman, *supra* note 26, p. 10 and 35.
30） *Ibid*., p. 11 and 35-39.
31） *Ibid*., p. 12.
32） *Ibid*.
33） Seavey, *supra* note 28, p. 868.
34） Fridman, *supra* note 26, p. 13.

"important not merely from the point of view of those parties themselves, but also from the point of view of the rights and liabilities of strangers to the relationship"; furthermore, these two aspects of the relationship "have been differentiated as *external* and *internal*."[35] As illustrated above, it is unquestionable that the legal relationship to a third person is a significant matter of concern in the law of agency.

2.2.2 International Law

The case of agency is not uncommon even in international law, such as the well-known example of the treaty between Switzerland and Liechtenstein. According to Brownlie, "[s]tates may act on behalf of other states for various purposes, provided that authority to do so exists and is not exceeded. States may appoint other states as agents for various purposes, including the making of treaties."[36] Practically, we can see the examples of agency to be permitted under international law in areas of the commercial treaty and tariff treaty, wherein one state authorizes another state to act on its behalf (e.g., diplomatic negotiations, the conclusion of a treaty, and other external matters).[37] Historically, there are the cases in which person or persons have been committed by a state as agents (e.g., public diplomatic agents, officers in command of the armed forces, and commissioners employed for special objects, such as the settlement of frontiers).[38] However, it is inappropriate to classify said cases and the *inter-state* agency relationship as the same thing.

According to Sarooshi, "the existence of agency relationships under international law has been recognized by the International Court of Justice, the International Law

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35) *Ibid*., pp. 13-14.

36) Ian Brownlie, *Principles of Public International Law*, 7th edition (Oxford University Press, 2008), p. 670.

37) *Yearbook of the International Law Commission, 1964*, vol. 1, A/CN.4/SER.A/1964, p. 58, paras. 54-55.

38) See William Edward Hall, *A Treatise on International Law*, 8th edition (Oxford University press, 1924), pp. 351-378.

Commission, and authoritative commentators in a number of different cases where, in general, a principal has empowered an agent to act on its behalf to change certain of its rights and duties."[39] Additionally, he indicates that agency relationship under international law has characteristics in common with that under domestic law: each principal and agent is a separate legal entity; consent is necessary as a prerequisite for the establishment of the agency relationship; and the relationship is revocable by the principal.[40] However, it should be noted that Sarooshi refers to agency relationship under private law or law of agency to explain the above.[41] That is to say, he does not assume something like agency relationship under administrative law or public law in a domestic arena.

In this regard, there have been discussions among the members of the International Law Commission on whether to insert some provisions relevant to the agency agreement into the draft of the Vienna Convention on the Law of Treaties. In particular, Sir Humphrey Waldock (special rapporteur) explained why Article 59 (extension of a treaty to the territory of a state with its authorization) and Article 60 (application of a treaty concluded by one state on behalf of another) should be included in the draft treaty, which led to debate among the members.[42] Without going into detail, it should nevertheless be indicated for the purpose of this article, that the concepts of agency discussed in the *travaux préparatoires* were considered to be derived from municipal law, especially private law.[43] Again, any international agency agreement, such as agency relationship under administrative law or public law in a domestic arena, was not assumed in these discussions.

The above is a brief sketch of principal-agent theories in the relevant disciplines. Notably, some conferral or delegation of power has indeed occurred in either a

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39） Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, 2005), p. 33.

40） *Ibid*., pp. 31-42.

41） See, e.g., *ibid*., p. 41, footnote. 29.

42） *Yearbook of the International Law Commission, supra* note 37, pp. 53-65.

43） *Ibid*., p. 55 (para. 26) and p. 63 (para. 33).

principal-agent relationship in non-legal disciplines or that in legal disciplines. Namely, as the same/similar concepts—authority, delegation, and agent—are employed, scholars are likely to confuse the relationship in non-legal disciplines with that in legal ones or be indifferent to the distinction between them.

3. Principal-Agent Theory Applied to Functionalism: Theoretical Flaws

The nature of principal-agent theory has been categorized in legal and others areas. If this is the case, what careful considerations will be needed methodologically to incorporate said theory into the law of international organizations? In this part, I first examine how Klabbers has adopted this theory in his critical analysis; subsequently, I attempt to reveal some problems in his logical framework and methods. The problems to be assumed here are as follows: a gap in the understanding of functionalism between Klabbers and international legal/political scholars in general, theoretical flaws in Klabbers' criticism on functionalism, and the harmful influence of such application on the analysis of the law of international organizations.

3.1 Klabbers' Principal-Agent Theory

First, which method is appropriate in analyzing and evaluating a legal framework to incorporate ideas, concepts, and vocabulary from legal theories or from political ones? Indeed, the answer depends on the purpose and objective of the incorporation. Provided the object of study is relevant to legal facts, phenomena, and effects, the legal theory-related method seems more appropriate and valid (*Irrelevantia ad probationem non admittuntur*).

However, it does not seem that Klabbers has the recourse to principal-agent theory in any legal areas judging from his argument as below. Rather, it is presumed that he places argumentative importance on principal-agent theory in the area of

international relations.[44] It is acceptable from the fact that he refers to many works in international relations regarding principal-agent theory, which further corresponds to the fact that he describes "[i]t is in essence a theory not about law (not even institutional law) but, rather, about international organizations and their relationship to their member states."[45] Needless to say, it is not denied in itself that international legal scholars apply the viewpoints of international relations and politics to the study of the law of the international organizations concerned. The important thing is whether scholars could take advantage of the outcomes of international relations/political analyses as meaningful feedback to better understand, analyze, and address legal issues.

According to Klabbers, functionalism in the law of international organizations is first characterized in a way regarding "international organizations as entities created to execute functions through specifically conferred powers, delegated to them by their member states."[46] Then, he insists that grasping the relationship between an organization and its member state as the principal-agent one is inherent in functionalism:

> The basic idea behind functionalism is that states delegate functions to entities they create for this purpose: international organizations. International

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44） See, e.g., Jan Klabbers, "Theorizing International Organizations" in Anne Orford and Florin Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), p. 631, footnote 31.

45） Klabbers, *supra* note 10, p. 20. Klabbers also asserted that "the functionalism in the law of international organizations always was a political project like any other, an ideology to help justify the shifting of authority to actors whose activities would, for a long time, go without scrutiny or control and would be justified by the idea of functionalism." Klabbers, *supra* note 44, p. 633.

46） Jan Klabbers, "The Emergence of Functionalism in International Institutional Law: Colonial Inspirations," *European Journal of International Law*, Vol. 25, No. 3 (2014), p. 645. See also Anne Peters, "International Organizations and International Law" in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016), p. 36.

