Globalization and Issues for Public Law

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Introduction

In classic administrative law, the state and private individuals are depicted as opponents in a bipolar system and debate centers on how well individuals can defend their rights from infringement by the state and what balance the state will strike between the public good and private interests. Around the time of the Second World War, administrative law scholars took up the issue of public service delivery by the state. In the 1970s the field expanded to include how the interests of third parties are affected by administrative actions. Since then, two developments have significantly affected administrative law. First, we accept entities other than the state now carrying out public functions, and private actors being tasked with serving the public interest. This diffusion of public functions into the private sector is known as the multipolarization. Such diffusion can take the form of privatization, expanded outsourcing, and the involvement of private entities' self-regulation. Second, in addition to the issues involved in the transfer of responsibility to the private sector, states are also ceding control to international organizations and local government agencies, thereby creating a multilayered public sector. This report focuses on the implications of multilayered government, especially the problems arising from the diffusion of traditional state powers to supranational organizations under globalization.

To begin with, a few words on the semantic content of "globalization" are in order as this concept has a multiplicity of meanings. I discuss it in two distinct problem situations[1]. The first is globalization in the broad sense of the term—the expansion of economic activity and social connections across national borders. This socioeconomic globalization gives rise to various social problems relating to business, finance, labor, and the environment, problems that also cross national borders. Dealing with these social problems requires a transnational approach to goal setting, policy design, and implementation. The globalization, in the narrow sense of the word, of policy realization processes involves every aspect of public law—enactment, application, execution, rights and remedies (conflict resolution). Globalization means that we cannot assume that domestic public law (constitutional and administrative law) will evolve as it did when legal change was largely contained

[1] Takeshi Fujitani, *Globalization and the Reformation of Public Law and Private Law*, *in* Asano et al. (eds.), GLOBALIZATION AND THE REFORMATION OF RELATIONSHIP BETWEEN PUBLIC LAW AND PRIVATE LAW 333 (2015).

within each state. We are now facing an opportunity to reconsider basic concepts and fundamental theories of domestic public law, especially administrative law. This report assesses the problems that globalization presents for each stage of the policy realization process and investigates how public law theory can respond to these challenges in three parts. Part I, globalization and domestic public law, reviews how jurists in domestic public law, especially administrative law, have reacted to the phenomenon of globalization. Part II, globalization of standard setting, Part III, globalization of policy implementation, and Part IV, globalization of dispute resolution, describe how these stages of the policymaking process are being affected by globalization. Finally, the prospects for resolving the problems springing up in globalization's wake are presented.

I. Globalization and domestic public law

1. Three aspects of globalization

For the past decade, debates over globalization have been evolving concurrently across advanced economies, especially in Europe and North America. When I meet with researchers overseas, especially European researchers, and ask a question about globalization from a Japanese perspective, I am invariably asked why globalization is relevant to Japanese public law given that Japan is not part of a supranational organization e.g. the EU. Economic integration has, of course, progressed farther in Europe than in Japan, and the domestic impacts of globalization in Europe are quite unlike those in Japan. And yet, globalization has presented Japan with new challenges that have been debated since at least the 1990, three of which are discussed here.

First, from the 1980s to the mid-1990s, 'globalization as *metric*' dominated discussions. In the 1980s, Japan achieved prodigious economic success and the world's attention was drawn to Japan's socioeconomic systems. At the same time, Japan's large trade surpluses fueled international criticism. Japan was criticized for having opaque business and government practices that impeded trade and subjected to strong external pressure to dismantle non-tariff trade barriers.[2] For example, criticism of administrative guidance ("Gyosei-Shido") ultimately led to the passage of the Administrative Procedures Act in 1993.[3] Government involvement in protecting small retailers from competition from larger firms, often treated as a prime example of Japan's non-tariff barriers, was part of the Large-scale Retail Stores Act. Foreign pressure also led to the revision of this legislation to remove many of the

[2] HIROKI HARADA, SELF-REGULATION FROM THE PERSPECTIVE OF PUBLIC LAW 83-88 (2007).
[3] Koji Fukuda, *Japanese "Structure Problem" from the Perspective of EC and the Interest of Consumers*, 51 PUBLIC ADMINISTRATION REVIEW [KIKAN GYOSEIKANRI KENKYU] 29, 31 (1990).

restrictions on large store expansion.[4] During this period, globalization meant the recognition of the distinct nature of Japan's administrative system, which is to say accepting American or European practices as benchmarks.

The second version is *aspirational* globalization, which came to the fore during Japan's so-called 'lost decade' from the collapse of the bubble economy to the mid-2000s. At that time, the service sector moved toward the center of global economic activity. Japan's service sector struggled to compete internationally, and the business practices that had brought tremendous success in manufacturing lost their appeal. At the same time, the Japanese began to lose confidence in their socioeconomic systems.

To take one example, Japan's accounting standards did not conform with those of other nations. This long-standing divergence was suddenly recast as a cause for alarm. A sense of crisis took hold over Japan's accounting insularity ('Galapagos syndrome') and plans were laid to bring Japan's accounting practices into line with international standards.[5] In the second stage of reforming the inspection and certification system, when plans were being made for the privatization of monopolistic public service corporations, a bold proposal was put forward to turn the standards set by the ISO for conformity assessment bodies into legally binding registration requirements.[6] Globalization, or 'global standards,' became an end in itself for those aspiring to reform Japan's administrative system at that time.[7]

The third take on globalization saw it as *a target of concern*. This shift occurred in the mid-2000s, following the series of worldwide crises that began with the 9/11 attacks in the United States. Apprehension towards globalization was prompted by fears that creating more and stronger international institutions to combat terrorism, respond to financial crises, and respond to environmental problems would lead to a loss of national sovereignty in policymaking.[8] For example, criticism of the Basel Accords for banking supervision became much harsher around the time of the 2008 global

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[4] ATSUSHI KUSANO, THE LARGE-SCALE RETAIL STORES ACT (1992); Kiyoshi Haseggawa, *A Study on the Prior Coordination Guidance from the Sociological Jurisprudence*, 5 HONGO LAW&POLICY REVIEW [HONGO HOSEI KIYO] 207, 221 (1996).

[5] Hiroki Harada, *A Theoretical Approach to the Multi-Layered Public Sector*, *in* THEORIES ON THE LEGAL SYSTEMS IN THE PUBLIC SECTOR 143, 145 (2014).

[6] Hiroki Harada, *The Concept of Legitimacy in the Multi-Level Governance System*, *in* THEORIES ON THE LEGAL SYSTEMS IN THE PUBLIC SECTOR 49, 59 (2014).

[7] Yoshinobu Kitamura, *Impacts of the Global Standard on the Lawmaking and Enforcement of National Law*, 64 PUBLIC LAW REVIEW [KOHO KENKYU] 96 (2002).

[8] Yukari Yamauchi, *Emerging Administrative Laws on the International Economic Criminals*, 60-2 SOCIAL SCIENCE LAW REVIEW [SHAKAI KAGAKU KENKYU] 5 (2009).

financial crisis.[9] More worries were stoked by the Trans-Pacific Partnership (TPP) negotiations. In one instance, critics predicted that the TPP would dismantle national health insurance systems.[10]

These three perceptions of globalization did not develop sequentially, and it is clear that they coexist. My purpose in describing them here is to show that globalization has been affecting Japan's administrative law system for years and that its impact on domestic law has been growing step by step, as has awareness of these trends and the problems they generate.

2. Internationalization and globalization

Obviously, the legal form of treaties predates the decades under consideration here. Similarly, one might question treating globalization as a new phenomenon given that internationalization in the form of policy formation across national borders has a long history. And so it seems necessary to lay out the differences between internationalization and globalization.

States are both units of government and units of social control. In this report, internationalization involves the mutual adjustments, among states, of these two functions. Bilateral relations are the archetype of international coordination, but the same principal of the state as a unit also holds true for multilateral relations. Globalization, in contrast, takes the world as a unit instead of states in planning policy formation, implementation, and revision. For example, when clouds of Asian Dust from China cause a spike in Japan's air pollution, international environmental law shapes the two nations' efforts to find a mutually acceptable resolution. In this example, because an arrangement that serves the interests of both sides can be made, we can treat two states, i.e., Japan and China, as units of mutual adjustments. Other environmental problems, however, such as reducing greenhouse gases and protecting biodiversity, require planning on a worldwide scale. Global environmental problems are better dealt with through global environmental law rather than through balancing the interests of states as units.