> organizations are usually considered to be the agents acting on behalf of a principal, and functionalism is no exception. The principal is typically said to be constituted by the member states together. The mandate of the organization will be limited in scope, perhaps limited in time as well and must be revocable. Otherwise, the more appropriate construction is that of a transfer of functions instead of delegation.[47)]

However, he also indicates that two factors complicate the principal-agent relationship in functionalism more than that in general: one is that a principal (member state) is a collective actor—the collective principal[48)]—which implies that "the situation is different from the 'normal' type of principal-agent relations envisaged in private law"[49)]; the other is that "the principal is supposed to control and direct the agent but is at the same time part of the institutional structure of the agent."[50)]

As described above, Klabbers defines the essential characteristics of functionalism as a principal-agent relationship between international organizations and their member states in conjunction with the conferral/delegation of powers to the organizations by the states. Then, he criticizes such a situation wherein international organizations (agents) act—although subject to their member states (principal)—apart from their control.[51)] In this sense, principal-agent theory in international

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47) Klabbers, *supra* note 10, p. 24.

48) *Ibid*., p. 10.

49) *Ibid*., p. 25.

50) *Ibid*.

51) Klabbers indicates that it is natural for a functionalist approach to fail to control the expansion of organizational powers (*Ibid*., pp. 34-35). However, Virally, regarded as a functionalist, also recognizes that the functions of international organizations play an enabling and restricting role in the activities (Michel Virally, "La notion de Fonction Dans la Théorie de L'organisation International" in *Mélanges Offerts a Charles Rousseau: la Communaute Internationale* (A. Pedone, 1974), pp. 291-293; Michel Virally, "Definition and Classification of International Organizations: A Legal Approach" in Georges Abi-Saab (ed), *The Concept of International Organization* (Unesco, 1981), pp. 53-54). In this sense, it is difficult to say that in his functionalistic perspective, Virally originally tended to separate the activity of an

relations is considered to play a role in reinforcing his criticism of functionalism theoretically.

3.2 Some Problems in Klabbers' Theoretical Method of Incorporation and Logic

3.2.1 A Gap in the Understanding of Functionalism between Klabbers and International Scholars in General

Meanwhile, considering the relevant studies, it can be described that such an understanding as "functionalism is essentially a principal-agent theory ('functionalism as PA theory')" has been uncommon in the *legal analysis* focusing on international organizations, except for statements from the viewpoint of international relations and politics. For example, Wouters and De Man attempted to analyze the law-making processes of international organizations and their practices using the comparative approach of "the functionalism-constitutionalism dichotomy and agency theory."[52] Therefore, they have never conceived of functionalism as principal-agent theory. Sinclair argues that Paul Reinsch, who Klabbers nominated as a headstream of functionalism, "said little about the delegation of functions to IOs per se" in his major work; thus, this fact "hardly fits the principal-agent model that Klabbers defines as functionalism's key feature."[53] Whereas Johnstone generally agrees with Klabbers' contention, he does not consider a principal-agent theory as a useful

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international organization from a member state's consent and consider its power extensively. On this point, Peters also views the function as both the generating role of limitation on the international organizations and the enabling role of this activity under the functionalist paradigm (Peters, *supra* note 46, p. 36).

52） Jan Wouters and Philip De Man, "International Organizations as Law-makers" in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011), pp. 190-224.

53） Guy Fiti Sinclair, "The Original Sin (and Salvation) of Functionalism," *European Journal of International Law*, Vol. 26, No. 4 (2015), p. 969.

framework to understand functionalism, because the principal, agent, powers conferred, and control mechanisms are not easily identifiable. On this point, he describes that "this is where Klabbers critique does not go far enough—PA theory does not adequately explain or prescribe for what it purports to cover: namely the organization's relationship with its members."[54] Therefore, it is questionable to define the essence of functionalism as a principal-agent theory within the context of legal analysis in terms of the theoretical validity.

Additionally, it can be pointed out that some scholars differ in their opinions from Klabbers, even citing the perspectives of international relations and politics. According to Cogan, "[o]ur understanding of international organizations depends on the perspective from which we view them: outside in or inside out." The former, an externalist perspective, is an approach of primarily understanding international organizations "through the eyes of their founders and members—states,"[55] and "[t]he most extreme externalist perspective is taken by those commonly denominated as 'realists.'"[56] Namely, the realists think of international organizations as those that only "play a minor role" and "simply (and at most) a strategy that can be used by powerful states to maintain their power."[57] Hence, the realists have recognized that international organizations are "not autonomous, and since they do not have their own power, they do not themselves affect state behavior."[58] Cogan explains that because the realists regard the organizations as "the agent of states" or "their dependent creations," even if they are delegated powers by their principals (their member states), member states "feel free to ignore organizations whenever their interest so require" and "use international organizations for their own ends."[59]

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54) Johnstone, *supra* note 7.

55) Jacob Katz Cogan, "International Organizations" in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019), p. 540.

56) *Ibid*., p. 541.

57) *Ibid*.

58) *Ibid*., p. 543.

59) *Ibid*., p. 541.

Therefore, although the realists regard the relationship between an international organization and a member state as a principal-agent relationship, Cogan takes a different position from Klabbers' "functionalism as PA theory" because he places functionalism in the framework of liberalism, which is incompatible with realism.[60)]

Thus, there exists a gap in the understanding of functionalism, a principal-agent theory, and its connection between Klabbers and international scholars in general.

3.2.2 Theoretical Flaws in Klabbers' Criticism on Functionalism

Moreover, even though Klabbers' understanding of "functionalism as PA theory" is only aimed at revealing the characteristics and limits of the law of international organizations that are grounded on functionalism, the theoretical validity of his approach to principal-agent theory will become more dubious in terms of theoretical flaws in his criticism on functionalism. This is because Klabbers interprets the failure to accommodate the issues of third parties to the matrix of the law of international organizations as a *flaw* in functionalism, which derives from the essence of functionalism, albeit the issues are deemed to be within a matter of concern of principal-agent theory, especially in domestic private law and international law.