One difference between internationalization and globalization is the geographic scale of the issue to be dealt with. However, when it comes to policy realization, geography is not the only element to consider.[11] The state based policy realization process has been the process that the drafting and adjusting of treaties, laws, and other sources of policy standards used to work, in concerted manner, for

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[9] Criticism on the Basel Accords already rose just after the End of the Bubble-Economy. For example, Hiromi Tokuda, *The Basel Accords, GOAST, Revision Required*, 5081 THE EAST ECONOMY WEEKLY 20 (1992); SATOSHI HIGASHITANI, LIES ON THE BASEL ACCORDS (1999).

[10] Hiroki Harada, *Administrative Law Scholarship in the Era of the TPP*, 1443 JURIST [JURISUTO] 54, 55 (2012).

[11] Hiroki Harada, *Administrative Law Scholarship in the Multilevel Governance System*, *in* THEORIES ON THE LEGAL SYSTEMS IN THE PUBLIC SECTOR 8, 25 (2014).

any given policy realization. Globalization of the process involves the discoordination/dis-integration of such process. International law which is premised on the state as a unit accepts that international law consists of legal norms shared by states. The state is the right-holder in international law, which exacerbates the adversarial relationship between the state and private individuals in domestic law. Under this arrangement, the state acts as intermediary between the two separate spheres of international law and domestic law. For instance, when treaties are ratified, the two spheres are linked in a static fashion once the treaties are incorporate into domestic law. On the other hand, when a policy realization process is globalized, international policy standards and norms skip over the state and directly influence private individuals' rights and obligations. International standards and norms combine with domestic norms in a dynamic relationship without the involvement of national legislatures. In addition to blurring the boundaries between international and domestic law, globalization of policy design makes it more pluralistic. More actors are involved, and not only in international organizations established by treaties. International non-governmental organizations and private businesses in various nations are some of the actors now carrying out public duties. These two factors are producing normative pluralism. Diverse actors are involved in creating a variety of policy standards and norms, which is having direct and indirect effects on the domestic legal order. Regulatory cascades (Regelungskaskaden) flow from the global level to the local level in standard setting for policy design and execution.[12] The public sector that was once bound tightly to the state pole is expanding through the rise of multipolarization and multilayered government, indicating what sort of theoretical structure administrative law should be striving for and what issues the field faces in a pluralistic system.

II. Globalization of standard setting

1. Globalization today

(1) International regime

What problems are arising from the globalization of *policy standard setting*, which here refers not only to standards in laws, treaties, and regulations created by democratic institutions but also to administrative standards, annexes, protocols, and other ancillary standards. In general, the process of writing abstract rules falls entirely within policy standard setting. *Policy implementation* refers to the application of those rules in specific cases and the enforcement of compulsory requirements.

[12] Eberhard Schmidt-Aßmann, Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen, Der Staat 45 (2006), S. 315-338, 329.

The leading example of the globalization of policy realization are international regimes in which the enforcement or monitoring of compliance with rules established at the international level to resolve a problem in a specific area are delegated to international organizations that operate using procedures and systems created for that purpose. One of the chief characteristics of this type of globalized policymaking is profuse rule-setting to create protocols and other ancillary rules (secondary law).

A prime example of secondary law creation is found in global environmental agreements.[13] A general framework for how an agreement's obligations are to be met and compliance secured is included in the agreement, but the specifics on obligations are often relegated to secondary law. In most cases, changes to obligations in secondary law do not have to be ratified by legislatures. In practice, it is understood that ratification encompasses ex post revisions to agreements.[14] Domestic laws on methods for securing compliance with agreements are rarely amended in response to revisions to secondary law obligations. Enforcement mechanisms are usually treated as delegated legislation or as administrative regulations. Accordingly, legislatures generally authorize the framework for a policy realization process and are not involved in reviewing the details of how an agreement's obligations will be enforced in their own nations.

(2) International networks

Another prominent example of the globalization of the policy realization process are international networks, informal groups of actors not recognized in international law, most commonly national regulatory agencies from various nations, that collaborate in dealing with shared problems. International networks may also be organizations created as coordinating bodies. Standard setting in these networks is characterized by informality. The quintessential example is international financial market regulation.[15] Financial regulatory agencies and central bank representatives, coming together at the non-governmental organization that has no international legal personality, devise policy standards through informal processes. These standards are not legally binding, but failure to comply leads to exclusion from global markets, a sanction harsh enough to deter noncompliance. Therefore, rules and

[13] MASAHIRO NISHII (Ed.), GLOBAL ENVIRONMENTAL AGREEMENTS (2005); National Enforcement of Global Environmental Agreements, 7 QUARTERLY JURIST [RONKYU JURISUTO] 4 (2013).
[14] Yoshinobu Kitamura et al., *On the National Enforcement of Global Enviromental Agreements*, 631 YUHIKAKU'S BOOK REVIEW [SHOSAINO MADO] 30, 38 (2014).
[15] Hiroki Harada, Non-Delegation in the Multi-Level Governance System, *in* THEORIES ON THE LEGAL SYSTEMS IN THE PUBLIC SECTOR 351 (2014).

sanctions devised by international networks are not submitted for legislative approval and treated instead as revisions to administrative rules or as interpretations of indefinite concepts in existing law that fall within the law's framework.

2. Implications for public law

Until recently, the core of administrative law was the issue of rule of law in the administrative state — whether the actions of administrative agencies accord with the statutory laws enacted by legislatures. Central topics included reservation of the statutory law,[16] the requirement that government acts have a legal basis, and — even if opinions diverged on the nature of statute-reserved domain of administrative actions (infringement, exercise of state power, or matter of concern) — the field by-and-large continued to seek adherence to authorizing norms[17], such as grounds for state action and limits on legal effects, in areas where administrative acts must be based in law.[18] In other words, it is necessary for the extent of delegated administrative power to be limited and made explicit when specific authorization is granted by a legislature; insufficient is such general authorization as organizational norms that establish government agencies assign them jurisdiction and scope of their powers.

However, since globalization has taken hold, domestic/national legislatures are effectively not able to set standards in ever larger swaths of policy; at most, legislatures can only take an up-or-down vote on decisions made at the global level. Moreover, when policy standards set at the global level are applied domestically, they are treated as adjustments to administrative standards or as falling within the framework of existing law as interpretations of indefinite concepts. In more and more cases, policies made internationally and informally are taking effect in nations without legislative intervention.

3. Feasibility of a theoretical response

(1) Reassessing the concept of legitimacy — the concept of *open legitimacy*

Why do we have to comply with policy standards and norms decided at the global level? Having been influenced by German public law jurisprudence, in Japan this problem is generally framed as a question of legitimacy in legal discourse. If we look at legitimacy broadly, we can define it as a property of social systems and actions that are commonly perceived as right and proper.[19] In today's

[16] HIKARU TAKAGI, ADMINISTRATIVE LAW 69 (2015).
[17] YOICHI OHASHI, ADMINISTRATIVE LAW I 30 (2nd ed. 2013).
[18] HIROSHI SHIONO, ADMINISTATIVE LAW I 82-83 (6th ed. 2015).
[19] HARADA, *supra* note 2 at 241-242.

societies that prize individual liberty and self-determination above all else, decisions about government actions are supposed to be based primarily on these values. If individuals accept without question outcomes produced by a social system, including the state, that affect them, that system can be regarded as having legitimacy.[20] In other words, a system's legitimacy is revealed by whether individuals see acquiescence towards decisions made without their personal involvement as the right and proper response. Besides, it is possible to define legitimation, the attainment of legitimacy, as the method or process of demonstrating legitimacy.[21] Until now, among the principle of administration based in statutory law that the field of administrative law has attached great importance to, is the liberal view that legal controls and regulations can be imposed through the legalization of administrative acts, which also serve as a means of legitimation through the democratically sanctioned exercise of state power.[22] In Germany, debates on democratic legitimacy are held quite consciously, and the notion that state actions must rest on the will of the people is widely accepted.[23] In Germany, state acts that can be characterized as "decisions" are objects of legitimation. The source of legitimacy is not the specific stakeholders but the entire people of a nation, the collective *Volk*. Legitimation is achieved through popular elections. Legislators elected by the people select members of the core executive. This series of nominations and elections forms a chain of legitimation in which legitimacy conferred by the people is given the greatest weight.