First, he insists that "functionalism, being a theory concerning the relationship between organizations and their members, has little to say about legal issues that could not be cast in terms of that relationship—this applies to internal organizational issues (such as staff relations, relations between organs) and, most prominently perhaps, to the situation of third parties," and "it leaves no room for third parties."[61)] In addition, he describes that in functionalism, "this makes for a closed universe, aiming to provide comprehensive coverage concerning the way organizations are legally structured and embedded"[62)]; consequently, functionalism is essentially a

60） *Ibid*., pp. 543-544.
61） Klabbers, *supra* note 10, p. 11 and 73.
62） *Ibid*., p. 10.

principal-agent theory. However, as illustrated above, these argumentations are incompatible with some legal understandings of principal-agent theory considering the relationship to third parties. This is not attributed to the outcome that Klabbers' approach is engaged in political understandings of principal-agent theory. It is because, as also mentioned above, principal-agent theory in international relations indeed focuses on the issues of third parties rather than putting them outside its analytical concerns.[63] In this sense, his understanding and evaluation that defines "functionalism as PA theory" does not necessarily conform to principal-agent theory in the area of international politics and legal doctrines.

If legal functionalism is to be understood as essentially a principal-agent theory, as Klabbers has indicated, and as having theoretically contributed to a limited extent to accommodate the relationship to third parties or internal affairs (employment relationship), it can be said that it is a manifestation of inconsistency and insufficiency in functionalism. Hence, it seems that Klabbers should have raised the issue of these points if he took the opportunity of applying principal-agent theory to functionalism. However, he has not suggested this.

3.2.3 Harmful Effects of Such Application on the Analysis of the Law of International Organizations

Additionally, it can be indicated that the relationship between international organizations and their member states appears to be vague, as a sequel to regarding the essence of functionalism as a principal-agent theory. According to Klabbers, first, the international organization as the agent "is likely to have some discretion and autonomy," while that "is considered to be under general and comprehensive control" of the principal as the member states.[64] On this point, it can be said that there is not so much divergence between the reality of said relationship founded on the

63) Hawkins *et al*., *supra* note 18, p. 9.
64) Klabbers, *supra* note 10, p. 25.

delegation of powers or state consent and Klabbers' understandings of the principal-agent relationship. Second, Klabbers argues that the principal-agent relationship, in the context of international organizations law, has become complicated due to two factors: the principal is a collective actor and "the principal is supposed to control and direct the agent but is at the same time part of the institutional structure of the agent."[65] It can be illustrated that this is an indication of *dédoublement fonctionnel*[66] performed by member states. However, the problems elicited by Klabbers and the complicatedness that has influenced the characteristics of the principal-agent relationship have not been accounted for. Consequently, the structure and nature of said relationship as essential in functionalism have led to uncertainty or vagueness.

In this regard, Klabbers focuses on this in terms of the nature of the collective principal: "the situation is different from the 'normal' type of principal-agent relations *envisaged in private law*."[67] However, he does not particularly mention the alternative to the relations envisaged in private law, for instance, some principal-agent relation, if any, envisaged in public law, the agency in administrative law, or any other relations. On this point, Klabbers argues that "[t]o the extent that functionalism insists on organizations exercising delegated functions, the basis of delegation as far as UN is concerned has become tenuous," and functionalism cannot provide a sufficient explanation to the doctrine of implied powers.[68] Moreover, he criticizes that "as a theory of delegation, functionalism meets with some empirical resistance," and "[f]unctionalism may describe an ideal model of international organization, but the ideal model is, in reality, not easily met."[69] In this sense, it can

65） *Ibid*., p. 25.

66） Georges Scelle, "Le Phénomène Juridique du Dédoublement Fonctionnel" in Walter Schatzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der Internationalen Organisation – Festschrift für Hans Wehberg* (Klostermann, 1956), p. 331; Georges Scelle, *Precis de Droit des Gens – Principes et Systematique – Droit Constitutionnel International* (Recueil Sirey, 1934), pp. 10-12.

67） Klabbers, *supra* note 10, p. 25. [emphasis added]

68） *Ibid*., pp. 27-28, 31.

69） *Ibid*., p. 33.

be thought that Klabbers assumed the principal-agent relation to be limited within the range of delegation in *political* theories.[70] As indicated above, he might have an originally less keen interest in grasping the relation of international organizations and member states as the principal-agent relation because he regards functionalism as "in essence a theory not about law."[71] In other words, he merely identifies the relation of the organizations and the states as the principal-agent relation conveniently to analyze functionalism critically. Methodologically, there is unquestionable meaning in referring to some theory to clarify facts and strengthen explanatory force; nevertheless, it is difficult to say that the reference to principal-agent theory has been effective in Klabbers' argument.

Thus, applying principal-agent theory in terms of legal relations to the analysis of functionalism in the law of international organizations has eventuated to having harmful effects theoretically. Moreover, it is difficult to say that he has succeeded in identifying the relationship between international organizations and member states as a principal-agent theory in terms of international relations. Klabbers' method of referring to principal-agent theory might play a role in reinforcing his criticism of functionalism. Yet, theoretically delving in this point, it is found that his method came apart at the seams, did not bring about many benefits, and instead made the legal relations much vague.

4. Applying Principal-Agent Theory to the Law of International Organizations: Significance and Problems

Functionalism has certainly been pivotal in the law of international

70) As seen in Hawkins and others' recognition that "[d]elegation is a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former," the delegation in the area of political theories can be conceived as ambiguous and vague concept that may encompass the agency relationship. See Hawkins *et al.*, *supra* note 18, p. 7.

71) Klabbers, *supra* note 10, p. 20.

organizations,[72] while its limits have come to be revealed.[73] However, as illustrated above, it is difficult to evaluate its usefulness positively in regarding functionalism as essentially a principal-agent theory in the theoretical framework of the law of international organizations. Yet, the significance of an attempt to examine the law of international organizations by referring to principal-agent theory is undeniable. This is because the issues of whichever analogies or closely related theories can apply to the relationship between international organizations and member states and those of whether principal-agent theory is applicable, *ab initio*, to said relationship are understood to be an important prerequisite for examining the legal problems of state consent.

In the following, I first ascertain the position of state consent in the theory of functionalism and the law of international organizations. Subsequently, I examine the problems and considerations in incorporating legal theories, their concepts, and their vocabularies in a domestic arena to address the legal issues of state consent in the theory of the law of international organizations.

4.1 The Position of State Consent in the Theory of Functionalism and the Law of International Organizations

It is no exaggeration to say that functionalism cited in international law and the law of international organizations has been closely linked to the issues of state consent. According to D.M. Johnston, following the development of the world community

72） See, e.g., Armin von Bogdandy, Matthias Goldmann, and Ingo Venzke, "From Public International to International Public Law: Translating World Public Opinion into International Public Authority," *European Journal of International Law*, Vol. 28, No. 1 (2017), p. 126. See also Klabbers, *supra* note 10, p. 10.