Nevertheless, the globalization of the policymaking process has moved the locus of decision making to the global level. If cabinet ministers are participating in international negotiations, one could argue that the chain of democratic legitimation is attenuated but not broken. The same cannot be said for decisions made by international networks comprised of heads of independent agencies and central bank governors. From the time of the Europeanization debate over policymaking by the European Union, the loss of democratic legitimacy has been debated in Germany. Calls for complementary sources of legitimacy—participative legitimacy, output legitimacy, and trust—to compensate for the democratic deficit in supranational policy standard setting garnered broad support. Legitimacy was

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[20] Hiroki Harada, *The Relationship between Public and Private Law in the Globalized Policy Realization Process*, *in* Asano et al. (eds.) *supra* note 1 at 17.
[21] Matthias Ruffert, *Comparative Perspectives of Administrative Legitimacy, in* LEGITIMACY IN EUROPEAN ADMINISTRATIVE LAW: REFORM AND RECONSTRUCTION 351, 355 (Matthias Ruffert ed., 2011).
[22] Hiroki Harada, The Principle of Rule of Acts in the Public Administration, 373 LEGAL COURSE [HOGAKU KYOSHITSU] 4, 5 (2011).
[23] Masahiko Ota, *The Development of the Democratic Legitimacy Concept in the German Federal Constitutional Court*, *in* COLLECTED PAPERS ON THE CONSTITUTIONAL LAW 315 (Tokiyasu Fujita & Kazuyuki Takahashi eds., 2004); Tomonobu Hayashi, *Democracy as a Constitutional Principle*, *in* PERSPECTIVES ON THE CONSTITUTIONALISM TODAY 3 (Yasuo Hasebe et al. eds., 2013); Mie Kadowaki, *Demokratic Legitimation of the Insurer Autonomy in the German Health Insurance System* (3), 251 NAGOYA LAW REVIEW [NAGOYA UNIV. HOSEI RONSHU] 347, 366.

traditionally a qualitative matter (present/not present), but German legal theory and judicial precedents have added a *quantitative* dimension. Christoph Möllers, professor at the Humboldt University of Berlin, focuses on the connection between legitimacy and self-determination.[24] He locates the basis of individual legitimation and democratic legitimation in self-determination and free will. One could also point that the German Federal Constitutional Court has found that a certain degree of legitimacy can be reached through the combined effect of different modes of legitimation such as personal legitimation based on the connection between popular elections and official appointments, and material or content legitimation, which stems from creating laws that specify limits and requirements for administrative actions. Assuming these trends continue to develop, we may be able to reposition legitimation theory as follows: it is the theory to incorporate elements of complementary legitimation and envisage the possible variety of constellation through which national legislators guarantee the legitimacy in above-reformulated sense – the new concept of legitimacy will be on the spectrum the one end of which is the aggregation of autonomous, individual intention formation (market or competition based legitimation), and the other end of which is collective intention formation (democratic legitimation).

(2) The state' non-intervention option—the state as bulwark

If one accepts 'open legitimacy' idea, then the shortfall in democratic legitimation accompanying the multi-layered diffusion of the policy formation process at the global level can be ameliorated by forms of complementary legitimation to the point that it reaches the same level of legitimacy expected of national policy standard setting. This open legitimacy concept may apply when global policy standards are implemented by the state, but it is difficult to build order out of such legitimacy when the state is not involved at all. Sports law is the perfect illustration of this problem.[25] The World Anti-Doping Agency (WADA) is a non-governmental international organization that sets standards on performance enhancing drugs, the violations of which are continually in the news. The WADA Anti-Doping Code has been accepted by the International Olympic Committee and every sort of international sports federation. The Japan Anti-Doping Agency (JADA), a non-governmental organization, is a code signatory tasked with implementing doping tests. When an athlete is suspected of using performance enhancing drugs, a disciplinary panel determines what if any sanction will be

[24] Christoph Möllers, Gewaltengliederung, 2005, S.33ff.; Claudio Franzius, Europäisches Verfassungsrechtsdenken, 2010, S.79. It is argued that self-determination issue is the central to legitimacy question, by Dagmar Schiek, *Private Rule-making and European Governance*, 32 E.L. REV. 443, 450 (2007). Legitimation theory of Möllers is acutely analyzed by Toru Mori, *Aspects on the Democratizing Administrative Powers*, *in* CONSTITUTIONAL THEORIES ON GOVERNMENT STRUCTURES 355, 363 (2014)

[25] Examples of comprehensive study on the sports law are: MASATO DOGAUCHI & YOSHIHISA HAYAKAWA, INVITATION TO THE SPORTS LAW (2011); Klaus Vieweg (Hrsg.), Lex Sportiva, 2015.

imposed. If the panel finds a violation has occurred, it imposes loss of results and competition bans. If a Japanese athlete wants to contest JADA sanctions, they appeal to the Japan Sports Arbitration Agency. Appeals from athletes that compete internationally are handled by the Court of Arbitration for Sports. If an anti-doping agency issues sanctions without following a fair and reasonable decision making process and negatively impacts human rights and liberty, the question arises as to whether that infringement is a matter for administrative law to address.

In such cases, one theoretical countermeasure, even in a governance space unconnected with the state, is to make a legal claim on grounds analogous to domestic administrative law, such as the proportionality principle and the right to due process, with the intention to make decisions that are appropriate in any given governance space. This is the basic idea of *global administrative law*, which we shall examine below. There is, however, another way of approaching this question. What may appear at first glance to be a lack of a connection with the state can also be seen as no more than the result of the state applying the non-intervention option, which falls within the framework of the debate over legitimacy discussed above. In other words, the state can define and take on any task as a state function (absolute authority of the state).[26] Determining what qualifies as a state function is the authority and obligation of the state's lawmakers. Therefore, we can understand the actual absence of a link between the state and global policy formation as a result of the state's delaying the designation of that task as a state function, which is to say that the state is exercising its non-intervention option.
To avoid the negative domestic impacts of globalization, state lawmakers should be able to design new legal institutions at any time and resist the imposition of policy standards set at the global level.[27] In this way of thinking about the non-intervention option, legislators have broad discretion over how to achieve the legitimacy necessary for global policymaking; also, this way of thinking enables us to keep the global policymaking process within the state's framework for unified, collective intention formation. In short, the state can limit the fragmentation of governance spaces caused by globalization, maintain the circuit between intention formation in the public sector and the will of the people that is the starting point of democratic government, and remain able to continuously exert *meta-control*—in accordance with the constitution and general administrative law principles—over policy formation.

[26] Harada, supra note 11 at 36.
[27] For instance, if legislature finds rights infringements among private parties in the field of sports law grave and should be governed by collective intention formation, it can do so by partial incorporation into public administration [*Bubunteki Kokkagyoseika*] (HARADA, *supra* note 2 at 271), so that privately made decisions are now under public law discipline. France takes this approach: see, Yukio Okitsu, *France*, *in* RESEARCH ON THE CONFLICTS ABOUT SPORTS AND ITS RESOLUTIONS 5 (2014).