73） Klabbers, *supra* note 10, p. 50. Meanwhile, it is still certain that many international organizations generally put the basis of their activities on a member state's consent and cooperation. Regarding the principle of consent related to "international law's deep structure," see, e.g., Nico Krisch, "The Decay of Consent: International Law in an Age of Global Governance," *American Journal of International Law*, Vol. 108, No. 1 (2014), p. 3.

and international law that occurred in the late Cold War era, functionalism in the social sciences, and especially in political science, had been drawn upon in the field of international law studies from the necessity of transforming the classic model.[74] The influences of functionalism have been found in core fields of international law, such as the subjects, sources, consent (treaty, international agreement), custom, jurisdiction, diplomatic and consular protection, recognition, and responsibility,[75] and in the fundamental issues, such as basic norms, regulation of force, reduction of barbarism, promotion of social welfare, protection of individual and minority rights, development of common heritage institutions, dispute management, economic development, environmental protection, ocean development and management, exploration and management of outer space, and the protection of Antarctica.[76] However, functionalism finds no difficulty in accepting the "political foundations" of international law,[77] in comparison to legal formalism, which had been dominant among scholars in the age of traditional international law. Hence, functionalism in international law studies is interpreted to be in favor of adopting terminology that (1) "avoids the vagueness or normative ambiguity of traditional abstract concepts," (2) "permits the opening up of a hierarchy of differentiated norms," and (3) "reduces the global significance attached to those traditional doctrines that have served to inflate or 'legitimize' special interest policies."[78]

Likewise, Morgenthau argues that some criticism on international legal positivism after World War I and its revealed weakness has brought about movements in international law toward a "realist" one.[79] That is to say, "'realist' jurisprudence is, in truth, 'functional' jurisprudence."[80] Moreover, it is indicated that one point

74) See, e.g., Douglas M. Johnston, "Functionalism in the Theory of International Law," *Canadian Yearbook of International Law*, Vol. 26 (1989), pp. 24-29.

75) *Ibid*., pp. 29-40.

76) *Ibid*., pp. 40-55.

77) *Ibid*., p. 56.

78) *Ibid*., pp. 56-59.

79) Hans J. Morgenthau, "Positivism, Functionalism, and International Law," *American Journal of International Law*, Vol. 34, No. 2 (1940), pp. 265-273.

of improvement, which is expected to reflect the legacy of positivist jurisprudence starting with the axiom of "legal self-sufficiency" and the separation of the law from the sociological context,[81] is to place international law on the recognition of "the functional relationship between social forces and international law."[82] It can be pointed out that both D.M. Johnston and Morgenthau suggest the emergence of functionalism as an antithesis of formalism and positivism under traditional international law, while they connect functionalism with the legal / factual issues of state consent inevitably.

Furthermore, many scholars have noted that the law of international organizations is also destined to tackle said issues. For example, White explains that "[t]he functionalist approach adopted by international lawyers is characterized by a rejection of the idea that international organisations are simply 'vehicles for conference between the member nations.'"[83] Such recognition is by no means uncommon in case law. He argues that in the advisory opinion of *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice (ICJ) eschewed "a purely formalist or literalist approach to treaty interpretation in favour of a more teleological approach by looking at the goals and functions of the Organisations."[84] Additionally, Peters presents her understanding of legal functionalism related to international organizations as "[t]he emphasis on functions shielded the organizations against reproaches of encroachment on state sovereignty and thus strengthened them."[85]

Alternatively, it is noteworthy that scholars also recognize the issues of state consent in the law of international organizations as uneasily resolvable ones. For

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80） *Ibid*., pp. 273-274.
81） *Ibid*., p. 267.
82） *Ibid*., pp. 274-275.
83） Nigel D. White, *The Law of International Organizations* (Manchester University Press, 1996), p. 3.
84） *Ibid*.
85） Peters, *supra* note 46, pp. 35-36.

instance, Schermers and Blokker illustrate that assuming that Virally's study is useful for a better understanding of international institutional law, "[i]n his view, the general theory of international organizations has two 'poles': *state sovereignty* and the *concept of 'function,'*"[86] in the section titled "Virally and the concept of 'function.'" Then, they argue that "[t]he tension can in fact never removed 'from above,' by political decisions or rules of law, but only 'from below,' by a process of social integration," while this process has not advanced sufficiently so far, and under the situation that "sovereign states and international organizations will continue to exist," said tension is "so characteristic of the functioning of international organizations" and thus "is of fundamental importance for most of the issues of institutional law."[87] In turn, d'Aspremont proposes invoking the idea of functionalism to resolve the dichotomy in dialectical constructions, assuming the debate about the law of international organizations as the contradictory dichotomy between contractualism and constitutionalism.[88] According to d'Aspremont, the character of functionalism is depicted as "multifaceted," its concept is interpreted to be "indeterminate," and its method of argumentation is described as comparativism; these aspects of functionalism have led to the notion that "functionalism can be seen as underpinning both contractualism and constitutionalism," while "functionalism is sometimes constructed in dialectical terms, thereby easing the tension between these two opposing approaches."[89] Yet, paradoxically, d'Aspremont demonstrates that "the dichotomy between the contractualist and constitutionalist paradigms is performative, in that the tensions between those two approaches are constitutive of the discipline as a whole," and thanks to the dichotomy, the law of international

86) Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, 6th revised edition (Brill Nijhoff, 2018) pp. 19-20.

87) *Ibid*., pp. 23-24.

88) Jean d'Aspremont, "The Law of International Organizations and the Art of Reconciliation: From Dichotomies to Dialectics," *International Organizations Law Review*, Vol. 11, No. 2 (2014), pp. 445-448.

89) *Ibid*., pp. 446-447.

organizations can maintain its distinctiveness "as an independent subject of legal studies."[90] Furthermore, he contends that "contractualism and constitutionalism are to be considered as the inseparable, albeit incongruent, linchpins of the discipline."[91]

Therefore, the issues of state consent—the binary tension between the laws drawn to and detached from consent—are of the inseparable realistic problems in functionalism and the law of international organizations.[92] Stated differently, as illustrated in the reasons why functionalism was introduced in the law of international organizations, what is needed in constructing legal theory regarding international organizations is not only to overcome the issues of state consent on which concensualism and legal positivism have placed importance but also to keep a balance between state consent and an organization's autonomy to not lose the effectiveness and legitimacy of the latter.[93]

Considering both challenges, it will be helpful to know about some academic approaches to these issues. Given the coexistence of the conventional law grounded on state sovereignty and the institutional/organizational law beyond it in the entire body of the international legal order, some scholars have searched to examine the interrelation of said coexistence and have then considered balancing and, if possible, developing it. For example, it is well known that René-Jean Dupuy describes it as the coexistence of *droit relationnel* and *droit institutionnel*.[94] Dupuy built these two models of laws and thereby, in a dialectic approach, analyzed dynamic aspects of

90） *Ibid*., p. 451.

91） *Ibid*., p. 453.

92） Collins also discusses how to redefine "public law" or "publicness" on the premise of this dichotomy or tension between the contractual/horizontal and the institutional/vertical. See Collins, *supra* note 4, p. 70 and 79.

93） In this regard, this dichotomy/coexistence is different from some hope for the "move to institution" or "the modernist progress narrative which suggests a beneficent transition from sovereignty towards community." See David Kennedy, "The Move to Institutions," *Cardozo Law Review*, Vol. 8, No. 5 (1987), pp. 841-988: Collins, *supra* note 4, p. 76.

94） René-Jean Dupuy, "Communauté Internationale et Disparités de Développement," *Recueil des cours*, Vol. 165 (1979), p. 49.

how these laws could collide and be mixed. This *droit relationnel* or a horizontal nature of law is practically related to the effectiveness and constraints of the activities of international organizations in terms of a matter of state sovereignty or state consent. What should be remarkable is that he indicates that "the institutional order did not replace the relational order,"[95] and "in reality, the relational phenomenon is irreducible."[96] Further, Richard Falk depicts the characteristics of the international legal order as the *Westphalia conception* and the *Charter conception*, like Dupuy's two-model approach. He also demonstrates that "[i]n the contemporary international system the Charter conception is far from fully realized, the Westphalia conception is far from fully displaced."[97] Besides these is Friedmann's study analyzing the changing aspects of the international legal order in the era of post-World War II by conceptualizing the *law of coexistence and the law of cooperation*.[98]

Thus, it is reasonable to consider that the relevant studies and approaches that have addressed the issues concerned with a dichotomic/binary-tension legal framework, particularly those of state sovereignty/state consent, should be useful in the legal theory of international organizations, as well.

4.2 Problems in Incorporating Domestic Legal Theories in the Theory of the Law of International Organizations

Accordingly, what kind of approaches should be appropriate, on the premise of said dichotomy or binary tension, to resolve the problems or defects of the theory

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95) *Ibid*., p. 48. [*l'ordre institutionnel ne s'est pas substitué à l'ordre relationnel*.]

96) *Ibid*., p. 69. [*En réalité le phénomène relationnel est irreductible*.]

97) Richard A. Falk, "The Interplay of Westphalia and Charter Conceptions of International Legal Order" in Richard A. Falk and Cyril Edwin Black (eds), *The Future of the International Legal Order*, Vol.1 (Princeton University Press, 1969), pp. 32-33.

98) Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1964), pp. 60-71. See also Myres S. McDougal and W. Michael Reisman, "The Changing Structure of International Law: Unchanging Theory for Inquiry," *Columbia Law Review*, Vol. 65, No. 5 (1965), pp. 811-812.

of the law of international organizations criticized and indicated so far? Initially, it seems that a starting point is how to treat the relationship between international organizations and their member states. This is because this may not only well represent some characteristics of the functionalist legal theory of international organizations but also be subject to criticism. In this sense, it can be thought of as a first step toward improving and developing the legal theory of international organizations.

However, it should be noted that the understanding or identification of said relationship would depend on the perspectives of those who attempt to observe or analyze it.[99] That is to say, the application of some theory to said relationship necessitates it to be suitable for the reality of the situation and facts concerned. In other words, there are possibilities of a significant difference in positioning consent theoretically, depending on to what extent or which part of the legal relationship between international organizations and their member states should be regarded as a horizontal/equal relationship or a vertical/administrative one. Simultaneously, there may be a possibility of uncovering its unsuitableness or contradiction of adapting theory to reality by focusing on the actual situation of said relationship (*Facta loquuntur*). According to these circumstances, it may be expected to find out the applicability of another theory to that reality.

In the following, I ascertain the significance of adaptability of applying theory to reality by first analyzing the study of Sarooshi, who applies domestic administrative law to the case of the United Nations (UN), and then, the discussion about the mandatory system of the League of Nations in the ICJ case. Further, I highlight some methodological implications of judging the adaptation of theory to reality, considering the case of applying principal-agent theory to the law of international organizations.

99） See Cogan, *supra* note 55, p. 540.

4.2.1 Judging the Adaptation of Theory to Reality

We can assume an actual situation where X has conferred some authority/power to Y, recognizing it as a legal relationship theoretically, as either a horizontal or a vertical relationship. A (contract of) mandate in private law may be taken as a horizontal relationship between equal private parties, while a delegation (of powers) in administrative law as a vertical one is normally represented in the distribution of authority within an administration. The type of administrative delegation is supposed to be a vertical or "from the higher to the lower" relationship, such as delegation from superior to inferior organs within an administration or delegation from public to private.[100] If the theory of the delegation of powers in administrative law is attempted to apply to the case of the UN, it will be logically necessitated to adapt said theory to the situation that the subsidiary organs, such as the Sanctions Committee established and delegated by the Security Council, decide to oblige member states to implement measures required in the resolution.[101] In this regard, I hesitate to identify the actual situation that the sovereign states established international organizations by treaty and granted some powers to it with the representation of the delegation of powers.

First, Sarooshi contends that "[t]here is a considerable lack of clarity and consistent usage in the conceptual labels used to describe different types of conferrals by States of powers on international organizations"; similar concepts "are used interchangeably" with "a considerable lack and consistent usage";

100） For example, Cockayne refers to principal-agent theory in his article examining tightening regulations against private military companies/services. However, it should be noted that his analytical approach combines principal-agent theory with administrative contract or administrative delegation to private actors. See, e.g., James Cockayne, "Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies" in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007), pp. 196-216.

101） For detailed information and analyses on the activities and functions of subsidiary organs in the UN sanctions regimes, see Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007), pp. 146-181. See also Sato, *supra* note 5, pp. 34-51.

and similar terms, such as "ceding," "alienation," and "delegation," are used interchangeably.[102] Second, he assumes such conferrals "as being on a spectrum that at one end has conferrals that establish an agency relationship between the State and the organization and at the other extremity has conferrals that involve transfers of powers to the organization" and, in between two positions, has set the category of the delegation of powers. In this regard, he illustrates that the differentiation among them "depends on the degree to which a State has given away its powers to the organization," and those conferrals of powers "do not usually contain only one type of conferrals: they often contain both delegations of certain powers and transfers of others to an international organization."[103] Third, he presents the important criteria for judging the type of conferrals as follows: "the question of revocability," "the degree to which States retain control over the exercise of powers by the organization," and "whether the organization possesses the sole right to exercise conferred powers or whether States have retained the right to exercise powers concurrently with the organization."[104] In detail, the third criterion can be regarded as "[i]n the cases of agency and delegations in our typology the conferrals of powers are clearly revocable; while in the case of transfers the conferrals will generally be irrevocable."[105]

As already discussed in Section 2, Sarooshi refers to agency relationship under private law or law of agency to explain agency relationship under international law, whereas he refers to cases and examples of a delegation under international law without paying particular attention to those under domestic law in that monograph.[106] Further, he refers to many instances of constitutional provisions of European

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102） Sarooshi, *supra* note 39, p. 28. On this point, Sarooshi does not mention "from the higher to the lower" with respect to his argument about conferrals by states of powers on international organizations.