III. Globalization of policy implementation

1. Current state of globalization

(1) Policy implementation by non-state actors

Swooping downward from meta-control to policy implementation, how is globalization affecting the conditional application of specific standards in real life situations? The most striking change is the delegation of implementation to private organizations that do not have (or at least appear not to have) direct ties to the state. For example, the Clean Development Mechanism (CDM)[28] established under the Kyoto Protocol encourages developed nations to provide technical support to developing nations in order to lower greenhouse gas emissions. When a developing nation's emissions are certified as having been cut by a certain amount, that amount is converted into a unit of reduction credit that can be sold to developed nations needing to offset their own emissions to meet greenhouse gas emission targets. The United Nations' CDM Executive Board is in charge of authorizing projects. It also authorizes "designated operational entities" (DOEs) to certify emissions cuts. DOEs are private organizations having no ties to any national government. Imagine that you have requested CDM authorization for a project, only to have your request wrongfully denied by a DOE in violation of the rules of the Kyoto Protocol—where do you seek redress?[29] Similarly, products and services undergo a "conformance assessment process" to verify that they meet certain requirements. The standards applied in conformance assessments are determined by private groups or the International Organization for Standardization (ISO). The agencies that apply those standards and verify conformance are nearly all private organizations. The non-state status of these authorization and certification agencies is intended to ensure neutrality in making determinations. The drawback to this arrangement is that the interests of third parties, especially consumers, may be disregarded.[30] At this stage, the number of non-state actors and the scope of their authority is not particularly large. One important exception is the granting of refugee status under the mandate of the United Nations High Commissioner for Refugees, another is the aforementioned doping tests in sports law.

(2) Mutual assistance in administrative enforcements

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[28] Yukari Takamura, *International Institutions on the Global Warming*, 60-2 LIBERTY AND JUSTICE [JIYU TO SEIGI] 20, 26 (2007).

[29] Ernestine E. Meijer, *The International Institutions of the Clean Development Mechanism Brought Before National Courts*, 39 N.Y.U. J. INT'L L.&POL. 873, 882 (2007).

[30] Harada, *supra* note **エラー! ブックマークが定義されていません。** at 73-77.

The most critical issue going forward is cooperation in enforcement, including the exercise of state (coercive) power. Mutual enforcement is of particular concern in the area of international tax law. Even setting aside "global tax", adjusting the taxes between each dyad of nations is also a serious challenge. Given that, one could argue that international tax law is not a fitting example of the globalization of the policy realization process. However, preserving the state power to tax, a recently formed policy goal, is now shared by governments worldwide and the Organization for Economic Cooperation and Development (OECD) is acting as a policy forum along with the UN and other international organizations and their subsidiary bodies. These developments show that international tax law can be seen as an example of globalization.[31]

A concrete example of mutual enforcement in international tax law is the exchange of tax information. In 2010, the US government set off shock waves when it enacted the Foreign Account Tax Compliance Act (FATCA), part of the Hiring Incentives to Restore Employment Act. FATCA's purpose is to prevent tax evasion through the hiding of assets in offshore banks. Foreign financial institutions that sign on to a FATCA agreement are required to report account information to the US Internal Revenue Service (IRS).[32] The idea to overcome the territorialism constraint by administrative contract seems to remind us of the administrative contracts (exchange agreements) used by administrative agencies to act without authorized power. To be noted though is that, in order to induce foreign financial institutions to enter into a FATCA agreement, the IRS imposes a 30 percent domestic source income tax on interest and dividends paid on investments in the US. Institutions that accept FATCA are exempted from this tax. In actual practice, this incentive to sign on to FATCA has a coercive effect given the outstanding status and appeal of US financial markets. However, if individual financial institutions enter into agreements with US tax authorities and then share investor information, they would violate legal protections on investors' personal information and their duty to maintain confidentiality. To avoid this, the governments of the countries where these financial firms operate enter into an inter-governmental agreement (IGA) with the US government. The financial firms comply with each nation's laws against disclosing personal information by reporting to that nation's tax authorities only on accounts held by Americans. These authorities then transmit this information to the IRS through an automatic exchange of information standard, an arrangement referred to as the 'Model 1 IGA'. Japan and Switzerland have negotiated a different arrangement, the Model 2 IGA, which

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[31] Masao Yoshimura, *Establishing Common Bank Account Information System on the International Taxation*, *in* TAX LAW AND MARKET 532 (Hiroshi Kaneko et al. eds. 2014).

[32] Takeshi Fujitani, *Social Security System in the Globalized Society*, in Asano et al. (eds.), *supra* note **エラー! ブックマークが定義されていません。** at 206.

requires financial firms to provide aggregated information on the number of personal accounts and their value to the IRS. If the IRS requests more information, that request will be dealt with according to bilateral agreements on information exchange.[33] Although Model 2 seems to impinge less on private information protections, Model 1 has become the global standard and is currently accelerating the OECD's and G20's development of financial account information sharing services.[34]

A typical form of mutual enforcement in international tax law is the reciprocal collection of foreign tax obligations. For example, according to the "revenue rule" in American common law, the US government will not collect taxes imposed by a foreign government.[35] Recognition and enforcement of foreign judgments under private law does not apply to foreign tax judgments. The 2003 OECD model tax convention included a new mutual agreement on tax collection and in 2011 Japan became a signatory to the Convention on Mutual Administrative Assistance in Tax Matters, a mutual enforcement agreement.[36]

2. Globalization and public law implementation

It was once reasonable to assume that the implementation of legal norms and policy standards set domestically would be carried out by national or local government agencies. Now, however, the globalization of the policy realization process has brought about two changes. First, international non-governmental organizations with no ties to the state are implementing policy; second, at the same time there are cases where state agencies are implementing or enforcing laws according to mutual enforcement agreements that run counter to domestic legal norms. The problem with the first is that it completely sidesteps the liberal and democratic controls on administrative acts that the field of administrative law has envisioned. The problem with the second change is the tension that exists between mutual enforcement agreements that are not products of the state's democratic process and the rule of law.

3. The feasibility of a theoretical response

(1) Jurisprudence on private administrative law in the public sector

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[33] KAZUNORI ISHIGURO, BANKING SECRETS OF BANKS IN SWITZERLAND AND INTERNATIONAL TAXATION 420 (2014); Ryuji Ikko, *Fundamental Rules on Tax Reformation and Maintenance of Taxing Environment*, 31-1 TAX RESEARCH [ZEIKEN] 58, 64 (2015).

[34] Yoshihiro Masui, *Automatic Information Exchange on Banking Accounts of Non-Residents*, 14 QUARTERLY JURIST [RONKYU JURISUTO] 218 (2015).

[35] Asao Yoshimura, *Legal Aspects on the Possibility of Cooperating Tax Collection*, 94 FINANCIAL REVIEW 57, 60(2009).

[36] Yoshihiro Masui, *On the Commentary of the Convention on Mutual Administrative Assistance in Tax Matters*, 775 TAXATION RESEARCH [SOZEI KENKYU] 253 (2014).

Private organizations carrying out state functions is not a new phenomenon. Precedents can be found in the debate over privatization.[37] When the movement to privatize state-owned enterprises gained traction in the 1980s, some Japanese jurists took a page from German law to argue that privatization would not exempt the state from responsibility for an enterprise. For example, some have argued that once a public enterprise is turned over to a private firm, the state continues to have "guarantor status."[38] Another version of this theory maintains that after responsibility for running an enterprise is transferred to a private organization, the state still has a responsibility to guarantee the private organization will execute a public duty [theory of "securing by public administration, Gewährleistungsverwaltung"][39] In addition, theories of private administrative law (*Privatverwaltungsrecht*)[40] and public sector law (*Kokyo Bumon Ho*)[41], what public law principles apply—interpretation theory or legislative theory—depends on the character of the state functions delegated or transferred to a private actor. These theoretical frameworks can be extended to the globalization of the policy realization process. This extendibility is based on abandoning the premise that there is a clear demarcation between international law and domestic law, with the state standing in the middle, and recognizing the need to pay more attention to the interactions between the two.

Nevertheless, one must notice a difference: privatization theory deals with the situation where a societal task is first designated as a state business then the same take is delegated to the implementation by a private actor; here, as shown earlier, with global policy implementation there are cases where policy standards are applied and executed without state intervention at all. One could look at this type of unit of social management as "global administrative space" and further develop a theoretical model in which management functions are performed not only by international institutions built through international treaties but also by broader actors: this is the view taken by "global administrative law" centered around the United States.[42] Followers of this way of thinking focus on

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[37] Hiroki Harada, *Theoretical Approaches on Privatization*, in *supra* note 11 at 114.

[38] Narufumi Kadomatsu, *Legal Theories on Privatization*, 102-11=12 PUBLIC LAW AND POLICY REVIEW [KOKKA GAKKAI ZASSHI] 719, 770 (1989).