103） *Ibid*., p. 29.

104） *Ibid*.

105） *Ibid*.

106） *Ibid*., pp. 54-64.

Union (EU) member states in the case of transferring their powers to international organizations, notably including the EU and World Trade Organization (WTO).[107] It is noteworthy in this context that, first, he refers to the theory of the delegation of powers in domestic administrative law in his other monograph examining the delegation of Charter VII powers of Security Council to member states, subsidiary organs, and the secretary general,[108] whereas he does not follow this approach in the monograph published in 2005. As argued above, it should be remembered that the nature of delegation (within an administration or from public to private) in the area of domestic administrative law is fundamentally different from that in the case where member states conferred powers to international organizations. Second, it follows that the three types of conferrals of powers—agency, delegation, and transfer—have a mixed legal nature: some come under private law and others under public law. On this point, Sarooshi's indication that the differentiation among the types of conferrals "depends on the degree to which a State has given away its powers to the organization" is found out to be improper. In short, this is not a matter of *degree* but a matter of the *kind* of legal framework in which the act of conferral is regulated.

Hence, it is understandable that focusing on the actual situation of the relationship between international organizations and their member states has served to uncover its unsuitableness or contradiction of adapting domestic theories relating to delegation, transfer, and conferral to the reality at an international level.

Second, I will slightly consider the issues of the mandatory system established under the League of Nations from the viewpoint of adaptation of theory to reality. The mandatory system was an international regime to be effectuated by the mandate between the League and the mandatory (the mandatory powers), specified in Article 22 of the Covenant of the League. Paragraph 1 of the article stipulates that "… there

107） *Ibid*., pp. 65-76.

108） Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, 1999), pp. 3-49.

should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant," which confirms the mandatory system to be integrated in the Covenant, while Paragraph 2 of the article provides that "[t]he best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League." The substance and legal position of this system became a point of dispute in the ICJ case of *International Status of South-West Africa*. Regarding the meaning of "the Mandate," the Court recognized that "[t]he League was not, as alleged by that Government, a 'mandator' in the sense in which this term is used in the national law of certain States," and "[t]he object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law," and then, the Court concluded that "[i]t is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law."[109] Therefore, it can be demonstrated that the Court placed importance on observing the structure of the entire system instead of adhering to the terms of the mandate to get to the substantial content of the mandatory system.

Regarding the relationship between the League and the mandatory powers under this regime, it is reckoned that the analysis of Judge De Castro in the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia* is highly suggestive. Considering some special status of Article 22 in the structure of the Covenant, the content of the mandate, and the practices of reporting obligation, Judge De Castro understood that "[t]he relationship between the Mandator (League

109） "International Status of South-West Africa," Advisory Opinion of 11 July 1950, *I.C.J. Reports 1950*, p. 132.

of Nations) and Mandatory (South Africa) or, if preferred, between the guardian (*tuteur*) and the authority called upon to supervise its management, is not a relation of equality *inter aequales*, but one of subordination in the field of mandates."[110] In addition, he focused on the *travaux préparatoires* of Article 22 to examine the reasons the term "tutelage" was adopted in the Covenant:

> The terms employed—mandate, trust, tutelage—evidence each in their own way the common character of the committal of a trust (*fides facta*) protective functions exercised for the international organization and on its behalf by the mandatory. The latter is bound by the mandate, like the organization, with power of *offcium*. It is for this reason, it would seem, that the term 'tutelage' was chosen.[111]

Thus, either the advisory opinion or Judge De Castro denied the room left to apply a theory of the mandate in private law to this case based on the literal matching of the term "mandate" in terms of the adaptability to the real relationship between the League and member states, considering both the entire structure of the Covenant and the legal nature of the mandate.[112]

4.2.2 The Possibility of a Multifaceted Approach Based on the Adaptability between Theory and Reality

Needless to say, it is little wonder to suppose the application of theories related to the delegation of powers or a principal-agent relation to the analysis of the relationship

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110） Separate Opinion of Judge De Castro, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)," Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, pp. 202-203.

111） *Ibid*., p. 214.

112） Judge de Castro also denied that the powers of the League corresponded to the exercise of *exceptio non adimpleti*. *Ibid*., pp. 213-214.

between international organizations and their member states, provided that the organizations are established by states' agreement and that the extent of their powers depends on it. Simultaneously, it is by no means inevitable that the instances of domestic analogies corresponding to that reality are only limited to the conferral of powers. For example, some scholars regard the states establishing international organizations as "constituents" or "constituent power."[113] In this sense, theoretically, there may be room for positioning the relationship between international organizations and their member states in the context of constitutional theory (public theory)[114] or social contract theory.[115] Perhaps, it might have been necessary to refer to, if any, the delegation of powers in administrative law or principal-agent theory as a more appropriate legal relationship after due consideration of these points. For example, the characteristics of consent between parties in principal-agent theory in private law are different from that of the consent of the people in a social contract: the former characteristics are regarded as the private-law principle of consent, while the latter is as public law.[116] Thus, it is difficult to say that Klabbers' definition of "functionalism as PA theory" is based on a sufficiently comparative review and goes

113） See, e.g., Julian Arato, "Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations," *Yale Journal of International Law*, Vol. 38 (2013), pp. 297-301; John G. Oates, *Constituent Power and the Legitimacy of International Organizations: The Constitution of Supranationalism* (Routledge, 2020), pp. 17-51.

114） For relevant information not based on legal analyses, see, e.g., Oates, *supra* note 113, pp. 1-51.

115） See, e.g., Tetsuo Sato, "Legitimacy of International Organizations and their Decisions – Challenges that International Organizations Face in the 21st Century," *Hitotsubashi Journal of Law and Politics*, Vol. 37 (2009), pp.11-30. For relevant information not based on legal analyses, see Roger D. Congleton, "The Institutions of International Treaty Organizations as Evidence for Social Contract Theory," *European Journal of Political Economy*, Vol. 63 (2020), pp. 1-12 (https://doi.org/10.1016/j.ejpoleco.2020.101891); Liesbet Hooghe, Tobias Lenz, and Gary Marks, *A Theory of International Organization: A Postfunctionalist Theory of Governance, Volume IV* (Oxford University Press, 2019), pp. 9-25 ("Chapter 2: Philosophical Foundation of a Postfunctionalist Theory of International Organization").