[39] Akio Takahashi, *The Role of Acts in the Securing State*, *in* PUBLIC-PRIVATE PARTNERSHIP IN THE WORLD 161 (Shuichi Okamura & Takeshi Hitomi eds. 2012); Hiroshi Yamada, *What Is the Securing State?*, *in* ADMINISTRATIVE LAW SCHOLARSHIP IN THE RISK AND COOPERATIVE SOCIETY 47, 56 (2009); KATSUHIKO ITAGAKI, LEGAL THEORIES ON THE SECURING ADMINISTRATION (2013).

[40] Ryuji Yamamoto, *Legal Structures on Public-Private-Partnership*, *in* PUBLIC LAW AND POLICY 531, 556 (Mitsuaki Usui et al. eds. 2000); Yamamoto, *Partnership between private profit and nonprofit Organizations and Public Administration*, *in* THEORETICAL ISSUES ON THE ADMINISTRATIVE LAW 188, 189 (Hikaru Takagi & Katsuya Uga eds. 2014).

[41] HARADA, *supra* note 2 at 265-276.

[42] Takeshi Fujitani, *Administrative Law Scholarship in the Multi-Level Governance System – from the Perspective of the U.S. Law*, 6 LAW AND POLICY REVIEW IN THE NEW GENERATION [SHINSEDAI HOSEISAKUGAKU KENKYU] 141 (2010); Yukio Okitsu, *Global Administrative Law and Accountability*, *in* Asano et al. (eds), *supra* note 1 at 47. See also Keisuke Kondo, *How to Grasp Legal Orders in the Globalized World*, 176-5=6 KYOTO LAW REVIEW [HOGAKU RONSO] 380 (2015).

mechanisms, primarily procedural requirements, to ensure that global government entities operating in the global governance vacuum are accountable. Procedural requirements such as participatory processes, transparency, reasoned-decision, and means-ends rationality feature prominently. Proponents of this view argue that the public interest will be better served under a pluralistic order model than by various global government entities unmoored from the state. In other words, they take as their starting point that interest formation is multilayered and multipolarized and accept a kind of stakeholder democracy, i.e., that decision making amounts to interested parties reaching a consensus. Therefore, if this momentum continues undisturbed, "administrative law without the state" will become possible.

As I sees things now, "the state as mooring point" remains an essential consideration for the following reasons. First, the separation of the public sphere (collective intention formation) and private sphere (individual intention formation) serves to protect the rights and freedom of citizens. Second, this separation also makes it possible to maintain a unified structure through collective intention formation. By sustaining a unified structure through collective intention formation, a legitimate global policy formation process can be systematized to a certain degree. Assuming there are primary laws that temporally and logically precede global policy standards in each policy realm, these laws can be invoked to protect rights and interests should conflicts arise over the application of the secondary legal norms that are specific policy standards. Connecting primary legal norms to fundamental rights, national constitutions, and constitutional traditions, makes it possible to exercise meta-control cross-sectionally over institutional design in each policy area. Of course, if it should ever be possible for another legal order to preserve the state's role as mooring point, then it may no longer be necessary to obsess over the state when considering theoretical construction.

(2) Treaties and authorizing norms

Returning to the taxation example, Japan has signed on to bilateral tax treaties and mutual enforcement conventions that are executed domestically under the "Act for the Enforcement of Tax Treaties Involving Special Provisions of Income Tax Law, Corporate Tax Law, and Local Tax Law" (Special Tax Provisions Enforcement Act). This statute is the basis for regulations concerning tax audits and tax delinquency penalties on foreign tax obligations. On this point, the concept of a "two-step structure of the reservation of the statutory law" has been promoted in administrative law in Japan.[43] Proponents of this view argue that any imposition of obligation on private persons must have

[43] OHASHI, *supra* note **エラー! ブックマークが定義されていません。** at 27, 292.

a basis in law, and another legal basis is required to authorize the government to use compulsory means of performance in case of private persons' non-performance on the obligation above. This line of argument is particularly relevant to stress the principle of post-war administrative law in Japan, that is; whereas Japan's prewar Administrative Enforcement Act comprehensively set forth the methods to enforce compliance, under the postwar Administrative Substitute Execution Act it is argued that it is necessary to enact additional legal provisions for enforcement actions in areas the act does not cover. In this regard, in the case of mutual enforcement of foreign tax obligations, the Special Tax Provisions Enforcement Act alone provides a legal basis to enforcement actions; so it is deduced that the domestic law of counterparty state is to be the legal basis to impose obligation, i.e., tax liability. However, no administrative law jurisprudence has ever accepted the idea that the foreign administrative law can be authorizing norm, in terms of the principle of the reservation of the statutory law, in foreign administrative law has yet to be accepted in administrative law jurisprudence. With this regard, government officials in charge of drafting the amendment of the Act on Implementation of Tax Conventions so as to receive the Convention on Mutual Administrative Assistance in Tax Matters opines foreign tax obligations do not enjoy the right of priority as domestic tax obligations do, therefore foreign tax obligations are so-to-say equivalent to private obligation; or that what our government does, i.e., carrying out enforcement on behalf of counterparty state, does not amount to the violation of the constitutional principle of no taxation without statutory law[44]. However, administrative law theorists have never considered the possibility that private obligation can ever be enforced in the administrative enforcement procedure[45]; besides, the above-explained "two-step structure of the reservation of the statutory law" will required the authorizing norm not only on the enforcement but also on the imposition of obligation, a precondition of coercive enforcement. That said, we could take into consideration that the "the principle of administration based in statutory law" is not quite equivalent to "the principle of no taxation without statutory law", and the latter could allow various views on its scope and function[46]. Therefore we shall leave the differences among them aside, and let us rather focus on the relation between the exercise of public authority by administrative agencies and the domestic laws as well as treaties.

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[44] Ken'ichi Nishikata et al., *International Taxation Procedure*, 1447 JURIST [JURISUTO] 45, 47 (2012).
[45] Hiroki Harada, *International Networks on Administrative Enforcement and the National Public Law*, *in* ADMINISTRATIVE LAW SCHOLARSHIP AND INDIVIDUAL ACTS 73, 94 (2015).
[46] Tadao Okamura, *The Principle of No Taxation without Statutory Law and Soft-Law*, 563 TAX LAW SCHOLARSHIP [ZEIHOGAKU] 141, 162 (2010) postulates the principle as "legislative principle to guarantee that the people as autonomous individuals, through their representatives, deliberate and self-determine how to share tax burdens."

A dominant view prioritizes treaties over statutory law in Japanese domestic legal order. Nevertheless, one would still ask whether treaties can be authorizing norms in terms of the principle of administration based in statutory law.[47] This is because of the difference between treaties and statutes in their procedural requirements at the Diet; the Constitution sets a higher threshold for statutory law to become valid, as both houses must vote for the bill, while treaties can take effect by the resolution of Lower House only (Japanese Const., Art.61)[48]; Concluding treaties is constitutionally provided as the authority of the Cabinet (Japanese Const., Art.73(3)), while the Diet solely is vested the legislative power (Japanese Const. Art.41); and treaty provisions are generally less specific and seldom defining the conditions and effects of administrative activities. This view, taking procedural differences seriously, contends that tax treaties cannot newly impose tax liabilities that domestic statutory law does not provide; treaties can only exempt and reduce the obligation.[49] Therefore, the author argues that tax treaty modification of tax liability requires at least statutory provisions that explicitly refer to treaty law setting tax imposition[50] (there are such examples as statutory provisions referring to, hence "opened up to" treaty provisions; in Income Tax Act, Art.162, Radio Act, Art.3).

One can still argue that treaties at least have passed the Diet ratification process; here, foreign administrative law and regulations, giving rise to foreign tax liability, is even more indirectly, if any, controlled by the national Diet, than the case with treaties in which Japan takes part. If one still pursues the mutual administrative assistance in which foreign tax liabilities are enforced domestically, we need to set the conditions for "mutual recognition" of foreign tax liabilities so that we can consider them as equivalent/interchangeable with domestic tax liabilities. The requirement of "identical or substantially similar taxes" for the purpose of mutual administrative assistance in tax matters is the most straightforward reflection of the above described concept of mutual recognition; analogies can be found in the double criminality requirement of international assistance in investigation. I am of the opinion that, as long as domestic legislator provides substantive law conditions to be met before permitting domestic enforcement of foreign tax liabilities, "double taxability" is not a prerequisite; the point rather is that the domestic legislator must set the substantive law authorization for imposing obligations (i.e., tax liabilities) in addition to the authorizing law for enforcement per se.

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[47] Hiroki Harada, *Multi-Layered Structures on the Policy Realization Process*, *in supra* note 5 at 323; Takehisa Nakagawa, *National Enforcement of the International Covenants on Human Liberty Rights from the Perspective of Administrative Law*, 23 INTERNATIONAL HUMAN RIGHTS [KOKUSAI JINKEN] 65, 66 (2012).

[48] Kazuyuki Takahashi, *Logics on the International and National Human Rights*, 1244 JURIST [JURISUTO] 69, 81 based on the same point, also criticizes the views that prioritize (or equate) treaties over statutory law.

[49] SETSUO TANIGUCHI, INTERNATIONAL TREATIES ON TAXATION 32-34 (1999).

[50] Hiroki Harada, *The Principle of Administration Based in Statutory Law and the Principe of No Taxation without Statutory Law*, *in supra* note 45 at 33.

IV. Globalization of dispute resolutions

1. Current state of globalization

(1) International arbitrations

Finally, I shall examine the globalization of dispute resolutions as a sub-field of globalized policy realization process. Here the term of dispute resolutions, in a generic sense and covering broader sphere/functions than domestic judiciary, is in order because there is no judicial body comparable to domestic judiciary at the global level and there are a variety of dispute resolution procedures and control mechanism, some of which are not necessarily for redressing rights infringements. Dispute resolution, in a generic terminology sense covers does.

The archetypal example of globalization of dispute resolution, at least in our context, is international arbitrations. In addition to investment arbitration based on investment agreements[51], one can count tax treaty arbitration[52], as well as arbitrations in the field of international social security agreements.[53] Investment arbitration is the process based on the bilateral agreement for investment protection, to submit the disputes regarding the agreement to an arbitral tribunal for resolution.[54] There are procedural rules for investment arbitrations commonly used, such as ICSID (International Centre for Settlement of Investment Disputes) Convention Arbitration Rules and UNCITRAL (United Nations Commission on International Trade) Arbitration Rules. As for substantive rules, in addition to the agreement itself, domestic law as well as international law are referred to.[55] Although most of international investment agreements are bilateral, the substance of them is in convergence due to the use of model international agreement on investment. Besides, mutual reference made among arbitral tribunals promotes the convergence among tribunal decisions.[56]

(2) International civil rules and judicial coordination

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[51] INTERNATIONAL INVESTMENT ARBITRATION (Akira Kotera ed. 2010) shows comprehensive research on its legal problems. See also Shotaro Hamamoto, *Public Characters of International Investment Arbitrations and New Developments of Rescission System in the ICSID*, 170-4=5=6 KYOTO LAW REVIEW [HOGAKU RONSO] 395 (2012).

[52] Harada, *supra* note 45 at 99-102.

[53] Hiroki Harada, *Globalized Social Security Law?*, *in supra* note 45 at 190.

[54] Akira Kotera, *Legal Characters of International Investment Agreement*, 17 JAPAN INTERNATIONAL ECONOMIC LAW REVIEW [NIPPON KOKUSAI KEIZAI GAKKAI NENPO] 101, 102 (2008).

[55] Kazuyori Ito, *Significations of the Principle of Proportion in International Investment Agreement*, 13-J-063 RIETI Discussion Paper (2013) suggests that the proportionality principle, originated from domestic public law, now serves as substantive criterion in the investment arbitration.

[56] Shotaro Hamamoto, *Legal Orders on the Network of International Investment Arbitrations*, 85-11 LEGAL REPORT [HORITSU JIHO] 37, 40 (2013).

Once the traditional dichotomy of public law and private law is weakened, Japanese administrative law jurisprudence shifted its focus onto the complementary relationship between private law and public law aimed for certain policy goals. International civil rules is the globalized form of this complementarity.[57]

It is a civil rule with nature of international law, set for the sake of certain policy goals, to be implemented by domestic courts of treaty parties; examples are Vienna Convention on Civil Liability for Nuclear Damage and Treaties regarding consumer transactions. It must be admitted, however, that the number of actual cases with this category in Japan is still insufficient to develop further discussion. By the same token, we can count the issue of judicial coordination as a future agenda for us (at this stage we can only refer to foreign law practices)[58]; the judicial coordination is the field where they discuss the theory for coordination rules/procedures applicable to concurring decisions made by multilayered courts on the identical case; there, preliminary rulings, transfer of cases and mutual coordination of judgments, etc., are necessary. At this stage, German law is advanced in this front[59], while we don't have actual cases/examples in Japanese law.

2. Issues for Public Law

So far Japanese administrative law jurisprudence has attached importance to the judicial review over administrative actions as a primary measure of guaranteeing the principle of administration based in statutory law. As its corollary, a dominant view is that the court-intervened settlement of actions for the revocation of administrative dispositions violates this principle.[60] Moreover, a dominant view considers our judicial system as a unitary one, on the ground that our Constitution Article 76 provides unitary system of judiciary and our judicial system so far has had scarce connection with international judicial system.

The globalization of policy realization process, in the phase of dispute resolution, undermines these preconditions on which a dominant view rest. First, the development of international arbitration will widen the opportunity for arbitrators, who are chosen in a manner totally independent of domestic circuit of democratic legitimation, pursue in dispute resolutions that are functionally equivalent to

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[57] Harada, *supra* note 11 at 23.
[58] Harada, *supra* note 11 at 40-41.
[59] In German law the OMT-Case is now the most outstanding example about this point. See Yumiko Nakanishi, *The German Federal Constitutional Court's Decision Demanding a Prior Settlement on the OMT Decision of the European Central Bank*, 91-3 LOCAL AUTONOMY LAW REVIEW [JICHI KENKYU] 96 (2015); Ryota Muranishi, *Globalized Financial Systems and the Reservation by the Parliament*, in Asano et al. *supra* note 1 at 149.
[60] HIROSHI SHIONO, ADMINISTRATIVE LAW II 179 (5th ed 2013).

domestic administrative litigation, state redress, compensation for loss.[61] Particularly, when an investment arbitration based on ICSID Convention Arbitration Rules gives an award of damages, such decision does not have to be intervened by the domestic court's verification before becoming enforceable in a domestic court.[62] Second, our administrative law jurisprudence has paid little attention to the coordination among judicial courts' judgments; here we need to learn from private international law jurisprudence with regard to the recognition and enforcement of foreign judgments[63].

The second issue, investment arbitration, is becoming more real in Japanese context after the recent conclusion of TPP (Trans-Pacific Partnership) negotiation; now we have increasing possibility that Japanese regulatory policy shall be questioned in investment arbitrations.[64] In Germany, in the wake of two *Vattenfall* cases[65], the tension between investment arbitrations and domestic redress system is recognized

3. The feasibility of a theoretical response

(1) Permissibility of administrative settlement

The Arbitration Act in Japan provides "An arbitration agreement shall, except as otherwise provided for in laws and regulations, be effective only when the subject thereof is a civil dispute […] which can be settled between the parties" (Art.13(1)). Also, as for the court's invalidation of arbitral reward, the Act designates "the application filed in the arbitration procedure is concerned with a dispute which may not be subject to an arbitration agreement pursuant to the provisions of Japanese laws" as one of the invalidation causes (Art.44(1)(vii)). Nevertheless, except for the cases of recognition and enforcement of arbitral award, the Act applies only to those arbitration whose place is in Japan; therefore the above provisions have no reach on investment arbitration taken place outside Japan. In the meantime, the Art.45(2)(viii), regarding with the recognition of arbitral awards, is applicable to the arbitration whose place is even outside Japan; the provision designates "the applications presented in the arbitration procedure are related to a dispute which cannot be the subject-