116） "[T]he constitution of government rests on the principle of consent … the constitution of the public sphere rests on the figure of the citizen-subject." See Martin Loughlin, "In Defence of Staatslehre," *Der Staat*, Vol. 48, No. 1 (2009), p. 13.

through specific evidence-based examination. Therefore, it is necessary to assume the broad range of examination from principal-agent theory in private law to a social contract theory in meta-constitutional rules (public law)—covering the entire field of public and private law—to identify the legal nature of the relationship between international organizations and their member states.

However, there are some points to be noted for international legal scholars when introducing a multifaceted approach for referring to domestic legal theories respectively, based on distinguishing "public" and "private." First, they should consider critiques to the public/private dichotomy.[117] It can be said that more attention is required for this point when considering Raymond Geuss' argument that "[t]here is no such thing as *the* public/private distinction, or, at any rate, it is a deep mistake to think that there is a single substantive distinction here that can be made to do any real philosophical or political work."[118]

There are few academic voices that deny the application of private law theory to the law of international organizations. For example, Sarooshi insists that "domestic private law which regulates private rights and powers will not generally be suitable for transplantation to the law of international organizations"[119] if we focus on the governmental nature of powers exercised by international organizations. Rosalyn Higgins in the report to study "the legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties" indicates that there are many cases of relying on private law analogy in different fields of international law, including "the formulation of international law criteria on the measure of damages"; regarding whether member states bear a legal liability to

117) Comment by Stefan Kadelbach, "From Public International Law to International Public Law: A Comment on the "Public Authority" of International Institutions and the "Publicness" of their Law" in A. von Bogdandy *et al*. (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2010), pp. 44-45.

118) Raymond Geuss, *Public Goods, Private Goods* (Princeton University Press, 2001), p. 106.

119) Dan Sarooshi, "The Role of Domestic Public Law Analogies in the Law of International Organization," *International Organizations Law Review*, Vol. 5, No. 2 (2008), pp. 237-238. See also Sarooshi, *supra* note 39, p. 15.

third parties for non-fulfillment by international organizations of their obligations to third parties, we have no relevant domestic phenomenon that is appropriate to refer to domestic law analogy: "no clear «correct» private law analogy to an international organization" could be found. Therefore, she concludes that "our problem cannot properly be resolved by reference to private law analogy."[120)]

Alternatively, there are some court cases and legal studies to resort to a private law approach for addressing the issues concerning the law of international organizations.[121)] In the *Conditions of Admission* case,[122)] for example, the Court referred to the principle of good faith (*bona fides*), driven from Roman law and found commonly in public and private law.[123)] Additionally, Kotzur illustrates that "the demand for acting according to 'democratic *bona fides*' might help to compensate democratic deficits of international organizations such as WTO, the World Bank, the IMF, and others."[124)] In the *Namibia* case, as discussed above, Judge De Castro attempted to reinforce his opinion of identifying the essential role of the mandatory powers to play in the mandatory system as *tutelage* by citing a sentence of Roman law: "*qui propter aetatem suam sponte se defendere nequit*," whereas he denied regarding the mandatory powers as the mandatary in a contract of mandate.

120） Rosalyn Higgins, "Final Report of the Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties" in Institut de Droit International, *Yearbook* Vol. 66, Part. I (1995), p. 287.

121） Although not related to the law of international organizations, in the Lockerbie case, Judge El-Kosheri had the recourse to the principle of *nemo judex in sua causa* to reinforce his conclusion that "the Libyan domestic courts could not be the appropriate forum" as an even-handed trial against two Libyan suspects. See Dissenting Opinion of Judge El-Kosheri, "Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie", Order of 14 April 1992, *I.C.J. Report 1992*, para. 64.

122） Dissenting Opinion by Judges Basdevant, Winiarski, Sir Arnold McNair, and Read, "Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)," Advisory Opinion of 28 May 1948, *I.C.J. Report 1948*, para. 18.

123） Markus Kotzur, "Good Faith" in *Max Planck Encyclopedia of Public International Law* (https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412, July 26, 2021), para. 3.

124） *Ibid*., para. 23.

In this sense, it might be more appropriate, according to circumstances, to examine the issues of the law of international organizations from both public and private law approaches in conjunction.

Needless to say, an easy and simple method of deduction should be avoided in introducing public law approaches *per se*.[125] As Kadelbach indicates that "approaching institutional law with 'public law' criteria involves value judgments from normative systems which are external to it and is inclined to produce an idealized version of administrative law,"[126] the resort to the public law approach, which is incompatible with the reality and characteristics of the world society and international organizations, might be detrimental to recognizing the facts and clarifying the rationale. In this sense, a careful examination is needed to judge the adaptability of the public law approach as well. How can scholars theorize a vertical legal relationship at the international level on the premise of taking a public law approach? Is it necessary for them to theorize it? If not, how can they justify taking such an approach? There are the many obstacles to be overcome theoretically and empirically.[127] In this regard, Koskenniemmi describes the point where the relationship between law and governance in domestic society should not apply automatically to that in international society, considering the characteristics of international law, as "[h]ere is where the analogy with domestic society starts to break down."[128] Thus, it is significant to pay attention to the structural difference when focusing on the law-governance relationship as well. Therefore, it is expected

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125） "[A]dopting 'public law' rather than 'private law' as a system of reference may be helpful in highlighting the importance of international organizations, but runs counter to a number of other problems." See Wessel, *supra* note 4, p. 461.

126） Kadelbach, *supra* note 117, p. 48.

127） For similar remarks, see, e.g., Wessel, *supra* note 4, pp. 462-463; Bogdandy *et al*., *supra* note 72, p. 129. Sarooshi also denies "a State's domestic legal framework governing the exercise of a power can be considered to apply automatically to the exercise of the same or analogous power by an organization." See Sarooshi, *supra* note 119, p. 238.

128） Martti Koskennieimi, "Global Governance and Public International Law," *Kritische Justiz*, Vol. 37, No. 3 (2004), p. 250.

that the search for a multifaceted approach based on the adaptability between theory and reality, while considering the points discussed above, will be more prioritized toward the theoretical development of the law of international organizations.