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[61] Hiroki Harada, *International Investment Arbitrations and National Public Law*, *supra* note 45 at 273.
[62] Michiko Yokoshima, *National Approvals and Enforcement of the ICSID Arbitration Decisions*, 53-4 JOCHI LAW REVIEW [JOCHI HOGAKU RONSHU] 307, 334 (2010).
[63] Dai Yokomizo, *Administrative Law and Conflict of Laws*, 89-1 LOCAL AUTONOMY LAW REVIEW [JICHI KENKYU] 128 (2013), Yokomizo, *Conflict of Laws in the Era of Globalization*, Asano et al., *supra* note 1 at 109.
[64] Isomi Suzuki, *On the International Investment Arbitration System*, 86-8 LEGAL REPORT [HORITSU JIHO] 1 (2014); Shotaro Hamamoto, *Virtual and Real Images of International Investment Arbitration in the Discussion of the National Diet*, 87-4 LEGAL REPORT [HORITSU JIHO] 43 (2015).
[65] Markus Krajewski, Vattenfall, der deutsche Atomausstieg und das internationale Investitionsrecht, juridikum 2013, S. 348-360; ders, Umweltschutz und internationales Investitionsschutzrecht am Beispiel der Vattenfall-Klagen und des Transatlantischen Handels- und Investitionsabkommens (TTIP), ZRP 2014, S. 396-403; Darius Reinhardt, Vattenfall vs. Deutschland (II) und das internationale Investitionsschutzregime in der Kritik, KJ 2014, S. 86-94.

matter of an arbitration agreement pursuant to the provisions of Japanese laws and regulations" as the condition for refusal of granting the same status as final court decision to arbitral awards. Given this provision, now we have to take seriously the issue of permissibility of settlement in the actions for the revocation of administrative dispositions.[66]

The dominant view, as already mentioned, is to deny the permissibility of settlement on the ground that the principle of administration based in statutory law precludes administrative discretion that allows administrative authority to modify at will the administrative disposition in dispute. Yet two counterarguments have been made: the one is that we can still recognize "administrative free disposition of the case" if the statutory law leaves room for administrative discretion.[67] The other is to argue that a settlement regarding facts in dispute does not amount to the violation of the principle.[68] We would be able to deal with the permissibility of settlement issue, which is about the conflict with the principle of administration based in statutory law, by articulating the statutory ground for administration's making settlement, as well as providing procedural rules for settlement.[69]

The first prerequisite is that a settlement is permitted (at least not clearly precluded) by the statutory provision that authorizes specific administrative actions. As explained above, treaty provision for investment arbitration per se cannot serve as such authorizing provision. One might found such permissibility for settlement within some statutory provisions that leave room for administrative discretion; even so, careful and detailed examination on the purpose and extent of such discretion should be conducted. Moreover, it is crucial to have procedural rules that allow stakeholders to take part in the process of settlement intervened by the court, given the nature of administrative actions that often involve a third-party interest makes it inappropriate for the settlement to be made solely based on the agreement between the two litigating parties.

Also noteworthy is that most of the dispute resolutions via arbitration are about the rewards of damages; particularly, the ICSID arbitration, which is most widely used among various types of investment arbitration, the damage reward is the sole remedy provided on the Convention. Damage

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[66] Makoto Saito told on the round-table discussion (Akira Kotera et al., *TPP from the Legal Perspectives*, 1443 JURIST [JURISUTO] 12, 19 (2012)) that the argument on the reconciliation is appropriate to arbitrations in the administrative law if an arbitration agreement is limited to the conflict on which the parties are reconcilable.

[67] JIRO TANAKA, COMMENTARY ON THE ADMINISTRATIVE PROCEDURE ACT 111 (1957).

[68] Hisashi Koketsu, *Acknowledging Facts in Administrative Actions of Taxation and Agreements by the Interested Parties*, 44-1 KOBE UNIVERSITY OF COMMERCE REVIEW [SHODAI RONSHU] 41 (1992); Norihisa Yoshimura, *The Development of German Cases on the Agreement in Taxation*, in Usui et al., *supra* note 40 at 265; Hiroyasu Watanabe, *Reconciliation on the Tax Law*, *in* GOVERNMENTAL REGULATION AND SOFT LAW (Minoru Nakazato ed. 2008) 229.

[69] Yasutaka Abe, *Personal Opinions on the Reconciliation on the Administrative especially Tax Lawsuit*, 89-11 LOCAL AUTONOMY LAW REVIEW [JICHI KENKYU] 3 (2013).

awards are functionally equivalent to state redress and loss compensation under Japanese domestic public law. Although none of these remedies nullify administrative disposition, still they can be in *de facto* conflict with the regulatory authority provided by the statutory law, since the arbitral finding of the illegality of a certain regulatory measure, which could give rise to a large amount of damage awards, could virtually eliminate the enforcement of the regulatory measures in dispute. On the contrary, non-pecuniary awards[70] (provided such are granted by arbitral decisions) would be equivalent to the remedies from administrative litigation (such as action for the revocation of administrative dispositions, mandamus action, action for an injunctive order). If arbitral tribunal should grant de facto revocation of administrative disposition, it would be in tension with the exclusive jurisdiction of action for the revocation of administrative disposition, the bedrock norm for the Japanese Administrative Case Litigation Act. Moreover, if the tribunal could ever grant injunction or mandamus on administrative discretion, it will compromise the integrity of domestic law system that sets higher threshold for litigation in the cases where administrative authority had no chance to review the case in the first place.

Lastly, we shall examine the relationship between the arbitral decisions and domestic courts. The Arbitration Act recognizes an arbitral award, even taken place outside the state, and grants the equal effects to those of a final and binding judgment (Art.45(1)). In order to have a civil execution, however, a party must apply for and obtain execution order (Art.46). Since ICSID Convention Art.54 provides that contracting states are obliged to recognize and execute arbitral awards, no execution order is needed where the Convention applies, hence arbitral awards granted by ICSID arbitration are enforceable without the domestic court examination. Even outside the ICSID arbitration, as long as the New York Arbitration Convention (The Convention on the Recognition and Enforcement of Foreign Arbitral Awards) is applicable, the arbitral award is enforceable without execution order by the domestic court, although some are critical of this, on the ground that the claim for state redress is public law claim and beyond the scope of New York Arbitration Convention.[71]

There are a number of issues regarding the relationship between international arbitration and domestic administrative litigation and state redress. Future discussion should include such issues as the measures (particularly the selection procedures) to guarantee the neutrality of arbitrators, the feasibility

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[70] Yokoshima *supra* note **エラー! ブックマークが定義されていません。**, at 323; Akira Kotera & Yumi Nishimura, *Non-Cash Remedies in International Investment Arbitrations*, *in* ASPECTS IN THE INTERNATIONAL LAW 541 (Jun'ichi Eto ed. 2015).

[71] Tatsuya Nakamura, *Basic Problems on Investment Arbitrations (II)*, 55-10 JCA Journal 20; Masato Dogauchi, *Applicability of the New York Treaty on the Investment Dispute Arbitrations*, *in* THE REPORT OF THE STUDY MEETING ON THE INTERNATIONAL INVESTMENT ARBITRATION 101 (2009).

of establishing a permanent arbitral tribunal, and the legitimation requirement for arbitrators. Particularly our domestic public law jurisprudence should address carefully the question of whether the remedies for rights infringement, granted by the judicial court in the spirit of rule of law, must be limited to "lawsuit presided by professional judges at domestic court."

(2) Coordination (*Verbund*) and Conflict-of-Laws-type solution

The above mentioned international civil rule and judicial coordination are closely related to the concept of conflict-of-laws-type solution. However, our administrative law jurisprudence has less appreciated this concept so far. There reasons are following three points;

First, the conflict-of-laws-type solution does not suit the hierarchical norm structure, the bedrock idea for domestic public law jurisprudence. Domestic public law jurisprudence conceptualizes the domestic legal order as a hierarchy, the summit of which is Constitutional law, then the body comprising downward chains of delegation/specification; we tend to consider the issue of applicability of foreign (including non-governmental) law as the matter of Constitution-Treaty relationship, just as is the case with treaty law application in domestic cases.

Second the conflict-of-laws-type solution does not match the administrative law structure, which is basically meant to serve as norms of conduct of administrative authority. Apart from rather minority provisions that specify, as citizens' right, those claims against administrative authority, the vast majority of administrative laws and regulations are to authorize certain decision-making powers to administrative authorities, requirements, relevant factors and procedures for such authority to make decisions; they are characterized as norms of conduct of administrative authority [unlike civil norms specifying rights and obligations among related parties]. And this norm structure of administrative law, focusing solely on the one party of legal relationship but not on the other, seems foreign to the idea of Conflict of Laws. Furthermore, procedural law and substantive law are inseparable in administrative law[72], which makes more difficult to segregate the conflict-of-laws elements in administrative law from substantive law element therein.

Thirdly, conflict-of-laws idea is hard to be coordinated with the nature of public law as the law for policy realization.[73] The underlying assumption of conflict-of-laws idea is the interchangeability among each state's private law, based on the substantive commonality of those; on the other hand, public laws are generally in close tie with each state's policy, hence without substantive homogeneity.

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[72] TAKESHI NAKANO, A STUDY ON THE CONCEPT OF THE EXERCISES OF PUBLIC AUTHORITIES 12 (2007).
[73] Yoshihisa Hayakawa, *Choice of a Proper law and Applicability of Public Law*, 5 INTERNATIONAL PRIVATE LAW REVIEW (KOKUSAI SHIHO NENPO) 206, 219 (2003).

And that is why the attention is paid to the legislative intent on the geographical scope of substantive law, and territorialism is the dominant position. Public law has indeed discussed internationalization and globalization, yet the focus has been on the harmonization and convergence, both of which will reduce the differences among legal institutions of states, rather than investigating the coordination of concurring norms/rules, based on their differences and contradictions.

However, nowadays we observe some new theoretical developments, trying to incorporate a conflict-of-laws-type solution into the domain of public law, that is, "conflict-of-public-laws".[74] In terms of this paper, such potential might be found in the rules of recognition and enforcement of arbitral awards, jurisdictional rules for international civil rules, as well as recognition and enforcement of foreign court judgments. Besides, the concept of "coordination (Verbund)" in German public law jurisprudence, which has rejected the conflict-of-laws approach, is indeed on the common ground as the conflict-of-laws solution. Here, the concept of "coordination (Verbund)" means "the idea of order that, by combining the corporation principle and the hierarchy principle, two distinct organizational principles, to pursue the development of necessary action unit"[75]; examples thereof include coordination among administrations[76], regulations[77], constitutions[78], responsibilities[79], disciplines[80], constitutional courts[81], etc. These endeavors intend to provide the structure for mutual cooperation and coordination among states on the very ground of uniqueness and autonomy of each of the states; the prerequisite for such coordination/*Verbund* to be conceived is the commonalities in both policy goals and implementation structure, assuring the similar results even though enforced by different states'

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[74] Makoto Saito, *Globalizing and Administrative Law*, *in* FUNDAMENTAL THEORIES ON ADMINISTRATIVE LAW 349 (Tsutomu Isobe et al. eds. 2011). See also in German Law, Christoph Ohler, Die Kollisionsordnung des Allgemeinen Verwaltungsrechts, 2005; Martin Kment, Grenzüberschreitendes Verwaltungshandeln, 2010.

[75] Eberhard Schmidt-Aßmann, Europäische Verwaltung zwischen Kooperation und Hierarchie, in: Hans-Joachim Cremer u.a. (Hrsg.), Tradition und Weltoffenheit des Rechts: FS Helmut Steinberger, 2002, S. 1375-1399, 1381ff. (*Der Verbund ist eine Ordnungsidee, die die notwendige Handlungseinheit durch die Verschränkung zweier Organisationsprinzipien, der Prinzipien der Kooperation und der Hierarchie, herstellen will.*); Hans Christian Röhl (translated by Masahiko Ota), *European Administrations in the Cooperative Structure (I) (II)*, 82-1 LOCAL AUTONOMY LAW REVIEW [JICHI KENKYU] 3; 82-2 at 49 (2006).

[76] Matthias Ruffert, Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund, DÖV 2007, S. 761-770, 766; Claudio Franzius, Gewährleistung im Recht, 2009, S. 152f.

[77] Wolfgang Kahl, Der Europäische Verwaltungsverbund, Der Staat 50 (2011), S. 353-387, 360-365.

[78] Eberhard Schmidt-Aßmann, Verfassungsprinzipien für den Europäischen Verwaltungsverbund, in: Wolfgang Hoffmann-Riem u.a. (Hrsg.), Grundlagen des Verwaltungsrechts Bd.1, 2.Aufl. 2012, S. 261-339, 271 Rn.14.

[79] Christian Seiler, Das Europäische System der Zentralbanken (ESZB) als Verantwortungsverbund, EuR 2004, S. 52-70, 52.

[80] Matthias Knauff, Der Regelungsverbund, 2010, S. 398.

[81] Franz Merli, Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte, VVDStRL 66 (2007), S. 392-422, 418; Andreas Voßkuhle, Der europäische Verfassungsgerichtsverbund, NVwZ 2010, S. 1-8, 3; Marion Albers, Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen, VVDStRL 71 (2012), S. 257-295, 289.

agencies. We could call this commonalities as "mutual confidence"[82] And this line of thoughts shares a common idea with the conflict-of-laws solution, which rests on the interchangeability of substantive private laws among states. Moreover, regulatory coordination (*Regulierungsverbund*), in which regulatory authorities of each state enforce a common policy standard in a decentralized manner and build a cooperative relationship among them, is functionally very similar to the model of private law convergence, that is, having substantive private law for consumers unified and implementing such unified norms by courts of each state as well as by the Court of European Union.[83] Although one could argue that there is no simple extension of collaborative relation between civil and administrative laws in domestic setting to the global sphere, we can still reasonably discuss, by revisiting the fundamental ideas behind both branches of law, the potentiality for such collaboration in the globalized policy realization process.[84]

Conclusion

This report has given a sketch of issues regarding the globalization of policy realization process. Now it must be clear how intensely and broadly the globalization affects the public law jurisprudence. This report has discussed, as such examples, the principle of administration based in the statutory law, the legitimacy (or accountability), or the coordination and conflict-of-public-laws concept, but there are still more issues. Indeed, globalization does not leave intact many of purely administrative law issues such as the third-party standing to file administrative litigation, or the treatment of deficiencies with administrative procedures, as they are also subject to the harmonization pressure on the states' administrative litigation system.

This report has conceptualized "globalization" as "a concept to do with the formation, implementation and coordination of policies going beyond the state as a unit of governance" and examined its impact on public law jurisprudence. Though this report rather takes the earth as a whole as a more appropriate unit of governance/policy, it still embraces the classical public law jurisprudence's model of "the state as mooring point" when it comes to concrete discussion. This is based on the judgment as follows: given that (i) the constitutional decision of anchoring the primary democratic process to the statehood is still relevant, and (ii) the state monopoly of coercive enforcement power remains strong, we cannot underappreciate these two points when we are to realistically conceive the

[82] Hans Christian Röhl, Akkreditierung und Zertifizierung im Produktsicherheitsrecht, 2000, S. 44ff.
[83] Hiroki Harada, *The Concept of International Consumer Law*, *in* Asano et al. *supra* note 1 at 282.
[84] Yuki Asano, *From Private Law Theories to Legal Pluralism*, *in* Asano et al. *supra* note 1 at 303.

development of legal theory responding to the globalization of policy realization process. It does not necessarily mean that the author himself considers the "administrative law without state" is totally unthinkable; for instance, we might want to pursue the alternative model, as depicted by Hugo Preuß, a German public law scholar from the beginning of 20th century, of concentric circles-like order of corporations, centering individuals (so-called *Genossenschaft*, or cooperatives-based state).

As this report has shown, globalization of policy realization process requires a wholesale theoretical reinvention, which even bears the potential of transformation of administrative law theory. Needless to say is that such endeavor is far beyond any individual researcher and must be tackled with by the entire society of domestic public law scholars. Even more, as this report has already mentioned, this project shall inevitably require us of communicating with neighboring fields of legal studies, including international law, private law, criminal law, as well as "reference fields" of administrative law [such as immigration law[85]].

[85] Nami Thea Onishi, Immigration Law System in the Era of Globalization and Protection of Families, 65-2 Social Science Law Review 157 (2014); Onishi, Immigration Law System in the Era of Globalization, in Asano et al. *supra* note 1 at 241.