5. Concluding Remarks: Toward the Theoretical Development of the Law of International Organizations

Not a few scholars have discussed in various scenes how international organizations can play their roles to be suitable, effective, and responsive to a globalized world, with an understanding of the law of international organizations in the unresolvable rivalry/tension between the conventional factors based on state consent and autonomous ones beyond it. However, as far as I could check, any studies that analyze the *legal* relationship between international organizations and their member states as a principal-agent relation have been not found in discussions introducing the so-called "public law approach," including rethinking public law[129] or studying global law. As has just been illustrated, this falls in line with the fact that principal-agent theory has not been examined in the area of domestic public law. Conversely, it is also certain that the reference to the public law approach in a broad sense, including constitutionalism, has often been found in analyzing the law of international organizations.

It may be possible to take several approaches in analyzing it theoretically.

129） For example, Martin Loughlin defines public law as "as an assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of governing" (Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), p. 30) and conceives its characteristics as "that which confers the right to govern by way of positive law" (Loughlin, *supra* note 116, p. 5). According to Walker, it is his argumentation that "beneath the topsoil of the field of public law considered as *constituted*, and so as positive law, there is a deep layer of public law considered as *constitutive*, and so pre-positive and even pre-Constitutional" (Walker, *supra* note 4, p. 16). Loughlin took a position of referring to legal concepts such as *Staatslehre*, *droit politique*, and *res publica* for reconsidering public law and insisted that "[the] contemporary challenges to constitutional doctrine require a return to state-based concepts" (Loughlin, *ibid*., p. 2).

However, legal approaches to be used here should keep their adaptability between theory and reality, to not raise questions regarding the significance of taking the approach *per se* and the effectiveness of the outcomes obtained from such methods (*Factum negantis nulla probation est*). Speaking of a principal-agent relation in the area of domestic legal theories, agency relationship in private law comes under this scope, wherein we assume the nature of the relationship to be horizontal. To be sure, the actual relationship between international organizations and their member states may differ in each organization and activity. Moreover, this relationship relating not only to internal organizational issues but also to external relations of organization varies.[130] The equal relationship between contracting parties can be assumed in some cases such as is discussed in the *WHO and Egypt* case.[131] Therefore, it might be possible to introduce principal-agent theory in private law to the case, provided that said actual relationship can be regarded as horizontal. For example, there can be cases wherein multinational-force missions[132] (or their troop-contributing countries) authorized by the UN Security Council resolution should be placed, whether *de facto* or *de jure*, in a horizontal/equal relationship with the UN on the ground of the operations.[133] There might be room for applying a contract-of-mandate

130） As a new attempt to encompass and analyze both legal orders—(internal) rules of international organizations and (external) rules of international organizations vis-à-vis states—by means of concepts such as "the dual legal character (nature)" and "dual entities," see Gasbarri, *supra* note 9, pp. 93-140.

131） "Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt," Advisory Opinion of 20 December 1980, *I.C.J.Reports 1980*, pp. 73-98.

132） "Les opérations autorisées sont une construction complexe, dans la mesure où elles renferment des éléments à la fois «institutionnels» et «décentralisés»." See Linos-Alexandre Sicilianos, «Entre Multilatéralisme et Unilatéralisme: L'autorisation par le Conseil de Sécurité de Recourir à la Force,» *Recueil des cours*, Vol. 339 (2008), p. 403.

133） For example, INTERFET (International Force for East Timor) signed a memorandum of understanding with TNI (Indonesian Armed Forces) and UNTAET (United Nations Transitional Administration in East Timor) regulating their cooperation in the border areas. Moreover, INTERFET transferred its task and responsibility to UNTAET by agreement. See *Report of the Secretary-General on the United Nations Transitional Administration in East Timor, S/2000/53* (January 26, 2000), paras. 21-28; *Letter dated 8 February 2000 from the Secretary-General Addressed to the President of the Security Council, S/2000/92* (February 8, 2000),

theory[134)] in private law to these cases, thereby revealing their legal implication and any related problem. Thus, what should be required in introducing domestic legal theories to the facts, phenomena, situation, framework, and so on at the international level is to consider the structural difference between international and domestic society.[135)] Moreover, it follows that the adaptability of theory to reality is also a significant point of consideration. Identifying the relationship between international organizations and their member states, simplistically and uniformly, should be avoided in examining the law of international organizations. Simultaneously, this suggests that it is necessary to assume said relationship to be diversified in each organization.[136)] For international legal scholars, in short, a certain degree of

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Appendix (sixth periodic report to the UN on the operations of INTERFET), paras.12-17. Likewise, KFOR (Kosovo Forces) handed over its mission to UNMIK (United Nations Interim Administration Mission in Kosovo) by agreement; furthermore, KFOR and UNMIK made the Joint Declaration of August 17, 2000 on the status of KFOR and UNMIK. In this circumstances, UNMIK police could not access the site without KFOR agreement. See Marc Guillaume, Gilles Marhic, and Guillaume Etienne, "Le Cadre Juridique de L'action de la KFOR au KOSOVO," *Annuaire Français De Droit International*, Vol. 45, No. 1 (1999), p. 324; "Behrami vs. France" (no. 71412/01) and "Saramati vs. France, Germany and Norway" (no. 78166/01), *ECHR Grand Chamber Decision*, May 2, 2007, para.6.

134） Regarding a contract of mandate in Roman law, see, e.g., Alan Watson, *Contract of Mandate in Roman Law* (Clarendon Press, 1961).

135） "The 'publicness' of classical public international law resulted from nothing more than the fact that the actors were states, but did not presuppose any legal hierarchy between them. To think in terms of public law suggests that there are superiors and entities or individuals who are their subjects. This assumption is problematic. Not only legal realists would object that whether between international organizations and their member states such as a hierarchy is established depends on the distribution of powers between the organization and its member states." Kadelbach, *supra* note 117, p. 44.

136） Needless to say, international organizations differ in their functions, purposes, and activities. Indeed, some organizations, such as the UN, seem to be suitable for analysis using a public law approach. In contrast, the IOPC Funds, assigned the tasks of paying compensation to those who have suffered oil pollution damage, seems to correspond to an inter-governmental organization in general, whereas the characteristics of the Funds activities are described as of a civil nature rather than a governmental one. Thus, it is unlikely to analyze such organizations using a public law approach based on the same logic and rationale. For more detailed information of the IOPC Funds, see Thomas A. Mensah, "International Oil Pollution Compensation Funds" in *Max Planck Encyclopedia of Public International Law* (https://opil.ouplaw.com/view/10.1093/

prudence demonstrated above should be required to make use of domestic legal theories, *mutatis mutandis*, in analyzing their research targets and constructing their theory.

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